CHAPTER 5 Case Studies

Disputes Pending in Litigation

5.1 Case Study No. 1 (Military Engineer Services)

<table>
<thead>
<tr>
<th>Contract Agreement No.</th>
<th>GE/JHA/34 OF 2001-02</th>
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<tbody>
<tr>
<td>Name of Work</td>
<td>Repair/Maint of Roads under AGE B/R-I Area at Jhansi and Nowgong</td>
</tr>
<tr>
<td>Name of Accepting Officer</td>
<td>Garrison Engineer Jhansi (GE Jhansi)</td>
</tr>
<tr>
<td>Name of Contractor</td>
<td>Shri Harinder Singh</td>
</tr>
<tr>
<td>Amount of Contract</td>
<td>Rs. 9.97 Lakh</td>
</tr>
<tr>
<td>Date of Acceptance</td>
<td>18 Dec 2001</td>
</tr>
<tr>
<td>Date of Commencement</td>
<td>07 Jan 2002</td>
</tr>
<tr>
<td>Date of Completion</td>
<td>06 July 2002 (As per Contract)</td>
</tr>
<tr>
<td>Actual Date of Completion</td>
<td>Not Completed</td>
</tr>
<tr>
<td>Current Status of Dispute</td>
<td>Pending at District Civil Court</td>
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Introduction:

- The subject case is a classical example of how disputes are fashioned & handled in MES or may be in any govt. dept. It is a very beautiful example of how disputes
are overblown instead of adopting a rational & conciliatory approach in resolving the dispute. In case the GE & his staff had done their job with due diligence this dispute & such huge loss to the state would have been avoided as discussed in detail in the following paragraphs. Now let us ask the basic ‘how’ and ‘why’ questions in respect of the case study one by one.

(a) How the dispute arose?

(b) How the dispute was/is being resolved?

(c) How the dispute could have been resolved in a better way?

How the dispute arose?

- Garrison Engineer Jhansi (GE) floats a notice of tender for “Repair/ Maintenance of Roads at Jhansi and Nowgong” with an estimated cost of Rs.10 Lakhs on 24 Jul 2001. Tenders are issued to eligible applicant contractors on 26 Nov 2001. 07 quoted tenders are received back on 18 Dec 2001. The tender of Shri Harinder Singh (Contractor) was found to be the lowest.

- However, the contractor against one of the major items of road construction (Item No.5) i.e. “Premix carpet” (consisting of the work of Tack coat, premix carpet, seal coat & rolling) erroneously quoted “Rs. Eighty only” in words as against “Rs.580/-“ quoted in figures. As per General Conditions of Contract (GCC) of MES, rate quoted in words take precedence over rate quoted in figure. Even with rate as Rs. 580/- he was the lowest (L-1), but with this mistake the amount quoted by contractor got reduced by Rs.2.25 Lakh i.e. Rs. 9.97 Lakh from Rs.12.22 Lakh.

- On realizing his mistake after tender opening, the contractor wrote to GE requesting for remedy to correct the mistake committed. Although, procedurally / contractually there is no remedy other than revoking the offer, but GE accepted the tender in a hurry on the same day i.e. 18 Dec 2001. This pre-empted the contractor to revoke his offer & he was left with no option but to execute the work reluctantly as otherwise as per the policy in vogue during those days he would have been banned from further issue of tenders for a period of six months as punishment. Although this policy has been amended these days, as he only has to forfeit an amount equivalent to earnest money and thereafter no ban is imposed on further issue of tenders.
As per the policy, all items of the tender are required to be analyzed as per current prevailing market rates of material & labour. In case the total amount of all items of work quoted by L-1 is comparable with the total amount of the work based on analyzed market rates, the tender is accepted otherwise the tender is re-invited. However, in addition to comparing overall amounts, the quoted rate of each item of L-1 is also compared with its market analysis rate. In case the rate of any or some of the quoted items is found to be 50% more than the reasonable market rate analyzed by the dept., then those rates (called Freak High Rates) are referred to the L-1 for reduction. In case the contractor does not reduce the rate to bring them out from the range of being freak high, a restriction is imposed on these items for not executing them beyond the quantity catered in the contract. Similarly there may be quoted rates which are Freak Low Rates i.e. 50% below the reasonable market rates. Restrictions are also imposed on these rates to not to reduce the quantity of these items below what is catered in the contract.

In his zeal to accept a tender at low (erroneous) rates, the GE committed a serious error in not analyzing the other rates quoted by the bidders. There was an item No.16 in the tender for “Letter writing with Fluorescent tape over Sign boards” with unit of measurement as “10 Numbers (per cm height)”. The rate quoted by the L-1 Contractor for this item was too high i.e. Rs. 290/- as compared to an average rate of Rs. 21/- quoted by other bidders. However, the GE did not refer this rate to the contractor for reduction. Even if the market analysis of this item was not prepared by GE, but a cursory look at the comparison of rates quoted by all bidders would have shown that there is huge ambiguity in the quoted rate as the rates quoted by other bidders for this item were as low as Rs. 5/-. Had the quoted rates thoroughly analyzed by the GE & his staff, this item would have

<table>
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<tr>
<th>Description of Item</th>
<th>Unit</th>
<th>Qty</th>
<th>Rate (Rs.)</th>
<th>Amount (Rs.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Writing letter or figures (Block, Roman, Italic, Indian) not exceeding 30 cm height with Fluorescent Tape 25 mm wide and pasting properly over board all as directed</td>
<td>10 nos. (per cm of height)</td>
<td>500</td>
<td>290</td>
<td>1,45,000</td>
</tr>
</tbody>
</table>
been definitely referred for reduction & in case tender was still accepted without any reduction by the contractor, at least there would have been restrictions imposed upon its quantity during execution.

- Thus the individual items of the tender were not analyzed as per prevailing market rates of material & labour. It appears that comparative statement of rates quoted by all bidders was also not prepared before accepting the tender on the same day of receipt of quoted tenders. Thus, they failed to notice the freak rates quoted by L-1 due to lack of market rate analysis for comparison.

- Thus, the tender was accepted in haste so as to pre-empt the contractor from revoking his offer who had quoted erroneously for a major item of tender (premix carpet) making it freak low.

- This approach on the part of Garrison Engineer in respect of disputed item of “letter writing” lead to the following lapses:
  - Failure to notice freak high rate
  - Failure to refer the rate for reduction to contractor
  - Failure to restrict the quantity of the item
  - Failure to gauge the financial implication of sub unit “per cm height” on the quantity and amount of the item

- The quoted rates have to be compared with reasonable market rates & if the contractor has erroneously quoted unworkable rates, he should at least have been given an opportunity to rethink to revoke or go ahead with the offer made in the quoted tender.

- As per Indian Contract Act also, the promisor / offeror can revoke his offer before his offer is accepted. Even MES Contract conditions make provisions for the contractor to keep his offer open for 2/3 months before deciding to accept or reject the offer. Thus, if MES considers that at least 2 months time is required for its consideration of the offer, then contractor, who has made a genuine mistake be at least given some reasonable time to review his offer.

- Although, in case the contractor revokes his offer in a public tendering process, he is aware of the consequences of either forfeiting his earnest money or ban on further issue of tenders for a specific period. Thus, in the subject case under consideration, the contractor was pre-empted by GE to review his offer in the light of mistake made by him.
Thus, the acceptance of the tender in haste within hours of opening on the same day with malicious intent to pre-empt the contractor to review his offer with bona fide mistake sowed the seeds of the dispute.

The approach in the beginning of a contract by GE, lead the contractor to look out for some avenue to recompense. The same was provided by the approach of the GE by not declaring the rate of disputed item of letter writing as freak high and hence not restricting its quantity. The contractor took full advantage of the lapse.

The ignorance on the part of the GE and his staff about financial implications of this freak high rate item and its sub unit of “per cm height” lead the contractor to silently execute the work for this item till entire work was recorded in the MB.

He kept on executing the writing work on sign boards, off course under the guidance of the MES engineering staff. The work was executed & entered in Measurement Book (MB) duly signed by Contractor & MES Engineers including GE. The first running payment was made on the measurements recorded in the MB for 650 units.

However, while accepting the payment the contractor raised the claim that since the unit of item was for “per cm height”, the recorded 650 units of letters be multiplied by 15 as the height of letters as ordered by MES staff was 15 cm. Thus, in the second running bill, he claimed payment for 9750 units. Thus, the amount of this item increased by 15 times i.e. over Rs. 28 Lakh for an item of Rs. 1.45 Lakh in a contract concluded for an overall amount of less than Rs. 10 Lakh.

At this time, the GE and its staff realized the quantum of payment of over Rs. 28 Lakh against the amount of Rs. 1.45 Lakh against this item in the Contract.

This was the time when GE realized its blunder in accepting the contract and executing the quantities on ground without due diligence. Thus, in an effort to deter the contractor from highlighting this blunder by claiming such astronomical payment, GE started to rationalize his actions and putting the blame on contractor as under:

- For executing quantities of an individual item by exceeding the 25% limit as per GCC without written approval of the GE.
- By alleging that the item executed on ground was with a different specification i.e. a sheet as against a tape as catered in Contract.
– By directing the contractor to agree for a special (Star) rate for this item which was only a fraction of the rate accepted in the contract
– By charging compensation on the contractor for delay in completion of the work despite the fact that the delay was mainly attributed to MES for delay in supply of Bitumen & stopping release of running payment even of undisputed portion of work.

- Even some arbitrary & arm twisting tactics were adopted by GE by refusing to make legitimate payment for other items of the work. Even, extension of time was not granted despite default on the part of MES in not making available bitumen in time, which was to be supplied by MES as per contract. GE claimed that the contractor has exceeded the quantity of the disputed item of his own volition without any such written approval/directions from the dept. They also started questioning the quality of material despite approving the same & making payment in first running bill. All these pressures were imposed on the contractor apparently to withdraw his claim.
- After all the lapses; the approach of GE was never conciliatory. This is quite obvious as himself being accepting officer of the contract and deciding authority on various issues, GE tried to dominate the contractor to restrain him from raising such huge claims.
- The intention of the Engineer authority should not be biased towards any party to the contract even if the Engineer is the employee of one of the parties to the contract. Thus, here the importance of fairness, while dealing with contractors & contractual matters by the Engineer Authority, comes to highlight. Thus, the dispute could have been nipped in the bud by dealing with fairness & transparency.
- Thus approach of GE in dealing with the issue by trying to rationalize his mistake and arm twisting the contractor to withdraw his claim aggravated the dispute.
- The contractor also took full advantage of this chaos created by GE by refusing to proceed with work citing delay in payment of his dues. Taking advantage of the situation the item for road construction for which he had erroneously quoted very low rate, was also not executed. Thus, the intention of GE behind concluding the...
contract in haste, to take advantage of erroneously quoted freak low rate, was also defeated.

- As per the Arbitration clause in GCC of MES, the arbitration shall take place only after the completion or termination of work. Further in cases of cancellation of the contract, such reference shall not take place until alternative arrangements have been finalized by the Government to get the works completed through any other Agency. However, if both parties agree in writing, the arbitration can take place during execution of the work as well although these cases are very rare in MES. After several correspondence & meetings, the contractor finally invoked arbitration on 08 May 2004 by requesting the Appointing authority for appointment of Arbitrator.

**How the dispute was/is being resolved?**

- As per the contract provisions in MES for a contract concluded by GE, the appointing authority for appointment of Arbitrator is Chief Engineer. However, the appointing authority (Chief Engineer Lucknow Zone) instead of immediately appointing Arbitrator kept on raising conditions like directing the contractor to give an undertaking to complete the work during arbitration period. There were several rounds of correspondence & meetings before contractor gave desired undertaking. Finally the arbitrator was appointed on 05 Aug 2005 by the appointing authority 15 months after the request was first made.

- The work under this contract remained stand still during the period from the time the dispute arose i.e. 27 Jun 02 when the second running payment was claimed & till the time of appointment of Arbitrator i.e. from 27 Jun 2002 to 05 Aug 2005 and even thereafter during the time arbitration process was on. However, since the work pertained to routine annual maintenance work of road repair, the actual repair work on ground got carried out through other contracts concluded in subsequent years. However, MES maintained that since the rate quoted under this contract for road repair was freak low, they would get the required quantity executed at any other place they desired.

- The arbitration process went underway from 05 Aug 2005 to 20 Aug 2007, when the arbitrator finally gave his award. As per the award, the arbitrator was totally
convinced that the work was executed under the close supervision of MES Engineers. Therefore, the Arbitrator held that:

- Contention of MES that contractor exceeded the quantity of his own is an after thought.
- There were clear directions in the site order book directing about size of letters & location of work to be carried out.
- The work was not carried out overnight & first running payment was made for the entire work of letter writing duly entered in MB showing each & every letter/words written on sign board indicating their location.
- The only dispute was that the payment made to contractor was done without multiplying with ‘15’ as the height of letters was 15 cm & unit was ‘per cm height’.
- Thereafter, no further work of letter writing was carried out by the contractor.

- Therefore, arbitrator has inferred that MES was at fault by:
  - Accepting the tender in haste without proper market analysis just to take advantage of a freak low rate erroneously quoted by contractor.
  - Due to above lapse, they did not realize a freak high rate (disputed item) and hence did not refer it to the contractor for reduction.
  - The above lapse, lead them to another lapse i.e. not restricting the quantity of the disputed item during execution.
  - All these lapses lead to another lapse, i.e. ordering the quantity of disputed item in ignorance about the financial implication of the sub unit of ‘per cm height’ on the freak high rate item.

- Thus, the arbitrator after giving reasonable opportunity to both parties & even visiting the site, gave the award in favour of the contractor. The entire claim of the contractor for the disputed item amounting to Rs. 29.28 Lakh was awarded in his favour in accordance with the description of the item and its unit/sub unit. Not only this, another claim of the contractor for idling of Tool & plants for several months during the initial period when his second running payment was refused & allegedly he could not proceed for lack of funds was also awarded to him amounting to Rs. 2.80 Lakh.
Since the arbitrator concluded that the entire responsibility of the arbitration process was of MES, he allowed cost of reference to Arbitration of Rs. 1 lakh only to the contractor & disallowed any such cost to MES. Not only this, the claim of the contractor for interest for pre, pendente & post mil period was also awarded in favour of the contractor at 12%, 12% & 15% respectively till date of payment.

At the stage of award, as the quantum of award i.e. Rs.33.08 Lakh plus Rs. 19.30 Lakh on account of interest liability totaling to Rs.52.38 Lakh in a contract of less than Rs. 10 lakh looked astronomical and so incredible that the Central Govt. Standing Counsel (CGSC) Jhansi in his legal opinion commented that the award has been compiled through corrupt practice and hence against the public policy considering that arbitrator has overlooked the contract terms & conditions in the award. Hence, the same was strongly recommended to be challenged in the District Court under sec 34 of Arbitration & Conciliation Act, 1996.

Even all the high authorities of MES right from GE to Chief Engineer & even Engineer-in-Chief & Legal Advisor (Defence) without going into the departmental lapses decided to challenge the award in the Court. Thus, the award was challenged in the District Court Jhansi within limitation period in 2007 on the grounds of being against the public policy.

However, the court dismissed the objections filed by MES on 31 Aug 2010. The court rejected each & every argument including that of arbitrator entering into corrupt practice being found to be without any basis except the inference drawn as the award amount was found much higher than the contract amount. The court observed that in case MES apprehended any corrupt practice, it should have moved application before the learned arbitrator in accordance with the Act.

Thus, nothing on record could infer corrupt practice except unfounded doubt of MES. In fact the court went on to highlight the fairness of Arbitrator by even imposing a penalty of Rs. 2.11 Lakh on the contractor for his failure to complete the work of premix carpet which was quoted on freak low rate. Thus, all objections of MES against the award were well & truly rejected by the District Court Jhansi.

However, the MES officers in consultation with the CGSC Jhansi again recommended challenging the order of District Court in the High Court while progressing the case to Legal Advisor (Defence) through Engineer-in-Chief.
However, at the Engineer-in-Chief office, the recommendation was changed to implement the award citing no useful purpose shall be served in again challenging the award. The Legal Advisor (Defence) approved the recommendations of Engineer-in-Chief & advised to implement the award. Therefore, the appeal which was already filed in the Allahabad High Court within limitation period was withdrawn by MES. The payment, which had inflated by another Rs.19.12 Lakh due to liability of future interest of 15% since date of publishing of Arbitration award, amounting to Rs.71.50 Lakh was made to the contractor on 10 Sep 2011.

- However, the contractor again raised claim about less payment being made by MES on account of future interest of more than Rs.10 Lakh on account of interest over interest and filed an execution petition No.19/2011 in the District Court of Jhansi where the matter is still pending.

- The chances of contractor’s success has increased manifold with the recent split judgment given by the Supreme Court in Hyder Consulting (UK) Ltd vs state of Orissa on 25 Nov 2014 allowing merging of awarded amount and pre-award interest into the ‘sum’ for calculating the future interest. Thus, by the time the Execution petition of the contractor is decided and MES actually makes payment, the interest liability is bound to have increased even beyond Rs.81.50 Lakh.

**How the dispute could have been resolved in a better way?**

- If by some mechanism, the dispute at its inception was referred to some authority not involved in its creation, there would have been benefits for both parties. The dispute would have been resolved without such heavy costs to Government and even to the satisfaction of the contractor. The work would also have been completed smoothly, benefitting the ultimate users i.e. the armed forces for whom it was desired & planned. The huge public money would not have been lost as in the awarded amount & interest. The MES officers valued time and efforts & fee to the advocates & even arbitrators would have been avoided.

- Thus, the requirement was for a mechanism / system that starts functioning immediately to mitigate the dispute at its very inception. Let us look at these mechanisms one at a time:
(a) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):

- As per contract provisions of international agencies like ICC, FIDIC, World Bank or Indian Central Government agencies like NHAI, CPWD and the “Standard contract clauses” drafted by Infrastructure and Project Monitoring Division of Ministry of Statistics and Programme Implementation there is a provision of Dispute Review Board (DRB) / Dispute Redressal Committee (DRC).

- As per the DRB/DRC clause, immediately on coming into existence of the Contract there shall be a Standing Board to which all disputes shall be referred by any of the parties. The composition of the Board may be one member for small value contracts & three members for large value contracts with each party nominating one member & the two members selecting the third member who acts as chairman.

- In the case under discussion, had there been a standing Board at the time of initiation of dispute i.e. first / second running payment, the same would have been referred to it immediately. Moreover, in such cases, there is an element of cover up by the accepting officer of contract and his staff officers directly involved in preparation of contract document and execution of work. This often gives rise to dissatisfaction of contractor which consequently leads to dispute.

- In case the decision is given by an independent authority, which is final & binding on both parties it has more authenticity than the one given by an authority himself involved in the conflict or responsible for conflict. The decisions of Engineer Authority in respect of certain issues even if specified in the contract to be final and binding have often been rejected by the Arbitrator and the courts. But decisions given by the independent authority assume the final and binding status in case not objected within the specified time limit.

- With a neutral independent board in operation, it would not have tried to cover up the lapses made by GE. There would have been no stoppage of work by the contractor. The amount awarded by Arbitrator to Contractor for claims of reference to arbitration (Rs. 01 Lakh), idle Tool & plants & watch-ward (Rs. 2.80 Lakh) & interest (Rs.39 Lakh + 10 Lakh) totaling to Rs.52.80 Lakh would have straight away been avoided. As far as the main claim of Rs.28 Lakh is concerned, some solution within the limits of Contract conditions, acceptable to the contractor
if not exactly to the liking of GE, but may be less than the Rs.28 Lakh, could have been arrived at.

- Thus, had there been a clause of DRB/DRC in the contract conditions, the dispute would have been resolved in an efficient and effective manner.

(b) **Amicable settlement through Conciliation/ Mediation:**

- As per contract provisions of international agencies like ICC, FIDIC, World Bank or Indian Public Sector Organizations like DMRC, ONGC, SAIL, BHEL and the Model “Standard contract clauses” drafted by Infrastructure and Project Monitoring Division of Ministry of Statistics and Programme Implementation there are provisions for Amicable settlement using one of the techniques of conciliation or mediation to resolve the contractual disputes.

- As per the clause, an independent third party shall facilitate resolution of contract dispute. In case the parties reach a consensus as regards to the settlement of dispute, the dispute is resolved once for all after signing of settlement agreement which becomes final and binding on both parties. In this technique, the approach of each party is not to insist on its contractual rights but to have what best can be achieved under the prevailing circumstances.

- The spirit behind the techniques of conciliation or mediation is that the parties in dispute always try to rationalize their stand and see their side of story, whereas, a conciliator/ mediator can visualize the dispute from an independent perspective. Thus, the conciliator is in a better position to advice the parties to re-evaluate their respective claims and settle for a compromise which entails a win-win situation for both parties. Thus, in case the process of amicable settlement had been applied in the resolution of the dispute in present case study, as was requested by the Contractor, the government would have settled for a better deal in comparison to Rs. 72 Lakh ultimately paid. Even the contractor would have been pleased to complete the work on time had his legitimate claim been settled reasonably. Even the government would have been spared from the efforts and expenditures of the dispute resolution period of over 12 years and still continuing.

- The clause of conciliation which MES has introduced in its contract conditions now, even that would not have helped. Firstly, there is a restriction on use of the clause for contracts less than Rs. 1 Crore. Secondly, there is a restriction of Rs. 2
Lakh on the individual claim. In the case under study, the amount of the contract was not even Rs. 10 Lakh but the amount of the claim in respect of the dispute was Rs. 28 Lakh. Hence, as it does not fulfill any of the criteria for application of conciliation clause, the clause would not have been made applicable.

- It has been observed that the contractor in his various correspondences during the period hinted at amicable & reasonable solution to the dispute through negotiation / conciliation.
- Thus, had there been a clause of Conciliation/ mediation without any financial restriction in the contract conditions, the dispute would definitely have been resolved in a better way.

(c) Arbitration during the period of execution:

- Had there been no reservations on the timing of Arbitration as there is in MES contracts, the Arbitrator would have been appointed immediately on occurrence of dispute rather than after a lapse of 3 years after the occurrence of dispute.
- It is important to understand that the delay in appointment of the Arbitrator is actually adding up to the interest liability of the government. Thus, when there is a claim made by the contractor during execution period it is in the interest of both the parties to resolve it immediately rather than wrapping it under the carpet for years.
- It is even more crucial for the government to get it resolved immediately through Arbitration when the Engineers who witnessed the dispute are present rather than when they get transferred. After the Engineering staff is changed in two-three years, it becomes difficult for the new incumbents to defend the case before Arbitration. The only basis to defend the case being the site documents and files also start becoming untraceable when the actual time to produce the same comes. Therefore, these evidence must be produced by the executive who were their authors as they will definitely be able to throw more light on the facts rather than new incumbents.
- The amount awarded by Arbitrator to Contractor for claims of idle Tool & plants & watch-ward (Rs. 2.80 Lakh) & interest (Rs.39 Lakh + 10 Lakh) totalling to
Rs.51.80 Lakh would have been straight away saved had the Arbitration took place at the onset of dispute and implemented within limitation period.

- Thus, had there been no reservation on the use of Arbitration during execution period in the contract conditions, the dispute would definitely have been resolved in a better way.

(d) Decision on implementation/ challenge of award by Independent Technical Committee:

- From the present case study, it is observed that the approach of MES Engineer Authority was to cover up the lapses which lead to occurrence of dispute. Even the reference of dispute to Arbitration was a flawed decision. Thus, had there been an independent technical committee to look into the claims of the contractor even before appointment of Arbitrator, the dispute could have been avoided as the claim of the contractor was genuine. Thus, the unbiased recommendations of this independent committee could have prevented the dispute causing huge loss to the state.

- Even thereafter, the team that defends the case in Arbitration proceedings should be delinked from recommendation / decision on implementation or challenge of award. The reason is that more often than not the team tries to cover up weak defence of the case by recommending challenge of unfavourable award. The decision to implement or challenge the award should be based on recommendations by an Independent Technical Committee.

- Thus, in the present case study had there been an independent technical committee scrutinizing the award, the lapses on the part of the executive team and the defence team would have been observed and unbiased recommendation to implement the award would have avoided astronomical amount paid as interest by the government.
(e) Avoiding Interest Payments:

- It may be seen that the interest liability in the above case has increased the total liability by more than the double. Thus, how do we avoid this liability irrespective of the fact that we implement or challenge the award.

- In case we decide to implement the award, we must decide and act fast as Arbitrator generally gives three months for implementation. In case the awarded amount is paid in that period we can avoid the future interest liability.

- As regards the past and pendent lite interest is concerned, we may include a condition in our contract that Arbitrator shall not award any past or pendent lite interest on any awarded amount. ONGC, DMRC and Indian Railways have such type of clause in their GCC. The Apex court has sustained such clause in various judgments given recently and any interest given by the Arbitrator ignoring such conditions have been set aside by the Court as we may see in the subsequent case studies.

Mandatory award payment (protected by BGB) before challenge in Court by either party:

- However, if any party decides to challenge the award, there is always a fear about increasing interest liability during the long litigation period which generally increases the overall liability by over 100%. Therefore, it may so happen that in cases of genuine grounds available for challenge the party decides to forego the challenge considering the interest liability.

- In the present case study, although the grounds for challenge were non-existent and it was a futile exercise to challenge the award leading to further increase in the interest liability by over Rs. 19 Lakh during litigation and still counting. However, in case there were genuine grounds, then had there been a clause as is existing in the contract conditions of NHAI New Model EPC Contract Document, neither the interest liability would have increased while litigating in the courts nor there would have been any anxiety about recovery from the contractor in case the Court set aside the award.

- As per the clause there is a provision to make mandatory award payment (protected by BGB) before challenge in Court by either party.
  
  - If award being challenged by losing party:-
– Losing party to make payment of awarded amount to winning party (WP)
– Winning party to give bank guarantee of awarded amount to losing party (LP)

– On final decision of the litigation:
  – If no change in award
    - bank guarantee to be released by LP
  – If award set aside
    - bank guarantee may be encashed by WP

• In case such a provision had existed in the GCC of MES, there would have been no hesitation in making the payment to the contractor for the awarded amount of Rs. 33 Lakh against a bank guarantee of equivalent or more amount within the limitation period without waiting for the legal advice from LA (Defence). Thereafter, the award can be challenged in the court without worrying for the accumulation of interest as the interest liability ceases on making the payment.

• Thus, after losing the case in the District Court the additional loss to the state of Rs. 19 Lakh paid would not have taken place. At this stage, if decision to discontinue further appeal was taken, the Bank guarantee of the contractor could have been released.

• This policy shall avoid the fire fighting of the MES officials at every stage of verdict whether the Arbitration award stage or the stage of decision by any of the Courts. At least plethora of execution petitions pending against the UOI and seizure of government accounts by the courts shall be avoided by adopting this policy.
5.2 Case Study No. 2 (Military Engineer Services)

Contract Agreement No.: CEJZ/JHA/12 OF 1990-91
Name of Work: Provision of Hangers at Jhansi
Name of Accepting Officer: Chief Engineer Jabalpur Zone
                      (Later on taken over by Chief Engineer Lucknow Zone/Bhopal Zone)
Name of Contractor: M/S Radha Construction Co.
Amount of Contract: Rs.2.26 Crore
Date of Acceptance: 15 Jan 1991
Date of Commencement: 05 Feb 1991
Date of Completion: 04 May 1992 (As Per Contract)
Actual Date of Completion: 31 July 1992 (Extn granted by Dept.)
Current Status of Dispute: Pending at District Civil Court

How the dispute arose?

This is another typical case where delay in preparation of final bill leads to several claims by the contractor decided in his favour.

- The contract for “Provision of Hangers at Jhansi” was awarded by MES to M/S Radha Construction for an amount of Rs.2.26 Crore on 15 Jan 1991.
- The Period of completion as specified in the Contract was 15 months with date of commencement as 05 Feb 1991 and date of completion as 04 May 1992.
- The work was satisfactorily completed by the contractor on 31 July 1992 taking just an additional period of 3 months for completion. The extension of time up to the actual date of completion was granted by MES without any levy of compensation.
- However, there was an abnormal delay in finalization of deviation orders by MES. In the present case 15 Deviation Orders were finalized in 1997 i.e. 5 years after completion of the work. Even thereafter, the Final bill was not paid to the contractor. The contractor invoked Arbitration on 04 Feb 1998 by requesting the appointing authority for appointment of Arbitrator to adjudicate his claims.
- Payment for work done by the contractor within reasonable time is the contractual responsibility of the dept.
As per the contract provisions the contractor shall submit his final bill within three months of completion of work and is entitled to payment within 6 months of submission of the final bill. Therefore, as per the contract provisions, the contractor ought to have been paid the final bill by 30 Apr 1993.

However, due to non-finalization of deviation orders by MES, the final bill could not be processed. The non-payment of the final bill to the contractor for five years culminated into the dispute.

(b) **How the dispute was/is being resolved?**

- The contractor invoked Arbitration by requesting the appointing authority on 04 Feb 1998. However, the arbitrator was appointed by the appointing authority only on 27 Mar 2001 i.e. three years after the request was made.

- However, three claims of the contractor were not referred by the appointing authority to the arbitrator citing them to be beyond the ambit of arbitration being covered under ‘excepted matters’ for which decision of the dept. officer being final authority as per the contract conditions. This gave rise to another dispute which has been kept out of the purview of this case study and has been dealt separately under case study No.05 to better appreciate different issues involved.

- The Arbitrator appointed in this case published his final award in respect of the dispute on 15 Oct 2001 mainly in favour of the contractor. In the present case, the claims allowed by the arbitrator are as under:

**IN FAVOR OF CONTRACTOR**

(a) Residual payment of final bill: Rs.2.65 Lakh

(b) Compensation for delay in payment of final bill: Rs.3.32 Lakh

@ 15% PA Simple interest for delay period of 5 years

(c) Payment for additional works carried out: Rs.0.76 Lakh

(d) Compensation for non release of Bank Guarantee: Rs.0.87 Lakh

(e) Escalation over additional item payment: Rs.0.04 Lakh

(f) Pre & Pendent-lite interest @ 15% PA Simple Interest: Rs.1.00 Lakh

for delay period of 5 years on (c) & (e) (Rs.80,000/-)


Total on date of award: Rs.8.64 Lakh
IN FAVOR OF MES:

(a) Certain recoveries: Rs.0.90 Lakh
(b) Interest @ 15% PA Simple Interest till date of award: Rs.1.06 Lakh
Total on date of award: Rs.1.96 Lakh

Net Liability of UOI within limitation period: Rs.6.68 Lakh
Future Interest @ 15% PA Simple Interest from date of award i.e.15 Oct 01 to date of payment: *Rs.13.02 Lakh

*Liability till 15 Oct 14 (matter pending before Dist. Court)

Net Liability of UOI (AS ON DATE): Rs.19.70 Lakh
(in case UOI application is dismissed in Dist. Court)

- The abnormal delay in preparation & payment of final bill is always criticized by the Arbitrator. The dept. is always at sea explaining the causes of delay. Thus, the Arbitrator almost invariably gives the damages for the delay in favour of the contractor.

- In the present case also there has been unexplainable abnormal delay in finalization of Final bill. The same has been acknowledged by the Arbitrator while duly compensating the contractor in the award. It has been observed that the arbitrator has taken the abnormal delay of over 09 years in payment of the Final Bill very seriously. Thus, most claims by UOI have been disallowed by him owing to such abnormal delay in finalizing the Final Bill. There can be no excuse to cover up such delay in final payment. Simultaneously, the arbitrator has allowed all the reasonable claims of contractor to compensate him for such delay.

- It may be considered that even the delay in appointment of arbitrator adds up to the interest on the amount awarded to the contractor. Thus, in the present case the arbitrator has considered 01 year from the date of completion as the reasonable period when the Final payment was ought to have been made by the dept. Thus, for the delay he has awarded 15% interest on the awarded amount w.e.f. 31 July 1993 till date of award. The financial effect of the interest for this award for the Pre & pendent-lite period is Rs.4.33 Lakh out of which Rs.1.62 Lakh can be attributed to delay in appointment of arbitrator for three years.

- Another, 15% future interest has been awarded by the arbitrator on the total amount due to the contractor on the date of award till date of payment. This
aspect has been overlooked by the dept. while projecting the case for Legal Advisor (Defence) advice. Thus, from the brief of the case and the memorandum of award, it appears that there is no future interest on the awarded amounts. In any case as per ACA 96 Section 31 (7) (b), the award shall carry a future interest @ 18% per annum by default in case the award is silent on the aspect of future interest. Thus, in the subject award 15% per annum future interest shall be applicable.

- Generally, as the process of projecting the case through bureaucratic channel takes time, pending the advice of the LA (Def), an application is filed in the Court within the limitation period to avoid later rejection on account of delay in case the advice is to contest the award. In the present case, although there does not appear any solid ground to challenge the award, the dept. took a stand to contest the award in the court just because it was not to their liking. The LA (DEF) in lieu of providing any concrete advice commented “to wait for the outcome of court case”.

- The case is pending in the District Court since 15 Jan 2002. Thus, in the last 12 years, the liability of UOI, on account of 15% future interest, has increased by another Rs. 13 Lakhs & still counting. Thus, the amount of award which was Rs. 6.68 Lakh on the date of award, has already inflated to Rs.19.70 Lakh as on 15 Oct 2014.

- Not to mention here that there is no infirmity in the award & no reason under sec 34 to challenge the award. Thus, in all likely-hood the application of MES may be dismissed and as on date they shall have to shell out thrice the amount initially awarded.

How the dispute could have been resolved in a better way?

(a) **Decision on implementation/ challenge of award by Independent Technical Committee:**

- There is a tendency amongst the Government counsels to invariably advice contesting the award on the ground of being against the public policy, if no other ground under sec 34 is admissible. This is a vicious circle as the litigation in the courts goes on for years.
- The whole purpose of adopting ADR technique to resolve the disputes expeditiously is defeated if the entire cycle of courts is to be exercised in each & every arbitration award. In case there is a very strong ground to set aside the award, only then assistance of court is desired and not because that the award is not favoring the government. It has to be realized that to fight reasonable award just to cover up the lapses of the dept. amounts to loss to the state & sheer wastage of public money. Thus, this practice needs to be curbed.

- The decision to contest the award has to be taken judiciously by an authority / team of officials independent of the dispute after thoroughly scrutinizing the award. In the present practice, in majority of cases the recommendations is given by MES officials who defended the case during Arbitration. There shall always be an element of bias in the recommendations by the party to dispute which also participated in the defence of the arbitration case. They always try to put the blame of their lapses on the arbitrator and recommend contesting the award even if there are absolutely no chances of getting the award set aside. Generally the recommendation given by these officials prevails & advice as per their recommendation is given by the LA (Def). This leads the way for long legal battle & perpetual increase in liability of interest which has been seen to always exceed the principal amount in almost every case at the time of final payment. In case an independent team scrutinizes the award, in a time bound manner, and gives its recommendations it shall be unbiased.

- Moreover, it is seen from experience in several cases as in the current case study that the LA (Defence) generally does not add any value to the recommendations made by the department but more often leads to frustrating delays. In this case as well the advice of LA (Defence) lacked clarity.

- Therefore, there is a need to relook at the process of taking advice from LA (Defence) which invariably leads to delay in timely action whether in respect of implementation or challenge both within limitation period of three months.

- Delays in timely advice leads to expiry of limitation period to file the application in the court. There have been cases experienced by the researcher and several Supreme Court case laws where the court has not condoned the delay in filing the
application as the Apex court has held that even court has only one month discretion after the lapse of three months granted by ACA 96 and not beyond that.

- On the other hand the threshold time limit for future interest is three months from date of award. Till that time no future interest is applicable. But once that threshold limit expires, the future interest is applicable for those three months as well and accumulates continuously till the same is paid to the contractor.

- As per CPWD Works Manual 2014 clause 35.15 (2) (i), if the Competent Authority of department considers the award as reasonable, the advice of Law Ministry is not required. Only when the Competent Authority is satisfied that strong grounds to challenge the award exist, it shall seek the advice of Law Ministry.

- The same approach needs to be implemented in MES. In case the competent authority decides to implement the award it should immediately make the payment without processing the case for LA (Defence) advice. This shall save the interest liability as seeking LA (Defence) advice generally leads to delays and accumulation of future interest even if the ultimate decision is to implement the award.

- Moreover, it is seen that in case there is a requirement of sending the case for advice to the LA (Defence), the recommending authority tries to cover up the lapses of department in execution and defence. Therefore, the recommendation is generally to challenge the award in the court by putting the blame on the Arbitrator for misconduct and unfavourable award. However, the same recommending authority shall act rationally and practically to implement the fair but unfavourable award if there is an option of taking a decision of its own.

- Thus, had there been a policy of independent technical committee to recommend on the issue of challenge/implement of the award and no requirement for LA (Defence) Advice by the competent authority, the apparent decision would have been to implement the award. This action would have saved additional expenditure of double the amount of award as on date and 13 years of litigation which actually has been detrimental to the interest of the state.
(b) Award on agreed terms:

- Actually, it has been seen that it is very difficult to get any award to be set aside in the court. Therefore, all out efforts need to be made at the time of arbitration to get the award in favour of UOI. In case it is observed by the defending team that there are lapses on the part of the dept., efforts should be made to arrive at a settlement under sec 30 of the Act to bargain better for UOI rather than fighting a legal battle subsequently. Therefore, necessary provisions are required to be made / requisite powers be allowed for the dept. officials to achieve settlement as after the settlement is achieved there is no legal battle & no interest liability. Reasonable time (six months) may be amicably allowed for payment to be made in the settlement agreement itself to allow for bureaucratic delays in making payment.

(c) Avoiding Interest Payments:

Mandatory award payment (protected by BGB) before challenge in Court by either party:

- A better way to avoid the detrimental consequences of delays related to seeking LA (Defence) advice, shall be to include the clause of mandatory payment of award protected by Bank Guarantee.
- In the case of delay in getting timely legal advice from LA (Defence) for implementation at least there shall be no stress about accumulation of future interest. However, in case there is a delay in case of challenging the award, the current procedure of filing the application in the court pending LA (Defence) advice may continue. Thus, even if the final advice received is for implementation, the only action required shall be release of Bank guarantee submitted by contractor. And in case the advice received is to challenge, the application has already been filed in the Court which shall be pursued vigorously.
- Thus had there been such a policy, government would have at least saved additional expenditure of double the amount of award as on date.

(d) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):

- The approaches discussed above are for controlling the damage. However, a proactive approach adopted universally in all contracts but more so in Construction contracts is the adoption of DRB.
• The DRB is there right from the commencement of the project to resolve the disputes as they arise to create a healthy working atmosphere essentially required for successful completion of the project.

• It is seen that in the current case study, major award has been of compensation for delay in making final payment for over 5 years. The delay has occurred due to non-finalization of deviations by the department. Had there been a DRB in operation, it would have resolved the disputes regarding the deviations during the construction period itself, thereby eliminating not just the requirement of this wasteful expense but the entire dispute itself as abnormal delay in payment was the only cause of dispute leading to arbitration.

• Thus, it may be seen that in the current case study, as against the damage control approaches which could eliminate the additional interest liabilities, the proactive approach of DRB would have eliminated the entire awarded amount itself.
5.3 Case Study No. 3 (Military Engineer Services)

Contract Agreement No.: CEIZ/JHA/23 of 1987-88
Name of Work: Provn of Special Vehicle Bays at Jhansi
Name of Accepting Officer: Chief Engineer Jabalpur Zone
(Later on taken over by Chief Engineer Lucknow Zone/Bhopal Zone)
Name of Contractor: M/S P.N. Garg
Amount of Contract: Rs.51.06 Lakh
Date of Acceptance: 13 Apr 1987
Date of Commencement: 05 May 1987
Date of Completion: 04 Nov 1988 (As per Contract)
Extended Date of Completion: 26 July 1990
Actual & Certified Date of Completion: 26 July 1990
Current Status of Dispute: Pending at District Civil Court

How the dispute arose?

- The work of ‘Provn of Special Vehicle Bays at Jhansi’ was awarded for Rs. 51.06 Lakh on 13 Apr 1987 to a contractor M/S P.N. Garg who was not a registered contractor with MES.

- The period of completion as specified in the contract was 18 months. However, the same was extended by the department by more than the double up to over 38 months.

- The completion certificate was issued by the department on the extended date of completion i.e. 26 July 1990.

- During the execution of the work, the contractor was allowed to install rolling shutters to the garages fabricated by a fabricator ‘Y’ in lieu of the one ‘X’ specified in the contract subject to price adjustment.

- The UOI contends that they could not finalize the special rates (called star rates) for above price adjustment for the reason that the contractor did not produce the purchase vouchers. From the documents scrutinized by the researcher, it appears
to be the fact that they did request the contractor numerous times to produce the vouchers but the contractor defaulted in producing the same.

- Thereafter, the UOI made its independent trade enquiries to finalize the rates in 1992. However, as time passed & staff kept changing, the matter entangled in the bureaucratic & red-tapism issues & the rates could not be approved till 1996.

- Even thereafter, the final bill preparation and technical check at department levels took three more years i.e. 1999.

- At the time of technical check of final bill some discrepancies were noticed such as:
  
  - Some of the stores issued to contractor did not match the theoretical consumption. Hence, recoveries at penal rate of double the market rate were affected.
  
  - There was no document to show that defects notified to the contractor were rectified by him during his defect liability period. Hence recovery for non-rectification of defects was made.
  
  - As per contract condition, for availing escalation in prices, the contractor needed to notify the increase in labour wages. As no such notice was given by the contractor, the escalation in respect of labour already paid to the contractor during running payments was deducted at the final bill stage.
  
  - A further observation was subsequently taken by the audit that Trade Tax at the rate of 4% which was implemented in U.P. with effect from 1987 was not affected from the running payments of the contractor. Hence, the same was deducted from the entire payments made & to be made to the contractor.

- Taking into account all these recoveries and the effect of special rates finalized by the department based on its independent enquiry, the final bill amount of the contractor turned to MINUS Rs.3 Lakhs.

- The contractor was for the first time intimated about these recoveries in 1999 which is nine years after completion of work.
• Shockingly, the contractor was never asked to deposit this amount in the Government treasury till 2009 when the Arbitration process was already in progress i.e. 19 years after completion of work.

• The minus final bill which was progressed to audit Authorities in the year 2000 was not audited by them for over a decade for non-availability of certain original documents (technical sanction and Comparative Statement of Tenders) despite several requests from all level officers of the department.

• These documents were untraceable during the shift of the Jhansi area to different administrative authorities (Chief Engineer Jabalpur to Chief Engineer Lucknow to Chief Engineer Bhopal) over the period.

• All efforts by personal visits & liaison by MES officials from Jhansi office to all these three offices went in vain.

• During all these chaos and abnormal delays, a Bank Guarantee Bond (BGB) of Rs. 1.5 Lakh submitted by the contractor against retention money expired due to delayed notice by UOI. The bank neither extended the validity nor encashed it on account of delayed notice by UOI.

• Thus, the non-payment of final bill for 18 years lead to the contractor invoking Arbitration for resolution of disputes in 2008.

Analysis of dispute

• From the case files analyzed by the researcher, it has transpired that the dispute has been made out of a non issue. This also highlights the red-tapism prevalent in the rules which no one wants to bend even at the cost of eventual loss to the department.

• All MES officials responsible for fixing the special rate acted strictly as per rules which require the contractor to produce purchase voucher to show actual expenditure made by him. MES officials also make their independent Market enquiry about the rate. The lesser of the two becomes the basis for fixing the special rate payable to the contractor.
• Thus, the reason for the delay has been attributed to non-production of purchase voucher by the contractor for finalization of price adjustment of departure from contract by providing a rolling shutter fabricated by a different fabricator than mentioned in the contract.

• However, a precondition before incorporating any major item in the work was verification of its purchase voucher. Thus, the default for allowing the material to be incorporated in the work without ascertaining the purchase voucher was that of the department.

• The rate was finally decided by the department independent of purchase voucher after 6 years of completion proves that this remedy could have been employed by the department at the first instance itself. But nobody wanted to deviate from the laid down rules even if at the cost of loss to the state by abnormally delaying the final bill.

• Thus, a minor act of non-production of purchase voucher by the contractor has been made as the crux of dispute by the UOI which actually has lead to the loss to the state.

• Another reason that can be assigned to the dispute from the document analysis of the project files of the MES is the lack of continuity of the MES officials due to their frequent transfers. Any omission on the part of past officials keeps lingering over a period of time as the new incumbents are unwilling to take responsibility or deviate from procedures to regularize the omissions on the part of past officials. Thus, in the present case the omission on the part of past officials of incorporation of material without verifying the purchase voucher was not owned by the succeeding officials. They kept on insisting on production of voucher from the contractor to finalize the rate bound by the cage of procedures.

• Another reason that can be attributed to the creation of dispute as analyzed by the researcher is the indifferent and inflexible attitude of the audit even if it leads to loss to the state. In the present case, the delay in processing the final bill for about a decade is attributed to Audit. Their approach of delaying the contractor’s payment due to lack of some internal documents lead to increase in interest payment as granted by the Arbitrator subsequently.
This is a classical example where for not processing the final bill in time the department had to pay over Rs. 7 Lakh and still counting as the matter is still in court for contractor’s claim of future interest over pendente lite interest.

How the dispute was/is being resolved?

Arbitration

- The final bill was not paid to the contractor for 18 years after completion of work when he invoked Arbitration on 26 Mar 2008 by requesting Appointing Authority i.e. Engineer-in-Chief for Appointment of Arbitrator to adjudicate the disputes.

- The department did not concur for appointment of Arbitrator on the plea that his claims are time barred but the Engineer-in-Chief finally appointed the Arbitrator after nine months of the request on 17 Dec 2008.

- Although the first Arbitrator entered upon reference on 30 Dec 2008, he resigned on 03 Nov 2009 owing to his transfer.

- Another Arbitrator was appointed on 02 Dec 2009 who conducted the Arbitration proceedings and published his award on 29 Sep 2010.

- The Arbitration award was entirely in favour of the Contractor. All his claims, except the cost of reference, were awarded in his favour. All claims of UOI were totally rejected.

- During Arbitration process, both sides put the blame for delay in finalization of final bill on the other side. However, a delay of 18 years has got no excuse.

- UOI blamed the contractor for not producing the purchase voucher for finalizing the special rate.

  - The reason for delay in processing the final bill for over 18 years was such naïve that no independent person or Arbitrator would accept it. The Arbitrator severely criticized the approach of UOI, stating that they were at liberty to finalize the rates independently as they ultimately did later. Moreover, the Arbitrator noted that UOI could not have allowed the incorporation of material in the work without satisfying about the purchase vouchers.
Another, plea given by the UOI for non-finalization of Final Bill was non-rectification of Defects notified to the contractor at the time of issuing completion certificate.

However, the Arbitrator did not agree to this lame excuse as he commented that the defects were of very minor nature which could have been rectified by UOI at the risk & cost of the contractor. However, UOI could not produce any documentary evidence of rectifying these defects for claiming the recovery against rectification.

The first time contractor was intimated about over issued stores was nine years after completion.

This was strongly criticized by the Arbitrator. He noted that the finalization of stores issued by UOI to contractor to demand penal recovery should have been done within a reasonable time of 6 months after completion.

UOI deducted the labour escalation already paid in running payments of the contractor at the final bill stage citing reason of no notice being given by the Contractor for such enhancement in labour wages.

The Arbitrator has taken a very pragmatic view that since all such notifications of increase in labour wages are in public notice, failure on the part of the contractor to give such notice shall not debar him from getting his legitimate dues. UOI are deemed to have notice of such notifications being principal employers responsible to ensure payment of minimum wages to contractor’s labour.

In view of the above observations, the Arbitrator rejected all the deductions made by the UOI in the Final bill. However, the Arbitrator allowed the price adjustment of MINUS Rs.2 Lakh in respect of rolling shutters in accordance with independent trade enquiry by UOI with minor changes as suggested by contractor.

Accordingly, the Arbitrator allowed PLUS Rs. 6.64 Lakh to the contractor as the balance payment of the Final bill as against MINUS Rs.3.00 Lakh arrived by the UOI in the final bill.

The Arbitrator also allowed the release of Interest bearing Security deposit of Rs. 70,100 & BGB of Rs. 1.50 Lakh against retention money. These securities were required to be released on payment of final bill, but delay of 18 years in payment
of final bill lead to delay in release of these securities as well. However, no damages were paid to the contractor for the delay as security was already interest bearing and validity of BGB had already expired which was not extended by the contractor/Bank.

- The Arbitrator also allowed pendente lite 8% p.a. simple interest on awarded amount for about 17 years till date of publishing of Arbitration award.
- The Arbitrator also allowed 11% p.a. simple interest from date of publishing of Arbitration award till date of payment in case the payment is not made within limitation period of three months specified in ACA for challenging the award.
- In view of the above, the claim by UOI of final bill amount of MINUS Rs.3 Lakhs and interest over it was totally rejected by the Arbitrator.
- The claims of cost of reference by both parties were also rejected by the Arbitrator.
- Although the award was not in favour of UOI but as there were no grounds to challenge the award, it was decided to implement the award. However, as the implementation took one year after publishing of award, it further added to the interest liability.
- An amount of Rs.12.46 Lakh has been paid to the contractor in Sep 2011 which included principal amount of Rs. 5.05 Lakh along with interest amount for 18 years amounting to Rs. 7.41 Lakh (incl. Rs.52,000/- as future interest)
- However, the contractor is still fighting an execution petition for less payment made claiming interest over interest.

**How the dispute could have been resolved in a better way?**

- From the document analysis carried out in respect of the entire case, it transpires that the issue has been tackled in a very immature manner by the department.
(a) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):

- It may be seen that non-finalization of star rate was the core of the delay in finalization of final bill and lead to the dispute which kept on lingering for years together.
- Thus, had there been a provision of DRB in the contract conditions, even department could have taken its dispute of non-production of purchase voucher by the contractor to DRB.
- The dispute could have been resolved during the execution period itself with the assistance of DRB whose decision in respect of dispute would have been final and binding on both parties.
- It is seen that certain peculiarities develop with passage of time as in this case where due to change of administrative control over Jhansi area several original documents went untraceable which lead to Audit's non-processing of Final bill for over a decade.
- In case the dispute is resolved with the help of DRB at the inception stage, the problems related with change of entire staff over a period of time leading to dispute would not have occurred. In the present case the new incumbents were not willing to take responsibility or deviate from procedures to regularize the omissions on the part of past officials. This situation will seldom arrive if disputes are resolved through DRB during the contract period itself instead of lag of several years as in the present case.
- Any adjudication or recommendation by the DRB for the special rate would have been easier for the department to accept rather than arriving at rate without voucher by departure from the rules. Once the financial adjustment was accepted by both the parties, final bill processing was easy.

(b) Amicable settlement through Conciliation/ Mediation:

- Similar to the DRB or even better option would have been the provision of conciliation/ mediation where through the intervention of the third party the issue would have been resolved amicably by finalization of the star rate within the contract period.
- The contract pertains to the time when the ACA 96 was not there i.e. there was no provision for conciliation in the Act. However, even today when ACA has been implemented for almost two decades in the country, the MES contracts with value
of less than Rs. 1 Crore do not have a provision of conciliation clause. Thus, the contract with value of Rs. 51 Lakh as the current case could not have had any conciliation clause.

- Even if the conciliation clause had been there, it would not have been possible to refer the dispute to the conciliation as the claim of both, the contractor for Rs. 6 Lakh & department for MINUS Rs. 3 Lakh, were over the threshold limit of Rs. 2 Lakh to be eligible for reference to conciliation.

- Thus, there are impractical restrictions imposed over the use of conciliation clause in MES which becomes evident from the current case.

- Generally when there is a stalemate like the one in the current case, there needs to be some flexibility or contract provision to approach a mediator to break the ice. The mediator is just a facilitator to bring the disputing parties to discussion table. The matter would not have gone to such an extent that final bill is not paid for two decades had there been such a provision.

- It is often seen that during the execution if the relationship between the contractor and the department officials starts deteriorating, it often leads to autocratic approach by the dominant department officials. Therefore, the solution even if available is not explored due to constrained relationship. The documentary analysis in this case also hints to such a scenario. The conciliator with his interventionist approach can prevail upon both parties to reach an amicable settlement and thus a financial adjustment which was required in the current case.

(c) Arbitration during the period of execution:

- There are reservations on the use of Arbitration during the contract period to resolve the dispute. Only in exceptional cases do the department officials agree for Arbitration during the contract period.

- Had there been no restriction on use of Arbitration during contract period, the dispute could have been referred by any party for adjudication.

- It is the personal experience of the researcher that the department officials are reluctant to give a logical and fair decision in contract matter due to fear of audit and being tied with the chain of procedures. However, if the same decision is given by the Arbitrator, the same is acceptable. There have been several instances where the decision makers have expressed their inability to give a fair decision and themselves advised the contractor to approach the Arbitrator. Therefore,
Arbitration during execution period is a better and practical approach to resolve contractual disputes in a government contract.

- Thus, in the present case if there was no reservation on use of arbitration during execution period, the dispute would have been resolved on time saving huge amount of public money wasted as interest payment made to the contractor.
- Not only the expeditious resolution of dispute, the recoveries including that for over issued stores which were rejected by the Arbitrator due to abnormal delay or non traceability of old documents would have been rightfully effected by MES in the Final bill.
- In the current case, the Arbitration process took 30 months i.e. 09 months for appointment of Arbitrator and 21 months for Arbitration proceedings. However, the total time as per ACA 96 & contract conditions should have been 7 months – one month for appointment and six months for publishing of award after arbitration proceedings. Thus, the entire process of dispute resolution has taken 23 additional months than what the parties had agreed for initially. Clubbing it with 18 years before invoking arbitration process, the total span of dispute has been over 2 decades as the matter is still in the courts over calculation of final interest calculations.
- Considering the nature and magnitude of dispute, the Arbitration process would have delivered the award in respect of the star rate in a short time while the construction period was still on.

(d) Decision on implementation/ challenge of award by Independent Technical Committee:

- As the award was not in favour of UOI but as no grounds existed to challenge the award, it was rightly decided to implement the award. However, as the implementation process took one year after publishing of award, it further added to the liability in respect of future interest.
- Therefore, there is a need to relook at the process of taking advice from LA (Defence) which invariably leads to delay in timely action whether in respect of implementation or challenge both within limitation period of three months.
- Delays in timely advice leads to expiry of limitation period to file the application in the court. There have been cases experienced by the researcher and several
Supreme Court case laws where the court has not condoned the delay in filing the application as the Apex court has held that even court has only one month discretion after the lapse of three months granted by ACA 96 and not beyond that.

- On the other hand the threshold time limit for future interest is three months from date of award. Till that time no future interest is applicable. But once that threshold limit expires, the future interest is applicable for those three months as well and accumulates continuously till the same is paid to the contractor.

- Therefore, in the present case when it was decided to implement the award, the delay of over year would have been avoided in case the decision was taken at the department level instead of sending it to the LA (Defence). Moreover, it is seen from experience in several cases that the LA (Defence) generally does not add any value to the recommendations made by the department but more often leads to delays and even creating confusions and ambiguities.

- As per CPWD Works Manual 2014 clause 35.15 (2) (i), if the Competent Authority of department considers the award as reasonable, the advice of Law Ministry is not required. Only when the Competent Authority is satisfied that strong grounds to challenge the award exist, it shall seek the advice of Law Ministry.

- The same approach needs to be implemented in MES. In case the competent authority decides to implement the award it should immediately make the payment without processing the case for LA (Defence) advice. This shall save the interest liability as seeking LA (Defence) advice generally leads to delays and accumulation of future interest even if the ultimate decision is to implement the award.

(e) Avoiding Interest Payments:

Mandatory award payment (protected by BGB) before challenge in Court by either party:

- A better way to avoid the detrimental consequences of delays related to seeking LA (Defence) advice, shall be to include the clause of mandatory payment of award protected by Bank Guarantee.
As in this case study, in the case of delay in getting timely legal advice from LA (Defence) for implementation at least there shall be no stress about accumulation of future interest. However, in case there is a delay in case of challenging the award, the current procedure of filing the application in the court pending LA (Defence) advice may continue. Thus, even if the final advice received is for implementation, the only action required shall be release of Bank guarantee submitted by contractor. And in case the advice received is to challenge, the application has already been filed in the Court which shall be pursued vigorously.
5.4 Case Study No. 4 (Military Engineer Services)

Contract Agreement No.: CEJZ/GWL/36 OF 1988-89
Name of Work: Provn of Married Accommodation for JCOs, HAVs, and ORS for ‘X’, ‘Y’ Bde and Armed Regt ay Gwalior
Name of Accepting Officer: Chief Engineer Jabalpur Zone (Later on taken over by Chief Engineer Bhopal Zone)
Name of Contractor: M/S Banco Construction
Amount of Contract: Rs.1.62 Crore
Date of Acceptance: 24 Oct 1988
Date of Commencement: 09 Dec 1988
Date of Completion: 08 Aug 1990 (As per Contract)
Extended Date of Completion: 31 Dec 1991
Actual Date of Completion: 31 Dec 1991
Final Bill Paid on: 04 Mar 1995
Current Status of Dispute: Pending at High Court

How the dispute arose?

- The subject work was awarded by MES to M/S BANCO Construction for Rs. 1.62 Crore on 24 Oct 1988.
- The initial period of completion as per Contract was 21 months, however, the work was actually completed with a delay of 17 months on 31 Dec 1991.
- There were several claims made by contractor during the execution of work which were not agreed by the department.
- The contractor signed the final bill under protest and thereafter gave a list of claims on 19 Oct 1993.
- The undisputed portion of final bill was paid to the contractor on 04 Mar 1995.
- Thereafter, for adjudication of his claims raised earlier, the contractor invoked Arbitration on 30 Mar 1996.
How the dispute was resolved?

- The Arbitrator was appointed by the department on 22 July 1998.
- The Arbitration proceedings went on for 2 years when the final award was published by the Arbitrator on 31 July 2000.
- The award was in favour of Contractor amounting to Rs. 6.07 Lakhs plus an interest of 15% per annum simple interest from 01 July 1992 (i.e. 6 months from date of completion) to date of award. The claim of UOI for cost of reference was rejected by the Arbitrator.
- The Arbitrator allowed 120 days from date of award to UOI to pay the amount due (including interest thereon) to the contractor. In case of failure, the UOI shall also pay on the due amount future interest @ 15% per annum simple interest with effect from a day after date of award till date of actual payment.

The Arbitration:

The major claims of the contractor and their disposal through arbitration are discussed as under:

Major Claims awarded:

Claim 6: Escalation on material, fuel and labour not paid correctly:
- The Claim of the contractor brought out several discrepancies in escalation amount calculations of UOI. The same were discussed threadbare & finally an amount of Rs.2.08 Lakh was considered as just & fair amount of award against this claim by the arbitrator.

Claim No.16: Loss due to delay in payment of RARs and final bill:
- The claim of contractor for delay in payment of running payments and abnormal delay of 3 years in final bill has been considered in his favour by the Arbitrator. Therefore, on account of this claim and for consequent delay in release of BGB of Rs. 1.5 Lakh against retention money linked with final bill payment, the Arbitrator awarded an amount of Rs. 54,000/- in favour of the contractor.

Other Claims:
- Apart from above, there were 25 other claims which were technical in nature. The same were pleaded by both parties and accordingly several claims were rejected
and some were awarded in favour of the contractor whose financial effect was approximately Rs. 3.45 Lakhs.

**Interest Claims:**

- The total amount of the above referred claims as awarded by the Arbitrator was Rs. 6.07 Lakhs. On this amount the Arbitrator awarded 15% per annum as simple interest with effect from 01 July 1992 till date of award (31 July 2000).
- The Arbitrator also awarded a future interest @ 15% per annum simple interest on awarded amount of various claims with effect from date of award till date of actual payment in case the payment is not made within 120 days from date of award.
- The only claim of UOI for cost of reference was rejected by the Arbitrator.
- The financial liability of UOI at the time of award, if paid upto 30 Nov 2000, was Rs.6.07 Lakh plus 7.37 Lakh i.e a total of Rs. 13.44 Lakh.

**Challenge of award:**

- It is seen from the document analysis of the period after receipt of award that officials of UOI who defended the case were agitated to find that despite their efforts the award went in favour of the contractor. Therefore, they felt aggrieved by the award and recommended to challenge the award in the civil court under section 34 of ACA despite the fact that no grounds as per section 34 were made out.
- The CGSC gave his opinion only to challenge without giving any authentic and strong reasons.
- The case was sent for the advice of Legal Advisor (Defence) through proper channel by the department on 25 Sep 2000.
- However, the application to set aside the award was already filed in civil court in Gwalior on 26 Aug 2000 within one month of date of publishing of the award i.e. 31 July 2000. *(Court Case – I: Case No. Civil Misc Appeal No.19/2000 in the Court of VI ADJ Gwalior)*
- However, there were no similarity in the grounds as mentioned in the application filed in the court and as mentioned in the case forward to LA (Def).
- As seen from application filed in court, under the grounds to set aside award, the UOI pleaded that Arbitrator has awarded future interest without authority. They
also stated their grievance against each technical claim awarded by the arbitrator as if the court shall go into the merits of each claim again.

- On the contrary, the case forwarded to LA (Def) stated that the award is not to the liking of UOI as arbitrator has awarded pendent lite interest for which he is not empowered and hence has misconducted.
- However, none of the grounds as in the case forward for advice or the application filed are legally tenable.
- Notwithstanding above, the advice of LA (Def) was received for contesting the award which was already in process.

**Mischief by the Contractor:**

- As is usually the case in most of the cases, the contractor despite knowing and participating in the objections filed by UOI in the application to set aside the award, filed an execution petition immediately after expiry of limitation period of 90 plus 30 days to claim the awarded amount along with interest from UOI. *(Court Case – II: Case No. MJC 7/2001 in the Court of VI ADJ Gwalior)*
- The civil court issued show cause notice to UOI on 09 Feb 2001 for payment of the amount.
- Meanwhile, on 10 May 2002, the **Court Case – I** was decided in favour of the Contractor as the Learned Civil Judge rightly does not see any of the infirmities in the Award and rejects all the objections as brought out by UOI. The court clearly brought that the Arbitrator has given his award judiciously and not miscounducted himself.
- The CGSC on 22 May 2002, however, again advised UOI to appeal against the judgment in the High Court this time stating the reason as the award being made against the public policy of India to give undue enrichment to the contractor.
- Simultaneously, in the **Court Case – II** (execution petition filed by Contractor), the court directs UOI to pay the decree amount of Rs. 6.07 Lakh.
- The department then gets into fire fighting to avoid attachment of the account and property of the Garrison Engineer Concerned (Gwalior).
- At this point of time on 08 Jun 2002, it is observed by fresh incumbent at Chief Engineer’s office Jabalpur, that the grounds in application dated 26 Aug 2000 dismissed by the civil Court were faulty, feeble and not in accordance with Sec 34 of ACA. It was also observed that the fresh grounds for challenge in High Court
now being given in his legal advice by the CGSC were also unconvincing. Therefore, it was asked that CGSC to re-examine his advice. However, it was directed to deposit the amount of award in the court to avoid accrual of interest in the event of still challenging the verdict in the High Court.

- Thus, despite realization that the grounds for challenge are very weak and legally untenable, the department went ahead with the advice of the CGSC and filed an appeal under section 37 of the ACA in the High Court of MP at Gwalior Bench on 26 Jun 2002. (Court Case –III: Case No. M.A.460/02 in the High Court of Madhya Pradesh Gwalior Bench)

- The grounds of the Appeal filed under section 37 in the HC were fairly different from those taken in the Application filed under sec 34 in the lower court which is legally not allowed.

- Simultaneously, it was prayed to stay the execution proceedings by the lower court till the appeal is decided by the HC.

- However, only the principal amount of the Award i.e. Rs. 6.07 Lakh was deposited in the Civil court on 05 Aug 2002 with a request not to release the same to the contractor till the disposal of appeal in the HC. However, the same was released to the contractor on 12 Sep 2002 on contractor’s request with no opposition from CGSC.

- The contractor then requested for the payment of interest amount also through the execution petition which was calculated as additional Rs.11.56 Lakh over Rs. 6.07 Lakh already received. The civil court issued warrant for attachment assets of GE Gwalior to recover the balance amount if not deposited by 03 Dec 2002. The date was extended several times. However, the department got the stay on execution proceedings from the HC through Court Case –III.

- The CGSC advised to challenge the maintainability of the execution petition by filing a writ petition in the HC. The writ petition was filed in the HC on 09 Dec 2002 under Article 227 of the constitution of India for issuance of the writ of certiori for quashing the proceedings under Section 36 of Arbitration & conciliation Act 1996. (Court Case –IV: Case No. W.P. No.2813/02 in the High Court of Madhya Pradesh Gwalior Bench) However, the same was dismissed without any relief to UOI.
• However, it is seen from the document analysis that the Chief Engineer office was not convinced with advises given by the CGSC in the entire matter and initiated a case for initiating appropriate action against him for negligence and professional misconduct for wrong advice and actions leading to embarrassment to the government. Simultaneously, they requested for advice of LA (Def) in the matter on 17 Mar 2003.
• However, the advice was finally received from the LA (Def) after several reminders and personal liaisons on 30 July 2004. The legal advice received was ambiguous as it stated that

“We have examined the matter, as the department is desirous of withdrawing the appeal which was not filed on the advice of the CGSC without referring the matter to this office. This is an administrative matter and the department may take action as deemed fit by them.”

• Thereafter, directions were issued by the Engineer-in-Chief office on 18 Aug 2004 to take further necessary action in consultation with CGSC.
• The Chief Engineer office on 29 Sep 2004, decided to pursue the appeal in the HC in consultation with the CGSC despite clear apprehensions over the outcome of the appeal and its consequences on rising interest liability at a later date.
• However, due to change in CGSC and the administrative control of Gwalior office of MES, there was a lapse and the appeal under sec 37 pending with HC was dismissed on 27 Apr 2006 due to non-appearance of CGSC or any one from the department side.
• However, the information about dismissal of the appeal and consequently vacation of stay over execution proceedings were not available with the department till Nov 2009 when the warrant for kurkee order in continuation of kurkee order of 25 Oct 2002 for balance amount of award were received. The balance amount now demanded was Rs. 24 Lakh.
• Therefore, on the advice of new CGSC, the department filed an appeal for restoration of the case dismissed by HC on default from department side. However, as the delay period was over three years an application to condone the
delay was also filed simultaneously. (Court Case V: Case No. MCC 17/2000 in the High Court of Madhya Pradesh Gwalior Bench)

- However, on the advice of the new CGSC, the department decided to deposit the balance amount in HC as a security before arguing for stay of the warrant of attachment issued by executing court.

- On the basis of willingness of the department to deposit the balance amount, the HC stayed the warrant of attachment of properties and account of GE Gwalior issued by executing court.

- The balance amount of Rs. 24 Lakh which is basically the interest part was deposited by the department in the HC on 22 May 2010.

- The HC also decided to condone the delay and restored the original appeal under section 37 on 10 Aug 2010, which was earlier dismissed on default of UOI, after imposing a cost of Rs. 10,000/- on UOI. The cost was deposited by UOI.

- Thus, against a total liability Rs. 13.44 Lakh in year 2000, department has already paid Rs.30 Lakhs. The appeal filed in the year 2002 for setting aside the award is still pending in the High court.

How the dispute could have been resolved in a better way?

(a) Avoiding Interest Payments:

Mandatory award payment (protected by BGB) before challenge in Court by either party:

- Even after paying an astronomical amount of Rs. 30 Lakhs against an arbitral award of Rs. 6.07 Lakhs, the dispute remains pending for over a span of two decades in a case where the department is themselves not convinced about the grounds for challenge.

- This case leads us to seriously think about incorporating the clause in the GCC of MES for Mandatory award payment (protected by BGB) before challenge in Court by either party.

- In case such provision existed in the contract provisions, neither would there have been a loss of additional Rs. 16.66 Lakh nor the department officials been always engaged in fire fighting to escape the attachment orders of their property and account. Even the expenditure made in plethora of court cases as in the current case study would have been saved.
• Thus, the simple action after adopting said clause shall remain to make the payment of Rs.13.44 Lakh (principal amount plus pendent lite interest) to the contractor against the bank guarantee immediately on receipt of award. As the action shall be in accordance with the contract condition there would be no requirement to wait for any advice or obtain any approval from appropriate authority which invariably is cause of delays and consequential loss to the state in the form of future interest liability.

**Contract Clause to debar Arbitrator from awarding past and pendente lite interest**

• Simultaneously, a clause similar to that adopted by Indian Railways and DMRC pertaining to **interest on arbitration award** should be included in the MES GCC to clearly debar the arbitrator from awarding any interest on the principal awarded amount till the date of the award. Thus, no past and pendente lite interest shall be allowed on the awarded amount. This shall be in line with the clause 31 (7) (a) ACA 96 where the freedom has been given to the parties to agree on such arrangement. The same has also been upheld by the apex court in various judgments as also seen from the case study No.15 in respect of Indian Railways.

• In case such provision existed in the contract provisions, a loss of additional Rs. 7.37 as pendente lite interest would have been avoided. With both the above provisions Rs. 24 Lakh paid as pendent lite and future interest would have been avoided.

**(b) Decision on implementation/ challenge of award by Independent Technical Committee:**

• It is seen in the current case study that despite being not convinced about the grounds of challenge and the soundness of legal advice rendered by the CGSC, the department officials could not adopt the correct path of implementing the award. They kept on getting entangled in the plethora of court cases under the misguidance of CGSC.

• Even after initiating a case for disciplinary action against the CGSC, they could not act independently after getting highly ambiguous advice from LA (Defence).

• From the current case as well as personal professional experience of the researcher, the department officials do not assert their own professional expertise
and just blindly follow the path of compulsive litigation as directed by the CGSC and LA (Defence).

- The current case is a perfect example of quality of legal advice which often is ambiguous and delayed which is responsible for further propagation of dispute and enhanced losses to the state.
- The MES officials of contract cadre are legally quite competent to decide the best course of action but bound by rules and procedures are compelled to proceed as per the so called legal advice.
- Therefore, it is high time that Decision on implementation/challenge of award is entrusted to Independent Technical Committee of department officials not associated with the dispute. Such approach can avoid the delays and losses and unnecessary litigations.
- As per CPWD Works Manual 2014 clause 35.15 (2) (i), if the Competent Authority of department considers the award as reasonable, the advice of Law Ministry is not required. Only when the Competent Authority is satisfied that strong grounds to challenge the award exist, it shall seek the advice of Law Ministry.
- The same approach needs to be implemented in MES. In case the competent authority decides to implement the award it should immediately make the payment without processing the case for LA (Defence) advice. This shall save the interest liability as seeking LA (Defence) advice generally leads to delays and accumulation of future interest even if the ultimate decision is to implement the award.
- Thus, in the current case if the MES officials had acted according to their own professional acumen instead of blindly following the legal advices, they would have avoided two decades of litigation and loss of Rs. 16.66 Lakh.

(c) Amicable settlement through Conciliation/Mediation:

- Most of the claims raised by the contractor were technical in nature and small in amount. Therefore, reference of these claims to conciliation would have been the best choice to resolve them amicably.
• However, again couple of claims like the escalation claim for which 2.08 Lakh was awarded by the Arbitrator would have still not been covered under the current conciliation clause which put a restriction of Rs. 2 Lalh on each individual claim.

• Thus, the conciliation clause should prove to be the best option to resolve such disputes if absolved from impractical restrictions.

• Adopting this technique in the current study during the execution period would have not only saved the future interest of 16.66 Lakh but the pendente lite interest of Rs.7.37 Lakh as well. Thus, only amount payable would have been Rs.6.07 Lakh or even lesser if amicably settled.
5.5 Case Study No. 5 (Military Engineer Services)

Contract Agreement No.: CEJZ/JHA/12 OF 1990-91
Name of Work: Provision of Hangers at Jhansi
Name of Accepting Officer: Chief Engineer Jabalpur Zone
(Later on taken over by Chief Engineer Lucknow Zone/Bhopal Zone)
Name of Contractor: M/S Radha Construction Co.
Amount of Contract: Rs.2.26 Crore
Date of Acceptance: 15 Jan 1991
Date of Commencement: 05 Feb 1991
Date of Completion: 04 May 1992 (As Per Contract)
Actual Date of Completion: 31 July 1992 (Extension granted by Dept.)
Current Status of Dispute: Pending at High Court

How the dispute arose?

- The facts of the case are already described in case study No.02. As the dispute is with reference to a separate arbitration award given by a different Arbitrator on different claims and the same is pending at a different level (High Court) with different issues involved, it is being dealt as a separate case study. To avoid the duplicity, the facts are just briefly described.

- The contract for “Provision of Hangers at Jhansi” was awarded by MES to M/S Radha Construction for an amount of Rs.2.26 Crore on 15 Jan 1991 which was satisfactorily completed by the contractor on 31 July 1992 taking just an additional period of 3 months for completion duly extended by MES without any levy of compensation.

- However, an abnormal delay in finalization of deviation orders and consequent delay of 5 years in payment of final bill by MES compelled the contractor to invoke Arbitration on 04 Feb 1998.

- The appointing Authority took 3 years to appoint the Arbitrator in Mar 2001, but deleted 3 claims of Contractor for reason of being covered under ‘excepted matters’ for which decision of the dept. officer being final and binding. This lead to initiation of a separate dispute and reason for second Arbitration as against the first arbitration discussed in case study No.02.
How the dispute was/is being resolved?

- In respect of three claims of the contractor not referred by the appointing authority to the arbitrator, the contractor in Mar 2002 approached the High Court of MP (Jabalpur Seat) for appointment of arbitrator under section 11 of ACA 96 (Case No.MCC 272/2002).

- Another arbitrator was appointed by the High Court on 23 Oct 2002 after taking the consent of both the parties on the name of the arbitrator to adjudicate upon the balance three claims of the contractor not referred to the earlier arbitrator. However, in the light of various rulings by the Apex court, this policy has been discontinued and all claims by the contractor are referred to the arbitrator.

- The request of MES to the arbitrator to first decide upon the arbitrability of the three claims falling under ‘excepted matters’ being outside the ambit of arbitration, was turned down by the arbitrator.

- The arbitrator went ahead with the arbitration stating that while appointing him as arbitrator, the directions of the court were clearly to adjudicate the claims and not for deciding the arbitrability of claims before adjudication.

- Thereafter, the department participated in the arbitration. The arbitration award was published by the arbitrator on 18 Aug 2003.

The claims allowed by the arbitrator are as under:

**IN FAVOR OF CONTRACTOR**

(a) Claim on account of Overhead expenses due to: prolongation of contract period on dept. default
   Rs.2.26 Lakh

(b) Claim for loss of profit on account of prolongation: of contract period on dept. default
   Rs.49.31 Lakh

(c) Claim for reimbursement of amount of escalation: in labour wages due to wrong application of value of Lo

   Total on date of award: Rs.51.57 Lakh

- Claim of (pendente lite) interest on the above amount was not awarded by the Arbitrator citing the reason of not been indicated/referred by the High Court.
Patently illegal Award

- This award given by the Arbitrator can be perfectly categorized into the category of Patently illegal award as defined in the ONGC Vs Saw Pipes Case.
- The Claims No.1 and 2 pertain to damages due to prolongation of the contract. As we may see in various case studies specifically case study No.13 & 14 pertaining to similar awards given by the Arbitrators in respect of MES Contracts that Supreme Court has withheld these awards. However, in a case pertaining to ONGC the Supreme Court has disallowed similar award of damages.
- The reason for such differentiation can be attributed to the better clause for extension of time in ONGC GCC than the one given in MES GCC. The ONGC clause covers any default on the part of the employer for which only extension of time is admissible as against the damages. On the other hand, the MES clause 11 covers only 2 defaults on the part of MES which debars the contractor from claiming any damages after the grant of extension. Even these two defaults have become obsolete these days. Therefore, if the Arbitrator holds that the delay was attributable to MES for any reason not covered in the clause 11, it awards damages to the contractor despite the fact that extension of time has already been awarded.
- These claims appear to be after thought and retaliatory on the part of the contractor after the final bill was not paid for over 5 years after successfully completing the work in reasonably good time period.
- If these two claims awarded against the MES can be considered as harsh, the last claim No.03 awarded by the Arbitrator for Rs. 49.31 Lakh makes the award as patently illegal.

Let us analyze the award in respect of claim No.03.

- The contractor contended that in the formula for calculating the labour escalation amount, the minimum labour wage (of an unskilled labour) as on the date of opening of the tender has been wrongly applied by the department.
- As per the Minimum Wages Act 1948, the minimum labour wage is arrived at by adding basic rate and a special allowance. These rates are notified by both central government as well as state government separately from time to time.
The rates notified by each government for any particular area may be at variance. In those cases, as per the central government gazette notification, for works falling under central sphere, the higher of the rates notified by Central or state government shall be made applicable. Thus, as all MES works fall under central sphere, this statute is applicable to all MES contracts including the contract under study. However, this aspect is not specifically mentioned in the contract conditions of MES.

At the time of opening of tender, the minimum wage as notified by the U.P. state government was higher (Rs.27.90) as compared to Central government (Rs.15.05).

Thus, the escalation was rightly calculated by the MES officials during the running payments considering the higher of the two values for minimum wage. The escalation amount was accepted by the contractor under running payments without any protest.

However, with the final bill stuck for over 5 years giving rise to the dispute, the contractor as retaliation measure added this claim along with other claims like that of damages for prolongation of contract period.

As per the claim made by the contractor, the value of minimum wage applicable on the date opening of tender ($L_0$) shall be as notified by the Central government which was lower of the two wages. However, the minimum wage for subsequent periods ($L_1$) during construction, made applicable for calculation remained the higher of the two wages (as notified by the State government). This had an effect of drastically increasing the labour element ($L_1-L_0$) and hence the escalation amount.

The contention of the contractor was accepted by the Arbitrator. Thus, the escalation amount increased from Rs. 10 Lakh to Rs. 60 Lakh as per the award made by the Arbitrator for approximately Rs. 50 Lakh in favour of the contractor for this claim.

The justification given by the Arbitrator for the said claim was that the value of minimum wage ($L_0$) at the time of opening of tender was decided by the Accepting officer as a final and binding decision in terms of the contract conditions. And the value of minimum wage ($L_0$) decided by Accepting officer was as notified by central government.
Therefore, the Arbitrator held that he does not have authority to interfere with such final and binding decision. However, he went on to award the claimed amount after calculations made with the wrong value of minimum wage ($L_0$).

However, the evidence based on which such decision was made by the Arbitrator is an internal correspondence between MES officials made three years after completion of the work in Sep 1995. This advisory letter was issued by an MES official from the office of the Accepting officer interpreting the statute erroneously. But as the mistake was realized, the implementation on the said advice was withheld by another communication by the same official within 4 days of the earlier letter. However, the Arbitrator held that though the letter was withheld, it was not cancelled and hence he held that the decision of the Accepting officer remained final and binding.

Thus, the Arbitrator has clearly given the award not just in violation of the contract conditions but also in ignorance of the law i.e. the Minimum Wages Act, 1948. Such awards as per the Supreme Court judgment in ONGC Vs. Saw pipes can be classified as Patently illegal.

The award in respect of the above claims was challenged by MES in the District Court of Jabalpur by filing an application under section 34 of ACA 96 to set aside the award. However, the application of MES was dismissed by the court on 22 Sep 2009.

The District Court has also not appreciated the issue correctly in accordance with the law position. The District Court held that:

- The contract has been awarded by the Central government, therefore, all rules applicable shall be of central government unless some special provisions apply
- MES has not been able to produce any statute or contract condition to prove that notification issued by U.P. state government shall be applicable

It is very clear that when the central government notification itself mentions that state government minimum wage shall be applicable if it happens to be higher from the central notified wage, what else was required by the court. In view of the analysis of the claim No.3 as above, the judgment of the District Civil Court was definitely required to be challenged.
Surprisingly, in this case the CGSC advised not to challenge the judgment as it was perfectly in order.

However, the department officials recommended to contest the judgment and case was sent for LA (Defence) for advice. The LA (Defence) concurred with the recommendations of the department.

The Appeal was filed in High Court Jabalpur against the Judgment of District Court Jabalpur. The case is still pending in the High Court.

How the dispute could have been resolved in a better way?

(a) Avoiding Interest Payments:

- There is no doubt that this was the perfect case to challenge even up to the Supreme Court level. By virtue of section 31 (7) (b) of ACA 96, the awarded amount shall carry 18% future interest from date of award till date of payment in case no future interest is awarded by the Arbitrator. Thus, as on date 18 Dec 2014, the interest liability itself of MES has increased to Rs. 1.04 Crore which is double the amount awarded by the Arbitrator. Thus, MES may have to pay over Rs. 1.75 Crore (both awards combined) as an additional amount in a contract of Rs. 2.26 Crore for a dispute created due to delay in payment of final bill. The saving grace is that no interest for the pendente lite period has been awarded by the Arbitrator on the awarded amount otherwise the award payment would have easily exceeded the contract amount.

Mandatory award payment (protected by BGB) before challenge in Court by either party:

- In the present case study, the grounds for challenge are strong but the time spent in litigation is taking the interest liability to enormous amount.

- Therefore, there is a need to introduce a clause as is existing in the contract conditions of NHAI New Model EPC Contract Document where neither the interest liability would have increased while litigating in the courts nor there would have been any anxiety about recovery from the contactor in case the Court sets aside the award.

- As per the clause there is a provision to make mandatory award payment (protected by BGB) before challenge in Court by either party.
If award being challenged by losing party:-
   - Losing party to make payment of awarded amount to winning party (WP)
   - Winning party to give bank guarantee of awarded amount to losing party (LP)

On final decision of the litigation:-
   - If no change in award
     - bank guarantee to be released by LP
   - If award set aside
     - bank guarantee may be encashed by WP

- In case such a provision had existed in the GCC of MES, there would have been no hesitation in making the payment to the contractor for the awarded amount of Rs. 51.57 Lakh against a bank guarantee of equivalent or more amount within the limitation period. Thereafter, the award can be challenged in the court without worrying for the accumulation of interest as the interest liability ceases on making the payment.

- This policy shall avoid the fire fighting of the MES officials at every stage of verdict whether the Arbitration award stage or the stage of decision by any of the Courts. At least plethora of execution petitions pending against the UOI and seizure of government accounts by the courts shall be avoided by adopting this policy.

(b) Institutional Arbitration:
- Had there been institutional Arbitration clause in place in the contract conditions, the chances of getting such patently illegal award shall be eliminated.
- The panel of the Institution is generally composed of highly experienced Arbitrators in the field of dispute; therefore, the quality of awards shall be of high standards as compared to the Ad hoc system in vogue in MES.
- Considering that each award before publishing by the Arbitrator is scrutinized by a technical committee of highly experienced experts of the institution, the quality of award would be better.
- Patently illegal awards, as published by the Arbitrator in the current case study, would not be able to pass the scrutiny of the expert committee. Awards in violation of law and contract provisions as the current case shall be avoided.
Thus, the percentage of cases going to litigation shall reduce drastically. Hence, the cost of litigation which is generally the major part in dispute resolution process and the connected accumulation of interest liability shall be eliminated.

Not just the cost of litigation but the detrimental consequences of bad awards as in the current case where a party might end up paying Crores of rupees for the misconduct of the Arbitrator.

The institution with their strict rules and procedures in place monitors the progress of the Arbitration proceedings shall ensure that the dispute is resolved expeditiously and economically.

Thus, it is high time that the myth around Institutional Arbitration being costly is broken. It is better to pay the fee for professional Arbitration conducted through the institution rather than to face the shocks and feel cheated by Ad hoc Arbitrations time and again.

Thus, there is an urgent need to bring professionalism in the Arbitration by opting for Institutional Arbitration to resolve the disputes in an expeditious, effective and more professional manner than to tolerate the situations as in the current case study.

(c) Improving the Contract conditions of MES:

It is fine to put the blame on the Arbitrator and the Court for giving the wrong decisions, but it is high time that we make the contract conditions crystal clear to avoid any ambiguity in future and consequent loss of public money.

Extension of Time condition 11 of MES GCC

In another case Ramnath International Construction (P) Ltd. v. Union of India - 2007 (2) SCC 453 decided on 11 Dec 2006 pertaining to MES GCC clause 11(C), the Supreme Court held that the clause clearly debars any claim of damages by the contractor in case extension of time has been obtained. The Court in that case held that such a clause is clear consent of both the parties to accept extension of time alone in satisfaction of claims for delay in lieu of claim for damages. Any award of damages by the Arbitrator against this specific clause of the contract shall tantamount to exceeding his jurisdiction.

However, the Ramnath case appears to have been superseded by the latest judgments as in case study 13 & 14. The apex court has upheld the Arbitrator
award in respect of damages for prolongation of the contract holding MES responsible for the delay.

- The MES GCC clause 11 in respect of “Time, delay and extension” stipulates only 2 reasons (delay in issue of Stores and tools & plants) for delay attributable to department on the basis of which only extension of time can be granted without any entitlement for compensation. However, both these reasons have now become obsolete as Stores and T&P are seldom issued to the contractor by the department.

- The actual reasons for the delay attributable to MES leading to time overrun of the projects as seen from the various case studies in this research are mainly as under:
  - Delay in handing over of unencumbered free site
  - Change in site
  - Changes in structural design
  - Delay in giving decisions
  - Delay in payment of running bills
  - Frequent and major changes in scope of work
  - Delay in finalization of extra work
  - Delay in finalization of rates of extra items
  - Delay in appointing specialist agencies for certain works
  - Delay in giving revised designs and drawings

- Thus, if these are actual reasons attributable to the department and not the two reasons as specified in Clause 11, we need to specify these reasons in the clause 11 of MES GCC. Thus, in case of delays due to these reasons or any other reason attributable to MES, contractor shall be entitled only for extension of time for completion of work and not for any damages whatsoever.

- As per the Clause 5A of GCC of ONGC in respect of case study No.19, in the event of project getting delayed for any reason attributable to the department, the contractor will not be entitled to claim damages or compensation but shall be entitled only for extension of time for completion of work. This condition was accepted by the apex court to overturn any award of damages to the contractor. The Supreme Court judgment in that case has reinforced that any award against the clear terms of the contract shall be liable to be set aside. Such awards by the Arbitrator shall be considered to be made by exceeding his jurisdiction.
However, in certain cases like Bharat Drilling & Treatment Pvt. Ltd. vs. State of Jharkhand & others in Civil Appeal No. 10216 of 2003 decided on 20th August, 2009, the Supreme Court has held that clauses like Clause 11 only prohibits the department from entertaining the claim, but not the arbitrator from awarding the damages.

Therefore, if Arbitration Clause of MES GCC also stipulates that Arbitrator shall not award to the contractor any damages for delay on account of any reason attributable to department where suitable extension of time has been granted by the department, the Arbitrator shall also be barred from giving such damages in the award.

**Escalation condition**

- The main reason responsible for such blunder on the part of the Arbitrator as well as the District Court was that there was something missing from the contract clause. That omission gave rise to an ambiguity which the contractor took full advantage.
- The huge loss to the government would have been averted and the litigation avoided, in case the Escalation clause specifically mentioned the following:
  - The minimum wage of an unskilled male mazdoor shall be the higher of the wage notified by Government of India, Ministry of Labour and that notified by the state government both relevant to the place of work and the period of reckoning.
- The above referred clause has been clearly stipulated in the GCC of CPWD.
- The value of $L_0$ i.e. the minimum wage at the time of opening of the tenders has been a bone of contention and has lead to several disputes in the past as well. There are certain uncertainties associated with the contract condition of MES in respect to arriving at its value. Even the alleged final and binding decision in this case study which was later withheld can also be attributed the uncertainty associated with the clause.
- Therefore, if the value of $L_0$ is clearly stipulated in the contract data itself, such disputes can be avoided and would certainly have been eliminated in the current case study. The last amendment issued to the tender document fixing the date of
receipt of tender should clearly specify the value of $L_0$ to avoid such repetitive disputes and consequent losses in the future.

- Thus, in the current case study, by inclusion of clauses as discussed above would have saved litigation in various courts for 11 years and definitely the astronomical amount of award plus interest.
5.6 Case Study No. 6 (Military Engineer Services)

Contract Agreement No.: CA NO CEBZ/GWL/26 OF 2010-11
Name of Work: Special Repairs to Certain Dwelling Units at Gwalior:
Name of Accepting Officer: Chief Engineer Bhopal Zone
Name of Contractor: M/S Bansal & Co
Amount of Contract: Rs.2.23 Crore
Date of Acceptance: 16 Aug 2010
Date of Commencement: 04 Sep 2010
Date of Completion: 03 Mar 2012 (As per Contract)
Extended date of Completion: 19 Sep 2012
Actual Date of Completion: 19 Sep 2012
Current Status of Dispute: Decided by High Court

How the dispute arose?

- As seen above the work was awarded for Rs.2.23 Crore to a contractor M/S Bansal & Company who is a registered contractor with MES.

- The period of completion as specified in the contract was 18 months. However, the same was extended by the department by over 6 months.

- The completion certificate was issued by the department on the extended date of completion i.e. 19 Sep 2012.

- During joint measurements for Final Bill in Oct 2012, the contractor raised a claim regarding additional payment in respect of chase cutting.

- The work consisted of renovation of the old existing buildings. There were several items of removing old surface wiring and replacing it with new concealed wiring. **Concealed wiring**: After cutting the chases in the wall, electrical conduits are fixed inside the chases and thereafter concealed inside the brick walls using cement-sand mortar before finally plastering the wall.

- The items for new concealed wiring do not specify that chase cutting shall be paid separately. However, the preamble of Standard Schedule of rates (Part-II-2004),
which has been specifically mentioned to be taken cognizance of in respect of all items of this contract, states that:

- The rates for point wiring do not include:
  - Cutting chases for conduits and sinking's for boxes and making good to walls, floors etc. in case of recessed or concealed conduit wiring.

- The rates for new brickwork include for:
  - Forming or leaving chases for concealed water tubing and concealed conduit wiring.

- A separate item for cutting chases in old brickwork has been taken in this contract which covers making good as well after fixing the conduits.

- However, there was another clause for internal electrification work in the contract which stated that the cost of chase cutting and making good the surface shall be included by the tenderer against respective items of BOQ and no price adjustment (Plus/minus) shall be made due to such variation, unless or otherwise mentioned in any item.

- Thus clearly there was an ambiguity in several contract clauses of the contract document in respect of chase cutting as to whether the chase cutting is to be deemed as included in the concealed wiring item or paid separately under specific chase cutting item.

- At the stage of final bill in Oct 2012, the contractor contended that all chase cuttings including those for electrical conduits shall be paid separately under the item of chase cutting.

**How the dispute was resolved?**

- In view of the ambiguity in contract clauses, positive recommendation for accepting the claim of the contractor was made by MES engineer executives to the Accepting officer i.e. the Chief Engineer during the period Nov 2012-Jan 2013.

- However, the accepting officer conveyed his final & binding decision in respect of intention of the contract to the contractor on 25 Feb 2013 that cost of chase cutting
is included in item of concealed wiring and hence disallowed the claim of the contractor for additional payment for chase cutting.

- After receiving this letter from the Accepting officer, there was no further protest shown by the contractor and he received the final bill amount on 16 Apr 2013 without any protest implying his satisfaction of the decision given by the Accepting officer.

- Thereafter, the contractor vide letter dated 12 Jul 2013 referred his letter dated 02 Feb 2013 where he stated that his signature in final bill may be treated as “under protest” on account of deduction for chase cutting for conduits. He also enclosed his list of other claims. The claims not only covered Rs.2.03 Lakhs for above referred dispute but also included a claim of Rs. 15 Lakh for losses and damages suffered on account of prolongation of work apart from interest claims and cost of reference to Arbitration.

- Despite giving claims, the contractor also stated in the letter dated 12 Jul 2013 that they are still looking for amicable and equitable settlement.

- Considering the above request of the contractor, a recommendation was made by the Commander Works Engineer Office on 23 July 2013 to the Accepting Engineer to consider the above described core dispute amounting to Rs.2.03 Lakhs for reference to Conciliation.

- It was highlighted that if the settlement agreement is signed by the parties as a result of conciliation proceedings, it shall resolve the dispute once for all as the settlement agreement has the same status and effect as an arbitral award on agreed terms. However, in case the matter reaches Arbitration several other auxiliary claims amounting to several times this core claim shall also be pleaded by him as per his list of claims.

- However, on 03 Aug 2013, the recommendation for appointing the Conciliator was rejected by the Accepting Officer being beyond financial limits of Rs. 2 Lakh for each claim as specified in the contract clause.
Thereafter, the contractor invoked Arbitration on 29 Aug 2013 by requesting the Appointing Authority i.e. Engineer-in-Chief for appointing the Arbitrator to adjudicate the disputes.

However, at this point of time it came to light that the letter dated 02 Feb 2013 claiming to treat his final bill as “under protest” was a fake letter. He only enclosed a copy of that letter to all the department officers along with his letter dated 12 Jul 2013 only to mislead the department to make grounds for Appointment of Arbitrator to stake claims even after signing the final bill & receiving payment without any protest.

Therefore, the request for appointment of Arbitrator was rejected by the department on 27 Sep 2013 citing Section 63 of Indian Contract Act & Condition 65 of MES GCC. As per these conditions, once the contract stands discharged from both sides; Contractor - by successfully completing the work and department – by making the full & final payment, any further claims thereafter are deemed to have been waived & extinguished.

Thereafter, the contractor filed an application dated 03 Mar 2014 before the High Court of Madhya Pradesh (Gwalior Bench) for appointment of Arbitrator under section 11 (6) of Arbitration & Conciliation Act, 1996 (Arbitration Case No.3/2014).

The contractor pleaded before the High Court that:

- the letter dated 02 Feb 2013 was submitted to the Garrison Engineer (Gwalior) personally but he refused to give a receipt.
- he received the final payment under coercion & duress to repay huge amount involved towards loan & payment to suppliers

Before the Hon'ble High Court, the following stand was taken by the deptt:

- The entire case of the contractor is based on one FAKE LETTER alleged to be dated 02 Feb 2013.
After his acknowledgement that he did not submit the letter dt 02/02/2013 by Regd. post & hence does not have any receipt of the same, the entire case being made by him is proved to be fabricated.

This proved the submission made by department that said letter was actually enclosed with a letter dt 12/7/2013 i.e after receipt of payment without any protest on 16 Apr 2013.

With the kind of strategy that this petitioner is playing, no case shall ever be barred by limitation period.

There was no compulsion to receive final payment under coercion & duress as Final payment involved was only a fraction as entire payment was already received by him as advance payment during the contract period. The actual payment received by him in Final Bill was only Rs.4.72 Lakh as against the total payment of Rs.2.28 Crore in the said contract. Therefore, the contention of huge amount involved towards loan & payment towards suppliers was straight away proved wrong & misleading.

Therefore, once the final & binding decision of the Accepting officer was conveyed to contractor on 25 Feb 2013 and no dissatisfaction to the decision shown by him by collecting full & final payment without any protest, there is NO LIVE DISPUTE to be adjudicated through Arbitration.

The High Court concurred with the stand taken by the dept. and in the absence of any conclusive material on record (postal receipt, etc) rejected the contractor’s letter dated 02 Feb 13 as evidence to show that contractor raised the dispute before acceptance of final bill. Accordingly, the High Court in its judgment dated 24 Jun 2014 dismissed the application of the Contractor under sec 11 of ACA 96 citing absence of any live dispute.

How the dispute could have been resolved in a better way?

This is the fastest disposal of any dispute as witnessed by the researcher in his career in favour of the department. The entire resolution of dispute took less than a year. The court case was finally decided in less than 4 months.
– 12 July 2013: The contractor raised his claims
– 29 Aug 2013: Contractor requests for appointment of Arbitrator
– 27 Sep 2013: Appointing Authority rejects the request
– 03 Mar 2014: Contractor approaches High Court
– 24 Jun 2014: High Court dismiss the application of the contractor

This case highlights the efficacy of Prompt resolution of disputes and continuity of dept. officials. Had the contractor delayed invoking Arbitrator by a couple of years, the team of officials dealing with the contract at various levels would have changed due to routine transfers. In that scenario, the malafide intent of the contractor by producing a fake (back dated) letter would have been difficult to catch. This fake letter dated 02 Feb 2013 was the only evidence on which the contractor relied to prove presence of a live claim. As the officials change, it takes time for the new incumbents to get into the groove specifically in old disputes.

Therefore, in the current case had the contractor continued to deal with dept. officials over a period of time insisting with his claims to buy some time and then approached the Appointing Authority after a couple of years, he could have succeeded in getting the Arbitrator appointed if not from the Appointing Authority then from the court.

(a) Amicable settlement through Conciliation/ Mediation:

– Despite the fact that department was able to get rid of the claim of the contractor in a short period of time, the fact remains that in case the contractor had succeeded in getting the Arbitrator appointed, the government would have again been entangled in the long battle of Arbitration and litigation. Thereafter, the chances of contractor succeeding in not only his core claim but several auxiliary claims were bright due to the prevailing ambiguity in the contract clause for which the contractor generally gets the benefit from the Arbitrator as seen from the several other case studies.

– Despite the fact that government succeeded in the court case to pre-empt the contractor in getting the Arbitrator appointed, the fact remains that the dispute was not decided on merits. Had the conciliation taken place before the final bill, the dispute resolution would have been more satisfying for both parties as the verdict from the court case can only be called as procedural win.
(b) Arbitration during the period of execution:

- The current case also brings an issue to focus as to why the contractors need to adopt such unethical tactics like fake letters to get their legitimate disputes resolved on merits when dispute resolution is actually their contractual right.
- It is generally seen that when the contractor has raised disputes and signed the final bill under protest, the processing and payment of the undisputed portion of their final bill does not get paid for a considerable period of time for various reasons. From the various case studies in the current research it may be seen that for payment of undisputed portion amount it has generally taken not months but years. (Case Study No.08: 3 ½ years & Case Study No.10: 2 ½ years after completion) Consequently, the contractors are forced to adopt such unethical tactics as may also be seen from the Case study No.12 where immediately on receiving his entire dues from the government, the contractor withdrew his no claim certificate and raised certain claims.
- Therefore, let us discuss the basic question that if the contractor had the option to get his dispute resolved during the execution period either through Arbitration or DRB or conciliation/mediation, there was no requirement to adopt these unethical tactics for getting the disputes resolved which otherwise is his legitimate contractual right.
- In case the contractor feels dissatisfied with the decision of the Accepting officer on any of his claims, not only should he be allowed to invoke arbitration during the construction period but it should be made mandatory and in case of his failure to invoke arbitration within 28 days, the decision shall then become final and binding. Thus, with the limitation period inbuilt in the contract clauses, any default on the part of the contractor shall result in waiver of his right to invoke arbitration thereafter. Thus, all malaise associated with delayed Arbitrations shall also get eliminated.
- Thus, the clause of Arbitration during execution period would have been ideal to resolve such contractual disputes.

(c) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):

- There was only one dispute that occurred during the current case study. Had there been a standing DRB, the decision of the DRB would have been more satisfying for both parties rather than the way it actually got eliminated rather than resolved.
Had the DRB decided on the merits of the case; may or may not in favour of the government, it would have been easily acceptable owing to the ambiguity in the contract clause. Giving a decision in an issue where some responsibility actually lies with the officials for the creation of the fault (ambiguous contract clause) shall always have an element of bias.

Even the contractor would have been satisfied that his claim was duly heard and then decided on merits rather than losing on procedural part or having the need to indulge in unfair practice.

Thus, the dispute resolution procedure of DRB would have resolved the dispute more effectively in the current case.
### 5.7 Case Study No. 7 (Military Engineer Services)

<table>
<thead>
<tr>
<th>Contract Agreement No.:</th>
<th>CWE/JHA/J/01 OF 1984-85</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of Work:</td>
<td>Construction of Two No. Over-Head Reservoirs of One Lakh Litre Capacity Each 20 m &amp; 18 m High Staging At Nowgong</td>
</tr>
<tr>
<td>Name of Accepting Officer:</td>
<td>Commander Works Engineer, Jhansi</td>
</tr>
<tr>
<td>Name of Contractor:</td>
<td>M/S Mk Prabhakar</td>
</tr>
<tr>
<td>Amount of Contract:</td>
<td>Rs.5.15 Lakh</td>
</tr>
<tr>
<td>Date of Acceptance:</td>
<td>18 May 84</td>
</tr>
<tr>
<td>Date of Commencement:</td>
<td>28 May 84</td>
</tr>
<tr>
<td>Date of Completion:</td>
<td>27 Feb 85 (As per Contract)</td>
</tr>
<tr>
<td>Extended Date of Completion:</td>
<td>10 Feb 86</td>
</tr>
<tr>
<td>Actual Date of Completion:</td>
<td>Work not completed</td>
</tr>
<tr>
<td>Date of Cancellation:</td>
<td>11 Jun 86</td>
</tr>
<tr>
<td>Current Status of Dispute:</td>
<td>Pending in Arbitration</td>
</tr>
</tbody>
</table>

**How the dispute arose?**

- The subject work was awarded by MES (CWE Jhansi) to M/S M.K. Prabhakar for Rs. 5.15 Lakh on 18 May 1984.
- The scope of work was for construction of two overhead water reservoirs at a place called Nowgong over 100 km from Jhansi. The period of completion initially advertised as 9 months was later reduced to 6 months during tendering stage.
- The financial position of the work was very tight right at the contract award stage. The contract was accepted in the second call with an amount even consuming some part of the tolerance limit beyond sanctioned amount.
- The contract was allotted to M/S M.K. Prabhakar, not a registered contractor of MES, although from the analysis of the documents, it appears that the contractor was a specialist firm in executing bore well as well as overhead water reservoir works.
- The contractor was a proprietorship firm with Mr. M.K. Prabhakar as its proprietor. However, he made a Special Power of Attorney (SPA) in favour of his
father Mr. R.N. Prabhakar to deal with all matters in respect of this contract including reference to Arbitration if required.

- The foundation design was finalized and contract concluded without prior soil investigation. Thereafter, testing to ascertain safe bearing capacity of soil was thrust upon the contractor before starting the work. Thus, immediately on start of the work, the site met with a stratum (black cotton soil up to a depth of 4 m) which was not envisaged before contracting.

- Thus, a complete change in foundation design was done from what was made part of contract.

- Not only the depth of foundation was increased from 2 m to 4 m but the contractor was asked to provide 6 number of 4 m long and 30 cm diameter Reinforced Cement Concrete double under reamed piles below the raft which was a major deviation from the contract.

- The above decision was given 45 days after commencement date of the work which lead to delay at the very beginning of the work.

- Not only this, the design of shaft of the Tank was also changed including its thickness from 12 cm to 15 cm, reinforcement and strength of concrete.

- Thus, there were major departures from contract drawings.

- However, from the document analysis, it is seen that the contractor took all these changes in his stride and progressed with work in right earnest.

- However, he was facing problems in supply of cement and steel from the department:
  - Firstly, the stores were being made available at the MES stores at Jhansi. Thereafter, the contractor was required to transport the stores to Nowgong for over 100 km.
  - Secondly, the work was halted several times for non availability of stores with MES especially specific diameters of reinforcement steel.

- Other problem faced by the contractor was of co-ordination as the MES Engineer-in-Charge of the work was also based at Jhansi and there was delay in stage passing at every stage leading to interruptions and delays.

- The contractor also complained about delays and undue curtailments in the running payments.
Also, the financial effect of the various changes made after contracting was leading to deviations beyond permissible financial limits. However, in lieu of taking up the case for revision of sanctioned amount, the department tried to curtail the other connected works so that increase in expenditure can be compensated with some savings by reducing the scope of some connected works.

Under these circumstances, a friction developed between executive staff and the contractor leading to blame games. The same is evident from the various correspondence exchanged during that period.

Under these circumstances, the work could progress only 38% till Feb 1986. At this belated stage, a decision was finally taken on the part of department to make the stores available at Nowgong subject to price adjustment duly amending the contract.

The period of completion was extended three times till 10 Feb 1986. However, finally the contract was cancelled on 10 Jun 1986 almost two years after commencement.

It is seen that sufficient opportunity was not given to the contractor for joint recording of inventory of complete/ incomplete items of work & materials and Tools and plants at the time of cancelation. The formalities were completed by the department independently without participation of the contractor on 23 Jun 1986 i.e. within 2 weeks of cancelation letter.

Even the deviation orders in respect of major changes in foundation & shaft of the tanks were approved after cancelation of contract with some connected deviations totally rejected.

The friction was such obvious that even the drawings and contract documents were obtained by the concerned Junior Engineer of MES on pretext of reading but the same were not returned back to the contractor despite his request in writing. The lack of sufficient sets of drawings with site staff has been observed from the internal correspondence of department.

The contractor on 13 Aug 1986 invoked Arbitration by requesting the appointing Authority i.e. Chief Engineer Jabalpur for appointment of an Arbitrator to adjudicate the disputes.
How the dispute is being resolved?

- The appointing authority kept writing to the contractor to give his claims in writing before his request for appointment of an arbitrator can be agreed.
- The contractor kept requesting for return of his drawings and contract document to enable him to prepare his claims.
- However, neither the set of contract or drawings were made available to him to make his claims nor any arbitrator was appointed by the department at that point of time.
- The Risk and cost contract for an amount for Rs.5.15 Lakh was concluded by the department. The work was actually completed through risk and cost on 30 Apr 1987.
- After completion of the work through risk and cost contract, the final bill of the defaulting contractor was finalized. The final bill became negative due to risk and cost amount, compensation amount for delay and non-return of over issued store.
- The contractor was notified the MINUS amount of final bill on 23 Jan 1989 for depositing i.e. 2 ½ years after cancelation of the contract.
- Thereafter, after another delay of over 1 ½ years on 08 Jun 1990, the arbitrator was appointed by the department to establish their own claims. However, claim of contractor was shown as NIL in the appointment letter.

ARBITRATION

Arbitrator (No.1)

- This Arbitrator (No.1) entered upon reference on 17 Jul 1990 directing both parties to give their written statement of case and pleadings in defence.
- At this point of time, the SPA holder Mr. R.N. Prabhakar, father of Mr. M.K. Prabhakar, revealed that the proprietor of the firm has already expired on 27 July 1989 in a road accident.
- Mr. R.N. Prabhakar, therefore, intimated name and addresses of himself, his wife, wife of late proprietor Mr. M.K. Prabhakar and their two minor children as being legal representatives / successors to be impleaded as party in the pending dispute to proceed with the case.
However, the arbitrator insisted on production of succession certificate/ affidavit and power of attorney signed by all legal heirs in favour of person empowered to deal with the case.

However, no response was received from the contractor side. Thus, the arbitrator resigned on 15 Apr 1994 owing to his transfer almost 4 years after his appointment without any progress in arbitration proceedings.

**Arbitrator (No.2)**

- The vacancy of the arbitrator was filled on 06 May 1994 by appointment of Arbitrator (No.2) by the Appointing Authority.
- The Arbitrator (No.2) entered upon reference on 16 May 1994 directing both parties to give their written statement of case and pleadings in defence.
- At this point of time, the department took legal advice which said that Arbitrator may proceed by making all legal heirs as party and in case of their default to respond, to proceed ex-parte.
- Incidentally, this legal advice was exactly what the SPA holder Mr. R.N. Prabhakar had requested.
- Accordingly, the Arbitrator (No.2) entered into reference afresh by issuing notice to all the legal heirs on 08 Dec 1994 to submit their written statement (WS).
- UOI submitted their written statement of claims on 13 Feb 1995.
- At this time in May 1995, Mr. R.N. Prabhakar responded by submitting that his SPA still holds good and he along with a technical consultant shall represent the contractor in the arbitration case. He also requested for returning the copy of contract and drawings along with copy of other records maintained in the work by MES. He also requested the presence of the then Engineer-in-Charge of the work during Arbitration oral hearing.
- First Arbitration hearing was held at Jhansi on 09 Jun 1995 which was attended by Mr. R.N. Prabhakar along with the technical consultant.
- However, again a point was raised by the department for production of affidavit that he is the authorized representative of all legal heirs in the case.
- Mr. R.N. Prabhakar was also informed that since no claims of the contractor have been referred in the letter of appointment of Arbitrator, in case he wants to submit
his claims, he needed to approach the appointing authority. Mr. R.N. Prabhakar confirmed that he shall approach the appointing authority after receipt of contract documents from MES for preparing his claims which was accepted by MES.

- The requisite documents as requested by the contractor were finally made available to him in July 1995 on the directions of the Arbitrator.

- Mr. R.N. Prabhakar, on 15 July 1995, submitted his claims to the appointing authority and requested for referring his claims to the Arbitrator already appointed.

- The Arbitrator (No.2) kept writing to Mr. R.N. Prabhakar to submit the affidavit.

- The second date of oral hearing took place on 29 Sep 1995 which was attended by Mr. R.N. Prabhakar along with his technical consultant.

- Mr. R.N. Prabhakar submitted SPA by the wife of the late Proprietor in his favour to defend the Arbitration case. Another month’s time was given by the Arbitrator to contractor to submit their pleadings. Department was asked to ensure the presence of the then Engineer-in-Charge in the next date of hearing.

- During this period it has been observed that department could not trace a copy of the final bill of the risk and cost contract which was asked by the contractor and the arbitrator to prove their claim of risk and cost despite all out efforts.

- Observing that the contractor is taking assistance of a Technical Consultant, the department got the approval for taking assistance of an Advocate for defending the case.

- However, the department did not concur to the addition of claims of contractor for adjudication by the Arbitrator.

- The contractor submitted the pleadings in defence in respect of claims of UOI

- The contractor kept requesting for reference of his claims to the Arbitrator, however, on being denied the opportunity, he approached the court on 24 Feb 1996 for appointment of fresh Arbitrator to adjudicate his claims.
However, after the court case was filed by the contractor, the department on 01 Nov 1996 included the claims of the contractor as well for adjudication by the current Arbitrator.

Accordingly, the current Arbitrator (No.02) gave the opportunity to the contractor to submit his statement of claims and to UOI for their pleadings in defence on 18 Nov 1996.


**ARBITRATOR NO. 2 GOES MISSING**

At this point of time the Arbitrator, a Senior Army officer, gets transferred out of MES but does not submit his resignation being disqualified as per contract provisions.

Thereafter, the contractor and department keep issuing reminders to the Arbitrator at his new address for early fixing of the date of hearing on from May 1997 to Dec 1998 with no response from him.

Even on the directions of the Appointing Authority on 27 Mar 1999 to the Arbitrator to either proceed with the case expeditiously or resign as Arbitrator, the Arbitrator does not respond.

Thereafter efforts were made to locate his current status from the MS Branch of Army responsible for transfer of Army officers in 2000 but in vain.

Suddenly out of the blue on 09 Oct 2002, the Arbitrator submits his resignation to the Appointing Authority i.e 5½ years after submission of all WS and pleadings by both parties and 8½ years after his appointment!!

Thus, the department as well as the contractor lost the opportunity when both parties were present and eager to resolve the dispute once for all.

**Arbitrator (No.3)**

Thereafter, the case was taken up with Appointing Authority for appointment of fresh Arbitrator in Nov 2002.
• The fresh Arbitrator (No.03) was appointed by the Appointing Authority Chief Engineer Jabalpur on 15 Jan 2003 but again with Claims of the contractor shown as ‘NIL’

• The new Arbitrator (No.3) entered upon reference on 27 Jan 2003 directing both parties to give their written statement of case and pleadings in defence.

• However, now the SPA holder of the contractor went missing and all letters of Arbitrator were received back undelivered. Despite personal enquiry by the department officials and advertisement issued in national newspapers in Apr- May 2003, no information about the person was received.

• Suddenly, the technical consultant on 21 May 2003, in response to the advertisement in newspaper intimates that SPA holder Mr. R.N. Prabhakar has also expired in Apr 2003. He requested to fix the hearing which shall be attended by himself on behalf of the wife of Late Mr. R.N. Prabhakar. He submitted the death certificate and letter from the lady to the effect.

• However, the Arbitrator on 26 Jul 2003 again directed them to produce an SPA from the wife of Proprietor Late Mr. M.K. Prabhakar, being the real legal heir.

• The address of the wife of Proprietor Late Mr. M.K. Prabhakar was provided by the wife of Late Mr. R.N. Prabhakar and requested to correspond only with her in future.

• In Nov 2003, the technical consultant submit photocopy of SPA in his favour from the wife of Proprietor Late Mr. M.K. Prabhakar and requested to proceed with the case.

• Thereafter despite several reminders by both parties and even directions by appointing authority to expedite and finalize the case, the Arbitrator did not fix any date for the next one year.

• Finally, on 06 Dec 2004, the arbitrator resigned citing reasons that wife of Proprietor Late Mr. M.K. Prabhakar has neither confirmed that she has given SPA to the technical consultant nor her consent given for enlargement of time to proceeding with Arbitration. Although no such correspondence made with the
lady by the Arbitrator is available on record. On the contrary, the consent for enlargement of time as given by the SPA holder consultant on 02 Nov 2003 is available on record.

**Arbitrator (No.4)**

- Thereafter, it took over three years of efforts by the CWE Jhansi office to get the vacancy of Arbitrator filled as there were fresh set of people sitting at the office of appointing authority shifting the responsibility from Chief Engineer Lucknow to Chief Engineer Jabalpur and back.

- Finally, fresh Arbitrator (No.04) was appointed by the Chief Engineer Jabalpur on 15 Feb 2008, i.e. three years and two months after resignation of the last arbitrator. However, again the claims of the contractor were shown as ‘NIL’.

- The Arbitrator (No.4) entered upon reference on 21 Feb 2008 directing both parties to give their fresh written statement of case and pleadings in defence.

- This Arbitrator (No.4) directly corresponded with the SPA holder consultant with copy to the wife of Proprietor Late Mr. M.K. Prabhakar.

- The consultant submitted fresh written statement on behalf of the contractor on 27 Mar 2008 and the department submitted their fresh pleadings in defence on 11 Apr 2008.

- The date of oral hearing was fixed for 25-26 Apr 2008 by the Arbitrator. However, on 25 Apr 2008 citing a letter of consultant not available on records, the Arbitrator writes to the wife of Proprietor Late Mr. M.K. Prabhakar asking for clarification on status of consultant as her authorized attorney through suitable power of attorney. The hearing was postponed.

- The very next day on 25 Apr 2008, the Arbitrator submits his resignation citing the very reasons referred above.

**Arbitrator (No.5)**

- Another Arbitrator (No.05) is appointed by the Appointing Authority on 19 May 2008. However, again the claims of the contractor were shown as ‘NIL’.
The Arbitrator (No.5) entered upon reference on 27 May 2008 directing both parties to give their fresh written statement of case and pleadings in defence.

This Arbitrator (No.5) only corresponds with the wife of Proprietor Late Mr. M.K. Prabhakar and fixes 20 Jul 2008 for oral hearing.

At this stage on 30 Jun 2008, UOI includes claim of interest @ 18% on the amount of minus final bill amount for the first time.

The ex-parte hearing actually takes place on 02 Aug 2008 where no one from contractor’s side participates. Only the claims of UOI are discussed as UOI objects to discussion on contractor’s claims being signed by consultant not empowered by legal heirs.

On 23 Aug 2008, a letter from the wife of Proprietor Late Mr. M.K. Prabhakar is received where she begs to be relieved from the harassment and hassles of this case. She states that she is leading a miserable life without inheriting any property.

However, the Arbitrator kept on asking enlargement of time from the lady for almost another one year without any response.

Finally, the Arbitrator resigned on 13 Jul 2009 citing above reasons and owing to his transfer.

Arbitrator (No.6)

Another Arbitrator (No.06) is appointed by the Appointing Authority on 25 Aug 2009. However, again the claims of the contractor were shown as NIL.

The Arbitrator (No.6) entered upon reference on 21 Nov 2009 directing both parties to give their fresh written statement of case and pleadings in defence.

This Arbitrator (No.6) only corresponds with the wife of Proprietor Late Mr. M.K. Prabhakar.

However, the Arbitrator does not proceed with the case citing no clarity about legal heir of the contractor on the basis of 23 Aug 2008 letter from the wife of Proprietor Late Mr. M.K. Prabhakar distancing herself from the case.

This Arbitrator (No.6) finally resigned on 30 Sep 2011 on his transfer.
Arbitrator (No.7)

- It takes another one year to get the vacancy filled with the appointment of Arbitrator (No.7) on 10 Sep 2012. However, again the claims of the contractor were shown as ‘NIL’.

- The Arbitrator (No.7) entered upon reference on 02 Nov 2012 directing both parties to give their fresh written statement of case and pleadings in defence.

- However, the files of the various Arbitrators which were being handed over till date to successive Arbitrators do not reach this Arbitrator despite several reminders to appointing authority.

- This Arbitrator (No.7) finally resigned on 25 Aug 2014 on his transfer also citing reasons of non-receipt of files of previous arbitrators containing the written statements & pleadings of both parties and the Arbitration proceeding details till date.

- At present there is no Arbitrator appointed and the process to get Arbitrator No.8 appointed was on. However, the researcher after analyzing the case after thorough document analysis proposed to close the case for reasons discussed below.

Flaws from the Department Side

- From the document analysis, it appears that contract administration by the department was highly ineffective and the contractor and the project suffered the consequences. The flaws noted from the department side are discussed as under:

  Construction Stage:

- The foundation design was finalized and contract concluded without prior soil investigation leading to chaos right at the initial stage of foundation construction.

- The reluctance of the department to ask for increase in sanctioned funds and instead trying to cut corners by reducing the scope of work to compensate for increased scope of foundation work further increased the chaos.

- The decision to supply stores like cement & steel to the contractor over 100 km away (Jhansi) from the site lead to frequent delays. Non availability of several
stores specifically reinforcement steel even at Jhansi halted the progress of work several times.

- Office of Engineer-in-Charge was based over 100 km away from the site in Jhansi which lead to delays in mandatory inspections at every stage and consequent decision making for smooth progress of the work. There were also delays in making running payments.

- The department officials created hostile environment by playing blame game instead of inculcating healthy working culture by trying to resolve the problems being faced by the contractor working in a remote area.

- Cancelation of contract and recording of inventory was carried out by the department without adequate notice to the contractor in an arbitrary manner. Even contract document and drawings were seized from the contractor before cancelation.

   **Dispute Stage:**

- The contractual request of Contractor for appointment of Arbitrator immediately on cancelation was not accepted on the plea of first finalizing the risk & cost contract.

- Thereafter, the request for appointment of Arbitrator was rejected for not submitting his claims whereas his repeated request to return the contract documents for preparation of claims was left unheard.

   **Arbitration Stage:**

- As per the contract, in case of cancelation of contract, the Arbitrator had to be appointed immediately after conclusion of Risk and Cost Contract.

- However, the first Arbitrator was appointed four years after the conclusion of Risk & cost contract. Thus, even for establishing its own claims, the department delayed the appointment of Arbitrator by four years.

- By the time the first Arbitrator was appointed the contractor had already expired in a road Accident.
• Therefore, the strategy of UOI officials to pre-empt the contractor from raising his claims actually came to haunt them.

• Basically speaking the case came to a dead end by the death of the proprietor in 1989.

• However, by wasting the time and efforts of their successive officials the department has kept the dispute alive for next twenty five years.

**The Real Claims:**

• Let us see what the actual claims of UOI are.

• The minus final bill amounting to Rs.2,61,000/- is basically composed of three components:
  
  - Claim for compensation for delay in completion of work amounting to Rs.55,000/-.
  - Work done at the risk & cost of contractor amounting to Rs.1,60,000/-.
  - Recovery of over issued store by the department at double the market rate amounting to Rs. 46,000/-.

• Before justifying the claim of risk and cost, the department has to first prove that their cancelation of contract was legal.

• They have to prove that there was no breach from their side and entire accountability for delay in completion was that of the contractor.

• Looking at the facts brought out above, proving their contention based on the documents available on record appears to be out of question.

• From the perusal of various similar case studies under the current research, specifically Case Study No.11, 13, 14, 17, 18, 19 & 20 as decided by the Supreme Court of India, the decision of Arbitrator can be safely predicted in favour of the contractor.
• Thus, in case the cancelation is declared as invalid by the Arbitrator, the question of claim of risk and cost amount does not arise. The claim for compensation for delay shall also meet similar fate.

• Even if hypothetically considering that Arbitrator may like to award in UOI favour, the final bill copy of the risk and cost contract to establish the actual excess amount incurred has gone un-traceable with UOI since last 20 years.

• As far as the claim for penal recovery of over issued stores is concerned, from the various case studies under research and the experience in other cases, it is seen that the delay in intimating the recovery leads to award of no claim. The argument given by the contractor that since the sites of MES are generally in secured area and under close supervision of MES officials, all supplied material is consumed in the work. More so in this work when the contractor was not given adequate opportunity for joint measurements after cancelation, the claim is generally rejected. Even if the Arbitrator awards in favour of the department, it is only the price to the department that is paid rather than double the market rate as claimed by the UOI.

• An additional claim of interest over award amount @ 18% per annum not originally included in the letter of Appointments issued to all successive Arbitrators was made by the UOI before Arbitrator No. 05 for the first time on 30 Jun 2008 i.e. 22 years after cause of action will have to stand the test of limitation. However, this claim was never included again in subsequent appointments of Arbitrators as well.

• The claim of cost of reference generally has been rejected by all Arbitrators to be borne by each party individually. However, in some cases it is provided only to the winning party.

Claims of the Contractor:

• The claims of contractor pertain to following:

• Claim No.01: Payment of Extra work got done in foundation and shaft wall at negotiated rates as this being beyond deviation limit: Rs.51, 000/-.
- Claim No.02: Compensation for breaches of reciprocal promises: Rs.72,500/-.
- Claim No.03: Payment for cost of Tools & Plants and other materials retained by the Department: Rs.1,60,000/-.
- Claim No.04: Payment of cost of storage shed for cement and other items: Rs.20,000/-.
- Claim No.05: Payment of Final Bill: Rs.75,000/-. 
- Claim No.06: Payment of Interest on deferred payment of RAR and claims as above @ 18%.
- Claim No.07: Cost of Reference: Rs.10,000/-. 

Thus, the contractor has claimed an overall amount Rs.3.89 Lakh plus an interest of 18% from date of cancelation of contract to date of payment.

In case, the cancelation of the contract is considered to be improper by the Arbitrator, not only all claims of UOI shall be rejected but a large percentage of above amount might be awarded in favour of the contractor. The awarded amount might be multiplied several times as interest liability for 28 years since cancelation of contract shall be huge.

Thus, the UOI is not going to benefit in pursuing the subject case any further. Therefore, the researcher after the complete document analysis of the case recommended to close the case and the same has been recently processed for closure.

How the case could have been resolved in a better way?

(a) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):
- This is a perfect case for dispute resolution through the DRB. There were number of issues right at the commencement of the project which required to be resolved with the assistance of unbiased and independent committee like DRB.
- There were several defaults on the part of the department which they tried to thrust on the contractor like complete change in design of the foundation and structure, delay in supply of reinforcement steel, delay in giving decisions, lack of
co-ordination and delay in payment of running bills, etc. An independent committee of technical persons involved in the project right from the commencement would have helped to give unbiased decisions for the disputes to avoid the cancelation and help in timely completion of the project.

- This is perfect example of a case where the contractor actually had been victimized to cover the department’s own defaults. The contractor was helpless in the hostile working environment and DRB would have been of immense help to get his grievances settled.

- This appears to be a case similar to case study No.01 where the department officials to cover up their defaults try to dominate the contractor. This often gives rise to dissatisfaction of contractor which consequently leads to dispute.

- In case the decision is given by an independent authority, which is final & binding on both parties it has more authenticity than the one given by an authority himself involved in the conflict or responsible for conflict. The decisions of Engineer Authority in respect of certain issues even if specified in the contract to be final and binding have often been rejected by the Arbitrator and the courts. But decisions given by the independent authority assume the final and binding status in case not objected within the specified time limit.

- With a neutral independent board in operation, it would not have tried to cover up the lapses made by department officials. There would have been no cancelation of the contract.

(b) Institutional Arbitration:

- This is a perfect example to show the abnormal delays associated with Ad hoc Arbitration where there has been:
  - A lapse of 25 years in Arbitration process
  - Proprietor and the SPA holder both expired
  - An Arbitrator goes missing for 5 years without resigning
  - Seven Arbitrators appointed
  - Arbitration is still incomplete
  - Dispute still unresolved

- This is not an exceptional case, as the researcher has come across similar cases where there have been several Arbitrators appointed who do not make any efforts
to proceed with case diligently and resign after getting transferred, leaving the
dispute unresolved for years.

- This problem is more in cases pertaining to small value contracts (below Rs. 50
  Lakh) which are actually over 55% of the total pending Arbitration cases (377) in
  MES as on 18 Feb 2014. The reason being that the officers appointed as
  arbitrators in these disputes are never dedicated Arbitrators. On the other hand the
  Arbitrators appointed in majority of high value Contracts (Above Rs. 50 Lakh) are
  holding the post of dedicated Arbitrators in the department.

- Most of the Arbitrators appointed in the current case study were either executives
  looking after current projects and other officers responsible for planning and
  designing of fresh projects. Therefore, they were holding the additional
  responsibility of an Arbitrator.

- Moreover, most of the Arbitrators appointed on small value contracts generally
  lack legal training and qualification.

- Had there been institutional Arbitration clause in place in the contract, the
  situation could not have been such bizarre as in the current case study.

- The institution with their strict rules and procedures in place monitors the progress
  of the Arbitration proceedings and shall never allow such situation to occur where
  the proceedings are just abandoned by the successive Arbitrators.

- The institution shall ensure that Award is published in the stipulated time.

- Even the parties shall be conscious of the fee and expenses attached with each
  hearing and would not try to drag the proceedings so as to increase the cost of
  Arbitration abnormally.

- The panel of the Institution is generally composed of highly experienced
  Arbitrators in the field of dispute, therefore, the quality of awards shall be of high
  standards as compared to the Ad hoc system in vogue in the government
  departments.

- Considering that each award before publishing by the Arbitrator is scrutinized by
  a technical committee of experts of the institution, the quality of award would
  further enhance and shall be difficult to set aside in the courts.

- Thus, the percentage of cases going to litigation shall reduce drastically. Hence,
  the cost of litigation which is generally the major part in dispute resolution
  process and the connected accumulation of interest liability shall be eliminated.
Thus, it is high time that the myth around Institutional Arbitration being costly is broken.

Further, considering the major reason of delay as brought out in the current case of frequent change of the Arbitrator due to retirement/transfer of appointed Arbitrators shall be eliminated as the Arbitrators on the panel of the Institution are dedicated Arbitrators mostly retired professionals with rich experience in the field of the dispute. Therefore, there shall be continuity from the Arbitrator side and strict discipline to enforce timelines of the rules of institution in holding the Arbitration proceedings and publishing the award on time.

The Supreme Court in some of the recent judgments as in the case study No. 16 as well as (2009) 4 SCC 523 (Union of India Vs. Singh Builders Syndicate, 2009) has criticized this policy of serving officers of one party being appointed as Arbitrators. The Court has suggested that government should phase out such Arbitration Clauses providing serving officers as Arbitrators and encourage professionalism in Arbitration.

Ministry of Law and Justice in a Consultation paper (Ministry of Law and Justice, 2008) in respect of Proposed Amendments to Arbitration and Conciliation Act 1996 has also elaborated all the advantages of Institutional Arbitration over Ad hoc Arbitration. One of the most important advantages being an experienced committee to scrutinize the arbitral awards before the award is finalized reducing the possibility of the court setting aside the award.

The Law Commission in its 246th report on Amendments to Arbitration and Conciliation Act 1996 (Law Commission of India, Aug 2014) as published in Aug 2014 has also advocated for encouraging institutionalizing the Arbitration in India by professional Arbitral Institutes by proposing suitable clause in the Act itself.

Thus, there is an urgent need to bring professionalism in the Arbitration by opting for Institutional Arbitration to resolve the disputes in an expeditious, effective and more professional manner to the situations as in the current case study.

Thus, had there been an institution governing the Arbitration process, the Arbitration would have been completed in the lifetime of the proprietor and the dispute resolved at least two decades back. The case
(c) Performance Guarantee forfeiture in lieu of Risk and cost contract:

- Had there been a clause of forfeiture of performance guarantee, there would have been no extreme situation as in the current case study. Immediately on cancelation of the contract, the performance guarantee would be forfeited and balance work completed independently of the original contractor who would be set free after clearing his final bill.

- Thus, there was no requirement of running after and tracing the legal heir of the contractor for over two decades to recover the risk and cost amount as only requirement from contractor i.e. the performance guarantee was already in possession of the department.

- The clause of obtaining the performance guarantee of 5% upfront from the contractor and forfeiting it in case of default in completing the work by the contractor also acts as a deterrent for contractor to not abandon the work.

- **How does these clauses are work better than the policy of Risk and Cost:** The policy of completing the balance work after cancelation of the contract on the risk and cost of the original contractor also acted as a deterrent or negative motivation for the contractor. However, it failed to make immediate adverse impact on the contractor as he did not lose anything. Generally, they already have taken all their legitimate dues for the proportion of work executed and the future liability of risk and cost amount is not immediately affecting their cash flow. On the other hand, if 5% of the entire project cost is forfeited, it does impact their cash flow strongly and most immediately.

- For the government also, firstly establishing the risk and cost amount through arbitration/litigation has proved to be a thorn in the flesh as invariably in all cases where contractor has participated in the arbitration proceedings, government has not succeeded in establishing the claim as legal. In case, mainly in exparte arbitrations where contractor abandons even the arbitration process, it becomes extremely difficult to first locate the contractor and then to ascertain his property details to recover the amount through execution petition.

- Therefore, in the case of forfeiture of performance guarantee at least the burden of tracing the person and then his property details shall be avoided. The requirement of filing execution petitions by the department shall not be there once the
performance guarantee is with the department. Even in cases where the department is actually at fault in cancelling the contract, the contractor shall be a more active participant in the adjudicatory forums to expeditiously get the dispute resolved to reclaim his performance guarantee. Thus, with both parties actively participating in the dispute resolution process the dispute span which as seen in current case study was more than 2 decade gets reduced drastically specifically when prolongation of dispute span is not producing any interest gain to the contractor with suitably drafted clauses.
### Case Study No. 8 (Military Engineer Services)

<table>
<thead>
<tr>
<th>Contract Agreement No.:</th>
<th>CEJZ/GWL/19 OF 2001-02</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of Work:</td>
<td>Provn of OTM Accommodation for Infantry Bn No.1 AT Gwalior (Phase-III)</td>
</tr>
<tr>
<td>Name of Accepting Officer:</td>
<td>Chief Engineer Jabalpur Zone</td>
</tr>
<tr>
<td></td>
<td>(Later on taken over by Chief Engineer Bhopal Zone)</td>
</tr>
<tr>
<td>Name of Contractor:</td>
<td>M/S Atul Construction Company</td>
</tr>
<tr>
<td>Amount of Contract:</td>
<td>Rs.3.34 Crore</td>
</tr>
<tr>
<td>Date of Acceptance:</td>
<td>15 Jan 2002</td>
</tr>
<tr>
<td>Date of Commencement:</td>
<td>09 Feb 2002</td>
</tr>
<tr>
<td>Date of Completion:</td>
<td>08 Nov 2003 (As per Contract)</td>
</tr>
<tr>
<td>Extended Date of Completion:</td>
<td>11 Oct 2004</td>
</tr>
<tr>
<td>Actual Date of Completion:</td>
<td>11 Oct 2004</td>
</tr>
<tr>
<td>Current Status of Dispute:</td>
<td>Award implemented</td>
</tr>
</tbody>
</table>

**How the dispute arose?**

- The subject work was awarded by MES to M/S Atul Construction Company for Rs. 3.34 Crore on 15 Jan 2002.
- The initial period of completion as per Contract was 21 months, however, the work was actually completed with a delay of 11 months in Oct 2004.
- There was a major claim made by contractor during the initial stage of execution of work which was not agreed by the department. Thereafter, certain other minor claims were also made by the contractor.
- The contractor signed the final bill under protest on 23 Mar 2005.
- The contractor gave a list of claims on same date to be paid along with the final bill.
- As the contractor did not participate in the joint measurements for final bill for five months, the final bill was prepared by the department. The contractor stated that the final bill prepared by the department be taken as undisputed portion of the
final bill and may be paid to him as such. Further, the claims submitted by him may be considered as disputed part.

- However, the undisputed portion of final bill was paid to the contractor after three years in Feb 2008. The payment was received by the contractor under protest.
- The main dispute arose due to certain ambiguity in the contract drawings and specifications. The drawings of all buildings, surprisingly, only mentioned the internal dimensions of the rooms. The thickness of the walls was mentioned in the drawings as FW (Full width). However, the specifications gave option to the contractor to use old size bricks (230 mm long) or modular bricks (200 mm long). However, on directions of the department, the layout of the building was made considering 230 mm thick brick. Therefore, the contractor claimed that the plinth area of the building increased as against the area considered while tendering for which he needed to be compensated.
- The core of the entire dispute was rejection of claim by the department in respect of additional payment for increase in sizes of the buildings.
- The other claims raised thereafter were just auxiliary claims and would have not been raised if the core dispute was fairly decided by the Accepting officer.

**How the dispute was resolved?**

- For adjudication of his claims raised earlier, the contractor invoked Arbitration on 26 Mar 2009.
- The Arbitrator was appointed by the department on 28 July 2009.
- The Arbitration proceedings went on for 2 ½ years when the final award was published by the Arbitrator on 06 Feb 2012.
- Thus, the dispute which arose by contractor signing the final bill under protest on 23 Mar 2005 culminated into the award after 7 years.
- The award was in favour of Contractor amounting to Rs. 20 Lakhs plus an interest payment of Rs.6.6 Lakhs from date of cause of action to date of award. The claim of UOI for cost of reference & interest over it has been rejected by the Arbitrator.
- The award also carried future interest of 12% p.a. in case the payment was not made within 90 days from date of award.
The department decided to implement the award, however, as it took more than a year to make the payment, it lead to an additional interest payment of over Rs. 1.5 Lakh which was further disputed by the contractor.

Thus, as against the total calculation of Rs. 30.25 Lakh made by the contractor claiming future interest over pendent lite interest awarded by the Arbitrator, UOI has made a payment of Rs. 28.1 Lakh in Mar 2013. However, in this case the contractor has not gone to the court for the same.

The Arbitration:
The major claims of the contractor and their disposal through arbitration are discussed as under:

Major Claims awarded:

Claim 1:
- The major dispute which was raised by the contractor very early during execution of the contract was about **non payment of additional amount for increase in sizes of the buildings.**
- This is an interesting dispute which arose due to certain ambiguity in the contract drawings and specifications as already described above under “Why the dispute arose?”.
- The Arbitrator partially concurred with the contractor and awarded an amount of Rs. 5.7 Lakh to him as against his claim of Rs.8.5 Lakh.

Claim 7:

**Interest due to delay in grant of Extension:**
- The contractor claimed that extensions of time on several occasions for completion were rightly due to him for reasons of delay not attributable to him.
- The extensions were eventually granted by UOI, but there was delay in granting such extensions. There have been periods ranging from 2 months to 13 months when the extension of time was not available.
- This lead to deduction of compensation from his running payments during these periods. The deducted amount was finally paid to him after the extension was granted by UOI.
- Therefore, he claimed interest over the deducted amount for the period it was allegedly illegally withheld by UOI.
• The Arbitrator has criticized the approach of UOI in not granting extension of
time within reasonable time frame. Such situation leads to deprivation of use of
cash flow by the contractor during such periods.
• Therefore, the Arbitrator awarded an amount of Rs. 1.93 Lakh to the contractor
against this claim.

Claim 8:

**Interest over delayed and restricted payment in running and final bill:**

• There were delays in payments of running bills, specifically the last two bills by
111 days and 548 days respectively. Further, there was a curtailment to the tune of
about Rs.16 lakhs which was later paid after above referred delays.
• The contractor contended that above delays were breach of contract by UOI and
claimed interest over the delayed payments.
• After ascertaining the correct figures of curtailments and respective delays, the
Arbitrator concurred that delays beyond three days and curtailments in running
payments without giving proper justification in writing to the contractor is a
breach on the part of the UOI.
• Accordingly, the Arbitrator awarded over Rs. 4 Lakh on account of subject claim
to the contractor.

Claim No.9

**Loss due to freezing of Price Index for material and erroneous calculation of
labour escalation**

• It was contended by contractor that freezing of price index for material in
accordance with contract in the circumstances of the current case was not in order
as additional work was ordered at belated stage and beyond contractual
(Deviation) limits.
• The Arbitrator concurred with the contractor that since new work of a block of
garages was ordered on contractor after original date of completion, contractor
cannot be expected to procure materials in advance.
• Therefore, the Arbitrator overruled the freezing of price index for material
escalation by UOI and after correcting some mistakes in labour escalations,
awarded an overall amount of Rs. 1.85 Lakh on account of this claim.
Claim No.11:

**Loss due to delay in release of retention money:**

- The contractor contended that retention money of Rs. 18.71 Lakhs recovered from the running payments was to be released after completion of work after retaining 1% of contract amount i.e. Rs. 3.34 Lakh. This balance amount of 1% was to be released at the time of payment of final bill.

- However, an amount of Rs.14.57 Lakh was retained for over 22 months by the UOI.

- Moreover, as there was a delay in payment of final bill, a BGB of Rs. 4 Lakh (against 1% of retention money) was retained for three years instead of ideal period of 9 months if the contract conditions for payment of final bill were followed.

- Considering all these delays on the part of the UOI, the Arbitrator awarded an amount of Rs.3.94 Lakh in favour of the contractor.

**Other Claims:**

- There were several other technical claims where the arbitrator awarded a combined amount of Rs.2.50 Lakhs in favour of the contractor.

- Thus, the arbitrator awarded a total of Rs.20 Lakhs in favour of contractor.

Claim No.14

**Claims of interest:**

- The Arbitrator has awarded @ 10% per annum simple interest against all claims (except 7, 8 & 11) with effect from 10 Jul 2005 till date of award i.e. 06 Feb 2012.

- The Arbitrator also awarded a future interest @ 12% per annum simple interest on awarded amount of various claims with effect from date of award till date of actual payment in case the payment is not made within 90 days from date of award.

**Claims of cost of reference to Arbitration of contractor & UOI:**

- The claims of cost of reference to Arbitration of UOI as well as contractor were rejected by the Arbitrator.
How the dispute could have been resolved in a better manner?

(a) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):

- Majority of claims of the contractor pertain to the period of construction specifically the major claim regarding the increase in plinth area of buildings was raised right at the commencement of the contract. This claim has been awarded by the Arbitrator in favour of the Contractor and the same has been accepted and implemented by MES without any objection. Thus, in case the same decision was given by the standing DRB, it would have been readily accepted by the department.

- In case the main claim of the contractor was resolved to the satisfaction of both the parties and the final bill processed in reasonable time, there would probably have been no dispute as other claims of the contractor are just auxiliary claims to amplify his dissatisfaction.

- A standing DRB in the present case was the ideal technique to resolve the disputes as it arose.

(b) Amicable settlement through Conciliation/ Mediation:

- Although, the major claim made by the contractor can be treated to be covered under excepted matter for which the decision of the Accepting officer shall be final and binding, however, the apex court has held as correct the adjudication by Arbitrator in such matters in several cases. Thus, the Arbitrators are frequently giving their award in respect of such excepted matters as well.

- Sometimes, under the fear of audit or bound by contractual conditions and procedures, the accepting officers are reluctant to give fair decisions favouring contractors. Therefore, in these cases if a mediator or conciliator, can impress upon the accepting officer to reach a logical and fair decision.

- Thus, the clause of conciliation without any restriction of financial limit should be enforced in all contracts. However, restriction of Rs. 2 lakh to individual claim as is the prevailing provisions in MES contracts shall not be able to cover case as under study here as the claim amount was Rs.8.5 Lakh. Thus, such a simple dispute which is easily resolvable through conciliation would be deprived of resolution just because of the impractical restriction in current conciliation clause in MES.
(c) **Arbitration during the period of execution:**

- In case the contractor does not participate in final bill preparation and does not sign the bill or signs it under protest, generally it is experienced that the finalization of even the undisputed portion of final bill is abnormally delayed by Audit as in the present case where the payment of undisputed portion of the final bill was made to the contractor 3 years after signing under protest. All these delays add up in the final payment as pre-reference interest and thereafter interest over this interest as was the case here.

- Therefore, had the dispute been referred to the Arbitrator during arbitration, a lot of efforts and public money in the shape of interest would have been avoided as in the present case.

- The major dispute which arose in 2002 and lead to several auxiliary claims by the contractor was finally resolved through Arbitration award in 2012 i.e. a decade after it arose. Had there been no restrictions on Arbitration during the construction period, the dispute resolution would have been expeditious and economical as well without inducing contractor into auxiliary claims.

(d) **Decision on implementation/ challenge of award by Independent Technical Committee:**

- The present award also carried future interest of 12% p.a. in case the payment was not made within 90 days from date of award.

- As the award was not in favour of UOI but as no grounds existed to challenge the award, it was rightly decided to implement the award. The department decided to implement the award, however, as it took more than a year to make the payment, it lead to an additional interest payment of over Rs. 1.5 Lakh.

- It is seen from experience in several cases that the LA (Defence) generally does not add any value to the recommendations made by the department but more often than not leads to delays. Therefore, in the present case when it was decided to implement the award, the delay of over year would have been avoided in case the decision was taken at the department level instead of sending it to the LA (Defence).

- As per CPWD Works Manual 2014 clause 35.15 (2) (i), if the Competent Authority of department considers the award as reasonable, the advice of Law
Ministry is not required. Only when the Competent Authority is satisfied that strong grounds to challenge the award exist, it shall seek the advice of Law Ministry.

- The same approach needs to be implemented in MES. In case the competent authority decides to implement the award it should immediately make the payment without processing the case for LA (Defence) advice. This shall save the interest liability as seeking LA (Defence) advice generally leads to delays and accumulation of future interest even if the ultimate decision is to implement the award.

- Thus, the policy of sending the cases for the advice of LA (defence) needs to be discontinued to avoid frequent loss to the state because of the associated delays as in the current case.

(e) Avoiding Interest Payments:

Mandatory award payment (protected by BGB) before challenge in Court by either party:

- A better way to avoid the detrimental consequences of delays related to seeking LA (Defence) advice shall be to include the clause of mandatory payment of award protected by Bank Guarantee. When such provisions already exist in the contract conditions the payments can be made by the GE immediately on receipt of awards without any procedural delays while simultaneously seeking advice from departmental authority.

- In the case of delay in getting timely legal advice from departmental authority for implementation, at least there shall be no stress about accumulation of future interest. However, in case there is a delay in case of challenging the award, the current procedure of filing the application in the court pending advice may continue. Thus, even if the final advice received is for implementation, the only action required shall be release of Bank guarantee submitted by contractor. And in case the advice received is to challenge, the application has already been filed in the Court which shall be pursued vigorously.
5.9 Case Study No. 9 (Military Engineer Services)

Contract Agreement No.: CEJZ/GWL/06 OF 91-92
Name of Work: Provn of Single JCOs Accn at Gwalior
Name Of Accepting Officer: Chief Engineer Jabalpur Zone
(Later on taken over by Chief Engineer Bhopal Zone)
Name of Contractor: M/S Beni Prasad Soni
Amount of Contract: Rs.53.47 Lakh
Date of Acceptance: 31 May 1991
Date of Commencement: 10 July 1991
Date of Completion: 09 Oct 1992 (As per Contract)
Extended Date of Completion: 22 Nov 1993
Actual Date of Completion: Work not completed
Date of Cancellation: 10 Feb 1995
Current Status of Dispute: Award implemented

How the dispute arose?

- The subject work was awarded by MES to M/S BENI PRASAD SONI for Rs. 53.47 Lakh on 31 May 1991.
- The initial period of completion as per Contract was 15 months. An extension of time was given to contractor for completion for additional 13 months. However, the work was not completed even after a total period of 42 months.
- Finally, the contract was cancelled by department on **10 Feb 1995**.
- The Risk and cost contract for an amount for Rs.68,000/- was concluded by the department after one year of cancellation on **08 Feb 1996**.
- The date of commencement of risk and cost contract was 12 Feb 1996 & date of completion as 11 Apr 1996. The work was actually completed on 23 Aug 96.
- The contractor requested for adjudication of disputes by appointment of an Arbitrator on 16 Sep 96.
- However, no arbitrator was appointed by the department at that point of time.
- Final bill of risk & cost contract was paid on 19 Feb 1997 for Rs.59,000/-.
The final bill of the original contractor was also prepared simultaneously on 19 Feb 1997.

However, the final bill amount of defaulting contractor amounted to MINUS Rs. 11.50 Lakh mainly due to penal recovery for unreturned stores and compensation for delay in completion of work affected by department apart from the risk & cost contract amount.

The contractor thereafter never signed his final bill.

There were several lapses on the part of department to recover this amount from the contractor.

Once the risk and cost contract was finalized on 08 Feb 1996, the amount required to be recovered from the contractor should have been notified to the contractor for depositing in the treasury as per contract conditions. Thereafter, in case of default on the part of the contractor to deposit the amount, the matter would have been referred for appointment of an arbitrator for adjudication of disputes.

However, it is seen that the contractor was asked to deposit the amount of MINUS final bill i.e. Rs. 11.50 Lakh for the first time only on 26 Feb 2004. Surprisingly, the risk & cost amount was still not added to the amount notified to the contractor.

However, the contractor did not respond to the notice of the department and did not deposit the amount leading to the dispute.

**How the dispute was resolved?**

- The request for appointment of Arbitrator to the Appointing Authority was made by the department (Chief Engineer) only on 18 Dec 2006 i.e. almost 12 years after origin of dispute.
- Even going by contract condition of going for arbitration after conclusion of risk and cost contract (08 Feb 1996), the Appointment of Arbitrator was 11 years late.
- The Arbitrator was finally appointed by Appointing Authority on 10 Jan 2007. However, the arbitrator resigned his appointment on 03 May 2008 due to superannuation.
- Thereafter, vacancy of Arbitrator was filled on 11 Jun 2008 who also resigned on 31 Oct 2009 due to transfer.
- Finally third arbitrator was appointed on 16 Nov 2009.
The Arbitration proceedings continued and the award was published on 28 Sep 2011 i.e. after over 56 months after appointment of first arbitrator.

**The Arbitration:**

- The contractor initially never participated in the Arbitration proceedings and did not submit his statement of case and pleadings in defence to the first two appointed Arbitrators who later resigned.
- The final Arbitrator gave a notice to the contractor directing to attend the hearing fixed for 20 Apr 2010 and gave his intention to proceed ex-parte in case of default of contractor in attending the hearing.
- The contractor did not attend this hearing on 20 Apr 2010 but wrote to Arbitrator stating sickness of partner as the reason for non-attendance. However, since no statement of case or pleading-in-defence was still submitted, on insistence of UOI, the Arbitrator proceeded ex-parte.
- Notwithstanding above, the Arbitrator sent a copy of Arbitration proceedings of 20 Apr 2010 to the contractor simultaneously giving a last opportunity to the contractor to present his case.
- The contractor submitted his statement of case or pleading-in-defence on 12 Jun 2010.
- Thereafter, the date of oral hearing fixed for 27 Aug 2010 was postponed several times as under:
  
  - 27 Aug 2010 – postponed on request of both parties
  - 14 Sep 2010 – postponed on request of UOI
  - 29 & 30 Oct 2010 – postponed on request of contractor
  - 10 Feb 2011 - postponed on request of contractor
- Finally the oral hearing took place on 24 Mar 2011 which was attended by both the parties.

The major claims of the UOI and their disposal through arbitration are discussed as under:
Major Claims awarded:

MES Claims

Claim No. 1:

Recovery on account of Minus Final Bill:
The major components of dispute in the calculation of final bill as decided by the Arbitrator are as under:

- Recovery for compensation and recovery for completion of balance work at risk and cost:

  The Arbitrator took note of the following facts:
  - Amount of risk and cost contract was only Rs.68,000/- which further reduced to Rs.60,000/- during execution. This amount as compared to original contract amount of Rs.53.47 Lakh suggests that 99% of work was complete.
  - UOI could not produce inventories of complete/incomplete work required to be prepared at the time of cancellation. The same is required to prove that there was no change made in the original scope of work to claim the amount of risk and cost. Moreover, he noticed that balance works were in the nature of defects.
  - The Arbitrator also took adverse note of non-production of documents to show as to why the provisional extension of time granted upto 30 Jun 1993 was not regularized or further extension was not given.
  - Considering the above facts, the Arbitrator felt that the amount of risk & cost of Rs.60,000/- though is payable to the UOI but the contractor cannot be penalized twice by levying compensation of Rs. 4 Lakhs for the delay.
  - Accordingly, the compensation of amount Rs. 4 Lakhs for the delay levied by UOI in final bill was disallowed by the Arbitrator and only the risk & cost amount of Rs.60,000/- was allowed in favour of UOI.

- Recovery for non-return of over issued Stores:
  - Another major recovery in the final bill was Rs. 4.80 Lakh on account of non-return of over issued stores.
  - However, UOI could not make available any notice issued to the contractor intimating these over issued stores.
  - The justification for quantum and the market rate applied could also not made be available by UOI.
• In the absence of above details, the Arbitrator disallowed the double the market rate recovery as affected by UOI in respect said claim.
• However, the Arbitrator allowed recovery at the actual cost to UOI and thereby reduced the recovery amount from Rs. 4.80 Lakh to Rs.3 70 Lakh.

Escalation due to the Contractor:
• The contractor was paid an amount of Rs. 6 Lakh during running payments on account of escalation of prices in material, labour & fuel.
• However, during final bill stage only Rs. 2.73 Lakh was allowed by UOI and balance was deducted giving reason that contractor’s notices for enhancement of labour wages were not found on record.
• However, the Arbitrator ruled that non-availability of records cannot deprive contractor of escalation payments due to him contractually. Therefore, he allowed Rs. 6 Lakh in favour of the contractor as already calculated & paid during running payments.

Considering all the above, the final bill amount of MINUS Rs. 12 Lakh as calculated by UOI was reduced to just MINUS Rs.23,000/- by the Arbitrator.

Claim No.2
Interest claim @ 24%:
• The arbitrator took adversely the delay in intimating the claim to contractor, considered the date of cause of action as 26 Feb 2004, when it was communicated for the first time to the contractor, in lieu of 08 Feb 1996 when the risk & cost contract was concluded. Therefore, UOI lost on 8 years interest. Accordingly, the Arbitrator awarded interest @ 10% per annum simple interest with effect from 26 Feb2004 till date of award.

He also awarded future interest @ 10% per annum simple interest on awarded amount with effect from date of award till date of actual payment in case the payment is not made within 90 days from date of award.

Claims of cost of reference to Arbitration:
• The claims of cost of reference to Arbitration by UOI was rejected by the Arbitrator.
Claims of Contractor:

Claim No.1

Amount of final bill due to them:

The contractor came out with his calculations to claim an outstanding final bill amount as Rs.7 Lakhs. However, the Arbitrator stuck to his calculations as per which final bill amount was MINUS Rs.23,000/-.

Claim No.2

Release of FDR amounting to Rs.39,000/- submitted towards additional security deposit

The arbitrator directed UOI to release this interest bearing security in case the contractor deposits the awarded amount of Rs.23,000/-, otherwise the same may be adjusted and balance amount be released to the contractor.

Other Claims:

Other claims of contractor were in respect of delay/curtailments in running payments, interest claim & cost of reference rejected by Sole Arbitrator

Implementation of the award:

- The award was not in favour of UOI as Minus amount of Rs. 12 Lakh of final bill as contented by UOI was reduced to only Minus Rs.23,000/-.
- However, as there were no grounds to challenge the award, UOI decided to implement the award.
- Even the contractor agreed to implement the award as with release of his long outstanding FDR he was actually to gain financially despite the final bill in negative. Accordingly, he deposited an amount of Rs, 43,000/- on 13 Jul 2012 which included the interest liability over awarded amount as well.
- However, the UOI encashed the FDR to draw an amount of Rs.57,000/-.
- Therefore, this entire amount of Rs.57,000/- was released to the contractor by UOI in Mar 2013.
- Thus, a net amount of Rs.14,000/- went in favour of the contractor.
How the dispute could have been resolved in a better way?

The disputes which arose during execution of the work during 1991-95 culminated into the award after two decades with no party gaining anything out of the long battle. This leads us to search for better options in dispute resolution mechanism.

(a) **Performance Guarantee forfeiture in lieu of Risk and cost contract:**

- This kind of situation is quite common in MES contracts where Contractor contends completion of the work and hence removes his resources from the project, however, there are certain defects in the workmanship due to which the ultimate users of the buildings are reluctant to take over the building and hence the MES officials do not issue the completion certificate. Because the contractor has removed all his resources from the project, the rectification of the defects lingers on.

- Even in projects where completion certificate has been issued indicating routine defects, the defect rectification is usually slow and becomes the cause of rift between the department and the contractor.

- The reason at the core of this situation is that contractor generally has procured major amount of payments due in running bills and gets busy in fresh projects. The retention money, except 1%, also gets paid at the time of completion. Therefore, the contractor loses interest in defect rectification which is considered as a tedious and losing job.

- Therefore, it is considered that the retention money which is just above 5% of the project cost should not be released till the defects intimated in the completion certificate are rectified to the entire satisfaction of the MES and users.

- However, in the cases like the current study where the completion certificate was withheld for defect rectification, a contract provision of obtaining performance guarantee of 5% of contract amount from the contractor can be very helpful. Default on the part of the contractor to complete the work leading to cancelation by department shall make him liable for forfeiture of his performance guarantee. Therefore, in the present case had there been a deterrent of forfeiture of performance guarantee of 5% the contractor would have been compelled to rectify the defects.
Thus, the combined effect of forfeiture of 5% performance guarantee and withholding of 5% retention money shall deter and simultaneously motivate the contractor to complete the work including defects rectification in right earnest.

Thus, the cases like the current study where the dispute spanned for a period of 2 decades could be eliminated and the reputation of the department in the eyes of users shall also improve by providing the projects in time and without any defects.

(b) **Amicable settlement through Conciliation/ Mediation:**

- As per MES contract conditions, in respect of cancelled contracts the arbitration shall be held only after conclusion of risk and cost contract.
- In the present case study, the risk and cost contract was concluded on 08 Feb 1996. Thus, it took one year for MES to conclude a fresh contract of just Rs. 68,000/- after the cancelation of the original contract.
- Even the fresh contractor took 6 ½ months as against 2 months contract period to finish the defect rectification work. Thus, it took an overall period of 18 ½ months after cancelation to actually get the defects rectified.
- However, with change of entire officials, there was a lapse in notifying the recovery amount of Rs. 11.50 Lakh of Minus final bill even seven years after finalization of final bill. Even the Appointment of Arbitrator to establish the claim was 11 years late.
- The arbitration process took further 56 months to finalize the award after much effort by department.
- Thus, if we analyze the efforts and expenditure made on the process of entire dispute resolution including the travelling, boarding and lodging expenses of the MES officials including the Arbitrator and compare it with the outcome where ultimately the department lost Rs. 14,000/-, the logical question to be asked shall be that is our existing dispute resolution process worth it.
- In situations like the current case study, where the issues are very minor like the rectification of defects for which department spent just Rs. 60,000/-on a risk and cost contract, the issues require just the intervention of a neutral third party who brings the parties to the negotiating table to resolve the dispute.
- Thus, two decades to resolve a dispute of such a minor nature does not speak highly about the culture of dispute resolution technique being adopted by MES.
However, even after the introduction of conciliation clause in its present form could not have been made applicable in the present dispute scenario as the threshold limit of Rs. 1 Crore value of contract does not get fulfilled here. Thus, a conciliation clause without any restrictions is the need of the hour to resolve these minor disputes which sting the department for two decades without any eventual gain.
5.10 Case Study No. 10 (Military Engineer Services)

Contract Agreement No.: CEJZ/GWL/32 of 2004-05
Name of Work: Provn of OTM Accommodation for Infantry
                   Battalion No.3 (Phase-I) AT Gwalior
Name of Accepting Officer: Chief Engineer Jabalpur Zone
                   (Later on taken over by Chief Engineer Bhopal Zone)
Name of Contractor: M/S Bansal & Company
Amount of Contract: Rs.3.85 Crore
Date of Acceptance: 25 Feb 2005
Date of Commencement: 24 Mar 2005
Date of Completion: 23 Sep 2006 (As per Contract)
Extended Date of Completion: 25 Jul 2007
Actual Date of Completion: 25 Jul 2007
Current Status of Dispute: Award implemented

How the dispute arose?

- The subject work was awarded by MES to M/S Bansal & Company for Rs.3.85 Crore on 25 Feb 2005.
- The initial period of completion as per Contract was 18 months, however, the work was actually completed with a delay of 09 months in Jul 2007.
- There were several differences and claims brought out by contractor during the execution of work which were not agreed by the department.
- As the contractor did not participate in the joint measurements for final bill, the final bill was prepared by the department on 22 May 2008.
- The contractor signed the final bill under protest on 09 Sep 2009 and later on gave the list of claims on 21 Oct 2009.
- The contractor stated that the final bill prepared by the department be taken as undisputed portion of the final bill and may be paid to him as such.
- The undisputed portion of final bill was paid to the contractor on 02 Feb 2010.
- Thereafter, for adjudication of his claims, the contractor invoked Arbitration on 11 Feb 2011.
How the dispute was resolved?

- The Arbitrator was appointed by the Appointing Authority i.e. Engineer-in-Chief on 08 Apr 2011. However, the Arbitrator resigned from the appointment due to his transfer on 04 Oct 2012.

- The vacancy was filled by the Appointing authority by appointing another Arbitrator on 28 Dec 2012.

- The overall Arbitration proceedings took 2 ¼ years when the final award was published by the second Arbitrator on 05 July 2013.

- Thus, the disputes which arose during execution of the work during 2005-07 culminated into the award after 7 years.

- The award was in favour of Contractor amounting to Rs. 11.80 Lakhs plus an interest payment of Rs.8.70 Lakhs from date of cause of action to date of award. The claim of UOI for cost of reference & interest over it were rejected by the Arbitrator.

- The award also carried future interest of 12% p.a. in case the payment was not made within 90 days from date of award.

- The department decided to implement the award, however, as it took over 5 months to make the payment, it lead to an additional interest payment of over Rs.63,000/-. 

- Thus, UOI has made a total payment of Rs. 21.13 Lakh on 20 Dec 2013 to the contractor against the subject award.

The Arbitration:
The major claims of the contractor and their disposal through arbitration are discussed as under:

Major Claims awarded:

Claim No. 24:

Payment for excavation of hard dense soil in lieu of soft/loose soil

- The Contractor contended that during execution, he had raised the point that the soil existing at site was hard/dense soil whereas contract catered the quantities for soft/loose soil only.

- The contention of contractor to make enhanced payment was not accepted by the site engineers. The matter was raised by him for decision by the Accepting officer
of the contract, but no decision was given by him on the matter. Therefore, the dispute lingered on.

- The Arbitrator on study of the properties of the soil from the soil investigation report made available concurred with the contention of the contractor that the soil was actually hard soil.
- Accordingly, the Arbitrator awarded Rs. 2.18 Lakh in favour of the contractor for subject claim.

Other Claims:
Most of the other claims of contractor were technical in nature. Out of a total of forty five (45) claims of the contractor:

- Fifteen (15) claims were rejected by Sole Arbitrator giving due cognizance to department’s pleadings.
- Nine (09) claims were partly allowed by Sole Arbitrator giving due cognizance to department’s pleadings.
- Five (05) claims were withdrawn by the contractor during hearing
- Fourteen (14) claims were awarded in full despite strong objections raised by UOI
- The total awarded amount in favour of Contractor in respect of various claims was Rs. 11.80 Lakhs.

Claims of interest:
The Arbitrator has awarded interest @ 12% per annum simple interest against all claims (except cost of reference) with effect from 25 Apr 2008 till date of award i.e. 05 Jul 2013.

- The Arbitrator also awarded interest @ 12% per annum simple interest for the delay in payment of undisputed final bill amount with effect from 25 Apr 2008 i.e. a day after due date of payment of final bill till the actual date of payment i.e. 02 Feb 2010.
- The total interest payment in respect of past and pendent lite period amounted to Rs.8.70 Lakhs
• The Arbitrator also awarded a future interest @ 12% per annum simple interest on awarded amount of various claims with effect from date of award till date of actual payment in case the payment is not made within 90 days from date of award. This future interest amounted to Rs.63,000/-. 

**Claims of cost of reference to Arbitration of contractor & UOI:**

• The claims of cost of reference to Arbitration of UOI was rejected by the Arbitrator but an amount of Rs.25,000/- was awarded in favour of the contractor.

• Thus, UOI has made a total payment of Rs. 21.13 Lakh on 20 Dec 2013 to the contractor against the subject award.

How the dispute could have been resolved in a better way?

(a) **Arbitration during the period of execution:**

• Most of the claims of the contractor including the claim of excavation in hard soil in lieu of soft soil were technical in nature. However, either no decision was given by the accepting officer or they were not agreed leading to the occurrence of dispute.

• However, the policy of the department to resolve disputes through arbitration only after completion of the work did not allow resolution during the construction period.

• Thus, the government lost public money in the way of pre-reference and pendent lite interest for 7 years and future interest which combined amounted to Rs.9.33 Lakh.

• Had there been no restriction on arbitration to resolve the contractual disputes during the construction period, this amount could have been saved.

• The spirit behind the restriction on arbitration during the construction period is that both parties concentrate their efforts and resources in progressing with the work and resolve the disputes only after completion.

• However, the spirit is totally defeated as one dispute leads to another dispute affecting the relationship as well as the progress of the work. Even the MES officials would be better off doing some constructive jobs rather than keeping track of the dispute records for years (7 years in the present study) together.
• Therefore, in case the resolution process proceeds as the works progresses not only the relations remain intact, progress increases as the contractor keeps getting his legitimate dues and government is saved of the interest expenses (Rs. 9.33 Lakh in the present case) ultimately paid along with the awarded amount.

• Thus, it is time that Arbitration begins as early as possible after occurrence of dispute rather than wait for several years when the officials are changed and are not adequately equipped to handle the defence of the case in Arbitration proceedings as the executives under whom the project was completed.

(b) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):
• A standing board adequately in picture about the project progress right from the very beginning of the project would be in even better position than newly appointed Arbitrator to appreciate the dispute and offer a quality solution which would be efficient as well as effective resolution of dispute.

• Thus, in case a DRB was in operation during the progress of the work all disputes would have been referred to it by any of the parties to expedite the resolution of dispute. This would have saved the years of efforts in keeping the dispute lingering on and the ultimate Rs. 9 Lakhs paid as interest over the awarded amount.

(c) Amicable settlement through Conciliation/Mediation:
• Generally, there would be some issues which would not reach the arbitration table if handled by the independent authority like a conciliator or a Mediator.

• Not only would the government benefit from resolution of dispute right at the inception stage definitely saving certain amounts but also keeps the relations from deteriorating and adversely affecting the progress of the project.

• However, here too the restriction of Rs. 2 Lakh as the threshold limit would pre-empt for referring a dispute to conciliation. Thus, a conciliation clause without any monetary restriction should be made applicable in all contracts to reap its benefits.
(d) Avoiding Interest Payments:

**Mandatory award payment (protected by BGB) before challenge in Court by either party:**

- As seen from above study, the three months period granted by the Arbitrator for making award payment without incurring future interest is generally very difficult to maintain. Generally, the advice from LA (Defence) is received after three months period when this future interest becomes applicable and that too for the initial three months as well.

- In the present study also, it was decided at the very onset by the department about implementation of the award as there was no infirmity in the award. However, despite that the LA (Defence) advice came late and an additional payment Rs. 63,000/- was made to the contractor for the delay.

- Thus, in case a provision is inbuilt in the contract provision of making immediate mandatory payment of awarded amount on obtaining the Bank guarantee from contractor, this problem of additional future interest payment shall be eliminated. On receipt of final decision by the appropriate authority about implementation or challenge of the award, the bank guarantee can be released or award challenged as the case may be.

- Thus, there is a need to incorporate the said contract condition to improve the dispute resolution process in MES.
### 5.11 Case Study No.11 (Military Engineer Services)

<table>
<thead>
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<th>Case No.</th>
<th>Civil Appeal No. 2479 of 2009 arising out of SLP (C) No. 3182 of 2005</th>
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<tr>
<td>Appellants</td>
<td>M/S G. Ramachandra Reddy &amp; Co. (Contractor)</td>
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<tr>
<td>Respondents</td>
<td>Union of India (Military Engineer Services)</td>
</tr>
<tr>
<td>Judge(s)</td>
<td>J. S.B. Sinha, J. Cyriac Joseph</td>
</tr>
<tr>
<td>Date of Supreme Court Judgment</td>
<td>15 Apr 2009</td>
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<tr>
<td>High Court</td>
<td>High Court of Madras</td>
</tr>
<tr>
<td>Date of High Court Judgment</td>
<td>14 Jan 2000 (Single Bench), 04 Oct 2004 (Double Bench)</td>
</tr>
<tr>
<td>Disposal of Execution petition</td>
<td>29 Apr 2013</td>
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<tr>
<td>Date of Contract</td>
<td>11 Aug 1988</td>
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<tr>
<td>Actual Date of Completion</td>
<td>Not Completed</td>
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<tr>
<td>Date of Cancellation of Contract</td>
<td>10 Jul 1991</td>
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<td>Arbitration invoked by</td>
<td>Contractor</td>
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<td>Date of award</td>
<td>17 Sep 1996</td>
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<td>Award</td>
<td>In favor of Contractor</td>
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<td>Civil Court Judgment</td>
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<td>High Court Judgment</td>
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<td>Final Judgment</td>
<td>In favor of Contractor</td>
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<tr>
<td>Dispute Span</td>
<td>25 years (dispute began with Acceptance letter itself)</td>
</tr>
<tr>
<td>Current Status of Dispute:</td>
<td>Award implemented</td>
</tr>
</tbody>
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### How the dispute arose?

- MES, through Chief Engineer Madras Zone, invited tenders for the work of “Married accommodation for MCPOs/CPOs/POs and Junior Sailors at Naval Air Station, Arakkonam”. The quoted tenders by the eligible contractors were submitted on 17 July 1988 and the tender of Contractor M/S G. Ramachandra Reddy & Co. was accepted on 11 Aug 1988 after exchange of certain correspondence with the contract amount of Rs.7.52 Crore.

- The period of completion of the contract was 21 months. However, despite grant of several extensions of time, the contractor could not complete the work in 35 months. Accordingly, the contract was cancelled by MES w.e.f. 17 July 1991 to get the balance work completed on the risk and cost of the defaulting contractor.

- The Contractor invoked Arbitration and requested the Appointing Authority for appointment of the Sole Arbitrator. However, when no such appointment was
made by the MES, the contractor moved court under section 11 of ACA 96. The Court appointed a Retired Judge of High Court as the Arbitrator on 23 Sep 1992.

- The MES appealed against the appointment of a Retired Judge against the terms of the contract in the High Court which allowed the appeal but contractor’s appeal in Supreme Court restored the order of the lower court. Thus, the appointment of the Retired Judge as Arbitrator was concurred by the Supreme Court.

**How the dispute was resolved?**

**ARBITRATION**

- The Arbitration proceedings commenced on 16 Sep 1994. However, the Arbitrator stated that Court has appointed him for only adjudicating the claims of the contractor and not of MES. Therefore, MES had to approach the court to get the orders dated 24 Nov 1994 directing Arbitrator to adjudicate counter claims of the MES as well.

- The Arbitration proceedings ended on 28 Mar 1996 but the award was published by the Sole Arbitrator only on 17 Sep 1996.

- The Arbitrator in its award declared that the **termination of the contract was illegal** as the MES and not the contractor who was responsible for delay in completion of the contract.

- Thus, all the claims of the contractor were awarded in his favour and all counter claims of MES including that of risk and cost amount were rejected by the Arbitrator.

**Claims of Contractor:**

**Claim No.1: Dispute regarding additional payment of 4.50% over quoted rates**

- The Contractor along with their quoted tender had submitted a covering letter dated 9/17.7.1988 carrying followings assertions:
  - Quoted Rates to be modified by “Over (+) 2.25%” over quoted percentage for Schedule ‘A’ Part I and total value considered accordingly.
  - The labour component of the proposed work is 40%.
- MES vide a letter dated 19.7.1988 refuted the above referred assertions of the contractor as under:
  - The tender is being considered with reduction of 2.25% over quoted percentage for Schedule ‘A’ Part I.
  - The labour component in the work is 20 as catered in the contract conditions and not 40 as referred by contractor in the covering letter.

- Thus, right at the quoting stage of the tender before acceptance of the contract, there was an ambiguity as to whether the sign before 2.25% was (+) or (-) whose cumulative effect would be 4.5% on the base price (Lump sum) stipulated in the tender for the building portion by MES.

- Thus, this ambiguity was required to be firmly clarified and incorporated in the body of the contract before accepting it. Moreover, the condition regarding the percentage of labour component, which is required for calculation of escalation amount payable to the contractor, being put by the contractor as against what is clearly specified in the tender either needed to be refuted or the tender to be rejected being non bonafide conditional tender.

- Nothing of that sort was done by MES. Even after communicating these ambiguities/conditions, the tender was accepted without any reference of the said reply letter by MES dated 19.07.1988. On the contrary the covering letter of the contractor dated 09/17.07.1988 containing the ambiguity/conditions was made part of the contract vide acceptance letter dated 11.08.1988. However, the contract amount was calculated based on reduction of 2.25% i.e. considering the (-) sign and not (+) sign.

- The Acceptance letter and the initial work order in the said form were signed by the contractor without any remarks.

- During the Arbitration the Contractor produced a letter dated 05 Aug 1988 written by him in response to MES letter dated 19 July 1988. As per this letter of the contractor, the contractor had reiterated his stand of (+) 2.25% over his rates and that of 40% labour element in escalation calculation formula. It stated that just before dropping the tender in the tender box, their Managing Partner had to include an extra 2.25% towards Turnover Sales Tax liability and the vertical line in the sign (+) was hurriedly put.
• Shockingly, on the assertion of MES that no such letter was ever received by them, the Arbitrator put the onus of proving that on MES instead of asking the Contractor to produce any postal receipt. Thus, the Arbitrator based his decision on the said (fake) letter of the Contractor. The blunder made by the MES in not making their letter dated 19 July 1988 as part of the contract came to haunt them.

• As per the Arbitrator, all the ambiguities/conditions created by the contractor in his covering letter of the quoted tender were firmly considered as part of the contract. Thus, the ambiguity of (+) or (-) sign before 2.25% was decided by Arbitrator in favour of the contractor treating it as (+) sign. Thus, an amount of Rs. 23 Lakh was awarded in favour of the contractor on account of this claim.

Claim No.2: Dispute regarding additional labour escalation payment considering labour component of 40% in lieu of 21%

• Again, the Contractor’s covering letter dated 9/17.7.1988 submitted along with their quoted tender asserted the labour component of the proposed work as 40% in lieu of 21% as catered in the initial tender document.

• The issue was decided by the Arbitrator that the covering letter asserting the labour component as 40%, which although denied by MES through a letter but not made part of the contract, shall supersede the 21% as catered in the tender.

• Thus, by inserting 40% labour component in the escalation formula specified in the tender an additional amount of Rs. 38 Lakh became payable to the contractor which was awarded by the Arbitrator in favour of the Contractor under this claim.

• Thus, the combined effect of the blunder made by MES in accepting a conditional tender which they should have otherwise rejected as per contract conditions cost them Rs. 61 Lakh plus interest thereon.

Claim No.3:
Dispute in respect of extra payment for escalation on labour involved in construction of high rise building:

• As per Central Government notification, construction workers employed on high rise buildings over 30 feet in height or four floors shall be paid 20% extra wages of the minimum wages fixed.
Therefore, the contractor during the construction period raised this claim several times, decision on which was deferred by the MES and then finally denied stating such provision is not covered under the contract.

During Arbitration MES contended that the matter was referred to the Accepting officer whose decision against such payment is final and binding and hence beyond jurisdiction of the Arbitrator. However, the Arbitrator held that the interpretation of a statutory rule cannot be decided by the Accepting Officer.

During the Arbitration when this claim was discussed, MES pleaded that since the contractor has not produced vouchers to prove extra payment incurred, he is not entitled to such claim. However, the Arbitrator held that for the statutory reimbursement claim, MES cannot now ask for such vouchers at this stage more so as during construction stage no such objection was raised.

Another objection then raised by MES was that the workers not employed on the high rise portion of the building were not entitled to extra wages. However, the Arbitrator held that it was not practical for the contractor to employ labour exclusively for high rise building.

Therefore, the Arbitrator decided in favour of the contractor on this claim and awarded him Rs. 16.70 Lakh.

Claim No.4:

Dispute regarding the legality of the termination of the contract and consequential damages:

As per the contractor, the termination of the contract was illegal and mala fide as it was MES who themselves were at default for the delay in completion.

MES granted extension of time several times without levying any compensation which shows that they were convinced that the delay was beyond the control of the contractor.

Contractor also pleaded that reinforcement steel required to be provided by MES at the place of execution was not provided and they were directed to collect the same from places like Bangalore and other places which further lead to the delay.

The contractor also pleaded that delay in making running payments and that too at reduced rate lead to financial strain and consequential delay in completion of the project.
• The Arbitrator took cognizance of the case Hind Construction Contractors Vs. State of Maharashtra, A.I.R. 1979 S.C. 720 (P.725) which laid down the principle that the clause of extension of time provided in a contract renders ineffective the express provisions of time being essence of contract.

• The Arbitrator held that MES kept on granting extensions of time in piecemeal without giving adequate and reasonable time to complete the balance work. Again referring to above referred Supreme court case law which said that before taking any drastic action like cancelling the contract, reasonable time needed to be given to the contractor to complete the work stating that the contract shall be cancelled if he does not complete the work in that time. However, in the subject case the letter dated 27 Jun 1991 was written to improve the progress of the work to avoid any action and within 2 weeks i.e. on 10 July 1991 cancellation letter was written making cancellation effective from 17 July 1991. Thus, the Arbitrator felt that no reasonable time was allotted to contractor before taking drastic step of cancellation. Therefore, the Arbitrator concluded that cancellation of the contract was illegal.

• Secondly Arbitrator also concluded that cancellation was made with a mala fide intention because the Notice inviting tender (NIT) for calling fresh risk and cost tenders was issued even prior to cancellation letter when the even the final measurements to ascertain the scope for balance work were not available.

• Thus, once the Arbitrator decided in favour of the contractor treating the cancellation as mala fide and illegal, he also decided in favour of contractor compensating him for loss of profit at the rate of 15% of the value of the balance work not allowed to be completed owing to illegal termination. Thus, an amount of Rs. 24 Lakh was awarded by the Arbitrator on account of this claim in favour of the contractor.

Claim No.5:
Dispute in respect of Plants and equipments of the contractor withheld by MES:
• In view of the cancellation being declared as illegal by the Arbitrator, he allowed an amount of Rs. 16.50 Lakh as damages for non-return of plants and equipments withheld by the MES.
Claim No.6:
Claim in respect of balance payment of Final bill for work done and material supplied:
- An amount of Rs.5 Lakh was awarded by the Arbitrator in respect of this claim.

Claim No.7:
Claim of interest @ 24% on the awarded amount for the pre and pendent lite period as well as future period
- The Arbitrator awarded 18% interest per annum for the pendent lite period till date of payment for the awarded amounts in respect of all claims except claim no.4. For claim No.4 the Arbitrator awarded 18% interest per annum only from the date of award till date of payment.

Counter Claims of MES:
Claim No.1:
Amount on account of execution of balance work through other agency at the risk and cost of the contractor:
- As per the contract provisions, in case of cancelation of the contract on the default of the contractor to complete the work, the balance is to be executed by another agency. Any additional expenditure made by the government to complete the balance work shall be recovered from the defaulting contractor. Thus, the fresh contract concluded for completion of balance work is considered as the risk and cost contract.
- Accordingly, the department completed the balance work at an additional expenditure of Rs.3.25 Crore which was demanded from the defaulting contractor. On non-compliance of the demand by the contractor, the amount of Rs. 3.25 Crore was claimed under this claim by the department.
- However, in view of the fact that termination of the contract was declared as illegal by the Arbitrator there was no question of awarding the said claim to the MES. Hence, against a claim of Rs. 3.25 Crore, the Arbitrator awarded NIL amount in favour of MES.
- Thus, despite incurring an extra expenditure of Rs. 3.25 Crore after the default of the contractor to complete the work, the Arbitrator did not award any amount in favour of the government.
Claim No.2:

Compensation for delay in completion of the work:

- In view of the fact that the entire delay was considered to be attributable to MES by the Arbitrator and then illegally terminating the contract without giving sufficient time to the contractor to complete the balance work, the Arbitrator rejected this claim of Rs. 25 Lakh as well.

Claim No.3:

Non-return of over-drawn stores issued by MES to the Contractor:

- MES raised a claim of Rs. 40 Lakh at penal rates in respect of stores issued to the contractor but theoretically not consumed in the work and thereafter not returned back.
- However, on scrutinizing the consumption records, it was revealed that the unaccounted store was within 5% wastage as permitted by contract conditions. On the contrary, it was found that the contractor owes Rs. 7.20 Lakh from MES on account of excess recovery. However, as the contractor had not claimed it in his claims the same was not accorded by the Arbitrator. Thus, this claim of MES was also rejected by the Arbitrator.

Claim No.5:

Non-submission of security-deposit for anti-termite treatment works:

- This claim of MES for Rs. 1.80 Lakh was also rejected by the Arbitrator stating that since the amount is deposited after completion of the work, the risk and cost contractor who completed the work is accountable for the same.

Claim No.4, 6 & 7:

Claims in respect of defective work, cost of reference to Arbitration and interest claim on awarded amount:

- All these claims of MES were also rejected by the Arbitrator.

- Thus, against combined claim of approx. Rs.4 Crore and interest thereon, MES was awarded NIL against these claims.
- On the other hand, the contractor whose contract was cancelled for non-completion of the work despite several opportunities given by extending the
period of completion got away with an amount of Rs. 1.23 Crore plus huge amount on account of interest thereon for pendent lite as well future interest. The final amount which the MES actually paid after exhausting all channels of appeal up to Supreme Court was Rs. 5.32 Crore.

CHALLENGING THE ARBITRATION AWARD IN HEIRARCHY OF COURTS:

SINGLE BENCH HIGH COURT:

- Aggrieved by the unfavourable Arbitration award, MES filed its objections in the High Court of Madras to set aside the award whereas the Contractor pleaded to make it a Rule of the Court.
- The Single Bench of the High Court held that there was no infirmity in the award or error apparent on the face that Arbitrator has misconducted. It held that as Arbitrator has given its elaborate reasoning to arrive at the conclusions, hence there was no justification to interfere with the award.
- Thus, the High Court on 14 Jan 2000 directed MES to pay the Contractor a total amount of Rs. 2.79 Crore (Rs. 1.23 Crore Principal amount + 1.56 Crore as interest till that date).

DIVISION BENCH HIGH COURT:

- Again being aggrieved of the said judgment, MES filed an appeal with the Division Bench of the Madras High Court. However, as a condition for interim stay, on the directions of the court MES paid an amount of Rs. 80 Lakh to the contractor and another Rs. 60 Lakh was deposited in the Court which was thereafter deposited in the Bank.
- The Madras High Court heard all claim wise objections of MES in detail and through its judgment dated 04 Oct 2004 held as under:
  - Claim No.1: The Division Bench observed that though there was an ambiguity as to whether the contractor wanted to add or reduce 2.25% to his quotation, but the court held that it was apparent that he wanted only to reduce 2.25% as per the acceptance letter which is final and conclusive evidence was arrived at by considering 2.25% reduction. Thus, the Court rejected the award of Rs.23 Lakh against this claim.
Claim No.2: The Division Bench took note of the clear rebuttal made by MES vide letter dated 19 July 1988 that 40% of escalation towards labour charges was not admissible and the conditions stipulated in tender shall prevail. Therefore, the court set aside the award of Rs. 31 Lakh awarded by the Arbitrator on this account.

Claim No.3: As regards the award of 20% extra payment in respect of escalation charges for labour working on high rise buildings, the court observed that the contractor was entitled extra payment only in respect of workers employed in 5th and 6th floors and not for the entire building. Therefore, the awarded amount was modified suitably by this order of the Division Bench.

All other awarded claims including the claim No.4 for loss of profit were left intact by the Division bench recognizing the defaults on the part of MES leading to delay in completion. Thus, a substantial amount (over Rs. 50 Lakh plus interest thereon of over Rs. 50 Lakh) was set aside by this judgment giving relief to MES authorities.

SUPREME COURT:

- However, the relief of the MES was short lived as contractor appealed before the Supreme Court against the judgment by the Division Bench of Madras High Court (Civil Appeal No. 2479 Of 2009 arising out of SLP (C) No.3182 of 2005)
- The Supreme Court overturned the judgment of the High Court in respect of Claim No. 1, 2 & 3 and held that the Arbitrator was perfectly right in arriving at the conclusions based on the evidence placed before him.
- In respect of Claim No.1 & 2, the Supreme Court held that the Arbitrator’s stand about covering letter dated 9/17.7.1988 forming part of the contract and the acceptance of contract without any modification is correct to sustain the award in respect of these two claims. The Court added that had MES letter dated 19.7.1988 rejecting the offer of contractor made part of the contract through Acceptance letter, the matter would have been entirely different.
- In respect of claim No.3 for award of the claim for higher labour wages in high rise buildings, the Supreme Court held that a high rise building cannot be divided into 2 parts. As same workers work for the construction of entire building, demarcation of workers exclusively for high rise portion was not practical. They
held that the nature of the provisions was only beneficent and the interpretation of High Court for making it applicable for only the 5th and 6th floor construction was incorrect.

- Lastly Claim No.4 regarding damages for loss of profit was deliberated in view of Clause 11 (C) of the MES GCC which clearly dears any claim of compensation to contractor apart from extension of time. Here, the Supreme Court held that as the Arbitrator has clearly held that the cancellation was mala fide and illegal and no contract can decide in advance if any damages are payable for illegal termination of contract. Moreover, the plea of clause 11 (C) was not taken by MES before the High Court; hence, the same was not permissible at this stage. Therefore, the award by Arbitrator in respect of this claim was not interfered by Supreme Court.

- Thus, the entire award of the Arbitrator in favour of Contractor was restored by the Supreme Court.

- The litigation continued even further for another 4 years when the execution petition (A. No.299 of 2013 in E.P. No.1908 of 2009) filed by the contractor for additional interest amount was finally disposed off by the Madras High Court. After the initial payment of Rs. 1.40 Crore in 2000, government paid another Rs. 1.30 Crore on 25 Jun 2010 and finally another payment of Rs. 2.62 Crore towards final satisfaction of decree on 07 Feb 2012. Thus, the department ended up paying a total amount of Rs. 5.32 Crore to the contractor against the principal awarded amount of Rs.1.23 Crore.

A Parallel Case:
- Interestingly, the same contractor had quoted another tender in the office of the same Chief Engineer for a different work on the same day i.e. 17 July 1988. Here too he happened to be the lowest and hence was awarded that contract too for Rs. 3.85 Crore. Interestingly, here too the contractor enclosed the similar covering letter asserting labour component to be 40% in lieu of 21% catered in the contract condition. However, the note regarding (+)/(-) 2.25% was not there. The contract was awarded on the same date i.e. 11 Aug 1988 as the subject case study. In this contract also the contractor could not finish the work and his contract was cancelled by MES on 31 Dec 1992. This work pertains to Contract No.
CEDD/VIZ/47 of 88-89: Provision of Married Accommodation for 190 MCOPs/CPOs and 24 JS and 38 DSC at 104 Area at Visakhapatnam.

- More interestingly, the contractor did not participate in the Arbitration proceedings in respect to this Contract despite several notices to him as well as his Advocate who was defending his case at the same time in the Supreme Court. Incidentally, when after sufficient postal as well as newspaper notices, the Arbitrator awarded an ex parte award amounting to Rs. 1.72 Crore in 2010 (Rs.63.16 Lakh principal amount + Rs.108.84 Lakh as pendente lite interest), the contractor was still pursuing his Execution Petition in respect of subject case study.

- Ironically this award dated 12 Feb 2010 was based upon ACA 96 and with no application to set aside within limitation period of 3 months, it acquired the status of Court decree. On 15 Dec 2010, MES actually owed the Contractor a sum of Rs. 0.42 Crore both decrees considered together. However, it has come to knowledge that MES although has paid the entire amount of Rs. 5.32 Crore due to the contractor in respect of the subject case study but was not able to recover the amount of Rs. 1.72 Crore from the contractor in the other case. The actual amount due as on date would be over Rs. 2.10 Crore considering 12% future interest the award carried.

How the dispute could have been resolved in a better way?

(a) Arbitration during the period of execution:

- The blunder made by MES during the contract acceptance stage itself set the stage for dispute. However, instead of trying to cover up the mistake better option would have been to face the music at the earliest rather than deferring it for years which lead to not just weakening of the defence in the Arbitration but payment of more than 100% as interest payment after 25 years of legal battle.

- After the blunder was made, had the Arbitration happened at the very beginning of the contract period, the litigation up to the Supreme Court for over 2 years for appointment of Arbitrator would have been avoided.

- Thereafter, if the case was decided on its merit at the very beginning, the possibility of completion of work by the original contractor would have been more
and the extra expenditure of Rs. 4 Crore for completion of balance work made by the government would have been saved.

- Even if the Arbitration had gone in favour of the contractor, at least the award against claim No.4 & 5 and the interest payment would have been avoided and only Rs. 77 Lakh would have been paid to the contractor instead of Rs. 5.32 Crore as finally paid.
- Therefore, the net saving in case of early Arbitration (even in losing case) would have been Rs. 8.55 Crore (Rs. 4 Crore: claims rejected + Rs. 4.55 Crore: award against claim No.4 & 5 and the interest payment)

(b) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):

- Another option for better dispute resolution in respect of current dispute would have been reference to a standing DRB at the very beginning of the project.
- As the DRB is an independent body, its decision shall be unaffected by the mistake made by the department officials. Therefore, in case the disputes are resolved and implemented without being entangled in the legal advices at the beginning, the contract would have been completed and loss to the department would have been restricted only to the mistake made during acceptance and not other claims related to illegal termination and astronomical interest amounts.

(c) Performance Guarantee forfeiture in lieu of Risk and cost contract:

- This case is a typical example in MES Contracts where despite the clear contract provisions that on default of contractor to finish the work, the balance work shall be got executed through another agency on the risk and cost of the defaulting contractor, the Arbitrator never awards any amount to the government in respect of the additional expenditure made.
- There would be numerous examples over the period of time where the Arbitrator always declares the cancelation by MES as illegal. Consequently, all claims of risk and cost amount of government are rejected and on the contrary the damages are awarded in favour of the defaulting contractor.
- It is seen that despite giving abnormal additional time for completion the contractor is unable to finish the work. Therefore, the department officials in their wisdom reach a conclusion that the contractor is not in a position to finish the work and therefore decide to cancel the work.
As per the contract clause the Arbitration to resolve the dispute shall commence only after the conclusion of risk and cost contract. Therefore, it is seen that the Arbitration actually begins after a considerable period of time. In the present case the Arbitration actually commenced after more than 3 years of the cancelation of the contract that too after the appointment of Arbitrator was obtained by the Contractor through the interference of the Court. It further took another 2 years for Arbitrator to publish the award.

Thus, 5 years after the cancelation a retired judge decides that the cancelation of the contract was illegal and hence rejecting the total claims of government over Rs.4 Crore, he awards Rs. 1.23 Crore plus pendent lite and future interest in favour of contractor.

There were two spells of litigation one for appointment of Arbitrator right up to the Supreme Court and second after the publishing of award that too up to the Supreme Court level and further 4 years in execution petition filed by the contractor. The combined litigation period was 22 years. However, the dispute arose right at the time of conclusion of contract, the total dispute span can be considered as exactly 25 years. Thus, in lieu of getting Rs. 4 Crore plus interest government actually ends up paying Rs. 5.32 Crore to the defaulting contractor after fighting a legal battle for 25 years.

Just because there is nothing at stake for the contractor at the cancelation stage, he abandons the contract without any fear of losing anything. On the contrary over a period of time with the entire official team changed, he succeeds in proving his innocence and blaming government for the delay in completion during the Arbitration proceedings.

The cancelation of the contract is proved to be illegal invariably in all such cases where the contractor participates in the Arbitration proceedings.

Thus, instead of having to pay for the default in completion of the projects, he actually gains handsome amount as damages and interest payments.

It is only in cases where the contractor abandons even the Arbitration proceedings; the exparte award goes in favour of the government as seen from the parallel case discussed above in respect of the same contractor. But as seen from the example of the parallel case, the recovery from the contractor is seldom achieved.
Let us again ask the basic question that has the strategy of Risk and cost contract as a prerequisite for dispute resolution through Arbitration delivered the desired results.

The answer is clear ‘NO’. Then why is MES still continuing with this policy from time immemorial when all other major government and public sector departments have abandoned the approach.

Had there been a provision of obtaining performance guarantee of 5% of contract amount which would be forfeited in case of cancelation of the contract, the results could be different. The forfeiture of 5% performance guarantee shall act as a deterrent for the contractor to not abandon the work unfinished.

Once the performance guarantee is forfeited, the final bill of the defaulting contractor is processed immediately. The balance work is executed through another agency and the defaulting contractor is set free without any liability of risk and cost amount. The forfeited performance guarantee amount can be used to cover for the additional expenditure made in completion unlike in risk and cost where government recovers nothing despite a long legal battle (25 years in current study).

The contract for the balance work can be concluded without any hindrance from defaulting contractor unlike Risk & Cost contract where the Contractor remains a stake holder till the completion of balance work. Even in Arbitration proceedings, the defaulting contractor is not concerned with the amount of fresh contract concluded unlike the risk and cost contract where the records for reasonability of rates accepted were required to be produced for establishing the claim amount.

Currently, the decision to cancel the contract to go for risk and cost contract is considered to be most tedious and cumbersome as lot of legal formalities are required to demonstrate transparency before the arbitrator. Therefore, the last ditch efforts are made to avoid taking the extreme step of cancelation so that the original contractor completes the work by extending the period of completion several times. The government appears to be at the mercy of the contractor for getting the work completed. With performance guarantee forfeiture clause, the decision becomes easy for government to cancel the contract at the first default. With e-tendering recently introduced, concluding fresh contract for balance work shall also be expeditious.
Thus, the cases like the current study where the dispute spanned for a period of 25 years could be eliminated and the reputation of the department in the eyes of users shall also improve by providing the projects in time and without any defects.

Even in the similar parallel Case discussed above where the MES got an exparte award in their favour but have not been able to recover, it would have been ideal if the amount was already available with MES as the forfeited performance guarantee amount.

(d) Decision on implementation/ challenge of award by Independent Technical Committee:

- As is apparent from the case that there was a blunder made by the MES officials while accepting the contract for which the department had to suffer huge losses in the Arbitration award.

- Although, the team responsible for acceptance would have changed by the time Arbitration case was defended, but the team defending the case shall generally give biased recommendations to challenge the award on receiving unfavourable award despite their spirited defence.

- In case the decision to challenge or implement the award is entrusted to an independent technical committee not involved with the dispute or defence team, the recommendations would be more authentic and neutral. Thus, had the award been analyzed by an independent team under the circumstances of the current case, the decision to implement the award could have been reached. This would have saved next 17 years of litigation and Rs. 4.09 Crore as additional loss to the state as interest payment. The legal fees paid and departmental efforts and expenses were obviously extra burden on exchequer.

- Even when the department lost in the court in the year 2000 when the award based on Arbitration Act 1940 was made rule of the court, had an independent committee decided to implement the award amount as on that date pegged at Rs. 2.78 Crores, government would not have to incur additional Rs.2.54 Crores after 13 years of further litigation. It is observed from the order of the Court that they had reduced the rate of future interest from 18% to 6% on principal amount only, thus, eliminating interest over interest for future period. However, further litigation restored future interest to 18% and the department even ended up paying interest over interest as well.
Thus, the department keeps on getting entrapped in the vicious circle of successive litigations on the legal advice from CGSC and LA (Defence) without asserting their professional acumen in such cases where the chances of winning were non-existent. This is where an independent technical committee would be of immense help to save the blushes to the department and loss to the state by offering an unbiased recommendation.

(e) Avoiding Interest Payments:

Mandatory interim award payment (protected by BGB) before challenge in Court by either party:

- This was a fit case where making immediate award payment against a bank guarantee from the contractor would have saved Rs. 4.09 Crore of public money.
- Thereafter, any period of litigation would not have hurt so much as in this case as the 17 years litigation to get the award set aside not only went in vain but incurred an additional expenditure of Rs.4.09 Crore.
- Thus, in case such policy, of mandatory interim award implementation protected by bank guarantee before challenging the award in the successive courts, is adopted in the MES contracts it shall go a long way in resolving the dispute in effective manner as the winning party gets the awarded amount and the losing party eliminates future interest liability.

Contract Clause to debar Arbitrator from awarding past and pendente lite interest

- Simultaneously, a clause similar to that adopted by Indian Railways and DMRC pertaining to interest on arbitration award should be included in the MES GCC to clearly debar the arbitrator from awarding any interest on the principal awarded amount till the date of the award. Thus, no past and pendente lite interest shall be allowed on the awarded amount. This shall be in line with the clause 31 (7) (a) ACA 96 where the freedom has been given to the parties to agree on such arrangement. The same has also been upheld by the apex court in various judgments as also seen from the case study No.15 in respect of Indian Railways.
5.12 Case Study No.12 (Military Engineer Services)

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**How the dispute arose?**

- Chief Engineer Bhatinda Zone of MES entered into a contract bearing number CEBTZ-14/95-96 for “Provision of OTM accommodation and certain essential technical buildings at Bhatinda” on 17 Sep 1995.
- The dates of completion for first & second phase of the work were 20 July 1996 and 20 January 1997 respectively.
- The contractor claimed to have completed the entire work on 31 August 1998, although the department issued the completion certificate on 09 Sep 1999.
- The contractor signed the final bill along with no claim certificate on 04 May 2000 without any protest.
- The final payment was released to the contractor on 19 Jun 2000 and a bank guarantee amounting to Rs.21,00,000 was released on 12 July 2000.
- However, immediately on receiving his entire dues from the government, the contractor withdrew his no claim certificate and raised certain claims on 12 July 2000.
The Chief Engineer, immediately after receiving the letter of contractor, on 13 July 2000 refuted the claims of contractor on the grounds of being raised after acceptance of the final bill and submission of no claim certificate.

The contractor on 10 Sep 2000 invoked Arbitration clause by writing to the Appointing Authority (Engineer-in-Chief) requesting for appointment of Arbitrator for adjudicating the disputes.

How the dispute was resolved?

As no appointment of Arbitrator was made by the Appointing Authority, the contractor filed an application under section 11 of ACA for appointment of Arbitrator with Civil Judge, (Senior Division), Bhatinda on 10 January 2001.

The application was dismissed by the Civil Judge, Senior Division, Bhatinda on 06 January 2003.

Thereafter, the contractor moved a writ petition before the High Court of Punjab and Haryana which was dismissed on 20 May 2004.

The contractor challenged the High Court’s decision before Supreme Court which was disposed on 03 January 2006. The SC set aside orders of the High Court and the lower court and directed that the application filed by the contractor under Section 11 of the 1996 Act for appointment of Arbitrator shall be placed before the Chief Justice of the Punjab and Haryana High Court for appropriate orders.

The Chief Justice of the Punjab and Haryana High Court passed the order on 08 Dec 2006 stating that all the disputes between the parties shall be referred to the arbitration and appointed a retired Chief Justice of Andhra Pradesh High Court Mr. M.S. Liberahan as sole arbitrator to decide the disputes between the parties.

Aggrieved by the above order of the High Court, the Department moved Supreme Court for relief in 2007.

The submission of UOI before the SC were that:

(i) No arbitrable dispute existed between the parties as full and final payment has been received by the contractor voluntarily after submission of ‘no-claim certificates’

(ii) In case, Arbitrator was to be appointed it should have been done with due regard to the arbitration clause i.e. a serving Engineer officer of MES should have been appointed rather than a retired judge.
On the other hand the contention of the contractor was that:

(i) ‘No claim certificate’ was given by the contractor under the financial duress and coercion as UOI had arbitrarily withheld the payment.

(ii) The issue whether ‘no-claim certificate’ was given voluntarily or under financial duress, is an issue which must be decided by the arbitrator alone.

The issue before the Supreme Court to be decided was whether after furnishing ‘no-claim certificate’ and the receiving the payment of final bill by the contractor, the contract stood discharged or any live arbitrable dispute still remained between the parties to be adjudicated by the Arbitrator.

As the contractor based his case on National Insurance Company Limited v. Boghara Polyfab Private Limited\(^1\), the SC bench considered it in detail. As per the said judgment where after considering the relevant facts, the court found a full and final settlement resulting in accord and satisfaction and no substance in the allegations of coercion/undue influence. And when a contract has been fully performed i.e. discharge of the contract by performance, the contract comes to an end. In regard to such discharged contract, there can be no dispute and no reference to arbitration. However, the question whether the contract has been discharged by performance or not is a mixed question of fact and law which itself is arbitrable.

However, the Court in the said judgment noted an exception to above proposition which is where both parties to the contract confirm in writing about contract being fully and finally discharged by performance of all obligations and there are no outstanding claims/ disputes, courts will not refer any claim or dispute to arbitration thereafter.

Another exception noted was with regard to those cases where one of the parties issues a full and final discharge voucher / no-dues certificate confirming that he has received the payment in full and final satisfaction of all claims with no outstanding claim. This amount to discharge of the contract by acceptance or performance and the party thereafter cannot make any fresh claims or revive any settled claim or seek reference to arbitration.

The bench opined that there are no fixed rules. If the claimant contends that a discharge voucher/ no-claim certificate has been obtained by fraud, coercion,

duress or undue influence which is refuted by other side, the Court must prima facie ascertain the authenticity of such contention. If such contention prima facie lacks credibility, there should be no requirement to refer the dispute for arbitration considering the heavy cost of arbitration. The assertion of fraud, coercion, duress or undue influence must be established prima facie by placing concrete material evidence. If the Court finds some substance in the allegation, it may decide the same or refer it to be decided by the Arbitral Tribunal. However, if the court concludes the claim to be an after-thought or lacking in credibility, there should be no reference to Arbitration.

- The court categorized the present case in exception as noted in Boghara Polyfab Private Limited. They held that prima facie no financial duress or coercion is established and that the contractor accepted the amount voluntarily leading to voluntary discharge of contract. Thus, there was no requirement of reference to any arbitration.

- Accordingly, the order of Punjab and Haryana High Court appointing the retired Chief Justice of Andhra Pradesh High Court Mr. M.S. Liberahan as sole arbitrator was set aside by the Hon'ble Supreme Court on 25 Apr 2011.

How to avoid such litigations?

- The case is an example of its kind where after 11 years of litigation, the government was at least saved from further frivolous Arbitration & litigation of decades.

- Had the order of High Court of reference to retired judge for Arbitration been sustained by the Supreme Court, the matter would have to be agitated before the Arbitral Tribunal. In case of award favoring contractor, the matter would then had to be agitated before Civil Court, High Court & even Supreme Court to get it set aside which taken together might have run for over a decade or more. This would have resulted in huge loss of man hours of government officers & machinery in fighting the case. The fee of Arbitrator, legal fee & other expenditure for over decades would then add on to the award amount & interest if finally went in favour of Contractor.

- Notwithstanding above, in the present case also it took over a decade to finally confirm that there was no dispute to be referred for arbitration. The efforts of
government & legal machinery if calculated in financial terms for fighting such legal battle against frivolous claim must have been huge.

- There is no doubt a need to curb such unethical tactics of contractors & consequent frivolous litigations. This can be done by taking stringent action against such contractors by blacklisting them at least after the highest court has confirmed that their action was lacking credibility. Our inaction in a way leads to encourage such unethical tactics by other contractors or repeat by the same contractor.

- Notwithstanding above, considering from an unbiased view, the contractor was actually deprived from his contractual right of getting the disputes resolved on merits.

- Again, the focus needs to be turned on the need for the contractor to adopt such unethical practice of withdrawing his no claim certificate to raise certain claims.

- As the contractor contended that the project was completed on 31 Aug 1998 but the completion certificate was issued by MES after more than a year on 09 Sep 1999.

- Had the contractor not adopted such so called “unethical” tactic and raised his claims and signed the final bill under protest, would his undisputed portion amount and Rs. 21 Lakh retention money Bank guarantee been released by department within 10 months of completion as he actually got after giving no claim certificate. The answer is certainly “No” as experienced from several case studies (Case Study No.08: 3 ½ years & Case Study No.10: 2 ½ years after completion). Therefore, the need to get back his legitimate dues in time compels a contractor to adopt such tactics.

- The contractors are also forced to adopt such unethical tactics as may also be seen from the Case study No.06 where immediately on receiving his entire dues from the government without any protest, the contractor adopted an unethical strategy of producing a fake letter as evidence to show existence of live dispute.

- Therefore, we need to address the basic question that if the contractor had the option to get his dispute resolved during the execution period, there was no requirement to adopt these unethical tactics for getting the disputes resolved which otherwise is his legitimate contractual right.
This leads us to the flaws in our current dispute resolution system and the need to improve the system.

**How the dispute could have been resolved in a better way?**

(a) *Arbitration during the period of execution:*

- It is true that MES was successful in defending the case and averted the appointment of Arbitrator after a legal battle of 11 years. However, truly speaking if had the provision of Arbitration clause clearly advocating Arbitration during the execution period, the need for this legal battle would have been not there.
- The approach of the contractor though unethical but still raises questions about pending disputes which could not be resolved on merits.
- The spirit behind the dispute resolution system is to expeditiously and economically resolve the disputes rather than put the disputes under the carpet. The strategy of current Arbitration clause is exactly the opposite. The executives responsible to get the construction done keep trying that the contractor does not raise any dispute during their tenure. And if he raises the disputes they take shelter of the Arbitration clause which makes it optional for them to agree on Arbitration during the construction period.
- Even after completion of the construction period, if the contractor raises any claims, he is made to withdraw and sign the bill without any protest. If the contractor still persists with his claims he faces the consequences by delayed payments of undisputed portion, if not from MES officials but from the audit side. This results in cases like the current case study.
- Therefore, we need to address these issues by relaxing the Arbitration clause to allow Arbitration as and when the dispute arises so that by the time the project gets over all issues are already resolved and the final bill can be processed expeditiously.
- In the recent past there have been drives on war footing to clear the outstanding final bills within target dates but no emphasis has been made towards the basic issues of resolving the disputes expeditiously which itself pave the way to early clearance of final bills.
• It may be seen that sometimes the issues involved are very innocuous but the executives get entangled in the procedural issues and are not able to take rational decisions which an Arbitrator shall easily decide in the interest of natural justice. The prime example is the case study No.3 where the final bill was not paid for 18 years for an issue over non-production of purchase voucher to finalize the rate of an extra item.

• Thus, had there been Arbitration clause freely allowing Arbitration during construction period, the cases like the current case study would reduce drastically.

(b) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):

• Another option for better dispute resolution in respect of current dispute would have been reference to a standing DRB at the very beginning of the project.

• As the DRB is an independent body, its decision shall be unaffected by the bias the involved executives have in the contract management. As the DRB is present at any time the dispute arises, it can offer unbiased solution in the interest of the work.

• Once the minor issues get resolved with the intervention of the DRB, the contractor would no longer indulge in unethical practices as was done in the current case study.

• The DRB needs to be in operation till the final bill is paid and the defect liability period is over to take care of all types of disputes so that not only the works get completed without hassles but the contractor also gets his legitimate dues in time. This will definitely reduce the burden of litigation on the department drastically.
How the dispute arose?

- A Contract for provision of certain civil works was awarded by MES to the contractor M/S Ravindra Kumar Gupta & Company on 23 Mar 1988.
- The period of completion as per original contract was 15 months. However, the contract period was extended by another 16 months and finally completed on 03 Nov 1990.
• However, some disputes occurred in respect of final payments due to the contractor for which the Arbitration was invoked by the Contractor.

How the dispute was resolved?

• The Arbitrator was appointed by the Engineer-in-Chief and the Arbitration proceedings commenced on 21 Apr 1994.
• The Arbitrator published the award on 30 Oct 1996 in favour of the contractor.
• As the Arbitration proceedings were based on the old Arbitration Act 1940 which requires the Award to be made rule of the Court before implementation, the award was filed in the court by the Contractor.
• However, MES filed their objections to set aside the award on the grounds that the Arbitrator has misconducted himself by giving an award which is against the law and available evidence.
• The main grievance of MES was against claim No.5 awarded by the Contractor in favour of the contractor which was for losses suffered by the contractor due to hold-ups and delay in work attributed to MES.
• MES contended that the award of this claim was against the specific condition of the Contract as stated in the Clause 11 (C) of GCC of MES Contracts which is part of the subject contract as well.
• As per Clause 11 (C) of GCC of MES, no claim for any compensation as a result of extensions granted by MES shall be entertained for any reasons. Therefore, MES contended before the Civil Court that Arbitrator has travelled beyond his jurisdiction by awarding against the terms of the contract.
• The Civil Court held that they cannot act as appellate court hearing the objections against the award in terms of limited jurisdiction of the Court as per the Section 30 of the Arbitration Act 1940.
• However, the Civil Court while making the award as Rule of the Court clearly stated that Arbitrator has decided the dispute within his jurisdiction and not acted beyond the scope of reference giving reasons in detail for such award.
• Aggrieved by the Judgment of the Civil Court, MES approached High Court of Uttrakhand at Nanital. The High Court Division Bench vide their judgment dated 10 July 2007 partly allowed the appeal specifically in respect of award for claim No.5 against the Clause 11 (C). The High Court accepted the plea of MES that the
delay in completion was attributed to the contractor himself for not having engaged adequate resources. Thus, the award only in respect of claim No.5 was set aside by the High Court on the ground that the Arbitrator travelled beyond the limits of the contract.

- Aggrieved by the decision of the Division Bench of the High Court of Uttrakhand at Nainital, the Contractor approached the Supreme Court.
- The Supreme Court held that the High Court was wrong in re-appreciating the evidence already led by the parties before the Arbitrator. The Arbitrator has given his decision based on thorough scrutiny and evaluation of the evidence giving elaborate reasons as well.
- The Supreme Court held that the Arbitrator has clearly stated that the MES was the defaulter for the delay in completion of the project by delaying the running payments, delaying several decisions including appointment of Anti-termite treatment (ATT) agency and increasing the plinth height of a building very late.
- The Supreme Court held that High Court has wrongly replaced its own opinion on appreciation of evidence by the Arbitrator which is not permissible as per Arbitration Act 1940.
- Therefore, Supreme Court while referring to various judgments on the related issue allowed the appeal by the contractor stating that Courts have very limited jurisdiction to interfere with the award given by an Arbitrator.

**How the dispute could have been resolved in a better way?**

**Suitably amending Extension of Time condition 11 of MES GCC**

- In a case specifically pertaining to MES GCC clause 11(C) *Ramnath International Construction (P) Ltd. v. Union of India* - 2007 (2) SCC 453 decided on 11 Dec 2006, the Supreme Court held that the clause clearly debars any claim of damages by the contractor in case extension of time has been obtained. The Court in that case held that such a clause is clear consent of both the parties to accept extension of time alone in satisfaction of claims for delay in lieu of claim for damages. Any award of damages by the Arbitrator against this specific clause of the contract shall tantamount to exceeding his jurisdiction.
- However, it is seen in the current case study as well as Case study No.14 and also Civil Appeal No. 2726 of 2004 (M/S Ravindra & Associates Vs UOI) involving
MES Contract as decided by the Supreme Court on 21 Oct 2009, the apex court has upheld the Arbitrator award in respect of damages for prolongation of the contract holding MES responsible for the delay. Thus, the defence of GCC clause 11 and Ramnath case are not serving the department in defending the case.

- It may be seen from all the three cases referred above as well as Case study No.05 that the Arbitrators are awarding the damages in various ways despite clause 11 of GCC and the courts including the apex court have upheld the decision of the Arbitrator on several occasions. Not just that, the amounts awarded as damages are actually the major proportion of the total awarded amount. In fact, the contractors are clubbing these claims with their minor technical claims and succeeding in getting huge award amounts in their favour.

- Therefore, we need to analyze these judgments and modify the clause 11 in such a way that the claim of damages by the contractor is not sustainable any further.

- The MES GCC clause 11 in respect of “Time, delay and extension” stipulates only 2 reasons (delay in issue of Stores and tools & plants) for delay attributable to department on the basis of which only extension of time can be granted without any entitlement for compensation. However, both these reasons have now become obsolete as Stores and T&P are seldom issued to the contractor by the department.

- The actual reasons for the delay attributable to MES leading to time overrun of the projects as seen from the various case studies in this research are mainly as under:
  - Delay in handing over of unencumbered free site
  - Change in site
  - Changes in structural design
  - Delay in giving decisions
  - Delay in payment of running bills
  - Frequent and major changes in scope of work
  - Delay in finalization of extra work
  - Delay in finalization of rates of extra items
  - Delay in appointing specialist agencies for certain works
  - Delay in giving revised designs and drawings

- All these reasons for delay are attributable to MES in routine but never accepted by the department to avoid claim of contractor for damages. Even the audit authorities bring out these defaults on the part of the department in their reports
regularly. Therefore, the Arbitrators have been awarding the damages to the contractors in respect of delays due to these reasons attributable to MES.

- Thus, if these are actual reasons attributable to the department and not the two reasons as specified in Clause 11, we need to specify these reasons in the clause 11 of MES GCC. Thus, in case of delays due to these reasons or any other reason attributable to MES, contractor shall be entitled only for extension of time for completion of work and not for any damages whatsoever.

- As per the Clause 5A of GCC of ONGC in respect of case study No.19, in the event of project getting delayed for any reason attributable to the department, the contractor will not be entitled to claim damages or compensation but shall be entitled only for extension of time for completion of work. This condition was accepted by the apex court to overturn any award of damages to the contractor. The Supreme Court judgment in that case has reinforced that any award against the clear terms of the contract shall be liable to be set aside. Such awards by the Arbitrator shall be considered to be made by exceeding his jurisdiction.

- However, in certain cases like Bharat Drilling & Treatment Pvt. Ltd. vs. State of Jharkhand & others in Civil Appeal No. 10216 of 2003 decided on 20th August, 2009, the Supreme Court has held that clauses like Clause 11 only prohibits the department from entertaining the claim, but not the arbitrator from awarding the damages.

- Therefore, if Arbitration Clause of MES GCC also stipulates that Arbitrator shall not award to the contractor any damages for delay on account of any reason attributable to department where suitable extension of time has been granted by the department, the Arbitrator shall also be barred from giving such damages in the award.

- Thus, in the current case study, by inclusion of such a clause litigation in various courts for 13 years could have been avoided as the main plea of the department against the award was in respect of damages.

- Not just this clause, MES needs to have such procedures in place so that the GCC can be amended and updated on regular basis to keep pace with the ever evolving law through recent case laws to take advantage rather than losing huge public money due to old and obsolete contract conditions.
5.14 Case Study No.14 (Military Engineer Services)

How the dispute arose?

- MES awarded a contract No. CECZ/COCHIN/3 of 86-87 to a contractor M/s. Asian Techs Ltd. for the work of “Provision of Lab and Administrative Block etc for NPOL at Kakkanad, Cochin” amounting to Rs. 3.59 Crore on 02 Sep 1986.

- The period of completion as mentioned in the contract agreement was 2 years. However, the work was completed in almost double the time on 30 Jun 1990.

- The Final bill was prepared by the MES on 27 Feb 1991. However, the Final bill was received by the contractor under protest on 07 May 1991.

- The Contractor invoked Arbitration on 10 Dec 1991 raising claims of Rs. 1.48 Crore and interest thereon.

- The appointment of Arbitrator was made after one year on 15 Dec 1992.
How the dispute was resolved?

ARBITRATION

- During the Arbitration proceedings, it was brought by the contractor that there were several breaches on the part of MES which culminated into delay in completion of the work on time.
- As per the contractor, several breaches attributed to MES during execution of the work were:
  - Change in location of site
  - Changes in design of building by omitting the basement floor
  - Delay in providing revised design resulting in suspension of work leading to idling of men and machinery and increase in cost of construction
  - Delay in giving decisions
  - Delay in supply of materials like steel reinforcements
  - Delays in running payments, under payments and non-payments of various legitimate payments
  - Delay in nomination of external agency to supply certain items as per contract provisions (Prime Cost Sum Items)
  - Non-finalization of rates for extra items ordered
- Even after completion, it was alleged by the contractor that his objections on wrong fixation of rates were not accepted. All rates were unilaterally fixed by the MES without considering his objections, thereby depriving him of huge legitimate dues.

Claims of the Contractor:

Claim No.01 & 02:

Compensation for extra expenditure made for works in prolonged period of contract:

- The contractor claimed Rs. 53 Lakh in respect of extra expenditure in carrying out works in the prolonged (extended) period of contract. The Arbitrator awarded an amount of Rs.15.50 Lakh against this claim.
Claim No.03:

**Compensation for maintenance of establishment in the prolonged (extended) period:**

- The contractor claimed Rs. 11 Lakh as compensation for maintenance of establishment in the prolonged (extended) period. The Arbitrator awarded an amount of Rs.7.10 Lakh against this claim.

Claim No.05:

- The contractor claimed Rs. 2.2 Lakh for additional lead for disposal of soil. The Arbitrator awarded an amount of Rs.1.10 Lakh against this claim.

Other Claims:

- There were several other claims mainly technical in nature where the contractor contended that less rates for extra items were fixed by the MES and accordingly less payment made. The Arbitrator although rejected some of the claims but awarded against several in favour of the contractor with the total against these items as Rs.16 Lakh.

- Thus, the Arbitrator awarded a total amount of Rs. 39.75 Lakh in favour of the contractor along with past and pendent lite interest @ 15% per annum each. The total amount payable within 2 months from the date of award after including past and pendent lite interest was Rs. 50.22 Lakh. Thereafter, the future interest liability @ 18% per annum to begin from date of award.

- All counter claims of the MES were rejected.

- The Arbitrator published the non-speaking award on 30 Dec 1993 in accordance with Arbitration Act 1940.

- The Award being based on Arbitration Act 1940 was filed in the Civil Court to which MES raised its objections. Some of the objections raised by MES and its disposal by the civil court were as under:
  
  - *The award being non-speaking is bad and vitiated:* The court held that under Arbitration Act 1940 and various judgments by the apex court, non-speaking awards are perfectly valid.
  
  - *The arbitrator does not have the power to award pendent lite interest:* The Court held that as per Supreme Court judgments awarding pendent lite interest by Arbitrator is perfectly valid.
- **Error apparent on the face of the award:** MES contended that the arbitrator allowed various claims of contractor violating contract provisions so there is error apparent on the face of the award. However, the Court held that in a non-speaking award with no documents appended, the ground of error apparent on the face of the award is not maintainable.

- **Arbitrator exceeding his jurisdiction:** MES took the plea of condition 11 of the GCC to plead that by awarding damages in claim No.1 to 3, the arbitrator has acted in violation of contract provisions and thus exceeded his jurisdiction. Even by arbitrating to re-fix the star rates for extra items where the decision of department official was final and binding as per contract condition 62 (G), the Arbitrator exceeded his authority. However, the court held that Court is not the appellate authority over the arbitrators to substitute its own evaluation more so in a non-speaking award where they cannot enter the mental process of the arbitrator.

- Thus, the Civil Court rejected all the objection raised by MES for setting it aside and made the award as a rule of the court on 08 Oct 1996.

- MES being aggrieved by the order of the Civil Court filed an appeal in the High Court of Kerela, Ernakulam (M.F.A. No. 452 of 1997 and CRP No. 1906 of 1998)

- The High Court set aside the non-speaking Arbitration award on 21 Mar 2002 on the grounds that all the claims except one were based on clauses 11 (C) and 62 (G) where the decision of the MES officer (CWE) shall be final and binding and hence they are beyond the purview of the Arbitrator as per the Arbitration Clause 70 of the contract. Thus, it was held that the Arbitrator acted beyond his jurisdiction.

- The issue was agitated by the Contractor before the Supreme Court in Civil Appeal Nos. 311-312 of 2003. The Supreme Court took cognizance of various correspondence exchanged during the construction period which clearly points out the defaults attributed to the MES leading to the delay in completion of the Project. Some of the documentary evidence noted by the Supreme Court were as under:
  - Engineer-in-Charge letter admitting suspension of work due to non-finalization of design of beams and roof slab of the building
  - Final User of the building under construction several times gave written directions to stop the work till their final decision on the matter.
– Several notices by the Contractor intimating about the idling of labour and machinery due to delay in supplying fresh design and drawings duly admitted by the Engineer-in-Charge
– Unconditional grant of extension of time by the MES
– Several notices by the Contractor for delays in running payments
– Several notices by the Contractor to close the contract agreement which was leading to huge losses on account of frequent stoppages of the work by MES/users
– Raising the issue of Non-finalization of rates of extra items by the contractor several times and the Engineer-in-Charge assurance that the same shall be settled in due course after completion of those items

- Thus, the Supreme Court was convinced that it was MES who was responsible for the delays, therefore, now they cannot take the shelter of Clause 11 (C) to avoid the claims of the contractor.

- The Supreme court also came to the rescue of the Contractor on the issue of decision of the MES officer (CWE) being final and binding stating that these may be applicable in case of nominal deviations but not when the entire scope of the work has been altered as is evident from the various documentary evidence.

- Some of the Case laws referred by the Supreme Court included Board of Trustees, Port of Calcutta vs. Engineers-De-Space-Age (1996) 1 SCC 516. The Supreme Court held that as per the Case law a clause like clause 11 of the MES Contracts can only prohibit the department to entertain the claim but not the arbitrator.

- The Supreme Court also held that in case of non-speaking awards the power of the courts to interfere is very restricted. Hence, it restored the award of the Arbitrator in its entirety and set aside the order of the High Court.

How the dispute could have been resolved in a better way?

Suitably amending Extension of Time condition 11 of MES GCC

- The case is similar to case study No.13. In the current case study as well as Case study No.13 and also Civil Appeal No. 2726 of 2004 (M/S Ravindra & Associates Vs UOI) involving MES Contract as decided by the Supreme Court on 21 Oct 2009, the apex court has upheld the Arbitrator award in respect of damages for prolongation of the contract. Therefore, the apex court held that after it has been
established by the Arbitrator that MES itself was responsible for the delay, the shelter of clause 11 is not available to them. Thus, the defence of GCC clause 11 and *Ramnath case* are not serving the department in defending the case.

- It may be seen from all the three cases referred above as well as Case study No.05 that the Arbitrators are freely awarding the damages to the contractor in various ways despite clause 11 of GCC and the courts including the apex court have upheld their decisions on several occasions in the recent past. Therefore, the Ramnath case judgment has been overruled several times as seen from these case studies.

- Therefore, we need to analyze these judgments and modify the clause 11 in such a way that the claim of damages by the contractor is not sustainable any further.

- The MES GCC clause 11 in respect of “Time, delay and extension” stipulates only 2 reasons (delay in issue of Stores and tools & plants) for delay attributable to department on the basis of which only extension of time can be granted without any entitlement for compensation. However, both these reasons have now become obsolete as Stores and T&P are seldom issued to the contractor by the department.

- The actual reasons for the delay attributable to MES leading to time overrun of the projects as seen from the various case studies in this research are mainly as under:
  - Delay in handing over of unencumbered free site
  - Change in site
  - Changes in structural design
  - Delay in giving decisions
  - Delay in payment of running bills
  - Frequent and major changes in scope of work
  - Delay in finalization of extra work
  - Delay in finalization of rates of extra items
  - Delay in appointing specialist agencies for certain works
  - Delay in giving revised designs and drawings
  - Suspension/stoppages of work by MES/users

- All these reasons for delay are attributable to MES in a routine but never accepted by the department to avoid claim of contractor for damages. Even the audit authorities bring out these defaults on the part of the department in their reports.
regularly. Therefore, the Arbitrators have been awarding the damages to the contractors in respect of delays due to these reasons attributable to MES.

- Thus, if these are actual reasons attributable to the department and not the two reasons as specified in Clause 11, we need to specify these reasons in the clause 11 of MES GCC. Thus, in case of delays due to these reasons or any other reason attributable to MES, contractor shall be entitled only for extension of time for completion of work and not for any damages whatsoever.

- As per the Clause 5A of GCC of ONGC in respect of case study No. 19, in the event of project getting delayed for any reason attributable to the department, the contractor will not be entitled to claim damages or compensation but shall be entitled only for extension of time for completion of work. This condition was accepted by the apex court to overturn any award of damages to the contractor. The Supreme Court judgment in that case has reinforced that any award against the clear terms of the contract shall be liable to be set aside. Such awards by the Arbitrator shall be considered to be made by exceeding his jurisdiction.

- The Supreme Court, in the current case study has referred to certain cases like Bharat Drilling & Treatment Pvt. Ltd. vs. State of Jharkhand & others in Civil Appeal No. 10216 of 2003 decided on 20th August, 2009, where the apex Court has held that clauses like Clause 11 only prohibits the department from entertaining the claim, but not the arbitrator from awarding the damages.

- Therefore, if Arbitration Clause of MES GCC also stipulates that there shall be no award to the contractor for damages for delay on account of any reason attributable to department where suitable extension of time has been granted by the department, the Arbitrator shall also be barred from giving such damages in the award being a pre-agreed contract clause.

- Thus, in the current case study, by inclusion of such a clause, not only the litigation in various courts for 16 years could have been avoided but the huge losses due to payment of damages to the tune of Rs. 23 Lakh plus interest could have been avoided.

- Not just this clause, MES needs to have such procedures in place so that the GCC can be amended and updated on regular basis to keep pace with the ever evolving law through recent case laws to take advantage rather than losing huge public money due to old and obsolete contract conditions.
### Case Study No.15 (Indian Railways)

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**How the dispute arose?**

The subject dispute pertains to two contract agreements signed between Indian Railways and two different companies M/s Concrete Products and Construction Company and M/s Kottukulam Engineers Private Limited signed on 30 Jan 1983 and 30 March 1984 respectively. The nature of work in both the contracts was same i.e. supply of monoblock concrete sleepers.

- Both the contracts were renewed afresh periodically by the railways for several years.
- The contract provided for supply of each sleeper at a specified rate based on certain standard rates of basic raw materials like cement and steel wires.
- The contract provided for variation in price of sleepers based on variation in price of basic materials.
The payments for the sleepers were made by the railways after thorough scrutiny of relevant documents to establish the increase in prices of basic raw materials.

The contracts were renewed with these parties in May 1997 with some variation in the escalation clause as per some new policy.

In July 1997 the railways realized that they have made some excess payment in the period 1989 to 1994 under escalation clause for the steel wires. Accordingly, an amount of Rs. 1.80 Crores was found recoverable from each of the contractors which were deducted from their payments due in the current running contracts.

Thus, this huge recovery by Railways from current contract for excess payment made several years back in different contracts made the contractors aggrieved and lead to the dispute.

**How the dispute was resolved?**

- Both the contractors challenged the recovery in the high court of Madras (Writ Petition No. 11805/1999 and 10814/1999).
- On the plea taken by the railways regarding the presence of arbitration clause in the contract, the high court appointed a retired judge as an arbitrator to adjudicate the dispute.
- This order of the single bench of high court was challenged by the contractor (Writ Appeal number 251 and 252 of 2000) pleading for appointment of arbitrator as per the contract conditions. These appeals of the contractors were allowed and the matter referred back to the single bench.
- The single bench instead of directing for appointment of arbitrator as per contract conditions straight away directed railways to refund the disputed amount deducted from the contractors’ dues along with the interest from the date of withholding to date of refund.
- The railways filed writ appeals to challenge the said order of single bench also asking for a stay on the implementation of the judgment. However, the appeals (Writ Appeal number 2822 and 2823 of 2001 along with Miscellaneous Petition number 21103 and 21104 of 2001) were dismissed by the division bench of Madras High Court on 30 April 2004.
• Thereafter the railways filed an SLP number 18244 and 18245 of 2004 in the Supreme Court which got converted to civil number 2999 and 3000 of 2005.

• However, the Supreme Court without going into the merits of the dispute referred the dispute for arbitration by a retired judge of Supreme Court.

• The Supreme Court while refereeing the dispute to arbitration took note of the arbitration clause in the contract and stated that this appointment being made against the contract conditions shall not be taken as precedent in future cases.

• The arbitration award was published on 24 June 2006 through which the railways were directed to not only refund the deducted amounts to the contractors but also the interest amount of approx. Rs. 2.30 Crores each along with future interest at the rate of 18% per annum from 01 Sep 2005 till date of payment to each contractor. Thus, the railways were directed to shell out approx. Rs. 4 Crores along with subsequent interests to each of the contractors.

• The Common arbitration award was challenged under Section 34 of the ACA 96 by the railways before the high court of Madras (O.P. number 142 and 143 of 2007).

• Simultaneously on 12 July 2007, the principal awarded amount was deposited by the Railways in the High Court of Madras. This amount was converted into interest bearing fixed deposit receipt at the High Court.

• The single judge bench dismissed the railways petition on 30 Nov 2010.

• The contractor approached Madras high court for payment of the awarded amount along with accrued interest from the amount deposited with High Court (application number 780 and 781 of 2011 filed in O.P. number 142 and 143 of 2007). This request of the contractors was upheld with the directions for disbursal of the amount to the contractor.

• Railways again filed an appeal in the Division Bench of the High Court praying that they were not accountable for payment of any interest for the period after deposit of principal amount in the High Court. However, this appeal of the Railways was also disallowed on 21 Mar 2012 by the Division Bench of the Madras High Court on the following grounds:
  – Railways never challenged the power of the Arbitrator to award interest or the award of interest before the single Bench.
The contract clause No.2401 being referred now before the division bench referring to no claim of interest on amounts retained or withheld by the Railways was only applicable for amounts not paid to the contractor but they cannot exercise lien on amounts already paid to the contractor.

- Thus, the Railways thereafter finally approached the Supreme court for relief through SLP (C) Nos. 5384-5385 of 2013 converted into Civil Appeal No. 2950-2951 of 2014.

- Although the appeal by the Railways was for setting aside the award but the Court basically considered only the interest issue as under:
  - Whether the contractor was entitled to any interest on the amount recovered and withheld by Railways.
  - If entitled, then for what period and rate of interest.

- The arguments put forward by the Railways before the Supreme court were as under:
  - High Court was wrong in interpreting that Railways had no authority to exercise lien over already released payments as the contract condition 2401 & 2403 allows such lien.
  - Arbitrator had no authority to award interest in view of Section 31 (7) of the ACA 96 which stipulates to award interest for past and pendent lite period only if the same is catered in the contract. And the contract condition 2401 & 2403 puts an embargo on entitlement of such interest.
  - There was no liability of the Railways to pay any interest after they deposited Principal amount in the High Court in 2007 (70% of which was released to the contractor along with the interest generated on 24 Apr 2011)

- The counter arguments from the contractor side were as under:
  - Railways had no authority to recover amounts accrued in a fresh contract on account of works performed earlier.
  - The claim of the Railways was time barred and accordingly rejected by the Arbitrator.

- The Supreme Court agreed with the arguments of the Railways and therefore held the following:
The award of interest by the Arbitrator against the terms of contract was incorrect. Hence, it was held that the contractor is not entitled to any interest payment up to the date of award.

The contractor becomes entitled for interest payment only from the date of award (26 June 2006) till the Principal amount was deposited in the High Court (12 July 2007).

The liability of the Railways to pay further interest was over once they deposited the Principal amount in the High Court subsequently converted into Fixed Deposit.

How the dispute could have been resolved in a better way?

- This is the only case amongst all the case studies under research where the government was at least able to save the embarrassment by just succeeding to avoid a substantial loss to the state at the final frontier before the apex court.
- However, the approach of the Railways in dealing can still be criticized as before making such a huge recovery, the legality and consequences of the action could have been ascertained through appropriate legal advice at the first place rather than trying to save the face by defending their action through 17 years long litigation.
- Notwithstanding above, after the recovery was held to be illegal at all the adjudicatory forums i.e. Arbitrator, Single bench and double bench of the High Court, the defence of the case by the Railways in Supreme Court is worth appreciation as they focused only on just one issue that of award of interest.
- Even the Supreme Court did not tinker with the award in respect of the legality or otherwise of the recovery amount and focused only on the issue of interest not just past and pedente lite but future interest as well.
- This judgment can be called as a landmark judgment in respect of issues concerning the award of past and pendente lite interest by the Arbitrator against the clear terms of the contract. Also, this judgment has cleared another issue in respect of interest liability after depositing the amount in the court.
As a result of the judgment, the Supreme Court at once struck down the interest payment of Rs. 2.30 Crore each in respect of both contracts as awarded by the Arbitrator.

Also, the payment of 18% per annum future interest on Principal amount of Rs. 1.80 Crore each with effect from 2007 (date of deposit in Court) to 2014 (Date of Judgment) which would have amounted to over Rs. 2.20 Crore in each of the contracts was also struck down.

Thus, it may be seen that overall financial impact of this judgment was over Rs. 9 Crore.

This is a landmark judgment in respect of the fact that Interest payments, which generally take astronomical proportion, if awarded against the terms of the contract can be challenged in the court and got expunged. Thus, it has set a precedent in respect of similar cases.

**Mandatory interim award payment (protected by BGB) before challenge in Court by either party:**

- Another better option available for dealing with such cases is the way NHAI has adopted the clause of mandatory interim award payment to the contractor immediately on the publishing of the award. In the return the contractor shall deposit a Bank Guarantee for the said amount. This will cease the liability of future interest of the department.

- With the past and pendente lite interest liability also eliminated as now confirmed by the apex court in case suitable contract clause as discussed above exists as in Railways and DMRC GCC, then the dilemma of challenging genuinely bad awards is overcome.
5.16 Case Study No.16 (Indian Railways)

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**CIVIL APPEAL NO. 6275 OF 2014**

- **Appellants**: Union of India (North Eastern Railways)
- **Respondents**: TRIPPLE ENGINEERING WORKS (Contractor)
- **Judge(s)**: J. RANJAN GOGOI, J. M. Y. EQBAL
- **Date of Supreme Court Judgment**: 13 Aug 2014
- **High Court**: High Court of Patna
- **Date of High Court Judgment**: 27 Jun 2012
- **Date of Contract**: 01 Nov 1993, 28 Apr 1994
- **Date of Completion**: Not Completed
- **Date of Termination**: 07 Nov 1994
- **Date of arising of Dispute**: 07 Nov 1994
- **Date of appointment of Arbitrator**: 1996
- **Date of Award**: Not yet Published
- **High Court Judgment**: In favor of Contractor
- **Final Judgment**: In favor of Contractor
- **Dispute Span**: 20 years
- **Current Status of Dispute**: Arbitration in Progress

**How the dispute arose?**

- Railways awarded 2 contracts for the work of ‘Setting up of Microwave towers at Muzaffarpur, Samastipur and Nansi Zones’ bearing No. CAO/CON/722 dated 01 Nov 1993 and No. CAO/CON/738 dated 28 Apr 1994 both to the contractor M/S Tripple Engineering Works.

- However, within 1 year and 6 months respectively of awarding the contracts, Railways terminated both the contracts on the same date i.e. 07 Nov 1994.

- The contractor alleged these terminations of the contracts as illegal and approached the Patna High Court (CWJC No.10574 of 1994) against the termination of the contracts.

- The writ petition filed by the contractor was dismissed by the Patna High Court on 15 Feb 1995 and directed the parties to Arbitration as per the contract conditions.

- The contractor appealed against the High Court order before the Supreme Court (SLP (Civil) No.17189 of 1995) but the Supreme Court on 11 Aug 1995 dismissed the appeal.
• Thus, the contractor got no relief even from the Supreme Court against the termination of the contracts. Hence as per the contract conditions, the contractor invoked Arbitration for adjudication of the disputes.

**How the dispute is being resolved?**

• An Arbitral Tribunal was appointed by the appointing Authority in Jun 1996 for adjudication of disputes.

• However, as in 2012, the Arbitration did not complete in one of the contracts and did not even commence in the other contract even after a lapse of over 16 years from the appointment of Arbitrators and 18 years after occurrence of the disputes.

• Therefore, the contractor approached the Patna High Court who appointed a Retired Sikkim High Court Judge as Arbitrator to adjudicate the dispute vide their judgment dated 27 Jun 2012.

• Railways filed an SLP (C) No. 20427 of 2013 converted to Civil Appeal No. 6275 of 2014 agitating the appointment of Arbitrator by the High Court against the terms of Contract.

• The reasons for the delay as brought out before the Supreme court were as under:
  
  – The Arbitration award not published till this SLP despite assertion by Railways that the proceedings are complete in respect of Contract No. CAO/CON/722 dated 01 Nov 1993:
    
    ▪ Frequent changes in the Arbitration panel due to retirement/transfer of appointed Arbitrators.

  – Arbitration proceedings did not even commence till this SLP was filed in respect of Contract No. CAO/CON/738 dated 28 Apr 1994 on account of following reasons:
    
    ▪ Contract was concluded by North Eastern Railway
    ▪ Thereafter, there was bifurcation of North Eastern Railway into North Eastern Railway and East Central Railway.
    ▪ The jurisdiction of the subject contract went to East Central Railway who disclaimed the responsibility in respect of Arbitration proceedings.
• The GCC of the contracts specified appointment of a three member panel as well as filling of vacancy from amongst the Railway officers only.

• The Supreme Court noted that the situation was disturbing and distressing as even after a lapse of two decades from the raising of the claims by the contractor against illegal termination of contracts, the resolution of dispute through Arbitration is still pending.

• The Supreme Court referred several recent judgments of the highest Court where Supreme Court had been forced to deviate from the contract conditions in appointment of Arbitrator.

• It noted that the Courts cannot be rendered powerless watching the dominating party making the mockery of Arbitration Process by keeping the arbitration proceedings pending for over a decade.

• Thus, the Supreme Court came down heavily on the Railways authorities in this case stating that the procedure and process under the ACA 96 has been rendered futile forcing the Court to depart from the agreed conditions of the contract for appointment of the Arbitrator.

• Thus, the Supreme Court dismissed the appeal of the Railways against the order of the Patna High Court appointing a Retired High Court Judge as Arbitrator.

**How the dispute could have been resolved in a better way?**

• This case is a perfect example of the abnormal delays in Arbitration proceedings to get the dispute resolved through this mandatory medium in government Infrastructure Contracts and helplessness of the Contractor.

• It is a pity that despite the absolute failure on the part of the Railway officers appointed as Arbitrators to proceed with the Arbitration and publish the award for a period of over 2 decades, the Railways authority decided to appeal before the Supreme Court to dismiss the order of High Court judgment appointing a retired judge as Arbitrator.

• The question needs to be asked about the quality of legal advice rendered in such “distressing and disturbing” circumstances, as noted by the Supreme Court, where Arbitration does not even commence in one of the cases for resolution of disputes for over 2 decades.
• Therefore, the Railways in this case should have proceeded with the Arbitration under the Arbitrator appointed by the High Court even if the same was not as per the contract conditions.
• The case clearly shows the ineffectiveness of the Ad hoc Arbitration controlled by the department officials.
• The remedy to encounter such type of situations is to go for Institutional Arbitration.

(a) Institutional Arbitration:

• Had there been institutional Arbitration clause in place in the contract conditions, such cases would become out of question.
• The institution with their strict rules and procedures in place monitors the progress of the Arbitration proceedings and shall never allow such situation to occur where the proceedings are just abandoned by the dominant party controlling the proceedings.
• The institution shall ensure that Award is published in the stipulated time.
• Even the parties shall be conscious of the fee and expenses attached with each hearing and would not try to drag the proceedings so as to increase the cost of Arbitration abnormally.
• The panel of the Institution is generally composed of highly experienced Arbitrators in the field of dispute, therefore, the quality of awards shall be of high standards as compared to the Ad hoc system in vogue in the government departments.
• Considering that each award before publishing by the Arbitrator is scrutinized by a technical committee of experts of the institution, the quality of award would further enhance and shall be difficult to set aside in the courts.
• Thus, the percentage of cases going to litigation shall reduce drastically. Hence, the cost of litigation which is generally the major part in dispute resolution process and the connected accumulation of interest liability shall be eliminated.
• Thus, it is high time that the myth around Institutional Arbitration being costly is broken.
• Further, considering the major reason of delay as brought out in the current case of frequent changes in the Arbitration panel due to retirement/ transfer of appointed Arbitrators shall be eliminated as the Arbitrators on the panel of the
Institution are dedicated Arbitrators mostly retired professionals with rich experience in the field of the dispute. Therefore, there shall be continuity from the Arbitrator side and strict discipline to enforce timelines of the rules of institution in holding the Arbitration proceedings and publishing the award on time.

- The reasons like bifurcation and jurisdiction of the contract going to a different entity who disclaimed the responsibility in respect of Arbitration proceedings shall not hold good once there is a provision of Institutional Arbitration. Such situations like not commencing the Arbitration for decades are dealt with by the exparte Arbitration proceedings after sufficient notice in Institutional Arbitration.

- In the current case judgment, the Supreme Court has referred another case involving Railways as decided by the apex court (2009) 4 SCC 523 (Union of India Vs. Singh Builders Syndicate, 2009) where the Court has criticized this policy of serving officers of one party being appointed as Arbitrators. The Court has suggested that government should phase out such Arbitration Clauses providing serving officers as Arbitrators and encourage professionalism in Arbitration.

- Ministry of Law and Justice in a Consultation paper (Ministry of Law and Justice, 2008) in respect of Proposed Amendments to Arbitration and Conciliation Act 1996 has also elaborated all the advantages of Institutional Arbitration over Ad hoc Arbitration. One of the most important advantages being an experienced committee to scrutinize the arbitral awards before the award is finalized reducing the possibility of the court setting aside the award.

- The Law Commission in its 246th report on Amendments to Arbitration and Conciliation Act 1996 (Law Commission of India, Aug 2014) as published in Aug 2014 has also advocated for encouraging institutionalizing the Arbitration in India by professional Arbitral Institutes by proposing suitable clause in the Act itself.

- Thus, there is an urgent need to bring professionalism in the Arbitration by opting for Institutional Arbitration to resolve the disputes in an expeditious, effective and more professional manner to the situations as in the current case study.
How the dispute arose?

- However, alleging default of the contractor in late commencing the work and thereafter executing poor quality of work, the Railways terminated the contract.
- The balance work was completed by Railways through a fresh contract on the risk and cost of the defaulting contractor.
- The contractor raised its claims and invoked Arbitration clause for appointment of Arbitrator on 30 Sep 1996.
- However, the Railways defaulted in appointing the Arbitrator forcing the contractor to approach the Calcutta High Court under section 11 (6) of the ACA 96 for appointment of the sole Arbitrator on 03 Jan 1997.
- The Calcutta High Court appointed a retired High Court Judge as the Sole Arbitrator on 10 July 1998.
How the dispute was resolved?

- The Railways participated in the Arbitration Proceedings which culminated in the publishing of the award by the Arbitrator on 25 Jan 2002.
- The Arbitrator awarded Rs. 1.30 Crore in favour of the contractor.
- Railways approached the High Court of Calcutta for setting aside the award under section 34 of ACA 96. However, the application of the Railways was dismissed by the High Court on 28 Oct 2003.
- Thereafter, the appeal of the Railways before Division Bench of the High Court was also dismissed on 15 Jun 2005.
- Therefore, the Railways filed an appeal in the Supreme Court bearing SLP (Civil) No. 20316 of 2005 which got converted to Civil Appeal No. 5618 of 2006.
- The arguments put forward by the Railways before the Supreme court were as under:
  - The appointment of a High Court Judge as Arbitrator by the High Court was against the contract conditions of appointing only Railways Officer as Arbitrator.
  - Thus, the composition of the Arbitral Tribunal was wrong and the Arbitrator did not have jurisdiction to adjudicate.
  - The Arbitrator had no powers to adjudicate on certain excepted matters.
- The arguments put forward by the contractor before the Supreme court were as under:
  - The lack of jurisdiction was never raised before the Arbitrator under section 16 of ACA 96 by the Railways. Therefore, the Railways have waived their right to object in respect to composition of the Arbitral Tribunal.
  - Even in respect of the excepted matters, no objections were raised during arbitration proceedings and claims were decided by the Sole Arbitrator on merits.
- The Supreme Court after hearing arguments of both sides observed the following:
  - As the Railways failed to appoint the Arbitrator within the requisite 30 days time limit, the Contractor approached the High Court for appointment of Arbitrator.
– As the High Court order of Appointment of a Judge was not challenged by the Railways, it becomes final and binding.
– As no objection with regard to jurisdiction/qualification was raised by the Railways during the Arbitration Proceedings, section 4 (Waiver of Right to object) of ACA 96 debars them from raising the plea before the court now.

- Thus, the Supreme Court held that having waived their right to object with respect to lack of jurisdiction before the Arbitrator in accordance with section 16 of ACA 96, Railways cannot be allowed to raise such objection for the first time in the court. Hence, the appeal of Railways was dismissed.

**How the dispute could have been resolved in a better way?**

(a) **Performance Guarantee forfeiture in lieu of Risk and cost contract:**

- The case pertains to the contract much before the policy of Performance Guarantee forfeiture in lieu of Risk and cost contract was implemented by Railways.
- This is yet another case where the government has lost out despite incurring extra expenditure on completion of balance work through a risk and cost contract after cancelling the original contract. Thus, not only did the government failed to recover the additional expenditure from the defaulting contractor but on the contrary had to heavy damages (Rs. 1.30 Crore) to the contractor.
- Thus, the strategy of risk and cost has again failed to deliver the requisite results and on the contrary has back fired leading to heavy losses of public funds.
- However, Railway Board vide their order No. 2003/CE-I/CT/4/PT.I dated 16/5/2006 amended their GCC to introduce the policy of Performance Guarantee forfeiture in lieu of Risk and cost contract. The balance work to be got done independently without any risk and cost of the original contractor who shall be debarred from participating in the tender for balance work.
- Thus, had the condition of forfeiture of performance guarantee been there in the case study contract there would have been better chances of contractor completing the work.
- The immediate prospects of losing out on 5% performance guarantee amount works as stronger deterrent than the government getting the work completed at his
risk and cost to recover the excess expenditure from him in the future. More so when in almost all case studies discussed, the government has failed to recover the amount from the contractor despite long and costly legal battle right up to the Supreme Court level.

- Moreover, the government department after forfeiting the contractor’s performance guarantee need not run around in litigation for years as in the case of the recovery required for risk and cost cases as the government’s demand from the contractor is satisfied with this contractual forfeiture.

- The process of forfeiture is convenient for the government than to first establish the recovery in Arbitration and litigation and thereafter try to recover from the contractor.

- The process of dispute resolution shall be faster even if the contractor tries to reclaim his forfeited amount through Arbitration and litigation as he becomes an active participant than when he avoids the process in case of risk and cost process.

- However, the contract clause in respect of forfeiture needs to be drafted suitably so that in the eventuality of contractor succeeding in reclaiming the amount, the interest liability does not accrue.

(b) Decision on implementation/ challenge of award by Independent Technical Committee:

- This is yet another prime example of immature dealing with Arbitrator’s award by the decision makers of the government while deliberating to implement/ challenge the award.

- The grounds on which the award was challenged in the courts were required to be raised before the Arbitrator. However, by not challenging the same before the Arbitrator, the government authority waived its right to raise the issue before the courts for the first time.

- This shows that the awards are challenged by the decision makers just for being un-favourable despite the fact that there are no valid grounds to challenge. This not only leads to in-fructuous wastage of time and efforts of the government machinery but also leads to loss of huge public money in the form of astronomically increasing interest liability during litigation generally running at least for a decade in various courts. In the present case the litigation ran for a total
period of 12 years in courts and 4 years in Arbitration. Thus the dispute spanned for a period of 18 years but the government did not get anything out of it except for losing the face and the public money.

- Therefore, this reinforces that the team responsible for defence of Arbitration should be delinked from the recommending committee which should give unbiased opinion about the chances, if any, of success in the litigation so as to arrive a practical decision to implement or challenge the award.

(c) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):

- Another, issue that emerges from this case is about reluctance of government authorities to acknowledge the emergence of dispute. Their initial tendency is to wrap the dispute under the carpet by not responding to the claims of Contractor and requests for appointment of an Arbitrator. It is seen that this period of delay ultimately harms the interest of the government only.

- This delay actually weakens the defence of the government as all the officials who dealt with case during execution are changed owing to transfer/retirement. Thus, the new officials who take charge defend the case only on the basis of documents available and are unable to highlight the real situations and defaults made by the contractor. Thus, there is nobody to challenge the claims of the contractor whether genuine or frivolous. Otherwise there is no logic that despite defaulting with abnormal delays in completing the work, the contractor is able present his case as a victim and gets all the damages whereas the government always ends up as loser.

- Thus, there is an urgent need to acknowledge the dispute raised by the contractor. This will be possible when a forum is given to the contractor like that of DRB/DRC which is independent from the project handling officials and where he can raise claims as his contractual rights.

- Fast resolution of disputes shall be beneficial not only for both the parties but for the smooth completion of the project with minimum cost and time overrun.

(d) Avoiding Interest Payments:

Mandatory interim award payment (protected by BGB) before challenge in Court by either party:
The contract condition of mandatory interim award payment protected by Bank guarantee before challenging the award in the court shall save huge losses due to future interest which carries a rate of 18% per annum as per ACA 96 in case not specifically mentioned in the award.

Thus, in case this condition is made applicable, the huge interest liability can be eliminated even in case the government does not succeed in the litigation or the litigation prolongs for several years as in the present case where litigation ran for 12 years.
5.18 Case Study No.18 (Central Public Works Department)

1 Case No. CIVIL APPEAL NOS. 3349 OF 2005
2 Appellants M/S J.G Engineers Pvt. Ltd. (Contractor)
3 Respondents Union of India (CPWD)
4 Judge(s) J. R V Raveendran, J. Markandey Katju
5 Date of Supreme Court Judgment 28 Apr 2011
6 High Court High Court of Guwahati
7 Date of High Court Judgment 08 Feb 2005
8 Date of Contract 26 Mar 1993
9 Date of Completion Not completed (Risk & Cost)
10 Date of Cancelation 14 Mar 1996
11 Date of appointment of Arbitrator 14 Feb 1997 (On Court directions)
12 Date of Award 22 Sep 2001
13 Award In favor of Contractor (22 Sep 2001)
14 Dist Court Judgment In favor of Contractor (12 Dec 2003)
15 High Court Judgment In favor of CPWD (08 Feb 2005)
16 Final Judgment In favor of Contractor (28 Apr 2011)
17 Dispute Resolution Span 15 years
18 Current Status of Dispute Award implemented

How the dispute arose?

- CPWD awarded the contract for the work of extension of terminal building at Guwahati Airport to the Contractor M/s. J.G. Engineers Pvt. Ltd. on 26 Mar 1993.
- The original period of completion as per the contract was 21 months.
- The contractor delayed the completion of first phase of the project forcing CPWD to terminate the contract on 29 Aug 1994. However, the contract was got restored by the contractor with 31 Jan 1995 as the extended date of completion with the intervention of the Guwahati High Court.
- However, the contractor was unable to complete the work even after 14 months beyond the extended date of completion for which no further extension of time was granted by CPWD.
- Thus CPWD again terminated the contract on 14 Mar 1996.
- The contractor again challenged the cancellation in the Guwahati High Court by filing a writ petition but the High Court referred the parties to arbitration on 25 Jun 1996 in accordance with the arbitration clause.
The balance work was completed by CPWD through another agency at the risk and cost of the defaulting contractor.

**How the dispute was resolved?**

- The arbitrator was appointed by the appointing authority of CPWD on 14 Feb 1997.
- The Arbitrator published the award in Sep 2001 where it was held by him that the termination of contract by CPWD was illegal.
- Therefore, all the claims of CPWD, including risk & cost amount, were rejected.
- On the contrary, the Arbitrator awarded several claims in favour of the Contractor with a combined amount of over Rs.1 Crore along with pendent-lite as well as future interest both @ 15% per annum.

Some of the major claims as decided by the Arbitrator are as under:

**Claims of Contractor**

**Claim No.1-3:**

**Claim regarding balance payment for work done including extra items:**

- An amount of over Rs. 23 Lakh in respect of balance payment of work done including the extra items was awarded by the Arbitrator in the favour of Contractor against these claims.

**Claim No.5,7,8,9:**

**Claims pertaining to extra expenditure made by the contractor during extended period in respect of escalation in rates of works and “On & Off site” overhead and establishment expenses:**

- An amount of over Rs. 41 Lakh in respect of the above claims was awarded by the Arbitrator in the favour of Contractor.

**Claim No.11:**

**Claim pertaining to loss of anticipatory profit @ 15% on account of balance work not allowed to be completed due to termination of contract:**

- An amount of over Rs. 39 Lakh in respect of the above claim was awarded by the Arbitrator in the favour of Contractor.
Apart from the above referred major claims, certain minor claims were also awarded in favour of the contractor taking the total principal amount awarded to Rs. 1.05 Crore in favour of Contractor.

The Arbitrator also awarded pendent-lite as well as future interest both @ 15% per annum on the entire awarded amount in favour of the contractor. The total amount payable on the date of award was over Rs. 1.75 Crore.

**Claims of CPWD:**

**Claim No.01**
Risk and cost amount of getting the balance work executed through an alternative agency:
- Against the total claim of Rs.1.47 Crore, the Arbitrator awarded NIL amount to CPWD in view of the fact that cancelation was held to be illegal by the Arbitrator.

**Claim No.02**
Liquidated damages levied on account of delay in completion of the work:
- Against the total claim of Rs. 57 Lakh, the Arbitrator awarded NIL amount to CPWD.

**Claim No.03**
Escalation that would be payable to the alternative agency in execution of remaining work (tentative)
- Against the total claim of Rs.75 Lakh, the Arbitrator awarded NIL amount to CPWD.

Thus, making the department responsible for all the delays and illegal cancelation of the contract, the Arbitrator awarded NIL amount in favour of CPWD against a total claim of Rs. 2.79 Crore made by CPWD.

Aggrieved by the award, CPWD filed the application under section 34 of the ACA 96 with the District Court at Guwahati for setting aside the award. However, the application was dismissed by the Court on 12 Dec 2003 holding that none of the grounds under section 34 (2) were applicable.

Thereafter, the matter was pleaded before the Guwahati High Court by the department who overturned the order of the District Court on 08 Feb 2005.
The appeal made by CPWD contended that the award was made in respect of matters pertaining to ‘excepted matters’ which could not be adjudicated by the Arbitrator being beyond the scope of the arbitration.

The High Court accepted the plea made by CPWD and set aside the award and remitted the matter back to the arbitrator for review.

Contractor aggrieved of the High Court Judgment, appealed before the Supreme Court.

Supreme Court held that the decision of specified department official on the issue of responsibility for the delay or validity of termination cannot be termed as final and binding or covered under the excepted matters.

In case there is no dispute as to who committed the breach, the consequential issues relating to quantification can be said to be final and binding. In case the contractor admits his breach or if the Arbitrator holds the contractor responsible for the breach, the decision of the specified department authority shall be final in regard to those issues. Thus, in that case even the actual expenditure made in getting the balance work completed through an alternative agency as decided by the CPWD authority shall be final and binding.

The Supreme Court held that the issue as to the other party committing the breach cannot be decided by the party alleging breach. Thus, it held that a contract cannot provide that one party will decide whether he or the other party committed breach and that it can be decided only by an adjudicatory forum: a court or an Arbitral Tribunal.

Thus, the Supreme Court held that the issue regarding fixing of the responsibility for the delay in execution of the work was arbitrable.

Thus, the Supreme held that the Arbitrator was right in deciding that it was the department who was responsible not only for the delay but also for illegal cancelation of the contract.

Thus, once the issue was decided by the Arbitrator against the department, it had no right to claim levy liquidated damages or the extra cost in getting the work completed through an alternative agency.

Thus, the Supreme Court upheld the award made by the Arbitrator and set aside the order of the High Court.
- The final amount paid by CPWD (including past, pendente lite and future interest) to the contractor is Rs. 3,40,87,876/- which is almost double the amount payable on the date of award which is attributable to the litigation.

**How the dispute could have been resolved in a better way?**

**Analysis of the case:**

- It is the same old story as the contractor despite not proceeding with the work with due diligence and failing to complete the work, ultimately has the last laugh by not only getting rid of the risk and cost amount penalty but also making a huge buck out of his failure.

- The department has no other choice but to mandatorily slog for several years (15 years in the current case study) to claim the risk and cost amount and end up on the losing side time and time again.

- In case we can motivate the contractor: positively as well as negatively, towards timely completion of the work, we cannot only relieve the department from long legal battle but also can get the satisfaction of successful completion of the project without cost and time overrun.

  (a) **Performance Guarantee forfeiture in lieu of Risk and cost contract**

  **AND**

  **Introduction of bonus clause:**

- The positive motivation for contractor to timely complete the work can be given by including a clause of bonus amount for early completion of the work. CPWD has now included the bonus clause in their GCC where for early completion by each week, \( \frac{1}{2} \% \) of the project cost as bonus is given to the contractor subject to maximum of 5% bonus. This is a huge motivation for the contractor to complete the work before time.

- The negative motivation or the deterrent can be introduced as already introduced by CPWD by the clause of obtaining the performance guarantee of 5% upfront from the contractor and forfeiting it in case of default in completing the work by the contractor.

- **How does these clauses are work better than the policy of Risk and Cost:** The policy of completing the balance work after cancelation of the contract on the risk and cost of the original contractor also acted as a deterrent or negative motivation.
for the contractor. However, it failed to make immediate adverse impact on the contractor as he did not lose anything. Generally, they already have taken all their legitimate dues for the proportion of work executed and the future liability of risk and cost amount is not immediately affecting their cash flow. On the other hand, if 5% of the entire project cost is forfeited, it does impact their cash flow strongly and most immediately.

- Similarly, the prospect of gaining bonus up to additional 5% by early completion of the project can act as a huge motivation rather than facing the music of long legal battle to avoid the risk and cost penalty.

- For the government also, firstly establishing the risk and cost amount through arbitration/litigation has proved to be a thorn in the flesh as invariably in all cases where contractor has participated in the arbitration proceedings, government has not succeeded in establishing the claim as legal. In case, mainly in exparte arbitrations where contractor abandons even the arbitration process, it becomes extremely difficult to first locate the contractor and then to ascertain his property details to recover the amount through execution petition.

- Therefore, in the case of forfeiture of performance guarantee at least the burden of tracing the person and then his property details shall be avoided. The requirement of filing execution petitions by the department shall not be there once the performance guarantee is with the department. Even in cases where the department is actually at fault in cancelling the contract, the contractor shall be a more active participant in the adjudicatory forums to expeditiously get the dispute resolved to reclaim his performance guarantee. Thus, with both parties actively participating in the dispute resolution process the dispute span which as seen in majority of case studies is generally more than a decade gets reduced drastically specifically when prolongation of dispute span is not producing any interest gain to the contractor with suitably drafted clauses.

(b) Avoiding Interest Payments:

**Mandatory interim award payment (protected by BGB) before challenge in Court by either party:**

- The contract condition of mandatory interim award payment protected by Bank guarantee before challenging the award in the court shall save huge losses due to future interest which carries a rate of 18% per annum as per ACA 96 in case not
specifically mentioned in the award. In the present case an additional payment of Rs. 1.66 Cr as future interest apart from Rs. 70 Lakh as pendente lite interest was actually paid by government.

- Thus, in case this condition is made applicable, the huge interest liability can be eliminated even in case the government does not succeed in the litigation or the litigation prolongs for several years as in the present case where litigation ran for 10 years. This is a fit case where making immediate award payment against a bank guarantee from the contractor would save over Rs. 1.66 Crore of public money due to future interest.

- Thus, in case such policy, of mandatory interim award implementation protected by bank guarantee before challenging the award in the successive courts, is adopted it shall go a long way in resolving the dispute in effective manner as the winning party gets the awarded amount and the losing party eliminates future interest liability.

**Contract Clause to debar Arbitrator from awarding past and pendente lite interest**

- Simultaneously, a clause similar to that adopted by Indian Railways and DMRC pertaining to interest on arbitration award should be included in the GCC to clearly debar the arbitrator from awarding any interest on the principal awarded amount till the date of the award. Thus, no past and pendente lite interest shall be allowed on the awarded amount. This shall be in line with the clause 31 (7) (a) ACA 96 where the freedom has been given to the parties to agree on such arrangement. The same has also been upheld by the apex court in various judgments as also seen from the case study No.15 in respect of Indian Railways. Even in this case study, the loss of public money to an extent of Rs. 70 Lakh on account of pendent lite interest could have been achieved if such clause existed in the GCC.

**Suitably amending Extension of Time condition in GCC**

- The GCC in respect of Extension of Time need to specify that in the event of project getting delayed for any reason attributable to department, the contractor will not be entitled to claim damages or compensation but shall be entitled only for extension of time for completion of work. The Arbitration clause should also
specify clearly that Arbitrator shall not award to the contractor any damages for delay on account of any reason attributable to department.

- The Arbitrators have been awarding the damages to the contractors in respect of delays due to reasons attributable to department. However, the Supreme Court judgment in case study No.19 in respect of ONGC has reinforced that any award against the clear terms of the contract shall be liable to be set aside. Such awards by the Arbitrator shall be considered to be made by exceeding his jurisdiction.

- Therefore, after the condition stipulates that Arbitrator shall not award to the contractor any damages for delay on account of any reason attributable to department, the Arbitrator shall be barred from giving such damages in the award.

- Thus, in the current case study, public money to the tune of 40% actually wasted could have been saved by inclusion of such a clause.
## 5.19 Case Study No.19 (OIL & NATURAL GAS CORPORATION LTD.)

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<tr>
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<td>Case No. civil appeal no.8817 of 2010 (arising out of slp (c) no.12188/2009)</td>
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<td>2</td>
<td>appellants: ONGC Ltd</td>
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<td>3</td>
<td>respondents: M/S Wig Brothers Builders and Engineers Pvt Ltd (contractor)</td>
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<td>4</td>
<td>judge(s): J. r v raveendran, J. h l gokhale</td>
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<td>5</td>
<td>date of supreme court judgment: 08 oct 2010</td>
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<td>6</td>
<td>High court: High Court of Uttrakhand at Nainital</td>
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<td>7</td>
<td>date of high court judgment: 14 July 2007</td>
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<td>8</td>
<td>date of contract: 20 Sep 1983</td>
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<td>9</td>
<td>original date of completion: 05 Jun 1985</td>
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<td>10</td>
<td>extended date of completion: 31 Dec 1986</td>
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<td>11</td>
<td>actual date of completion: 31 Dec 1986</td>
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<td>12</td>
<td>arbitration invoked by: Contractor</td>
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<tr>
<td>13</td>
<td>date of invoking arbitration: 24 Sep 1988</td>
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<td>14</td>
<td>date of appointment of arbitrator: 27 May 1989</td>
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<td>15</td>
<td>award: in favor of contractor (28 Nov 1994)</td>
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<td>16</td>
<td>dist court judgment: in favor of contractor (21 Sep 2002)</td>
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<td>19</td>
<td>dispute resolution span: 22 years</td>
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<td>20</td>
<td>current status of dispute: Modified Award implemented</td>
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### How the dispute arose?

- ONGC awarded a construction contract bearing No. 21/83-84 on 11 Oct 1983 to the contractor M/S Wig Brothers Builders and Engineers Pvt Ltd for the Construction of Multistoried Administrative Building at Dehradun for an amount of Rs.2.52 Crore.

- The date of commencement of the work was 05 Oct 1983 and the time period for completion as per the contract was 20 months.

- However, there was a delay of 19 months in completion of the Project. Certain disputes arose between the parties and the contractor invoked Arbitration on 24 Sep 1988.

- The Arbitrator was appointed by the Appointing Authority on 27 May 1989 to adjudicate the claims of contractor and counter claims of ONGC.
How the dispute was resolved?

* As per the GCC, the Arbitrator had to be a serving officer of ONGC. During the period of Arbitration proceedings the Arbitrator got promoted and thereafter retired from service. However, the Arbitrator continued with the Arbitration proceedings and published his award after retirement.

* The various claims of both parties as decided by the Arbitrator were as under:

Contractor’s Claims

Claim No.01

Compensation for damages due to prolongation of contract period:

- The Arbitrator held that both the parties committed breaches and were equally responsible for the delay of 19 months.
- Therefore, the Arbitrator awarded damages for half the extended period only @ Rs. 1 Lakh per month for a period of 9.5 months amounting to total of Rs.9.50 Lakh in favour of the contractor.

Claim No.02

Escalation for work completed during extended period:

- Again as the Arbitrator held both parties equally responsible for the delay of 19 months, he awarded half of the claim of Rs. 15.60 Lakh as per the calculations i.e. Rs. 7.80 Lakh in favour of the Contractor.

There were several other minor claims of technical nature and those of interest. Against the total claims of the contractor aggregating to Rs. 83 Lakh, the Arbitrator awarded an amount of Rs. 25 Lakh which was inclusive of 12% pendente lite interest up to the date of award. The Arbitrator awarded 6% as future interest on the awarded amount.

Claims of ONGC:

Claim No.1:

Rate of interest on Capital blocked

Amount Claimed: Rs. 42 Lakh
Claim No.2:
Non-utilization of Premises due to delay in completion of the building
Amount Claimed: Rs. 68 Lakh

Claim No.3:
Penalty due to delayed completion @ 10% per annum
Amount Claimed: Rs. 14 Lakh

- All the above referred counter claims of ONGC aggregating to Rs.1.24 Crore were rejected by the Arbitrator finding no merits in the claims.

- The award being based on Arbitration Act 1940 was filed before the Additional District Judge Dehradun (Civil Misc. Case No. 4 of 1995) for making it rule of the court. ONGC filed its objections to set it aside. Main objection of the ONGC was that the Arbitrator has misconducted himself by exceeding his jurisdiction against the facts and ignoring all documentary evidence placed before it.

- The contractor contended that there was no legal defect in the award and needs to be made rule of the court.

- The Additional District Judge held that no misconduct on the part of the Arbitrator could be established and hence made the award as rule of the court by judgment dated 21 Sep 2002.

- ONGC being aggrieved of the Judgment preferred an Appeal before the High Court of Uttrakhand at Nainital (A.O.No. 348 of 2002).

- ONGC pleaded before the High Court that as the Arbitrator has given his award after retirement against the terms of the Arbitration clause which requires a serving officer of the ONGC to be an Arbitrator, he has misconducted himself.

- However, the High Court did not buy this argument of ONGC and held that as ONGC was truly in picture of the facts regarding the promotion and retirement of the Arbitrator during the Arbitration proceedings. Even after the knowledge of the facts, ONGC never objected at that point of time and continued with the Arbitration and even gave its consent to continue Arbitration proceedings up to 30 Nov 1994. Therefore, they cannot take such a plea after completion of Arbitration proceedings and publication of the award to allege that the Arbitrator has misconducted.
Another plea taken by the ONGC to get the award set aside was that since the contractor himself was responsible for delay in completion of the project hence he is not entitled to be compensated with any damages for prolongation of the contract period. Even the Arbitrator in his award had held that both the parties were equally responsible for the delay of 19 months.

However, the High Court held that as ONGC had extended the period of completion by granting time extension without levying any compensation, the Arbitrator awarded a sum of Rs. 9.5 Lakh as damages at the rate of Rs. 1 Lakh for a delay of one month for 9.5 months delay on account of ONGC instead of 19 months as claimed by the contractor.

The High Court held that there is very limited scope to interfere with the award as per the Arbitration Act 1940 that too when the award is non-speaking one. The High Court commented that the court cannot enter the mental process of the Arbitrator for reaching his conclusions. Thus, the court did not find any infirmity with the award on this account.

As regards the award of interest is concerned, the High Court held that as the Arbitrator has held both parties responsible for the delay so the High Court decided to halve the rate of interest from 12% to 6% per annum in respect of pendent lite interest. Apart from this no other modification in the award was made by the High Court and the remaining award was left intact by the High Court judgment dated 14 July 2007.

ONGC still felt aggrieved by the judgment of the High Court and appealed against the judgment of the High Court to the Supreme Court. (Civil Appeal No.8817 of 2010 arising out of SLP (C) No. 12188/2009)

The Supreme Court held that the Court while considering an application under section 30 and 33 of Arbitration Act 1940 will not sit as an appellate authority over the award by re-appreciating the entire pleadings and records. The Court shall not consider any plea regarding wrong conclusion arrived at by the Arbitrator by failure to appreciate some material facts. However, only if some legal misconduct is apparent on the face of the award or in conduct of the Arbitration proceedings, the court can interfere with the award.
Therefore, in the subject case the court only focused on one issue of award of claim to the contractor for compensation for loss on account of prolongation of contract period due to default of the ONGC.

The Supreme Court noticed the presence of a clause 5A which specifically bars claim of damages when extension of time has been granted by ONGC for completion of project. As per the clause 5A, any default by the ONGC like delay in handing over of site in time, delay in giving instructions or drawings or any act which leads to delay in completion of project, etc then the only relief available to the contractor shall be extension of time and no other compensation or damages shall be payable to the contractor on this account. Thus, this clause covers all types of defaults attributable to ONGC for which no damages shall be paid to the contractor if extension of time has been granted by ONGC.

Thus, the Supreme Court held that presence of such clear provisions in the contract has been ignored by the Arbitrator while awarding Rs. 9.50 Lakh to the contractor.

The Supreme Court referred various Case laws of the Supreme Court on similar cases to prove the point. Relevant portion of the case Associated Engineering Co. v. Government of A.P. - 1991 (4) SCC 93 referred by the Supreme Court says that if the Arbitrator fails to arbitrate within the terms of the contract, he acts beyond jurisdiction.

Similarly, relevant portion of the case Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises - 1999 (9) SCC 283 referred by the Supreme court says that the Arbitrator is the creature of the contract and in case he awards an amount by departing from the specific provisions of the contract the same shall amount to misconduct and even mala fide action.

Another case referred by the Supreme Court was that of Ramnath International Construction (P) Ltd. v. Union of India - 2007 (2) SCC 453. The case specifically pertains to MES where a condition similar to clause 5A of contract clause 11(C) of the General Conditions of Contract clearly debars any claim of damages by the contractor in case extension of time has been obtained. The Court in that case held that such a clause is clear consent of both the parties to accept extension of time alone in satisfaction of claims for delay in lieu of claim for damages. Any award
of damages by the Arbitrator against this specific clause of the contract shall tantamount to exceeding his jurisdiction.

- Therefore, the Supreme Court in the subject case held that the award requires interference being given in violation of the contract provisions. Thus, the Supreme Court set aside the award against this single claim of Rs. 9.50 Lakh and interest thereon keeping the balance award intact.

**How the dispute could have been resolved in a better way?**

(a) Dispute Redressal Committee (DRC) / Dispute Review Board (DRB):

- It has been observed from the document analysis of the Arbitration Award of the current case study that there were several minor claims of technical nature which were rejected by the department during the construction period.

- Had there been a provision of DRB in the contract conditions, these minor claims could have been decided by the DRB during the time of construction. The Arbitration award in respect of these claims is just above Rs. 2 Lakh which is just 0.8% of the contract amount of Rs. 2.52 Crore.

- Once these minor issues were resolved during the construction period to the satisfaction of both the parties, the probability of contractor invoking Arbitration would have been reduced. It is observed through experience as also seen in the case study No.06 that the claims for damages are added by the Contractor along with the core claims while invoking arbitration. In the case study No. 06 also once the contractor was refused the core claim of chase cutting in walls for concealed wiring, he added claim of damages due to prolongation of contract of Rs. 15 Lakh as well. Had the contractor succeeded in getting the Arbitrator appointed, the auxiliary claim could well have been awarded in his favour as seen in several other case studies in the current research. In the current case study also the major claims i.e. Claim No. 1 & 2 and the consequent interest claims (awarded amount Rs.23 Lakh out of total award amount of Rs. 25 Lakh) appear to be clubbed to the basic technical claims as auxiliary claims and finally got favour from the Arbitrator in the final award.

- Thus, the provision of DRB is helpful in early resolution of the dispute as against the actual dispute span of over 22 years in the current case study.
(b) Amicable settlement through Conciliation/ Mediation:
- As discussed above that had the minor claims by the contractor decided early during the construction period to his satisfaction, may be through Conciliation/mediation, the chances of invoking Arbitration for auxiliary claims with substantial amounts would have been reduced.
- Thus, had the minor claims of technical nature of the contractor settled through conciliation/mediation, the liability of ONGC would have been only Rs. 2 Lakh.
- ONGC has already included conciliation in its contract conditions and several of its disputes are being settled through conciliation. As per information obtained through RTI, ONGC have signed 30 settlement agreements in the last five years (2009-2014) through Conciliation.
- Thus, settlement agreement signed in respect of minor technical claims would have helped in resolving the dispute expeditiously and economically rather than 22 years long legal battle as in the current case study.

(c) Avoiding Interest Payments:
- Contract Clause to debar Arbitrator from awarding past and pendente lite interest
- A clause similar to that adopted by Indian Railways and DMRC pertaining to interest on arbitration award should be included in the GCC to clearly debar the arbitrator from awarding any interest on the principal awarded amount till the date of the award. Thus, no past and pendente lite interest shall be allowed on the awarded amount. This shall be in line with the clause 31 (7) (a) ACA 96 where the freedom has been given to the parties to agree on such arrangement. The same has also been upheld by the apex court in various judgments as also seen from the case study No.15 in respect of Indian Railways. Even in this case study, the loss of public money to an extent of Rs. 5.6 Lakh on account of pendente lite interest could have been achieved if such clause existed in the GCC.

How can MES improve its GCC taking a leaf out of this case study?
- One good thing that has come out of this otherwise unfavourable case for the department (ONGC) is the reinforcement by the apex court that any award against
the clear terms of the contract shall be liable to be set aside. Such awards by the Arbitrator shall be considered to be made by exceeding his jurisdiction.

- As per the Clause 5A of GCC of ONGC at the time of subject contract, in the event of project getting delayed for any reason attributable to ONGC, the contractor will not be entitled to claim damages or compensation but shall be entitled only for extension of time for completion of work.

- The MES GCC clause 11 in respect of “Time, delay and extension” stipulates only 2 reasons for delay attributable to department on the basis of which only extension of time can be granted without any entitlement for compensation. However, both these reasons have now become obsolete. (Stores and tools and plants are seldom issued to the contractor by the department, therefore, the reason of delay in issue hardly arises)

- Therefore, we need to specify, in the condition 11 of MES GCC, all reasons for delay attributable to MES in routine (including any other reason) but never accepted by the department to avoid claim of contractor for damages. Even the audit authorities bring out these defaults on the part of the department in their reports regularly. However, the Arbitrators have been awarding the damages to the contractors in respect of delays due to these reasons attributable to MES.
## 5.20 Case Study No.20 (Indian Oil Corporation Ltd.)

1. **Case No.:** Civil Appeal No.1282 of 2011 [Arising out of SLP [C] No.11903/2010]
2. **Appellants:** Indian Oil Corporation Ltd. (IOCL)
3. **Respondents:** M/S SPS Engineering Limited (Contractor)
4. **Judge(s):** J. R V Raveendran
5. **Date of Supreme Court Judgment:** 03 Feb 2011
6. **High Court:** High Court of Delhi
7. **Date of High Court Judgment:** 08 Dec 2009
8. **Date of Contract:** 17 Oct 2000
9. **Date of Completion:** 17 Nov 2001
10. **Date of Actual Completion:** Not completed (Risk & Cost)
11. **Date of Cancelation:** 29 Oct 2002
12. **Arbitration invoked by:** Contractor
13. **Date of invoking Arbitration:** 18 Nov 2002
14. **Date of appointment of Arbitrator:** 17 Mar 2003 (On Court directions)
15. **Date of Award:** 27 Oct 2008
16. **Award:** In favor of Contractor
17. **Second Arbitration invoked by:** IOCL
18. **Date of invoking Arbitration:** 22 Jan 2009
19. **High Court Judgment u/s 11 of ACA 96:** In favor of Contractor (08 Dec 2009)
20. **Final Judgment u/s 11 of ACA 96:** In favor of IOCL (02 Feb 2011)
21. **Dispute Resolution Span:** 12.5 Years +
22. **Current Status of Dispute:** Pending In High Court in respect of 2\textsuperscript{nd} award

### How the dispute arose?

- IOCL awarded a contract amounting to Rs. 16.61 Crore for Construction of drinking water system for its Paradip Refinery Project to M/S SPS Engineering Limited on 17 Oct 2000 with 13 months as the period of completion.
- However, IOCL terminated the contract on 29 Oct 2002 on alleged default of the contractor to have completed only 16% of the work in over 2 years time as against overall time of 13 months allotted for entire completion of the work.
- IOCL notified to the contractor for getting the balance work completed through an alternative agency on his risk and cost as per contract conditions.
- Therefore, the contractor invoked Arbitration on 18 Nov 2002 requesting IOCL for appointment of the Arbitrator as per contract conditions.
• However, the IOCL did not appoint any Arbitrator forcing the contractor to approach Delhi High Court under section 11 of ACA 96 for appointment of an Arbitrator (Arbitration Application No.35 of 2003)
• The Delhi High Court disposed off the application by appointing a retired Judge of High Court as the Sole Arbitrator on 17 Mar 2003.

How the dispute was resolved?
• IOCL moved an application before the Arbitrator under section 16 of ACA 96 claiming that the claims of the contractor were not arbitrable under the terms of the contract.
• However, the Arbitrator decided on the application by holding that 3 out of 8 claims of the contractor were not arbitrable and went ahead with arbitration proceedings in respect of other 5 claims.
• During the Arbitration proceedings, the contractor contended that the delay in completion was totally attributed to various breaches on the part of IOCL stated as under:
  - Not providing the approach road from Main Highway to the site even till the termination of the contract. This lead the contractor to use alternate route for transportation of men, material and machinery which was 57 km longer
  - Failure to handover unencumbered free site
  - Delay in release of Mobilization advance
  - Delay in approval of drawings
  - Change in layout of reservoir twice
  - Final layout being finalized only four months before termination of contract
  - Changes in scope of the work
  - Delay in obtaining statutory approvals
  - Delay in finalization of extra work
  - Delay in payment of running bills
  - Hindrances created by the local mafia
  - Withdrawal of sale tax holiday granted by Orissa Government to the project leading IOCL to put on hold the entire project work of Paradip Refinery
• Therefore, the contractor contended that IOCL had illegally terminated the contract and encashed its Bank guarantees amounting to Rs. 2 Crore.

• IOCL participated in the Arbitration proceedings, filed their counter claims and refuted all the above referred breaches which the contractor alleged against them. As per contract conditions, IOCL was not under any obligation to prepare the approach road. There was a katcha feeder road available being used by Contractor to bring men and material. It was only in case of heavy machinery that the contractor had to take a longer route by a few km. All other contentions of the contractor were also adequately refuted by IOCL to the satisfaction of the Arbitrator.

• On the contrary, IOCL held contractor responsible for delay in completion of work leading to termination of the contract due to:
  - Inadequate resource mobilization
  - Poor finance management
  - Failure to achieve scheduled targets
  - Abandonment of the work for almost 6 months prior to termination by IOCL

• The Arbitrator after considering all the pleadings and arguments held that the contractor was responsible for the delay in completion of the project on time. Therefore, he held that the termination of the contract by the IOCL was justified and valid. However, the claims of both parties as decided by the Arbitrator were as under:

Claims of Contractor:

Claim No. 01:

Balance amount of final bill:
The initial claim of the contractor was Rs. 4.84 Crore. However, during the Arbitration proceedings, the amount was revised by the contractor to Rs. 38.6 Lakh. As the same was concurred by the IOCL, the Arbitrator awarded Rs.38.6 Lakh in favour of the contractor against this claim.
Claim No. 02:
Refund of three Bank guarantees amounting to Rs. 2 Crore as encashed by IOCL:

As per the GCC of the IOCL, the Bank Guarantees in respect of initial security deposits (2.5%), retention money (7.5%) and mobilization advance were open to be encashed after termination of the contract on default of the contractor. However, there is no clause of forfeiture of these Bank Guarantees. Only for the purpose of adjustment for risk and cost amount, these could be encashed. Therefore, the contractor claimed them back.

The Arbitrator held that after adjusting the amounts of encashed bank guarantees against mobilization advance balance amount of Rs.51.1 Lakh shall be payable by IOCL to the contractor against this claim.

Claim No. 03:
Refund of excess deductions made by IOCL:

Against a claim of Rs. 42 Lakh, the Arbitrator awarded an amount of Rs.1.61 Lakh in favour of the contractor.

- The following three claims (No.4, 5 & 6) of the contractor were held to be un-arbitrable by the Arbitrator:

Claim No. 04:
Compensation of 15% loss of profit and overheads in respect of balance work not allowed to be executed due to termination: Rs. 1.93 Crore

Claim No. 05:
Financial charges and interest charges for furnishing Bank Guarantees: Rs.20 Lakh

Claim No. 06:
Damages for loss of reputation and goodwill: Rs.3 Crore

Claim No. 07:
Pre-suit, pendent lite and future interest @ 18% per annum

The Arbitrator did not award any pre-suit and pendent lite interest in accordance with the contract provisions. However, it awarded 12% future interest in case the awarded amount was not paid within 3 months of the date of award.
• The Arbitrator awarded an overall amount of Rs. 91 Lakh in favour of the contractor. The Arbitrator also awarded an amount of Rs. 11 Lakh in favour of IOCL for their counter claims. Thus, the Arbitrator awarded a net amount of Rs. 80 lakh in favour of the contractor in the award published on 27 Oct 2008.

Risk and cost claim of the IOCL:
• However, despite holding the termination of the contract as justified the Arbitrator did not award any amount against the claim of IOCL on account of extra expenditure made by getting the work done through alternate agency on risk and cost of the contractor.
• The Arbitrator held that after termination of the contract on 29 Oct 2002, the balance work has still not been executed. The extra amount spent by IOCL would have been payable in case the balance work was got executed within reasonable time after termination. Thus, in the absence of any evidence of incurring such excess expenditure being produced before the Arbitrator, the claim was rejected.
• The award was not challenged by IOCL in the court. Thus, the award became final and binding for implementation.
• As per the IOCL GCC the risk and cost amount shall be demanded from the contractor on completion of the work through risk and cost contract, the defect liability period is over and full and final payment to the alternate agency has been made. Only after that the excess amount recoverable from the defaulting contractor shall be crystallized for demand.
• Therefore, when the risk and cost contract was completed on 29 Dec 2007, final bill of alternate agency made on 07 May 2008 and defect liability period of 01 year was over on 29 Dec 2008, IOCL calculated the actual extra expenditure made and amount to be recovered from the contractor.
• As per the calculations made by the IOCL an amount of Rs. 4.56 Crore was recoverable from the contractor. Therefore, they deducted the amount of Rs. 80 Lakh as awarded by the Arbitrator in favour of the contractor from this amount and raised a demand of Rs. 3.76 Crore from the Contractor through a notice dated 22 Jan 2009.
• Simultaneously, IOCL also stated that this notice be treated as notice for invoking arbitration in case the amount is not paid within 7 days. They also sent a panel of
3 names for selection of one by the Contractor as a Sole Arbitrator as per the Arbitration Clause of the Contract. One name in the panel was that of the earlier Arbitrator as well.

- The contractor contended that since the claim of risk and cost has already been rejected by the earlier Arbitrator which was not challenged by IOCL within the limitation period, hence, there was no requirement of further arbitration on the issue.
- As per the Arbitration clause in case the contractor does not give his nominee for selection as Arbitrator, IOCL shall select the Arbitrator of its own from the panel. Thus, IOCL would have been well within their rights to select the Arbitrator and proceed with Arbitration.
- However, IOCL instead of itself selecting an Arbitrator as per the Contract provisions decided to file an application under section 11 of the ACA 96 before the Delhi High Court for appointment of the Arbitrator to adjudicate the claim of extra expenditure through risk and cost of the contractor.
- The IOCL application was rejected by the Delhi High Court on 08 Dec 2009 on reasons of:
  - res judicata i.e. the claim of IOCL having already been adjudicated by the Arbitrator
  - claim being barred by limitation
  - As the risk and cost contract was completed 10 months before publishing of the award by the earlier Arbitrator, the claim of actual extra expenditure should have been agitated in that arbitration.
  - Malafide and mis-conceived Petition

- Aggrieved by the High Court judgment, IOCL appealed before the Supreme Court.
- The issues framed by the Supreme Court were as under:
  - Whether the High Court while considering an application under section 11 of ACA for appointment of Arbitrator is right in examining the tenability of a claim
  - Whether the High Court was right in declaring the claim to be barred by res judicata and the petition as mis-conceived and malafide
The Supreme Court vide its judgment dated 03 Feb 2011 held that the High Court while considering an application under section 11 of ACA 96 is not expected to consider the issue of res judicata of a claim. Considering res judicata will require extensive study of claims, pleadings and award of first arbitration and claims and pleadings for second Arbitration. The issue as to the claim is barred by res judicata has to be decided by the Arbitrator after examining all the above referred documents and hearing both parties.

As regards the claim of extra cost on account of risk and cost being rejected by the arbitrator in the first round Arbitration, the Supreme Court held that since at the stage of Arbitration, IOCL had not actually incurred the extra cost, thus the claim was considered as premature to be decided at that stage. Thus, the rejection at that stage actually implied adjudication at a later stage when the actual excess expenditure is determined.

It was held that tenability of the claim without pleadings and supporting documents cannot be decided at the stage of appointment of Arbitrator. It stated that section 11 does not envisage considering the claim or chances of its success.

Thus, the Supreme Court held that the High Court has errored in arriving at a decision that the claim of risk and cost amount was barred by limitation and mala fide without substantiating it.

However, Supreme Court did not concur with the approach of IOCL in deducting the amount already awarded to the contractor from their claims while making the demand from the contractor. It said that the award amount is an ascertained sum due recoverable by executing it as a decree, whereas, extra cost incurred by IOCL is still a claim still to be adjudicated. Thus, IOCL was wrong in adjusting the amount due against a mere claim. Therefore, IOCL was directed to make the payment of the awarded amount to the contractor and plead their claim of risk and cost before the Arbitrator.

The previous Arbitrator who adjudicated in the first Arbitration was appointed by the Supreme Court again to decide the claim of IOCL in respect of excess cost. However, the Supreme Court accorded full freedom to both the parties to raise all their pleas regarding limitation, tenability of the claim and res judicata before the Arbitrator without being biased by any opinion of the apex court made in the judgment in regard to the merits of the claim.
Second Round of Arbitration:
- Based on the Supreme Court directions dated 03 Feb 2011, second round of Arbitration began with the same Arbitrator who published the first award. The second award was published by the Arbitrator on 17 Sep 2012.
- Although, in the first arbitration the Arbitrator had accepted that the cancelation of the contract by IOCL was legal and IOCL was entitled to the risk and cost amount. However, since at that point of time the risk and cost amount was not finalized therefore the claim could not be awarded.
- In the second Arbitration, the arbitrator held that the claim of the IOCL was time barred in accordance Article 55 of the Limitation Act. The Arbitrator held that the cause of action for claiming the compensation in the form of risk and cost amount arose on cancelation of the contract in 2002. Thereafter, as per Article 55 of Limitation Act, this compensation could be claimed within 3 years. However, since the IOCL did not go about completing with the balance work, requiring 9 months, in right earnest, therefore, they cannot be allowed to postpone the commencement of the period of limitation by not performing its own obligation in reasonable time.
- Thus, the Arbitrator held that the claim of risk and cost of IOCL is hopelessly time barred as the period of limitation of three years as per Article 55 of limitation act has elapsed in 2005.
- The Arbitrator further held that IOCL has not been able to produce evidence to show the value of balance work in case the same was executed in a reasonable time say in 2003 by the other agency at the risk and cost of the defaulting contractor. Thus, the Arbitrator held that if the claim was not time barred the reasonable compensation to be allowed to the claimant IOCL shall be Rs. 80 Lakh as against Rs. 4.5 Crore claimed by IOCL.
- Thereafter, IOCL filed an application under section 34 of ACA 96 to get the award set aside in the High Court of Delhi on 02 Jan 2013 bearing No. O.M.P.-9/2013. The case has since been listed 6 times in the Delhi High Court however till date success has not been achieved to locate the contractor to serve him the copy of petition despite a lapse of 2 years. This is a set pattern in such cases where the contractor after obtaining his part of dues does a vanishing act when it comes to his turn in returning the favour. The same scenario is seen in the parallel case as discussed in case study No.11 where the contractor after collecting Rs. 5.32 Crore
from the MES against an award in one contract has not been traceable for recovery of over Rs. 2 Crore in a parallel case during the same duration as the first case.

- Thus, in the current case study the government department (IOCL) after cancelation of the contract has not yet been able to recover the risk and cost amount despite a long legal battle of 12.5 years and still trying to locate the contractor.

- On the other hand the contractor has already received his final dues. The saving grace is that the arbitrator has not awarded any damages to the contractor in this case study as the termination of the contract has been held as valid and on clear default of the contractor.

- Thus, these cases clearly expose the efficacy of the strategy of risk and cost.

**How the dispute could have been settled in a better way?**

(a) **Performance Guarantee forfeiture in lieu of Risk and cost contract:**

- The GCC of the IOCL in the subject contract did have a provision of Performance Guarantee. However, there was no provision of forfeiture of the Bank Guarantee in case of termination of the cost. Instead, there was a provision to get the balance work executed on the risk and cost contract of the defaulting contractor. The provision of encashing the Performance Bank Guarantee was to withhold the amount to cover for the excess amount to be incurred for completion of the balance work.

- Thus, had the contractor not got the Arbitrator appointed by the interference of the court at an early date, the Arbitration would have progressed only after the defect rectification period of the risk and cost contract was over in accordance with the contract conditions.

- Thus, in that scenario, there would have been no requirement of second round of Arbitration and the claim of IOCL towards extra expenditure made for completion of the work on risk and cost of the contractor would also have been decided simultaneously.

- However, in the current case study, the best option would have been the clause of forfeiture of performance guarantee amount. As the Arbitrator has clearly held that the contractor was responsible for the delay and IOCL was justified in
termination of the contract, therefore, the forfeiture of Performance Guarantee would have been held to be valid in accordance with the contract provisions.

- Thus, after forfeiture of the performance guarantee, there would have been no delay on proceeding with the Arbitration and there was no requirement for the contractor to approach court for appointment of the Arbitrator.
- Even, there would have been no requirement of second Arbitration as in the current case study.
- As per the direction of the Supreme Court, IOCL was not allowed to adjust the arbitration award ascertained sum in favour of the contractor with the Risk and cost claim amount. Thus, the amount of Rs. 80 Lakh was required to be paid to the contractor.
- IOCL has failed in the second round of the Arbitration as well to claim the risk and cost amount. Now IOCL is in the court for over last two years and the contractor is nowhere to be located. Thus, all efforts to get the risk and cost amount have proved to be hopeless.
- However, in case there was a clause of 5% performance guarantee (Rs. 83 Lakh), its forfeiture would have almost compensated the awarded amount (Rs. 80 Lakh + future interest) in favour of the contractor. As the awarded amount of Rs. 80 lakh in favour of contractor was not contested by IOCL and the Arbitrator holding the cancelation as valid and the compensation to IOCL if not time barred. So, the forfeiture of performance guarantee as compensation would was also hold valid. This would have resolved the dispute without the second round of litigation, second round of Arbitration and third round of litigation. This would have been in the interest of both the parties.
- Thus, this case study shows the benefits of such clause in reducing the time span of the dispute by avoiding the litigation up to Supreme Court and the second spell of Arbitration and needless litigation thereafter.