

CIAC



**Proceedings**  
**of**  
**“UNCTRAL INDIA WORKSHOP”**  
**held on 16<sup>th</sup> February 2015 at Scope Complex**  
**Lodhi Road. New Delhi.**

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## **I. “UNCITRAL INDIA WORKSHOP -2015”**

With a view to provide a focus on the emerging trends in international arbitration, to promote the effective use of Arbitration / Mediation and Institutional Arbitration/ Online Dispute Resolution (ODR) in Construction Industry, the **“2015 UNCITRAL INDIA WORKSHOP ON DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY”** “was organised on Monday, 16<sup>th</sup> February, 2015 at Mirza Ghalib Chamber, Scope Convention Centre, Lodhi Road, New Delhi, jointly by UNCITRAL- RCAP and Construction Industry Arbitration Council (CIAC).

UNCITRAL – Regional Centre for Asia & the Pacific (RCAP) is the core legal body of the United Nations system in the field of international trade law, with universal membership specializing in commercial law reform worldwide for over 40 years. UNCITRAL’s business is the modernization and harmonization of rules on international business, whereas

Construction Industry Arbitration Council (CIAC) was established in June, 2006 as a non-profit society jointly by Construction Industry Development Council (CIDC) and Singapore International Arbitration Centre (SIAC) to provide an institutional mechanism for resolution of construction and infrastructure related disputes.

Following topics, focusing on best practices and presenting case studies were discussed in the said workshop:-

- \* How to Promote the Use of Arbitration / Mediation
- \* UNCITRAL – Arbitration Rules, 2010 (Revised) - its Overview, Issues & Challenges.
- \* ODR- Suitability for Construction Industry.
- \* Institutional Arbitration – its Challenges & Benefits over Adhoc Arbitration.

Twelve (12) Technical papers were received from the eminent Engineers, Judges & advocates, out of which only six (6) papers were selected for presentation. i.e 2 Papers for each technical session. This was in addition to the International speaker for each session from UNCITRAL. A C.D. ( Soft Copy) contains the UNCITRAL- Arbitration Rules 2010 ( Revised), 12 Technical papers of eminent authors received for the seminar, “UNCITRAL INDIA WORKSHOP” Programme were provided to the delegates attending the said workshop apart from the CIAC- Brochures & other literature of relevance. Authors who presented their papers includes Christopher to- Executive Director, Construction Industry Council of Hong Kong, Mr. G C. Kabi, Arbitrator, Ministry of Urban Development, Mr Neeraj Aarora, Cyber Lawyer and Forensic Expert, Prof Rajesh Sharma, City University of Hong Kong , Justice I P Vashist ( Retd), Er. O.P Gupta, VSM, Acting Registrar, CIAC, Prof Oh Soogeun (Ewha Women's University, Seoul, South Korea and former Chair of UNCITRAL's Working Group III), Shri Anil Changaroth, Advocate & Solicitor, Singapore & Mr Gaurishanker Dubey, Former ED, SAIL & Sr Advisor, JSPL. Each technical session was chaired By S/Shri R.K. Misra, C. S. Prasad both Director General, CPWD (Retd) & Dr. B.D Mundra, Chairman, Simplex Infrastructures Ltd.

It was a unique opportunity when UNCITRAL organised such a Workshop in India **jointly with CIAC which was highly appreciated & welcomed.**

**II. Proceedings of the “UNCITRAL INDIA WORKSHOP” held on 16<sup>th</sup> February 2015 at Scope Complex Lodhi Road, New Delhi.**

**Opening Session**



Hon’ble Mr. D. Sadananda Gowda, Union Minister of Law & justice, while Opening the “UNCITRAL INDIA WORKSHOP” on 16<sup>th</sup> February, 2015 at New Delhi Stressed that there is a need of adopting methods & processes to resolve the business disputes to ensure a robust & conducive work environment to meet the requirements of building the infrastructure. While inviting Construction Industry Arbitration Council to work with the Law Ministry, Hon’ble Minister emphasized the need of resorting to the Institutional Arbitration in place of the Ad hoc Mode of Arbitration. Hon’ble Minister informed that the Ministry of Law & Justice would develop a Panel of Bodies providing Institution Arbitration and further advised the Govt. Departments & Public Enterprises to include Institutional Arbitration Clause in their contracts. Hon’ble Minister also stress the need of On- Line Dispute Resolution (ODR) in view of planning of Smart Cities. Hon’ble Minister while distributing the certificates of competence to various experts empanelled by

CIAC as Institutional Arbitration Specialists gave special emphasis on training a strong Cadre of specialists as Arbitrators as well as Mediation & Conciliation Experts. He further appreciated the services of CIAC being carried out for the construction Industry. Hon'ble Minister further desired that the Recommendations of the UNCITRAL – INDIA WORKSHOP be referred to his ministry for taking into Consideration the outcome of this workshop while making final recommendations for amendments in Arbitration & Conciliation Act, 1996.

Shri P.K. Malhotra, Hon'ble Secretary, Legal Affairs, Ministry of Law also stressed for making necessary recommendations to incorporate as amendments in the Arbitration & Conciliation Act, 1996 which is under consideration for amendment, so that the law & Rules made there under should not leave any gaps.

After the Opening Session, three Technical Sessions were held. The recommendations drawn on the basis of the deliberations in each Technical Session – Technical Session wise are:-

#### **1.0 Technical Session I –Arbitration**

1.1 Arbitration & Conciliation Act, 1996 is based on UNCITRAL MODEL LAW. UNCITRAL ARBITRATION RULES – 2010 (Revised) are well designed & most effective tools for dispute resolution in construction industry. Arbitration & Conciliation Act, 1996 is under revision with the Ministry of Law, G.O.I. New Delhi. Therefore the additional provisions made in the UNCITRAL- ARBITRATION RULES, 2010 (Revised) may be considered by the Ministry of Law & incorporated in the present Arbitration & Conciliation Act, 1996 (under revision).

1.2 UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (Model Provision) 2003, which have 52 model provisions including model provision 52- relating to the Audit & Appraisal system for PPPs required to be implemented.

1.3 “UNCITRAL” declared to set up a “Centre in India” jointly with the “Construction Industry Arbitration Council” for Construction Industry Dispute Resolutions, which was welcomed.

1.4 To set up National Regulator for Arbitration to regulate various arbitral institutions

- 1.5 Development of infrastructure for knowledge and skill through education and reform in higher education policy in India with specialisation in arbitration for professionals of various fields.
- 1.6 Creating data base on arbitration and sharing information.
- 1.7 Liberalisation of practice of arbitration through cross national professionals with reciprocal arrangement.
- 1.8 Codified Construction Law with law against unconscionable terms of contracts and third party rights when contract is made for benefit of such parties.
- 1.9 Establishment of time table of arbitral proceedings in 1<sup>st</sup> hearing with fee discussion of parties.
- 1.10 Notice of arbitration and response must and to include the details of statement of claim and defence respectively.
- 1.11 Time period of written statement be reduced to 45 days.
- 1.12 Arbitrator / wrongdoer to be held liable for intentional wrongdoing.
- 1.13 Allow the respondent and arbitral tribunal make third parties as party to proceedings provided they are the arbitration agreement party to payment to avoid multiplicity of parties.
- 1.14 Making of Award from date of reference be within 4 months, if claim amount is less than I crore. within 6 months, if claim amount is more than crore & within 30 days from, the close of hearing as laid down in Manual on CIAC - Arbitration Rules,2013
- 1.15 Before issue of final Award made by the Arbitral Tribunal, the Institution would review that award for any illegality in the award made as provided in Manual on CIAC- Arbitration Rules.2013

## **2.0 Technical Session II – Mediation & Institutional Arbitration**

### 2.1 - Mediation

- 2.1.1 Mediation is a flexible settlement technique, conducted privately and confidentially, in which a Mediator acts as a neutral facilitator to help the parties try to arrive at a negotiated settlement of their dispute where the parties have control over both the decision to settle and the terms of any settlement agreement.
- 2.1.2 Since Mediation is flexible, the mediation procedure can be adapted to the needs of the parties, including their cultural and legal backgrounds, and the specifics of the dispute. In establishing and conducting the mediation, the Mediator is guided by the wishes of the parties and treats them with fairness and impartiality.

2.1.3 During the mediation, the Mediator may hold meetings or conference calls with all of the parties present and may also hold separate meetings or calls with each of the parties alone.

2.1.4 In the course of the mediation, the parties can exchange settlement proposals, which may lead to a negotiated agreement. Such proposals can be made directly between the parties or through the Mediator.

2.1.5 Since control over the decision to settle and the terms of any settlement agreement remains with the parties, the Mediator has no power to impose a settlement on the parties

2.1.6 Mediation takes significantly less time than arbitration or litigation and involves lower costs.

2.1.7 Mediation can be a particularly useful tool when the parties in dispute have an on-going relationship

2.1.8 Mediation is likely to be less disruptive to that relationship than litigation & arbitration

2.1.9 Mediator skills training is a programme of comprehensive training in effective dispute resolution, where participants be trained is the skills required for effective mediation of commercial disputes.

2.1.10 CIAC may also start training of interested individuals for empanelment as Mediator like empanelment of Arbitrators on CIAC's, Arbitration Panel, which is pioneer in Human Resource Development in Arbitration.

## **2.2 Institutional Arbitration**

### **2.2.1 (i) Arbitration V/S Litigation & Mediation**

Arbitration compared to litigation has dominated the scene of dispute resolution

for the better part of the preceding centuries. Arbitration offers almost unlimited party autonomy and procedural flexibility. Unlike Mediation, arbitration delivers the certainty of a final and binding award.

### **2.2.2 (ii) Drew Backs in Ad hoc Arbitration**

- Ad hoc arbitration are known to be continuously suffering from diffident legal & practical problems like rushing to court for orders on ordinary

procedural matters and even in fixation of their fee itself- all this results in excessive delays & increased costs. Whereas an institutional arbitration is one in which a specialised institution intervenes and takes on the role of administering the arbitration process

- While selecting the Institution the factors to be considered- are -nature & commercial value of the dispute, rules of the institution as these rules differ, past record and reputation of the institution and also that the institutional rules are in tune with the latest developments in international commercial arbitration practice.

### 2.2.3 Institutional Arbitration is most suited for Dispute Resolution in Construction Industry Because

- Ad hoc arbitration is expensive than institutional arbitration. Arbitrations are generally conducted by people who are not conversant with arbitration laws.
- Lack of cooperation between the parties or delay on the part of the tribunal conducting the arbitration or writing the award leads to court intervention. Litigation costs would negate the cost advantages of ad hoc arbitration,
- For complex cases the tribunal may seek to appoint a secretary to deal with the considerable administrative work involved. The additional costs of the secretary's fees will add to the cost burden of the arbitration.
- An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as according to the rules of that institution.

### 2.2.4 Make India an International Institutional Arbitration Hub

The time has come that India should come up as hub for arbitration. Indian laws, Arbitrators and Infrastructure are fully competent to tackle the International Institutional Arbitration. We have already taken Initiative in this direction, but we have to create a confidence at International Level. An arbitration clause is incorporated in the tenders at National Level, so that Foreign Companies are legally bound for International Institutional Arbitration in India. India can beat the world in International Institutional Arbitration.

### **3.0 Technical Session -III -Arbitration**

- 3.1 ODR is a merging of information technology and traditional ADR to create a new efficient, cost effective, flexible & swift, and opposite Online Dispute Resolution system.
- 3.2 ODR system is entirely internet based, meaning that the users may conduct the procedures through a website, or that of a service provider.
- 3.3 In ODR as parties mutually agree to resolve their cross border e-disputes employing the mode and the manner they both agree on.
- 3.4 E-disputes that can be resolved through ODR are of diverse categories namely, Sale/ purchase disputes, auction, software development, construction license agreement, cybersquatting, consumer complaints, copyright, defamation trade secret, and could involve issues like censorship, access, privacy, fraud, deceptive trade practice and so on.
- 3.5 Like ADR, ODR is also not suitable for all disputes. Matters of criminal nature, matrimonial disputes, and matters involving rights of citizens as against the State are some of the examples which cannot be decided by ODR system.
- 3.6 If the losing party in a non-binding ODR procedure is unwilling to comply with the case outcome, one of two things can happen: if the decision is not binding at all, there is usually nothing the winning party can do to have the decision enforced. If the decision is binding like a contract, the winning party will have to enter judgment to enforce the outcome.
- 3.7 ODR may have a number of advantages and unique features which can help resolution of disputes in India. There are a number of problems in using ODR for dispute resolution such as lack of security, confidentiality and global enforceability
- 3.8 For a large number of business disputes with low value and having disputants at geographically far places, ODR is considered suitable being efficient, economical and time saving
- 3.9 Political commitment and rigorous effort of Judiciary would ensure adopter of ODR for resolving not only business disputes, but other disputes of minor value
- 3.10 ODR needs more exposure. Very few are aware of it
- 3.11 The main concerns emanate from the fact that the face-to-face interaction between the parties are lost.
- 3.12 ODR will not be able to cope with the various technical issues associated with Construction Industry Disputes which provide a very real and serious barrier that is preventing the success of ODR within the Construction Industry.

#### **4.0 Special Issues Raised During UNCIRAL INDIA WORKSHOP**

##### **4.1- Recommendations for Additional Amendments In Addition to Law Commission Report in Arbitration & Conciliation Act, 1996.**

4.1.1 Amendment to 'Public Policy of India' under the head "Fundamental Policy of Indian Law"

- w.r.to judgment of Hon'ble Supreme Court of India in Oil and Natural Gas Corporation Ltd. vs. Western Geco International Ltd. dated 04.09.2014.
- It should be "*Most Fundamental Policy of Indian Law*" with explanations to give finality to Arbitral Awards & limit judicial review of arbitral awards like in appeal under Public Policy of India.

4.1.2 Amendment to section 19 of the Arbitration and Conciliation Act, 1996 to give power to Arbitrator to call for records in evidence from the parties without resorting to s.27

4.1.3 Substituting "reasonable opportunity" in place of "full opportunity" in s.18 of the Act as per the English Law to avoid unnecessary delay

4.1.4. Listing the mandatory & derogable provisions of Arbitration Act as per English Act to avoid conflict with Institutional Rules.

4.1.5. Amendment to the Contract Act, 1872 by incorporating various judicial precedents in construction contracts eg. time essence with suitable changes as required giving certainty of interpretation of law and making it relevant to commercial realities.

4.1.6 To legislate special Construction Law considering specific requirements of Construction Sector like bonafide third party rights and unfair clauses of contract etc.

#### **4.2. For Making Arbitration More Effective**

4.2.1 To Frame Uniform Arbitration Clause, particularly in Govt. and Public Sector Undertakings, Detailing Procedure of arbitration and fees of Arbitrator.

4.2.2. Setting up infrastructure for Research, Education and Training in Arbitration for Construction Arbitrators & Engineers.

4.2.3 Strengthening Regulatory Mechanism for professional service by Arbitrators and Counsels through Institutional Arbitration.

4.2.4. Encouraging pro-active arbitration by adopting innovative methods and technology with flexible procedure.



### **III. Recommendations**

1. There is an urgent need to adopt effective dispute resolution mechanism to create a robust & conducive business environment.
2. Institutional Arbitration system needs to be introduced without delay in place of Ad-hoc mode of Arbitration.
3. There is a greater need to resort to mediation & conciliation processes prior to moving to Arbitration.
4. Ongoing disputes need to be immediately settled through a fast track dispute resolution mission to bring back the confidence of business to fulfil the substantial need of building the Physical Infrastructure in the Nation.
5. Ministry of Law & Justice, Govt. of India is requested to send necessary advisories/ directives in this context to all the Ministries & PSUs and ensure compliance.
6. For smaller disputes the online dispute mechanism need to be adopted. A Special Tasks Force may be constituted jointly with Construction Industry Arbitration Council to detail the modalities.
7. Ministry of Law & Justice was requested to advise Government and public sector organisations to normally accept the arbitral awards and not to go for further litigation in courts of Law.
8. Ministry of Law & Justice was requested to prepare a register of Institutions who could provide Institutional Arbitration support.
9. It was recommended that more such interactive sessions be organised jointly with UNCITRAL, while placing on record the appreciation & gratitude.
10. It was strongly recommended that a high powered action group be constituted by the Ministry of Law & Justice, Govt. of India, which may be convened by Construction Industry Arbitration Council to ensure that the recommendations as well as the subsidiary recommendations made, are implemented.
11. Several subsidiary recommendations emerged as listed in the Chapter 2.0 “Proceedings of the UNCITRAL INDIA WORKSHOP held on 16<sup>th</sup> February, 2015 at Scope Convention Centre, Lodhi Road, New Delhi”& there need to be acted upon.



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