

# Critical Issues In Dealing With Arbitration Cases

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## SYNOPSIS

*Arbitration is an area all the field engineers should be aware of. Proper representation of the case requires the knowledge of not only the provisions of the GCC, related Acts but also of the landmark court judgments. Though there are many issues involved, but it is proposed to concentrate on the five commonly faced issues excepted matters, payment of interest, appointment of arbitrators, claims on idling of labor and machinery, and claims on loss of business/reputation/profit.*

### Introduction:

Off late and after the introduction of new Arbitration Act 1996 it has been observed that the numbers of arbitration cases have increased. In many cases awards goes against Railway, although enough safeguards has been provided in the General Condition of contract under clause No.63 and 64 by a mechanism of resolving disputes and differences. If these provisions are understood correctly it can be helpful in upholding Railways interest. In addition to the provisions of Arbitration and Conciliation Act 1996, guidelines and the various court judgments have been issued/circulated from time to time by Railway Board. However, it is felt that the awareness about these provisions/guidelines and also about the landmark court cases has not reached to the field officer to the desired extent. An attempt is made in this paper to discuss few important issues related with the arbitration cases along with the relevant court judgments to help the Railway officers who are either acting as respondents or as arbitrators.

Following issues are proposed to be discussed in this paper.

- i) Arbitrability of Excepted Matters
- ii) Award of interest pre reference, pendente lite and post award
- iii) Appointment of Arbitrators not having the agreed qualification as per Agreement
- iv) Claims on idling of labour, machinery/loss of advance paid to labour or for machinery
- v) Compensation for loss of business/damage caused by breach of contract.

### 1.0 Excepted Matters:

As per clause 63 of GCC, the following clauses shall be deemed as "excepted matters" i.e. matters finally determined by railway, and are not arbitrable.

1	Clause 8	Assistance by Railway for the stores to be obtained by the contractor
2	Clause 18	Illegal Gratification
3	Clause 22(5)	Meaning, specification and drawings
4	Clause 39	Rates for extra items of Work
5	Clause 43 (2)	Signing of "No claim Certificate"
6	Clause 45 (a)	Measurement of works
7	Clause 55	Provisions of payment of wages Act
8	Clause 55-A(5)	Provision of contract labour
9	Clause 57,57-A	Provision of Mines Act
10	Clause 61 (1)	Right of Railway to determine the contract
11	Clause 61 (2)	Payment on determination of contract
12	Clause 62 (1) I to xiii	Determination of contract owing to default of contractor

Further, special conditions of contract are considered to be Excepted Matters. Excepted matters framed as claims are not arbitrable hence they shall not be referred to arbitration. This care should be taken while appointing the arbitral tribunal. However, even if these are referred for any reason, Objection Petition has to be filed before the Arbitral Tribunal under section 16(2) of Arbitration and Conciliation Act 1996. Award declared overlooking excepted matters are considered as one without jurisdiction and can be contested in court. Important court judgments regarding this issue are as under.

**1.1 GM Northern Railway Vs Sarvesh Chopra (AIR 2002 SC 1272), Hon'ble Supreme Court order dated 01.03.2002**

In this case Supreme Court has elaborately discussed the issues of excepted matters and gave the following ruling.

- (i) *“To sum up, our conclusion are (i) while deciding a petition under Section 20 of the Arbitration Act 1940, the Court is obliged to examine whether, a difference which is sort to be referred to Arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration Agreement, the court shall be justified in withholding the reference,*
- (li) *to be an excepted matter it is not necessary that a Departmental or in house remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in house settlement of the claim, the claim does not cease to be an excepted matter.*
- (lil) *An issue as to arbitrability of claim is available for determination at all the three stages while making reference to arbitration, in the course of arbitral proceedings and while making the award rule of the court”.*

**1.2 Arb. Application No.513 of 2006, In the matter of Sarvesh Chopra Builders Pvt. Ltd V/s U.O.I.**

Decided on 06/12/2007 by Hon'ble Justice Shri Shiv Narayan Dhingra of Delhi High Court.

It was held that not only the parties but even the Arbitrators are bound by the agreement between the parties. If there is a specific exclusion of certain types of claims, which are normally raised without any basis, in respect of loss of profit and loss of reputation etc, such claims cannot be referred to the arbitration. The petitioner had signed the contract with open eyes and he could not have asked that 'excepted matters' should also be referred to the Arbitrator Tribunal.

**2.0 Award of Interest:**

Payment of interest on arbitration is a subject of debate and the following will throw some valuable information.

**2.1 Interest Act:**

A) The interest Act 1978 legislates granting of interest. Some of the relevant sections of the Act are as follows.

Section 2(a): *“Court” includes a tribunal and an arbitrator*

*Section 3 (1) Power of court to allow interest: In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit allow interest to the person entitled to the debt*

*or damages or to be person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period.*

- (a) *if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;*
- (b) *if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:*

Section 2 (3): *Nothing in this section, -*

- (A) *shall apply to relation*
- (li) *any debt or damages upon which payment of interest is barred, by virtue of an express agreement;*

*From the above, it can be understood that interest act is rendered inapplicable by virtue of express agreement. GCC is one such agreement.*

**2.2 General conditions of contract on interest.**

Clause No. 16(3) and 64(5) which expressly prohibits interest are reproduced below.

Sr. No.	Clause number	Details
1	Clause 16(3)	<i>No interest will be payable upon the Earnest Money and Security Deposit or amounts payable to the contractor under the contract, but Government Securities deposited in terms of sub-clause(1) of this clause will be payable with interest accrued thereon.</i>
2	Clause 64(5)	<i>Where the arbitral award is for the payment of the money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made</i>

**2.3. Important and relevant court judgments on “Interest”**

Some of the relevant and important court judgments related to interest are discussed as under.

**(i) Supreme Court judgment in 2001- Interest for pre reference period**

Majority decision rendered by the Constitution Bench of the Apex Court reported in (2001) 2 SCC 721 (Executive Engineer, Dhankanal Minor irrigation Divisions V/S N.C. Buidharaj) held in, which became law of the Land observed that

*“As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the arbitrator to entertain a claim for interest on the amounts due and payable under the contract, the jurisdiction of the arbitrator to consider and award interest in respect of all periods has to be upheld. If the arbitrator has the power to deal with and decide disputes which cropped up earlier to the appointment of arbitrator, it is beyond comprehension as to why and for what reason and with what justification the arbitrator should be denied only the power to award interest for the pre-reference period.*

*The arbitrator appointed with or without intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibitions in the contract to claim or grant any such interest”.*

Comprehending this judgment and clause No. 16(3) and 64(5) of GCC, it can be concluded that there is prohibition for awarding of pre reference period interest in Railway contracts and hence it has to be disallowed.

(ii) AA No.4/2001 (Union of India vs Major VP Ninhawan (retd))

Accepting the challenge on clause 16(3), the lower court remanded the matter to the arbitrator to consider once again for granting of interest in one of the arbitrator cases of Railways. The union of India (Railways) had challenged the question of awarding interest in the Guwahati High Court in the year 2001.

Quoting the above Supreme Court judgment, Guwahati High Court (19-6-2002), held that

*“The arbitrator has jurisdiction to award interest on the sums found due and payable, for the pre-reference period in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. Thus the arbitrator has the jurisdiction to grant interest on the sums found due and payable for the pre-reference period, but will be subject to in the absence of any specific stipulation or prohibition in the contract to grant any such interest. If there are any such specific terms in the contract, prohibiting award of interest, the arbitrator does not have any authority to grant interest.*

*Sub Clause (3) of clause 16 of the General conditions of contract prescribes such prohibition and, therefore, the arbitrator does not get any jurisdiction to grant interest to the contractor. When there is a prohibition in the contract for grant of interest, in view of the Apex Court judgment, the arbitrator does not have jurisdiction to grant interest and no fruitful purpose will be served by remanding the matter to the arbitrator on the question of interest. The arbitrator's jurisdiction to grant interest, in view of the terms of the contract, is not available”.*

By holding so, the High Court of Guwahati upheld the clause 16(3) of GCC. The judgment was challenged by the

contractor in the Supreme Court and the Supreme Court dismissed the SLP summarily on 25-11-2002 which was circulated by Railway Board vide 2003/CE1/CT/9 dated 17-08-2006 for information and necessary action.

Summing up it should be said that awarding interest, for pre-reference and pendent-lite period by arbitrators is prohibited in GCC, and the same has been upheld by various courts' Judgments.

iii) New India Civil Erectors (P) Ltd Vs O.N.G.C. (AIR 1997 S.C.980)Agreement

Hon'ble Supreme Court held that it is essential that the arbitrator being a creature of the agreement must operate within four corners of the agreement and cannot travel beyond it. More particularly he cannot award any amount, which is ruled out or prohibited by the terms of the agreement.

## **2.4 Interest as per Arbitration and Reconciliation Act 1996.**

*Section No.31(7)(a): Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made, interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.*

In the Railway's GCC there is a provision to counter this. Clause 64(5) in the GCC provides that *“Where the arbitral award is for the payment of the money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made”*. This means since the parties agreed in contract that interest is not payable to the sums due and payable, then interest is not payable.

## **2.5 Future Interest**

*Section 31(7) (b) of Arbitration Act:*

*“A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment”.*

In number of cases, it has observed that arbitrators are silent on future interest, which results in paying interest of 18% by default as per this section. Arbitrator therefore may be requested to publish award indicating a rate not exceeding the current rate of interest as stipulated in Section 3(1) of Interest Act 1978.

## **3.0 Appointment of Arbitrators as per Agreement**

Qualification of arbitrators is laid down in GCC clause 64(3)(a)(i) &(ii) explicitly. These are reproduced below.

*64(3)(a)(i) In cases where the total value of all claims in question added together does not exceed Rs.10,000/-*

(Rupees ten lakhs only), the Arbitral tribunal shall consist of a sole arbitrator who shall be a gazetted officer of Railway not below JA grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the date when a written and valid demand for arbitration is received by GM.

64(3)(a)(ii) In case not covered by the clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as Contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators it will be necessary to ensure that one of them is from the accounts department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.

Few cases in this regard are as under.

3.1) UOI Vs M.P. Gupta: (2004) 10 SCC 504 order dated 05-02-2004: A three member Bench of Supreme Court upheld the contention of the Railway that only gazetted railway officers are to be appointed as arbitrators. In its order Hon'ble judges mentioned as under.

*"In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P.K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints justice P.K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months".*

Holding so, the apex court set aside the judgment of High Court and directed railways to appoint two gazetted railway

officers as arbitrators within 30 days.

3.2) Union of India Vs M/s. V.S. Engineering (P) Ltd., AIR 2007 SC 285:

This is a case where Supreme Court has vindicated the stand of Railways. Cl.64 or GCC of Civil Engineering stipulates that GM of the Railway has to appoint only gazetted officers as Arbitrators. Supreme Court held that courts cannot interfere when arbitral tribunal is appointed according to GCC.

Apex Court observed that when General Manager of the Railway has already appointed the arbitrator and despite this, learned Single Judge had overruled the objection and appointed a non-Railway arbitrator. In the present case, in view of the decision in M.P. Gupta's case wherein it was clearly stated that whenever the agreement specifically provided for appointment of two gazetted railway officers of equal status as arbitrators by the General Manager of the Railway, then in that case the Court should give this latitude to the General Manager to make appointment.

The Hon'ble Court further observed that Railways and public institutions are very slow in appointment of the arbitrator. Therefore, if appointment is not made in time on the request of the contracting party, then the power of the High Court to appoint arbitrator under Section 11 of the Act will not be denuded. However, the agreed qualification of arbitrator should always be given due consideration.

Observing so, the Supreme Court allowed the appeal filed by Railway by setting aside the orders of the High Court. Consequently, the appointment of Justice Y.V. Narayana as arbitrator and award passed by him of value of over Rs. 16.5 crores was also set aside. The Hon'ble Court directed General Manager to appoint arbitral tribunal within a period of 30 days from the date of receipt of a certified copy of the order.

#### **4.0 Idling of labor, machinery/loss of advance paid to labor and machinery:**

Clause 17A(iii) of GCC is reproduced below:

*"In the event of any failure or delay by the Railway to handover the contractor possession of the lands for the execution of the works or to give the necessary notice to commence the work or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the contractor to damages or compensation therefore but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable".*

In number of cases arbitrators awarded compensation to the contractor for loss of advances, idling of labor/machinery on account of delay on the part of Railway in handing over site/drawings etc.

This is clearly prohibited under clause 17A (iii) of GCC. Relevant court judgment dealing with such issue is as under.

4.1) P. Sathynarayana Rao Construction Company Vs UOI Rep. by GM (Construction) and other 2006 (1) ALT 130. The order of Hon'ble judge contained as under.

*"It is to be seen that the question is, in our considered view, no longer res integra. A similar question had already fallen before this court for consideration, in CMA No.410 of 2005 and batch, wherein, it was held by this court that Clause 17A (iii) of GCC, makes it abundantly clear that any delay on the part of Railways in any respect cannot be a ground for making any claim towards damages or compensation by the claimant. It was further observed by this court that the Railways may grant extension of time for completion of work as deemed reasonable.*

*Therefore, having regard to the finding recorded by the arbitrators regarding disallowing certain claims on the ground that they hit by clause 17(3) of GCC, we have not other option but to accept with the said findings".*

#### **5.0 Compensation for loss of business/damage caused by breach of contract.**

Clause 73 of Indian Contract Act is reproduced below:

*"When a contract has been broken, the party who suffer by such breach is entitled to receive, from the party who has*

*broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

*Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach".*

From the above, the items such as "loss of business etc" can be argued under remote and indirect loss as per the above section and ask for documentary proof in case claimant argues that they fall under direct loss. The documents produced if any should be critically studied for putting up effective counter during proceedings.

#### **Conclusion :**

From the above discussion it is seen that ample provisions are available in General Conditions of Contract, supported with relevant clauses of Arbitration and conciliation Act 1996, Indian Contract Act 1872, Interest Act etc to safeguard the Railway's interest. On careful scrutiny of various courts' judgments, it is further observed that frivolous claims by unscrupulous claimant can be successfully countered if the case is well presented before the Arbitral Tribunal or in the courts. The need of the hour is to understand the provisions in proper spirit and to take the help of Advocates expert in the field of arbitration cases in important cases. Apart from the above few issues there are many other issues in Arbitration cases which may be covered in future. ◆◆◆

### **PREPARING FOR A RENEWABLE JOURNEY**

In India, train is one of the most important modes of transport. IR (Indian Railways) has one of the largest and busiest rail networks in the world, transporting over 18 million passengers and more than two million tonnes of freight daily. The railways traverse the length and breadth of the country, covering 6909 stations over a total route length of more than 63327 km. As for rolling stock, IR owns over 200 000 (freight) wagons, 50 000 coaches, and 8000 locomotives. Traditionally, IR has been accorded priority for supply of energy for traction purpose. Nonetheless, power cuts still occur, resulting in sheer chaos. Also, the various maintenance units of the railways in far-flung remote areas are often starved off their energy requirements. This has an adverse effect on the overall performance of the entire system. Moreover, as energy needs increase, IR may have to compete with other priority sectors for the limited resources. Thus, evolving its own supporting energy system, comprising of renewable energy sources, may be the best decision for the railways. And, it is doing just that!

IR has recently taken a decision to adopt alternative sources of energy to meet its fuel requirements. It aims to execute a couple of projects in this direction at vantage points. Sukhbir Singh, member of the Electrical Department of Ministry of Railways, has commissioned the construction of seven windmills, each with a capacity of 1.50MW (megawatt). These have been installed at Kasthuriengapuram under Radhapuram taluk in Tirunelveli district of Tamil Nadu. There are plans to install more windmills in this region, and in coastal Tamil Nadu and Orissa. This is to increase the total supply of energy to IR. Singh said that IR has installed four solar power units - each having the capacity of generating 1.90 MW -at Nagpur, one of the hottest places in the country that experiences a temperature of 47 °C during summer.

Solar energy technologies generate electricity by means of heat engines or photovoltaics. Solar applications include space heating and cooling through solar architecture, potable water via distillation and disinfection, day lighting, hot water, thermal energy for cooking, and high temperature process heat for industrial purposes. Solar power is also being brought in for electrification of manned level crossings, administrative buildings, training institutes, canteens, hospitals, and for water heating functions. At present, 128 level crossings and four stations in West Central Railway have already been provided with solar panels for electrification purpose. Very soon, all zonal railway offices, divisional headquarters, and railway ministry headquarters will have solar power systems to light up the premises. According to a senior railway ministry official, 'The lights at the corridors and control rooms of these offices will draw power from solar panel! He added that solar panels will be installed at 44 divisional railway manager offices.

Solar geysers will be installed at railway hospitals and running rooms at 115 places. Solar street light systems will be provided at all railway training centres across the country. Railway's Oak Grove School near Nainital will also have solar lights at its campus.

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