

In order to engage with our readers and simplify the legal complexities of the infrastructure sector, EPC World has partnered with Rajani Associates, a full-service law firm for a series of legal Q&As. Through this Legal Q&A column, **SHISHAM PRIYADARSHINI**, Partner, Rajani Associates and **AMISH SHROFF**, Principal Associate, Rajani Associates, will endeavour to address the queries and challenges faced by our readers.



Shisham Priyadarshini

What is two-tier arbitration?

The provisions of arbitration are usually provided to settle the disputes and differences between the parties which may have arisen or may arise in relation to a defined legal relationship between the parties. An arbitration agreement is a pre-condition to commence any arbitral proceeding for such disputes and differences. Arbitration is considered a quicker mode to resolve the disputes.

An arbitration agreement may be a clause in an agreement itself or a separate agreement to arbitrate the disputes. In the absence of such provision (in the contract), the parties will then have to take a conventional route of approaching the court to resolve their dispute, which may be time consuming and expensive mode of dispute resolution.

While it is usual to have arbitration provisions in a contract; the concept of "two-tier arbitration" is a recent development in the Indian legal field.



Amish Shroff

In a two-tier arbitration, which is also referred to as the "second instance arbitration", in the event one party or all the parties to the contract, in the first instance, are aggrieved by the arbitral award passed by a sole arbitrator or a panel of arbitrators, as the case maybe and considering that the contractual agreements allows the aggrieved party to appeal against such arbitral award before the other arbitrator, such aggrieved party or parties may refer the matter to the second instance arbitration.

The second instance arbitration can be made subsequent to the award of an arbitrator in the first instance which is for a fresh hearing and resolution of the dispute to pass a new award, irrespective of the first award given in the first instance.

In order to enable the parties to invoke second instance arbitration to resolve the dispute, the arbitration clause in any contract must expressly provide for the second level of arbitration.

The two-tier arbitration is considered as a non-statutory appeal to an arbitral award. The second reference to arbitration is made at a stage of proceedings where the aggrieved parties would have otherwise ideally referred the matter for judicial appeal rather than invoking the second instance arbitration.

Whether a settlement of disputes or differences through a two-tier arbitration procedure as maybe provided in the contract between the parties is permissible under the laws of India?

In a landmark judgment accepting the concept of "two-tier arbitration" or "second instance arbitration", a three judge bench of the Supreme Court (comprising Justices Madan B. Lokar, R.K Agrawal and D.Y Chandrachud) held that arbitration clauses which provide for a two-step arbitration process are valid under Indian arbitral jurisprudence.

The issues before the Supreme Court were (i) whether the Arbitration and Conciliation Act, 1996 (Arbitration Act) allows an appellate arbitration (ii) whether there is an implied prohibition to an appellate arbitration in the Arbitration Act (iii) whether an appellate arbitration is contrary to public policy.

While examining these issues, the Supreme Court observed that, historically, two-tier arbitration was permissible in India before the Arbitration Act. The Supreme Court also relied on the report of the UNCITRAL Working Group, which was in favour of appellate arbitration. In light of this, the Supreme Court was

of the view that Parliament must be assumed to have known the view of the UNCITRAL Working Group (of which India was a state member) and must be assumed to have known the decisions of various domestic courts and yet decide not to specifically prohibit the two-tier arbitration resolving mechanism.

Although an arbitral award would be final and binding on the parties (unless it was set aside by a competent court on an application made by a party to the award), the Supreme Court observed that it does not preclude the parties to an arbitral award from mutually agreeing to a procedure whereby the award might be reconsidered by other arbitrators, by way of an appeal. The fact that recourse to the court is available under the Arbitration Act does not, in itself, prohibit the parties from mutually agreeing to reconsider an award with the intention of an early settlement of disputes and differences, without knocking the doors of the courts.

While deciding the issue of appeal before the second arbitrator, the Supreme Court also confirmed that a two-tier arbitration clause does not violate the fundamental policy or public policy of India.

How effective will be the judgement of the Supreme Court on two-tier arbitration for the parties?

The Supreme Court judgement is a welcome decision as it brings about a clarity on the issue of enforceability of two-tier arbitration in India.

However, the question to be considered is whether it is really time and cost effective for the parties to have the provisions for second instance arbitration in the contracts, especially keeping in mind the fact the contracts usually do have other dispute or dead lock resolving mechanisms in place, where the parties can amicably discuss and resolve their disputes and



differences or appoint an expert to arrive at a consensual decision. In fact, the parties can have various permutations and combinations to resolve these disputes and provide elaborate mechanism for the same in the contracts. It is only after exhausting all these options that the parties refer the dispute to an arbitrator or a panel of arbitrators, which arbitrators are also mutually appointed by the parties.

Before incorporating the second instance arbitration and delaying the right to appeal such award in the court of law, it is ideally advisable that the parties deliberate the requirement and sparingly provide for such additional layer of dispute resolution mechanism. Since nothing stops the parties from approaching the courts even after the second instance arbitration. This may then defeat the whole purpose of "speedy" disposal of the dispute in a "timely and cost efficient" manner.

This is the first time that Indian courts have recognised two-tier arbitration. Going forward, the rules and procedures for invoking and conducting two-tier arbitration will be required to be formulated. Like in case of most of the evolving legal provisions, only time will tell the usefulness of the

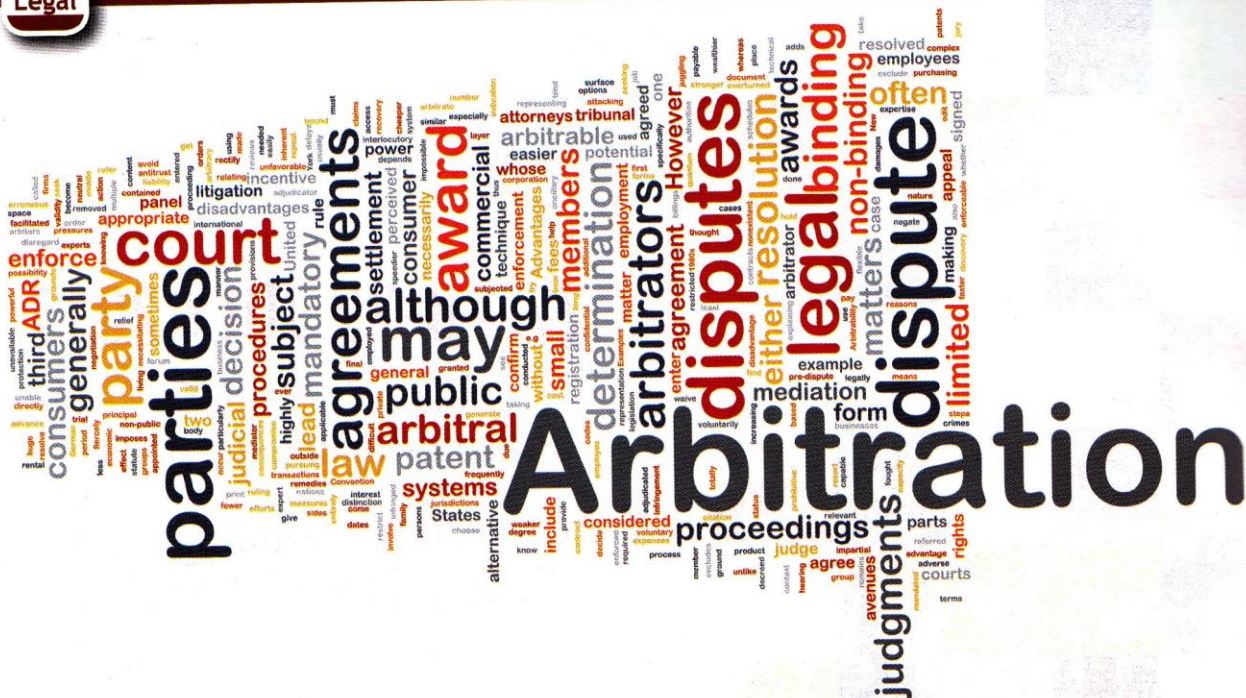
two-tier arbitration.

Also, while terminology may not be of that relevance, calling the second level arbitration as appeal may go to suggest that the second instance arbitration is superior over the first instance arbitration. The second instance arbitration is not actually reviewing the decision of the first arbitrator but conducting a fresh arbitral proceeding to pass a fresh award.

How is the Union Budget 2017-18 likely to impact the Infrastructure sector?

It is for the first time in 92 years that this year on February 1st a combined budget has been presented by the Government which is a major shift from the conventional trend to present a separate Railway Budget followed by Union Budget generally in the last week of February.

In the current budget, infrastructure sector continues to be the focus area of development with the roads and railways sectors being at the forefront. Toward this, the overall provision of staggering ₹ 2,41,387 crore has been made in the Union Budget for transportation sector as a whole which includes rail, roads, shipping.



As far as the road sector is concerned, the total fund allocation for the highways for financial year 2017-18 has been pegged at ₹ 64,900 crores which is almost 12% higher than the fund allotted for this sector in the previous year. While the announcement in the road sector is expected to bring in better days for the road construction companies, the Government must ensure that the development in this sector happens in a planned manner with the required participation of the private players. Proper resource allocation, time bound handing over of the land for the project, timely procurement of the consents and approvals, availability of funding options to finance the projects, risk sharing between the private player and the Government are some of the significant areas which require proper consideration of the project participants to meet the development target.

The Government has unveiled the largest-ever rail budget of ₹ 1,31,000 crores, which is an increase of 8.26% over the last years allocation of ₹ 1.21,000 crores. Metro railways have been being identified as the key transport area for which the

Government has proposed to announce the Metro Rail Policy, with the focus on innovative models to implement and finance the metro projects.

In the aviation sector, it has been proposed that certain select airports in Tier 2 cities will be taken up for operation and maintenance under the PPP mode. The Airport Authority of India Act is also proposed to be amended in order to enable effective monetization of the land assets with the Airport Authorities. The resources, so raised, will then be utilised for airport upgradation. The proposed plan to develop the airports in Tier 2 cities will eventually help to reduce the congestion at the major airports. This will also encourage more private players to enter the aviation sector, which will eventually benefit the end consumers at large.

In order to further ensure energy security, the Government has decided to set up Strategic Crude Oil Reserves at two more locations, namely, Chandikhole in Odisha and Bikaner in Rajasthan. This is in addition to the three strategic crude oil storages at, Visakhapatnam, Mangalore and Padur. As against the current storage capacity of 5.03 million metric tons (MMT),

the proposed storages would enhance the strategic reserve capacity of the country to 15.33 MMT.

In the Budget speech, it has been announced that by the end of 2019, there will be 100% rural electrification and for this the Government has allocated ₹ 4843 crore for electrification in financial year 2017-18.

Besides the fund allocation to various infrastructure sectors, the Government has also proposed amendment to the Arbitration and Conciliation Act, 1996. This is another announcement which is expected to have significant impact on the speedy resolution of the disputes in the infrastructure sector.

The enhanced allocation across the board including for roads and railways coupled with the proposed enactment of new and amendments to existing laws will prove to be a great boost to the infrastructure sector. The fund allocation is also expected to encourage the stakeholders to speed up pace of the project and create more job opportunities. This would have ripple effect on the allied industries mainly cement and steel sector, which can then expect to do well.

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