



ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS FOR HYDROPOWER PROJECTS

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for Water and Energy Security- Under Changing Climate**

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Presentation Layout



- Company Profile of SJVN
- Disputes in Hydropower Projects
- ADR Mechanisms
- SJVN's Experience in NJHEP
- Conclusion
- References



Beginning

- Incorporated in 1988 as JV between Gol and GoHP
- Category-I, schedule-A mini-ratna CPSE under MoP

First Project

- Commissioned first project, 1500 MW NJHPS in 2004
- NJHPS is largest hydropower station in India

Portfolio

- Projects with over **16,900 MW** capacity
- Eight projects of **3300 MW** are under-construction

Shared Vision

- **5000 MW by 2023**
- **25000 MW by 2030**
- **50,000MW by 2040**

Presence

- Nine states of India
- Two neighbouring countries - **Nepal and Bhutan.**





Subsidiaries

- **SAPDC** -- 900 MW Arun-3 HEP in Nepal.
- **STPL** - 1320 MW Buxar Thermal Power Project in Bihar.
- **SGEL**- SJVN Green Energy Limited

Joint Ventures

- **CPTC** - Cross Border Power Transmission Company Limited - 26% equity.
- **KHEL** - Kholongchhu Hydro Energy Limited, 50% equity - 600 MW Kholongchhu HEP in Bhutan.

Installed Capacity

- Generation : **2016 MW**
- Transmission : **86 km, 400 kV** (CPTC-JV)

Business Verticals

- **Power Generation** - hydro, thermal, wind and solar
- **Power Transmission**
- **Power Trading**

Recent Developments

- Five projects of **5097 MW** in Arunachal Pradesh
- Seven Pump storage projects (**PSPs**) of **9600 MW** in Maharashtra



Disputes in Hydropower Projects



- Disputes are endemic to construction industry in general and hydroelectric projects in particular.
- Delays in dispute resolution is major reason for time and cost overruns.
- Timely resolution of disputes is in best interests of all key stakeholders – project developers, contractors, funding agencies, and consumers.
- Key causes of disputes include challenging nature of projects, owner caused delays and inflated claims by Contractors

ADR Mechanisms



1. Dispute Adjudication Board
2. Dispute Avoidance through Independent Engineer
3. Conciliation through Conciliation Committees
4. Mediation through Independent External Monitors
5. Arbitration
6. Amicable settlement

Dispute Adjudication Board



- DABs by whatever name they are called - *Dispute Boards (DB)*, *Dispute Review Board (DRB)*, *Dispute Avoidance and Adjudication Board (DAAB)* were introduced in India by World Bank.
- Involve a standing body of one or three independent domain experts, who undertake regular visits to project sites, adjudicate disputes, when they are referred by one of the parties.
- DAB is creature of contract; parties establish and empower DAB with jurisdiction to hear and give the decision on dispute.
- Lately DABs adopt elaborate procedures with little to differentiate DAB proceedings from Arbitration.
- Submission of Claims by Contractors after completion is major impediment.



Dispute Avoidance through Independent Engineer

- In Sept. 2021 MoP notified *Dispute Avoidance Mechanism through Independent Engineer* for contracts of hydropower projects being implemented by CPSEs.
- It recognizes that fair and just resolution of disagreements at inception stage is key to successful performance of contract and prevention of time and cost overruns.
- The stated objectives of engaging 'Independent Engineer' are as follows:
 - To reduce the conversion of initial disagreements over issues into full-fledged disputes
 - For expeditious elimination of disagreements in a just and fair manner
 - To avoid time and cost overruns to ensure timely completion of the Projects
- Selection procedure of IE is a major reform. IE to be selected from panel approved by MoP. In case of negative feedback, empanelled persons could be dropped from the panel.
- IEs are expected to comply with the timelines prescribed by MoP for site visits and adjudication process.
- As panel is approved by MoP, neutrality of IEs is now beyond doubt



Conciliation through CCIE

- Conciliation exists as recognized form of dispute resolution with a governing statute in place - The Arbitration and Conciliation Act, 1996, which inter alia provides:
 - ❑ *Conciliation involves reference of disputes to Conciliators, which may number one, two, or three.*
 - ❑ *The Conciliator assists parties to reach **amicable settlement** and may **make proposals** for settlement, which **need not be in writing** and **need not be accompanied by reasons**.*
 - ❑ *The settlement agreement shall have status and effect of an arbitral award.*
 - ❑ *Parties to Conciliation may withdraw at any stage.*
- Conciliation has found widespread recognition after NHAI and MNRE successfully resolved many disputes through Conciliation Committees.

Conciliation through CCIE ... contd.



- *Conciliation mechanism through Conciliation Committees of Independent Experts (CCIE) introduced in December 2021 by MoP.*
- Three CCIEs constituted and notified by MoP.
- The contractor can choose to refer dispute to any one of these CCIEs.
- Envisaged as second tier mechanism after IE mechanism.
- Recourse to Arbitration not available to Parties availing CCIE mechanism.



Mediation through Independent External Monitors

- Advised by Central Vigilance Commission (CVC) in contracts with Integrity Pact (IP).
- Integrity Pact(IP) adopted to ensure transparency, equity, and competitiveness in public procurement.
- Under IP Act parties agree to refer differences during pre-award as well as execution phase to IEMs.
- Mediation through IEMs for public procurement contracts is welcome step being cost-effective vis-a-vis Arbitration.
- Contracts of hydropower projects already contain pre-arbitral mechanisms like DAB/Dispute Avoidance with domain experts.

Arbitration



- **Advantages of Arbitration over other ADR methods :**
 - ❑ Results in binding award with limited grounds for challenge.
 - ❑ Unlike conciliation and mediation, arbitration proceedings do not terminate if a party withdraws .

- **Disadvantages of Arbitration over other forms of ADR:**
 - ❑ Not cost effective for low-value disputes.
 - ❑ Unlike mediation and conciliation which ends in win-win situation arbitration ends in win-lose situation.

Arbitration ... contd.



- Following recent amendments in Arbitration Law, arbitral proceedings now conclude in 1-1.5 years.
- As arbitral proceedings are confidential, Arbitration does not aid in development of Law.
- **Fast Tack Procedure for Arbitration**
 - Recently MoP issued guidelines regarding Fast Track Procedure for Arbitration
 - Introduced in A&C Act vide the 2015 amendment.
 - Involves adjudication by a sole arbitrator, based on only written pleadings within six months.
 - Oral hearings will ordinarily not be held.

Amicable settlement



- For settlement of pending issues and eventual closure of contracts, amicable settlement can be attempted through a sub-committee of the Board.
- Successfully achieved by SJVN in its 1500 MW Nathpa Jhakri HEP.
- MoP also advised for constitution of sub-committee of Board to resolve ongoing disputes expeditiously.



SJVN's Experience in NJHEP

- The major civil works of NJHEP were awarded under four packages to joint ventures of foreign and Indian construction companies.
- The project faced insurmountable challenges - poor geological conditions, hot water conditions, flash floods, labour unrest, etc. Powerhouse was inundated twice due to floods in river Satluj.
- Contracts had three-tier dispute resolution mechanism.
- Challenge of DRB decisions was an exception rather than a rule.

Summary of DRBs' decisions

Contract	Total claims referred	Decided in favour of Employer	Decided in favour of Contractor	Amount awarded as % of claimed amount	Claims referred to Arbitration
1	29	24%	76%	28%	4
2.1	35	23%	77%	20%	3
2.2	45	20%	80%	29%	4
3	34	53%	47%	23%	6

- Awarded amount was in the range of 20 – 29 % of claimed amount.
- Most DRB decisions implemented by parties, with 17 cases referred to Arbitration.



Amicable Settlement for Closure of Contract

- Efforts made to resolve all disputes/issues pending before different forums
- Settlements reached in three out of four contracts.
- Settlement could not be reached in one Contract due to Contractor's reluctance.
- Sub-committee of Board of Directors, assisted by internal committee negotiated with Contractors.
- On recommendations of sub-committee, Board approved terms of settlement.



Conclusion

- DABs and Dispute Avoidance with Independent Engineer suited for inception stage.
- Conciliation and Arbitration suited as second-tier mechanism
- Conciliation has better chances of success vis-a-vis Arbitration as it leads to a **win-win situation**.
- Key to success of dispute resolution process is parties faith in the process.
- Notification of panel of IEs and Conciliation Committees are welcome moves.

Conclusion ... contd.



- Need to consider **Litigation history** during bid evaluation. **Quality-based selection for procurement of works** allowed now.
- In March 2022, MoP issued guidelines for **debarment of contractors** who repeatedly raise unjustified/inflated claims and engage in frivolous litigation/arbitrations
- SJVN's experience in NJHEP shows **adjudication of claims during progress of works** helps avoid disputes.
- Ultimate goal of parties should be expeditious resolution of all pending issues to enable **closure of contracts**.
- Parties must share the belief - their **interests are best served if resources are utilized on productive pursuits**.
- This belief will enable them to work together towards the **common goal of dispute resolution**.



THANK YOU

We can't solve problems by using the same kind of thinking we used when we created them.

- Albert Einstein

References

- The Arbitration and Conciliation Act, 1996
- MoP's O.M dated 27.09.2021 on *Model Contract Provision for “Dispute Avoidance Mechanism” through ‘Independent Engineer (IE) in the Construction Contracts of CPSEs executing Hydropower projects*
- MoP's O.M dated 29.12.2021 on *Dispute Resolution through Conciliation for Contractual Disputes in Projects implemented by CPSUs/Statutory Bodies under the administrative control of Ministry of Power – Constitution of Conciliation Committee of Independent Experts (CCIE)*
- MoP's O.M dated 16.03.2022 on *Guidelines for early settlement of disputes and to minimize the arbitral claims/disputes in hydropower sector*
- CVC circular dated 28.01.2022 on *Standard Operating Procedure for implementation of Integrity Pact*
- Department of Expenditure, MoF's O.M dated 29.10.2021 on *General Instructions on Procurement and Project Management*