

ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS FOR HYDROPOWER PROJECTS

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ABSTRACT

Construction contracts of hydropower projects are prone to disputes due to the complexities involved in their development. Several Alternate Dispute Resolution Mechanisms are available today for the resolution of these disputes. This paper discusses these mechanisms and their relative merits and demerits over each other. It also records the experience gained by SJVN in dispute resolution during the development of the 1500 MW Nathpa Jhakri Power Project.

1. INTRODUCTION

Disputes are endemic to the construction industry in general and hydroelectric projects in particular. Often resolution of these projects continues for years after the project's completion. This results in the project developer being saddled with mounting contingent liabilities during the dispute adjudication process and with high-interest liabilities in case of adverse outcomes.

Delays in the resolution of disputes have been identified as one of the major reasons for time and cost overruns, which are usually associated with hydroelectric projects.

While disputes lead to time and cost overrun in the project, the money that is eventually released only contributes to the contractors' balance sheet. The employer's interests are best served if the money towards claims is released while the works are going on so that it can be utilized on the project. The contractors also suffer in the process as huge sums are blocked in these disputes, thus adversely affecting their financial standing and capacities to gain business and complete ongoing works. It affects the funding agencies as well, as funds are blocked and thus impairs their ability to further fund such projects. Arbitration awards when enforced lead to escalation of the electricity prices and thus adversely affecting the consumers. Therefore, timely resolution of disputes in hydropower project contracts is in the best interests of all the key stakeholders – project developers, contractors, funding agencies, and consumers.

Analysis of the reasons for these disputes brings to light that hydropower projects are one of the most challenging infrastructure projects. Remote locations, long gestation periods, geological surprises, R&R issues, labour issues are some of the challenges faced while executing these projects. Furthermore, the fact that most of the hydropower projects are developed by CPSEs and other agencies of the State also plays a role in delaying the dispute resolution process. With public money involved, officials of these agencies tread cautiously, especially when the amounts involved are large and the contracts don't contain express provisions dealing with the claims in question. As a result, often even bonafide claims get referred to dispute resolution forums and the decisions of these forums are challenged before the next available adjudication forum. At the same time, some contractors have also developed a habit of raising inflated claims on flimsy grounds and continue to pursue them across forums in the hope that even if some of them get realized, the gains will more than makeup for the cost involved. In

the process, the disputes transform – from technical to legal and whatnot and the parties find themselves arguing over issues that they did not have in mind initially, while the core technical issues take a backseat.

2. ALTERNATE DISPUTE RESOLUTION MECHANISMS

Like other construction contracts, the dispute resolution process of contracts of hydropower projects primarily involved Dispute Adjudication Boards (DABs) and Arbitration. However, taking into account the inordinate delays in the dispute resolution process, the Ministry of Power has notified Dispute Avoidance Mechanism through Independent Engineers in place of DABs and Conciliation mechanism through Conciliation Committee of Independent Experts (CCIE) as an alternative to Arbitration. So presently the following mechanisms are available for avoidance and resolution of disputes in contracts of hydropower projects:

- (i) Dispute Adjudication Board
- (ii) Dispute Avoidance through Independent Engineer
- (iii) Conciliation
- (iv) Mediation through Independent External Monitors
- (v) Arbitration
- (vi) Amicable settlement

(i) Dispute Adjudication Board

Although the DAB mechanism has been replaced with Dispute Avoidance through Independent Engineers, however for existing contracts where contractors do not consent to the new mechanism, DABs shall continue to function. DABs involve having a standing body of one or three independent domain experts, who undertake regular visits to project sites adjudicate disputes, as and when they are referred by one of the parties. In three-member DABs both the parties nominate one person who is to be approved by the other party. The two members so selected jointly appoint the third member. The DAB can be a standing body constituted at the commencement of works or it can be constituted as and when a dispute arises. In electro-mechanical and hydro-mechanical contracts ad-hoc DABs comprising of sole member, commonly known as Adjudicator are constituted. A DAB is a creature of contract; the parties establish and empower a DAB with jurisdiction to hear and give the decision on the dispute. 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. SJVN's first project – the 1500 MW Nathpa Jhakri Hydroelectric Project was the first hydroelectric project in the country with the provision of DAB, which was then called DRB.

DABs have been successful in the resolution of disputes at the inception stage. However, lately, it has been observed that DABs have started to adopt elaborate procedures with the result that there is little to differentiate DAB proceedings from arbitration. Furthermore, DABs' success largely depends on the resolve of the parties to settle disputes. Often contractors do not submit claims while the works are going on and submit them in one go after the works get completed. In such cases DAB will neither be able to verify the facts by visiting the site nor will it be able to dispose of the disputes in a timeline provided in the contract. Similarly, if the employer challenges all the DAB's decisions in arbitration, as a rule, no meaningful purpose is served by having DABs. Thus there has been a marked decline in the efficacy of DABs due to the adoption of elaborate procedures on the part of the DABs and loss of faith on the part of the parties in the process.

(ii) Dispute Avoidance through Independent Engineer

Given the failure of the existing DAB mechanism in resolving differences at the initial stage, in September 2021 Ministry of Power has notified a Dispute Avoidance Mechanism through Independent Engineer for contracts of hydropower projects being implemented by CPSEs under its administrative control. The Dispute avoidance mechanism recognizes that the fair and just resolution of disagreements at the inception stage is key to the successful performance of the contract as per scheduled timelines and prevention of time and cost overruns. The stated objectives of engaging 'Independent Engineer' are as follows:

1. To reduce the conversion of initial disagreements over issues into full-fledged disputes
2. For expeditious elimination of disagreements in a just and fair manner
3. To avoid time and cost overruns to ensure timely completion of the Projects

A major reform that the IE mechanism has made is in the selection procedure of the IE. While DAB members were appointed by the parties, IE will have to be selected from a panel approved by MoP. In case of negative feedback, empanelled persons could be dropped from the IE panel. These provisions are expected to ensure compliance by IEs of timelines prescribed by MoP for site visits and adjudication process. At the same time since the panel is approved by MoP, the neutrality of IEs is now beyond doubt which will, in turn, lead the parties to repose faith in the process and implement the decision of IEs. An extensive standard operating procedure, detailing the functions to be performed by the Independent Experts along with timelines and fee schedule has also been notified.

(iii) Conciliation

Conciliation exists as a recognized form of dispute resolution in India, with a governing statute in place - The Arbitration and Conciliation Act, 1996. However, it has found widespread recognition after NHAI and MNRE successfully resolved many disputes through Conciliation Committees. Taking note of the fact that the existing mechanisms of DABs and Arbitration often take considerable time, in December 2021 Ministry of Power has also introduced a Conciliation mechanism through Conciliation Committees of Independent Experts (CCIE) for resolution of disputes in power projects being developed by CPSEs/administrative bodies under its administrative control.

As per the Arbitration and Conciliation Act, 1996, Conciliation involves the reference of disputes to Conciliators, which may number one, two, or three. The Conciliator assists the parties in their attempt to reach an amicable settlement and may at any stage make proposals for a settlement of the dispute, which may need not be in writing and need not be accompanied by a statement of the reasons. The settlement agreement shall have the same status and effect as if it is an arbitral award. Parties to Conciliation may withdraw at any stage.

In the CCIE mechanism introduced by the MoP, three Conciliation Committees of Independent Experts (CCIE) have been constituted and notified. The contractor can choose to refer the dispute to any one of these CCIEs, subject to the availability of the particular committee. Those disputes which remain unresolved following adjudication by Independent Engineer as part of Dispute Avoidance mechanism can be referred to CCIE.

However, to ensure that Conciliation may not become just one more tier in the already multi-tiered dispute resolution process, the CCIE mechanism mandates that parties availing it shall have to undertake that recourse to Arbitration shall not be available once the option of Conciliation has been exercised. So in case, the Conciliation proceedings fail, with either of the parties' withdrawing, only recourse to the legal process of courts shall be available. Therefore, the CCIE mechanism is an alternative to Arbitration. Similar to the Dispute Avoidance mechanism, for CCIE also, MoP has notified an extensive standard operating procedure, detailing the functions to be performed by the CCIE along with timelines and fee schedule.

(iv) Mediation through Independent External Monitors

Central Vigilance Commission (CVC) has advised that in those contracts wherein Integrity Pact (IP) is applicable, resolution of disputes through mediation before the panel of Independent External Monitors (IEMs) be attempted if the parties so agree. For this purpose, the parties may adopt any mediation rules. Integrity Pact(IP) essentially envisages an agreement between the prospective bidders and the buyer, with both sides pledging not to resort to any corrupt practices. It has been adopted to ensure transparency, equity, and competitiveness in public procurement. The parties agree to refer any differences during the pre-award process as well as disputes during the execution phase to IEMs.

In a mediation procedure, a neutral intermediary, the mediator, helps the parties to reach a mutually satisfactory settlement of their dispute. Any settlement is recorded in an enforceable contract. The difference between Mediation and Conciliation is mainly based on the fact that a mediator does not actively make decisions for parties whereas a conciliator assists the parties more actively i.e. proposes workable solutions to move forward. Like Conciliation, mediation proceedings also terminate when either party withdraws from the proceedings.

Having mediation through IEMs for public procurement contracts as advised by CVC is a welcome step, as it is cost-effective in comparison to Arbitration. However, since contracts of hydropower projects already contain pre-arbitral mechanisms like DAB/Dispute Avoidance with domain experts, having mediation may not serve any purpose for such contracts.

(v) Arbitration

Arbitration is by far the most popular ADR method being employed for the resolution of disputes in hydropower projects. Arbitration scores over other ADR methods as it leads to a binding award once the proceedings are initiated. Unlike conciliation and mediation, arbitration proceedings do not terminate if a party withdraws from it. Furthermore, only limited grounds are available for challenging the arbitral award before courts.

However, arbitration also suffers from disadvantages vis-à-vis other forms of ADR. Primary among them is the cost. Lately, arbitration has become very costly and thus does not make much commercial sense for low-value disputes. Furthermore, unlike mediation and conciliation which ends in a win-win situation and thus enables settlement of the dispute, arbitration ends in a win-lose situation. This acrimonious relationship delays the settlement process as often the losing party challenges the award in court and seeks consolation in having at least deprived the winner of the award for some more time.

In comparison to litigation, arbitration scores in terms of time. Following the recent amendments in the Arbitration Law, arbitral proceedings now conclude in 1-1.5 years, while court proceedings drag on for years together. However, as the arbitral proceedings are confidential, Arbitration does not aid in the development of Law; unlike court judgments arbitral awards are not available to be cited as precedent.

Recently MoP has issued guidelines for inclusion of provision regarding Fast Track Procedure for Arbitration in Contract documents. Provision regarding Fast Track Procedure was inserted in the Arbitration and Conciliation Act, 1996 as section 29B vide the 2015 amendment. It involves adjudication of disputes by a sole arbitrator, based on only written pleadings and documents, within six months from the date the arbitral tribunal enters reference. Oral hearings will ordinarily not be held but can be held if all the parties make a request or the Arbitral Tribunal considers it necessary.

(vi) Amicable settlement

Often the dispute resolution in hydropower projects continues for years and at times even decades after the project is commissioned. Until the resolution of all disputes and closure of the contract, the developer not only has to incur expenditure for pursuing these disputes but also has to deploy personnel for managing these contracts.

Therefore, with an aim of settlement of all pending issues and eventual closure of contracts, amicable settlement can be attempted through a sub-committee of the Board. This has been successfully achieved by SJVN in the case of its 1500 MW Nathpa Jhakri Power Project, which will be discussed in detail in the following paragraphs. Ministry of Power has also issued guidelines for the constitution of the sub-committee of the Board to analyze and resolve ongoing disputes with contractors expeditiously.

3. SJVN'S EXPERIENCE IN NJHEP

SJVN is a Category-I, Schedule-A mini-ratna CPSE under the administrative control of MoP. Currently, it has seven projects with 2016.5 MW capacity under operations and 8 projects aggregating 3301 MW under construction. Two projects with 426 MW capacity are under pre-construction and 15 projects of 10689 MW capacity are under survey and investigation stage. SJVN has set an ambitious target of 5000 MW by 2023, 25000 MW by 2030, and 50,000 MW by 2040. It is the only Indian company currently executing hydropower projects in Nepal and Bhutan and is actively looking for more opportunities for further expansion.

SJVN's first project, the 1500 MW NJHPS is the largest hydropower station in the country. The major civil works of this project were awarded under four packages to joint ventures of foreign and Indian construction companies. The project faced insurmountable challenges in the form of poor geological conditions, hot water conditions, flash floods, labour unrest, etc.; our almost complete powerhouse was inundated twice due to floods in the river Satluj.

The genesis of most of the disputes had in the question as to who among the two – Employer or Contractor - should shoulder the burden of the additional cost and time, that these challenges entailed. For the resolution of disputes, the contracts had a three-tier dispute resolution mechanism. Disputes were first referred to the chief executive of the employer and thereafter to DRB. A party aggrieved with the decision of the DRB could request it for review and if still not satisfied could challenge the DRB recommendations in Arbitration.

The DRBs played a key role in the resolution of disputes as the majority of the DRB decisions were accepted and implemented by the parties. The challenge of the DRB decision was an exception rather than a rule. So only a few disputes were referred to arbitration and there to in most cases, the AT awards were implemented by the parties.

Table 1 : Summary of Claims referred to DRBs

(All amounts in Rupees Crores)

Contract Particulars		Claims referred		Claims decided	
Contract No.	Contract Price	Nos.	Value of claims referred	Nos.	Value of claims
1	439	29	55	29	55
2.1	523	35	107	35	107
2.2	608	45	107	45	107
3	475	34	287	32	130
Total		143	557	141*	399

*The balance two claims were withdrawn.

As evident from this table, the DRBs gave recommendations in respect of all the disputes referred to them.

Table 2 : Distribution of DRBs' decisions

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

This table shows that in Contract # 1, 2.1 and 2.2 the majority of the claims (76% - 80%) were decided in the contractors' favour. In contract # 3 only 47% of the claims were decided in the contractor's favour. Furthermore, the amount awarded by the DRBs was only in the range of 23 – 29 % of the claimed amount.

Table 3 : Summary of claims referred to Arbitration

Contract No.	Total claims referred	Claims decided	Balance claims
1	4	4	-
2.1	3	3	-
2.2	4	4	-
3	6	5	1
Total	17	16	1

As evident from Table 3, only 17 cases were referred to Arbitration. Therefore most of the DRB decisions were implemented by the parties.

Amicable settlement with an objective of closure of Contract

SJVN's experience at dispute resolution through amicable settlement in the case of its 1500 MW NJHEP is instructive. Following the commissioning of the Project, earnest efforts were made to resolve all the disputes/issues pending before different forums i.e. Employer, DRBs, Arbitral Tribunals, and Courts. As a result of these efforts, we were able to reach settlements in three out of the four contracts.

In contract # 2.2, all the disputes were amicably resolved, and the contract was closed. In contract # 1 and contract 2.1, all disputes, barring two have been resolved. However, in contract # 3, owing to reluctance on the contractor's part, a settlement could not be reached. As a result, even in 2022, i.e. 18 years since commissioning the project, several disputes amounting to more than Rs. 500 crores, are still pending before arbitral tribunals and courts in this contract. Both the parties continue to allocate resources for defending and furthering these disputes, which could have been better utilized on ongoing and upcoming projects.

For settlement of pending disputes in NJHEP, the Board of Directors had constituted a sub-committee to examine the pending issues. This sub-committee of the Board was assisted by an internal committee comprising senior officials from the concerned departments of SJVN. The internal committee and sub-committee of the Board discussed the issues over a series

of meetings with the Contractors. Based on the recommendations of the sub-committee, the Board approved the terms of the settlement.

4. CONCLUSION

Many ADR mechanisms are available for the resolution of disputes in hydropower projects. All of them have their advantages and disadvantages. DABs and Dispute Avoidance with Independent Engineer are suited for resolution of differences during the inception stage. Conciliation and Arbitration are suited as a second-tier mechanism after DAB/Dispute Avoidance as their awards can be challenged on limited grounds. Among conciliation and arbitration, conciliation has better chances of success as it leads to a win-win situation for both parties. Notwithstanding the dispute resolution mechanism employed, the key to success lies in both the parties having faith in the process, which will help them give effect to the forum's decisions. In this regard, the steps taken by MoP, in notifying the panel of IEs and Conciliation Committees are welcome moves and will surely help reduce the pending disputes in hydropower projects.

Urgent steps also need to be taken to discourage frivolous litigation. Now that the Department of Expenditure, MoF has allowed quality-based selection for procurement of works, we can consider penalizing contractors who indulge in such practices, by making litigation history an important parameter while evaluating bids. This will make frivolous litigation less rewarding. In this regard, in March 2022, MoP has also issued guidelines that contractors who repeatedly raise unjustified or inflated claims and engage in frivolous litigation/arbitrations be identified and debarred from future projects.

SJVN's experience in NJHEP shows that adjudication of claims while the works are going on goes a long way in avoiding and settlement of disputes. The ultimate goal of the parties should be the expeditious resolution of all pending issues to enable the closure of contracts. However, it can only be achieved, if both the parties share the belief that their interests are best served if their resources are utilized on productive pursuits which will enable them to work together towards the common goal of dispute resolution.

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