

BAI takes steps to file Writ Petitions for inclusion of Arbitration Clause in contracts

An online meeting of BAI's Legal & Arbitration Committee was held on 7th October, 2024. The meeting was attended by, Shri K. Viswanathan, President, BAI; Shri Anand J. Gupta, Vice President, BAI; Shri Mohinder H. Rijhwani, Hon. Gen. Secretary, BAI; Dr. Dharmesh C. Awasthi, Chairman, BAI's Legal & Arbitration Committee; Adv. Dinkar Singh, Shri Swapnil Kaulgud, Dr. Rajiv B. Krishnani, Shri A.K. Ratheesh - all Co-Chairmen, BAI's Legal & Arbitration Committee and Shri Raju John, Executive Secretary, BAI.

Initiating the discussion Dr. Awasthi the meeting was necessitated due to some additional valuable input shared by Shri Swapnil Kaulgud and Adv. Dinakar Singh, with regard to the representations to be submitted to Kerala and Maharashtra States, as a precursory before filing the Writ Petition.

Shri Swapnil Kaulgud informed that he along with Adv. Dinkar Singh did in-depth research for finalising the representation to be submitted to the Kerala and Mumbai State Authorities to include Arbitration clause in all contract documents. He added that after the research, they have even developed second thoughts of whether to file the Writ Petition, in Bombay High Court, as the State has been promoting institutional arbitration through Mumbai Centre for International Arbitration (MCIA) for settlement of commercial disputes over Rupees Five Crores (Rs.5.00 Crores) between the State and private parties. Mumbai Municipal Corporation, PWD, CIDCO and other major State works authorities have arbitration clause in their General Conditions of Contract (GCC). He also informed members that, this practice is being followed by the State since 2016. He then expressed that, though major Works Authorities are in favour of Arbitration, most of the Government Departments are not including the same in the contract document and as such BAI should file Writ Petition in Bombay High Court too. He also observed that, many departments are not following the institutional arbitration clause for contracts above Rs. 5.00 Crore. He then given an example followed by the contract document introduced by RERA, wherein 6 clauses should be

compulsorily included in any contract and this six clauses are really the essence of the real estate agreement, which ultimately takes care of the interest of the flat purchasers. He felt a similar contract documents with minimum clauses to take care of the contractors' interest should also be compulsorily followed by all Works Authorities.

Shri Swapnil Kaulgud, stated that, he had orally taken up the filing of Writ Petition matter with Adv. Chetan with a fees of Rs.1.60 lakhs till admission. This fees was inclusive of Rs.25,000 for preparing the representation to be submitted to the works authorities and the representation is now being prepared by the Committee and as such this amount can be deducted making it a total payment of Rs.1.35 lakhs. The President approved the proposal of Shri Swapnil Kaulgud and requested him to go ahead and appoint Adv. Chetan with a payment of Rs.1.35 lakhs, which was agreed by all those present in the meeting.

Shri. Anand Gupta suggested that representation should be submitted to Governments of Kerala and Maharashtra as early as possible, and steps should be taken to circulate the draft representation to all State Chairman for submitting the same in the respective states.

Adv. Dinkar Singh said that High Courts are aware about the illegality of Departments not including the Arbitration Clause in the contract documents. He also felt BAI should submit the representations to the concerned authorities as early as possible and should also simultaneously do the ground work for preparing the Writ Petition within the time and preferably immediately after 17th November, 2024. He also informed the House that, he had done extensive research on the Kerala arbitration matter and is in the process of collecting the details from various tender documents. He then informed the house that, in Maharashtra, major Works Authorities like The Greater Municipal Corporation, PWD, CIDCO etc., has arbitration clauses in its contracts since 2016. He also observed that, these departments have well settled system of appointing institutional

arbitrators to decide on the matters above Rs.5.00 Crores and it is functioning exceptionally well as the Government is not deviating from the arbitration clause. He also expressed that, MICA is a State policy, which is recommendatory in nature and not directive and as such is not compulsorily included in the tender conditions. He also stated that, it is legally advisable to submit representation before filing the writ and requested the State Chairman of Kerala to submit it immediately. He also offered his services to appear on the matter to the courts throughout the country, whenever the opportunity demands.

Dr. D. C. Awasthi, appreciated each and every one who participated in the meeting and stated that, finally a decision on filing Writ Petitions at Kerala and Bombay High Courts have been taken after the completion of the time line of submitting the representation to the respective state Government. He also felt the fee of Rs.1.35 lakhs fixed for Adv. Chetan is reasonable and expressed hope of contractors would get some relief through BAI's Writ Petition.

The letters submitted to Government of Maharashtra and Government of Kerala are printed herein below.

Ref.: 15-MH/O/2024-25 Dated 11th October 2024

To

Shri Devendra Fadnavis
The Honourable Minister for Law and Justice Dept.,
Government of Maharashtra
Madam Kama Road,
Hutatma Rajguru Chowk, Mantralaya,
Mumbai 400 032

Representation on behalf of the State Chairman, Builders Association of India (Maharashtra State), to issue necessary directions, to all the 'State Instrumentalities' of State of Maharashtra, to implement 'State Litigation Policy' of State of Maharashtra, in its letter and spirit, which emphasize to encourage, at every level, resort of arbitration, as an alternative dispute resolution mechanism, to ensure effective, efficacious and expeditious resolution of commercial disputes.

Respected Sir,

- Builders Association of India (BAI), founded in 1941, is over eight decades old, all India apex representative body of civil engineering construction companies. BAI, works with various stakeholders in the construction sector, including contractors, builders, and developers. BAI acts as a bridge between the industry and the government, advocating for policy reforms that enhance business efficiency and support sustainable development.
- The Government of Maharashtra (GoM), as recommended by the 13th Finance commission, vide CTA- 2016/Pr.kr.94/ka19, dated 27.08.2014, approved the 'State Litigation Policy' of the State of Maharashtra & published with Unique No 201408271723588212, on the official website of the GoM.
- As per the guidelines, for the effective implementation of the State Litigation Policy,

incorporated in the 'State Litigation policy' itself, the State Government, in Para No. 7 of the 'State Litigation Policy', dated 27.08.2014, has emphasized, that resort to arbitration, as an alternative dispute resolution mechanism, shall be encourage, at every level, to ensure effective, efficacious and expeditious resolution of commercial disputes.

- The Government of Maharashtra (GoM), pursuant to its 'State Litigation Policy, dated 27.08.2014 and pursuant to several other ease of doing business initiatives, undertaken in the state of Maharashtra, passed government resolution dated 13th October, 2016 (Resolution). The Resolution, dated 13th October, 2016, inter-alia, states that:

"It has been noticed in most of the government contracts, the arbitration clauses are in the realm of ad-hoc arbitration and there is no uniformity in either of the covenants of dispute resolution or the appointment of arbitrators. Now, the Government of Maharashtra,

therefore, proposes to formulate a policy to promote, propagate and patronize institutional arbitration as preferred mode of dispute resolution, a vital part of the ease of enforcement of contracts and reduce the litigation, and institutional arbitration as the game changer and thereby give a fillip to establishment of International Financial Centre at Mumbai.”

The Resolution dated 13th Oct, 2016, inter-alia, states:

- The GoM proposes to promote institutional arbitration as a matter of its stated policy;
- All government contracts where the commercial value of the contract is INR 50,000,000 (Indian Rupees fifty million) and above shall have a recommended standard institutional arbitration clause to the effect that the dispute shall be referred to a recognized ‘Indian Arbitration Institute’;
- Existing government contracts may be suitably amended with the consent of both parties as regard the dispute resolution clause to provide that the dispute can be referred to the recognized ‘Indian Arbitration Institutes’, utilizing the recommended arbitration clause instead of the current clause;
- Even in cases where the arbitration has commenced or is about to commence, the parties shall have the option to move over to the proposed arbitration mechanism.

The Resolution, in addition to the above, also sets out a model clause which reads as follows:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration (“MCIA Rules”), which rules are deemed to be incorporated by reference in this clause. The seat of arbitration shall be _____. The Tribunal shall consist of [one/three] arbitrator(s). The language of the arbitration shall be English. The law of this arbitration agreement shall be _____. The Law Governing the contract shall be _____.”

- The Department of Law and Judiciary of the Government of Maharashtra (GoM), with pious objective, to ensure that arbitration shall be the preferred means of dispute resolution for government entities and in an effort to portray Mumbai as a proposed hub for international

commercial arbitration, vide circular dated 28 February 2017, certified the Mumbai Centre for International Arbitration (MCIA), as recognized arbitral institute for the purposes of its ‘Policy for Arbitration as a preferred mode of dispute resolution’ that was released by a government resolution dated 13th October, 2016 (Resolution). Accordingly, the GoM, recognized MCIA, as arbitral institute for arbitrations involving GoM/its instrumentalities and other bodies.

- BAI, is dismayed, to submit this representation, to the August office of Honorable Minister of GoM, to register its protest against some of the State instrumentalities, which explicitly **prohibits the inclusion of arbitration clauses** in its tenders through a clause stating “Arbitration is not allowed”. Few examples of the tenders issued by some of the state instrumentalities, are enclosed herewith this representation.
- Such deviation from the state policy, by the some of the state instrumentalities, stands in stark contrast to one of the prime objectives of the ‘State Litigation Policy’ of State of Maharashtra to encourage to resort to an arbitration, as an alternative dispute resolution mechanism, at every level, to ensure effective, efficacious and expeditious resolution of commercial disputes, read with the pious objective of the GoM, resolved vide Government Resolution dated 13th Oct, 2016 to promote institutional arbitration as a matter of its stated policy, to ensure that all government contracts where the commercial value of the contract is INR 50,000,000 (Indian Rupees fifty million) and above shall have a recommended standard institutional arbitration clause to the effect that the dispute shall be referred to a recognized ‘Indian Arbitration Institute’, to suitable amend all the existing government contracts with the consent of both parties as regard the dispute resolution clause to provide that the dispute can be referred to the recognized ‘Indian Arbitration Institutes’.
- ADR mechanisms including arbitration and mediation are less adversarial and are capable of providing a better substitute to the conventional methods of resolving disputes. The use of ADR mechanisms is also expected to reduce the burden on the judiciary and

thereby enable timely justice dispensation to citizens of the country. Some of the major initiatives, take by the Central Government, over the years, in this regard include; the enactment of the Arbitration and Conciliation Act, 1996, with a view to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith. To keep pace with current developments in the arbitration landscape and to enable arbitration as a viable dispute resolution mechanism, the arbitration law has undergone significant changes in the years 2015, 2019 and 2021. The changes are enabled to signal a paradigm shift for ensuring timely conclusion of arbitration proceedings, minimizing judicial intervention in the arbitral process and enforcement of arbitral awards. The Arbitration and Conciliation (Amendment) Act, 2015 provided for expeditious, fast track and time bound arbitral proceedings, neutrality of arbitrators and cost-effective delivery mechanism. This was followed by the Arbitration and Conciliation (Amendment) Act, 2019 with the main objective of giving boost to institutional arbitration and to reduce the share of ad-hoc arbitration in the country. Further, Section 34 of the Act was amended vide the Arbitration and Conciliation (Amendment) Act, 2021, which provides for unconditional stay of enforcement of arbitral awards where the underlying arbitration agreement, contracts or making of the arbitral award are induced by fraud or corruption. A time line to conclude the ADR process has been prescribed in the respective Acts. The legislative reforms with respect to the Arbitration and Conciliation Act, 1996, have facilitated the minimization of court-intervention in arbitration proceedings and efficacious settlement of commercial disputes.

- BAI, through this representation, urge to the August Office, to issue necessary directions, to all the 'state instrumentalities' of State of Maharashtra, not to deviate from the 'State Litigation Policy' of State of Maharashtra, but to implement in letter and spirit, which emphasize to encourage, at every level, resort of arbitration, as an alternative dispute resolution mechanism, to ensure effective, efficacious and expeditious resolution of

commercial disputes.

- The exclusion of arbitration clauses in the contracts, awarded by the instrumentalities of the state, contributes to extraordinarily delay in resolution of commercial disputes which ultimately affect the execution of state projects and casts a heavy burden on state agencies, with interest and litigation expenses. The commercial courts are overburdened by cases, contract disputes often remain unresolved for years, denying timely justice to the state as well as contracting parties. As the adage goes, "**Justice delayed is justice denied.**" The absence of arbitration clauses emboldens certain officials, as they feel their errors will go unchallenged due to the prolonged judicial process.
- Despite repeated representations to the relevant departments and ministries on this issue, corrective action has not yet been taken. We believe it is time for a comprehensive review of the beneficiaries of this anti-arbitration policy, which clearly conflicts with internationally accepted norms and best practices, including those of the International Federation of Consulting Engineers (FIDIC).
- The construction sector, in the State of Maharashtra, alone contributes over 15% to the state's GDP and is the largest employment generator in Maharashtra. However, the ease of doing business in the construction industry is deteriorating, largely due to deviation from the 'State Policy' by some of the instrumentalities of the State.
- In the light of the above, BAI, through the present representation, respectfully request the Hon'ble Minister to consider, reviewing the current policy of exclusion of arbitration clause and mandate the inclusion of arbitration clauses in all government contracts in Maharashtra, irrespective of the funding source. This would not only align Maharashtra with globally accepted standards but also strengthen its position as the most business-friendly state in India across all sectors.
- BAI, trust that your good office, will consider the above representation, in light of the current 'State Litigation Policy' of the State of Maharashtra, dated 27.08.2014, read with Government Resolution dated 13th Oct, 2016,

further read with Government Circular dated 28th February, 2017, to redress the grievances raised in the present representation, by the BAI, and to issue necessary directions, to all the 'state instrumentalities' of State of Maharashtra, not to deviate from the 'State Litigation Policy' of State of Maharashtra, but to implement in letter and spirit, the 'State Litigation Policy' of the State of Maharashtra, read with Government Resolution dated 13th Oct, 2016, further read with Government Circular dated 28th February, 2017, which emphasize to encourage, at every level, resort of arbitration, as an alternative

dispute resolution mechanism, to ensure effective, efficacious and expeditious resolution of commercial disputes.

With regards

Yours faithfully,



ANIL SONAWANE
State Chairman
BAI Maharashtra

Mobile : 9822979716 / 9552289999

Copy to :

- Chief Secretary, Law and judiciary Department of Maharashtra.

Enclosures:*

- Litigation Policy for State of Maharashtra-2014
- Government Resolution dated 13th Oct, 2016, Institutional Arbitration Policy
- Government Circular dated 28th February, 2017, Mumbai Int Arbitration Centre
- Summary of Tender Documents issued by the State or its instrumentalities (8 Departments, 8 Tenders recent FY 2024-25).

* not printed here

To

The Hon'ble Minister Law, Industries and Coir,
Government of State of Kerala,
Thiruvananthapuram.

Respected Sir,

Representation by the Chairman, on behalf of Builders Association of India (Kerala unit), to issue necessary Orders, to all the 'State Instrumentalities' of State of Kerala, to implement 'State Litigation Policy' of State of Kerala, in its letter and spirit, which emphasizes to encourage, at every level, resort of arbitration in construction contracts, as an alternative dispute resolution mechanism, to ensure effective, efficacious and expeditious resolution of commercial disputes.

1. Builders Association of India (BAI), founded in 1941, is over eight decades old, all India apex representative body of civil engineering construction companies. BAI, works with various stakeholders in the construction sector, including contractors, builders, and developers. BAI acts as a bridge between the industry and the government, advocating for policy reforms that enhance business efficiency and support sustainable development.
2. The Government of State of Kerala, after the issue relating to the Kallada projects, explicitly **prohibits, settlement of commercial disputes, relating to** construction contracts, through the process of Arbitration. Recently, the Acting Chief of the Kerala High Court, while speaking at the inaugural function of the Arbitration Centre at the Kerala High Court, said that:

“ Kerala Government in policy has not keen in referring to Arbitration Centre after the issue

relating to the Kallada projects. Kerala government legislated to nullify the arbitration clauses entered in the contracts. Of course, there was a challenge against the legislations ultimately it went to the Supreme Court and the Supreme Court upheld the challenge holding it as unconstitutional. I hope that the Kerala Govt will show the interest to refer disputes to the Arbitration Center."

3. As recommended by the 13th Finance Commission, Government of State of Kerala, vide G.O. (P) No. 12/2011/Law/Dated 03.12.2011, approved 'State Litigation Policy', which has been in operation. As per the guidelines for the effective implementation of the State

Litigation Policy, incorporated in the 'State Litigation policy' itself, the State Government, in Para (v)(b) of the 'State Litigation Policy, dated 03.2.2011, has emphasized, that resort to arbitration, as an alternative dispute resolution mechanism, shall be encouraged, at every level, to ensure effective, efficacious and expeditious resolution of commercial disputes. We would like to draw attention of the Hon'ble Minister to Para V of the above order which reads as follows:

" V. Alternative Dispute Resolution and Arbitration

(B) The resort to arbitration as an alternative dispute resolution mechanism shall be encouraged at every level, but this entail the responsibility that such an arbitration will be cost effective, efficacious, expeditious and conducted with high rectitude."

The state litigation policy was subsequently amended by orders, G.O.(P)No. 10/2012/Law, G.O.(P). No. 11/2011/Law, both dated 12.06.2012 and G.O.(P)No. 22/2019/Law Dated 07.12.2019. But Para V quoted above was untouched and remains intact.

4. Thus, on a plain understanding of the 'State Litigation Policy' of the State of Kerala, it is mandatory on the part of the 'State and its instrumentalities' to encourage to resort to arbitration, as an alternative dispute resolution mechanism, at every level, to ensure effective, efficacious and expeditious

resolution of commercial disputes. The present policy of introducing an exclusion clause in the Contract agreements; "Arbitration is not allowed" is in violation of the accepted and approved 'State Litigation Policy' and any internal circular directing to include the arbitration exclusion clause is in violation of the fundamental rights of the stake holders and against public policy.

5. The exclusion of arbitration clauses in state contracts by Government of Kerala contributes to project delays and casts a heavy burden on state agencies with interest and litigation expenses. The commercial courts are overburdened by cases, contract disputes often remain unresolved for years, denying timely justice to the state as well as contracting parties. As the adage goes, "**Justice delayed is justice denied.**" The absence of arbitration clauses emboldens certain officials, as they feel their errors will go unchallenged due to the prolonged judicial process.
6. ADR mechanisms including arbitration and mediation are less adversarial and are capable of providing a better substitute to the conventional methods of resolving disputes. The use of ADR mechanisms is also expected to reduce the burden on the judiciary and thereby enable timely justice dispensation to citizens of the country. Some of the major initiatives, take by the Central Government, over the years, in this regard include; the enactment of the Arbitration and Conciliation Act, 1996, with a view to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith. To keep pace with current developments in the arbitration landscape and to enable arbitration as a viable dispute resolution mechanism, the arbitration law has undergone significant changes in the years 2015, 2019 and 2021. The changes are enabled to signal a paradigm shift for ensuring timely conclusion of arbitration proceedings, minimizing judicial intervention in the arbitral process and enforcement of arbitral awards. The Arbitration and Conciliation (Amendment) Act, 2015

provided for expeditious, fast track and time bound arbitral proceedings, neutrality of arbitrators and cost-effective delivery mechanism. This was followed by the Arbitration and Conciliation (Amendment) Act, 2019 with the main objective of giving boost to institutional arbitration and to reduce the share of ad-hoc arbitration in the country. Further, Section 34 of the Act was amended vide the Arbitration and Conciliation (Amendment) Act, 2021, which provides for unconditional stay of enforcement of arbitral awards where the underlying arbitration agreement, contracts or making of the arbitral award are induced by fraud or corruption. A time line to conclude the ADR process has been prescribed in the respective Acts. The legislative reforms with respect to the Arbitration and Conciliation Act, 1996, have facilitated the minimization of court-intervention in arbitration proceedings and efficacious settlement of commercial disputes.

7. The Acting Chief of the Kerala High Court, while speaking at the inaugural function of the Arbitration Centre at the Kerala High Court, said that both the government as well as the contractors find it difficult to adjudicate their disputes in a formal system because of the nature of the dispute and the evidence involved in it. He thus expressed the hope that both the Central and State Governments will include arbitration clauses in their contracts and refer their disputes to arbitration.
8. The Arbitration Centre, established under the aegis of the Kerala High Court, would serve as a credible platform, instilling confidence in litigants to resolve their disputes through alternative dispute resolution methods instead of the formal justice system. Therefore, the Government of State of Kerala, pursuant to its existing 'State Litigation policy' shall promote, propagate and patronize institutional arbitration as preferred mode of dispute resolution, which is a vital part of the ease of enforcement of contracts and reduce the litigation.
9. Despite repeated representations to the relevant departments and ministries on this

issue, no corrective action has been taken. We believe it is time for a comprehensive review of anti-arbitration policy, which clearly conflicts not only with State Litigation Policy but also with internationally accepted norms and best practices, including those of the International Federation of Consulting Engineers (FIDIC).

10. The State of Kerala recently achieved the proud distinction of being ranked the No. 1 industry-friendly state in India, under the eminent leadership of the Hon'ble Minister. The construction sector alone contributes over 15% to the state's GDP and is the largest employment generator in Kerala. However, the ease of doing business in the construction industry is deteriorating, largely due to the absence of efficient dispute resolution mechanisms like arbitration.
11. In the light of the above, BAI respectfully request the Hon'ble Minister, to promote, propagate and patronize institutional arbitration as preferred mode of dispute resolution, to discard the exclusion of arbitration clause in its commercial contract and to mandate the inclusion of arbitration clauses in all government contracts in Kerala, irrespective of the funding source. This would be in alignment with globally accepted standards to strengthen its position as the most business-friendly state in India across all sectors and in line with the approved State Litigation Policy. Necessary orders may be issued to include the arbitration clause in all the contracts involving construction activities so as to avoid the arbitrary discrimination clause in State Government Funded Projects and external agencies funded projects and ensure a fair and efficient contractual framework for the construction industry in Kerala.

With regards

Yours sincerely



P. N. Suresh
Chairman, Kerala State
Builders Association of India.

Copy to: Shri K. G. Sanal Kumar, Law Secretary, Government of Kerala.