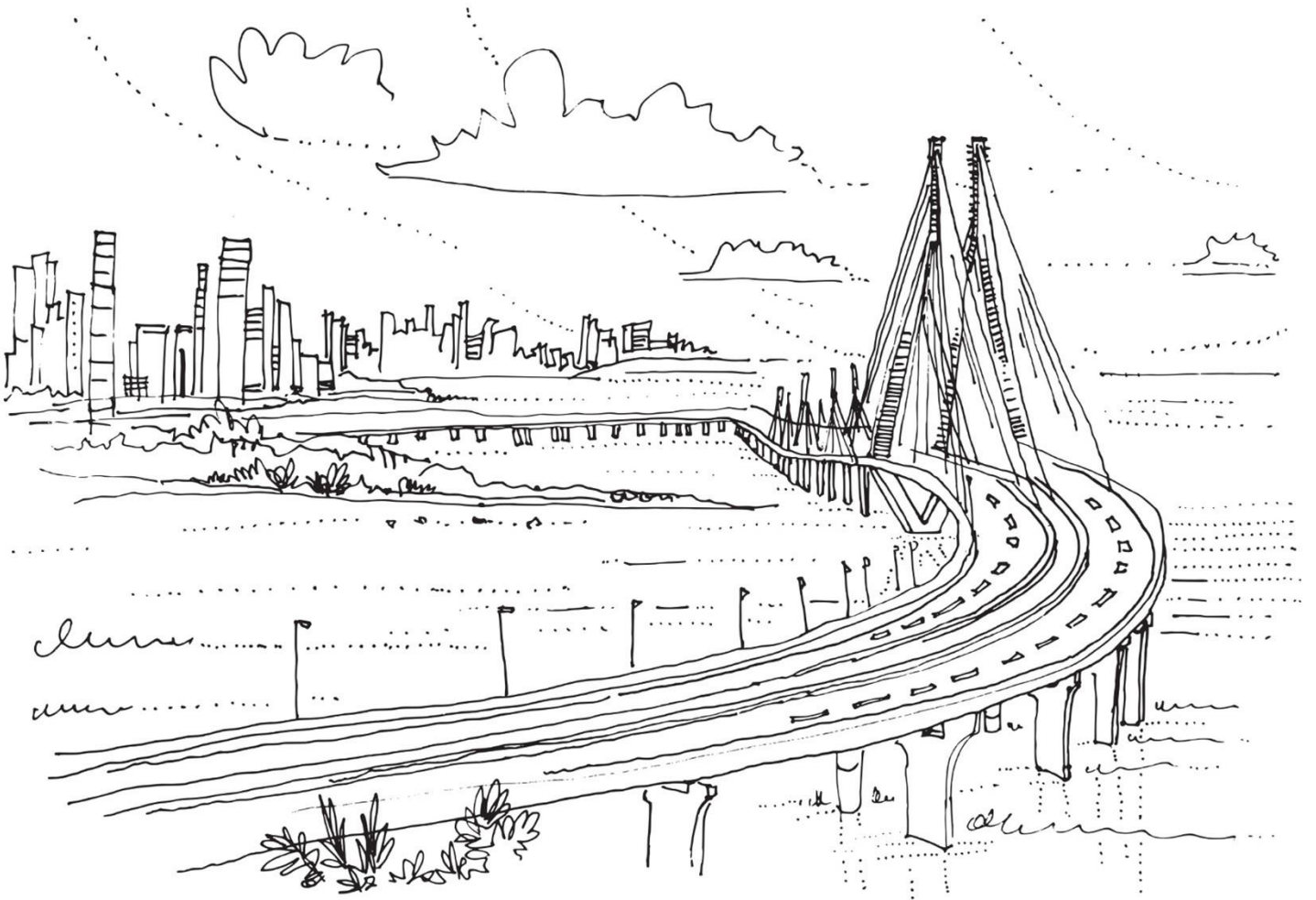




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Vivad Se Vishwas II – A window of opportunity to reap the fruits of your award

VIVAD SE VISHWAS II – A window of opportunity to reap the fruits of your award

Although, in the Union Budget 23-24, the Government of India had allocated INR 10 lakh crore (3.3% of GDP) towards infrastructure development, over the past decade, some of the biggest names in infrastructure have faced a torrid time financially. Some of this has been attributable to the fact that the contractors/concessionaires have been involved in long drawn disputes with the government and its entities resulting in crippling effects to cashflows and over leveraged balance sheets. With government officials being reluctant to approve payouts (even after arbitral awards / court decrees had been issued in favor of contractors) due to potential vigilance enquiries, private participation in infrastructure development began to adopt a more cautious approach. This approach of the government led to a backlog of litigation cases, working capital constraints, a reduction in competition in public tenders and a downward outlook in fresh investment.

In 2021, the government introduced the novel concept that whilst the government appealed against the arbitral award in favor of the contractor, the government would release funds against security to the contractor¹. That concept fell quickly out of favor with contractors who could not utilize such funds except by way of margin money for providing the security to procure these very funds. Most importantly, the litigation between the government and the contractors did not come to an end through the implementation of this concept.

To rectify this, the government, one of the largest litigants in India, has brought out 'Vivad se Vishwas II (Contractual Disputes)' Scheme ("**Scheme**") to settle disputes as set out in the Office Memorandum dated 29.05.2023 issued by Ministry of Finance, Department of Expenditure, Procurement Policy Division ("**Office Memorandum**").

Which entities can settle under the Scheme?

Disputes between a Procuring Entity and a Contractor can be settled through this Scheme.

Procuring Entity

- Inclusions
 - Central Government Ministries/Departments and attached and subordinate bodies.
 - Autonomous Bodies such as National Highways Authority of India (NHAI), some of the major ports, Central Government Employees Welfare Housing Organisation (CGEWHO), Central Power Research Institute (CPRI), Council of Scientific and Industrial Research (CSIR), Indian Railways Institute of Civil Engineering (IRICEN), and others².
 - Public Sector Banks and Financial Institutions such as SBI, BoI, BoM, Bank of Baroda and others.
 - Central Public Sector Enterprises such as ONGC, BPCL, HPCL, GAIL, EIL, AAI, HAL, IRCTC, BEML, DFCCIL, BSNL, CCL, CIL, NMDC, MMTTC, NALCO, NTPC, PEC, PFC and others³.
 - Union Territories without legislature and all agencies/undertakings thereof.
 - All organizations where Gol holding is 50%, unless these organizations have opted out.
- Exclusions
 - The State Government and Union Territories with legislature and attached and subordinate bodies have been urged to adopt the Scheme but are presently not included.

¹ Office Memorandum dated 29 October 2021 bearing reference number F.1/9/2021-PPD titled 'Insertion of Rule 227A in General Financial Rules (GFRs) 2017 – Arbitration Awards' issued by the Department of Expenditure, Ministry of Finance.

² For a detailed list see <https://igod.gov.in/ug/E051/organizations>

³ For a detailed list see <http://www.bsepsu.com/list-cpse.asp>

Contractor

- Any contractor willing to participate, including Central Public Sector Enterprises who are contractors to the procuring entities⁴.
- However, a concern exists. As per Paragraph 8, the scheme shall not apply to '*cases under international arbitration*'. This should ordinarily be interpreted to mean cases where the seat is situated outside India. However, if this is interpreted to mean '*international commercial arbitration*' under the Arbitration and Conciliation Act, 1996, this scheme would only apply to parties who are Indian nationals and corporate entities registered in India.
- The contractor need not be an award-holder. Importantly, even where the contractor is the award/judgment debtor, it can opt to settle under this Scheme.⁵ So, if the contractor has an Arbitral Award or a Court Award against it, it can reduce its liability by opting to settle under this Scheme as per the same mathematical calculation provided below. This is indeed a welcome and bold move by the government.

What disputes can be settled?

- Only contractual disputes can be settled.⁶ These include:
 - Procurement contracts (whether goods, services or works).⁷
 - PPP arrangements.
 - Earning contracts where the government receives money in exchange for goods, services, rights and other considerations.
- The Scheme is restricted to where:
 - An arbitral award has been issued up to 31.01.2023 ("**Arbitral Award**").⁸ Only cases involving domestic arbitration and not cases involving international arbitration are included.⁹ MSEFC awards are included. The Arbitral Award does not include interim orders.
 - A court award has been issued up to 30.04.2023 ("**Court Award**").¹⁰ Court Award can include a decree arising out of a civil suit or arising out of any proceeding pursuant to an arbitral award. The Court Award does not include interim orders.
 - Conciliation is ongoing after Arbitral Award or Court Award.¹¹
 - Monetary relief is the only relief granted. Where the Arbitral Award or Court Award includes a relief involving specific performance, this Scheme will not apply.¹²
- It is clear from the above that non-contractual disputes cannot be settled through this Scheme. Further, it is not applicable to matters which have not resulted in an arbitral award up to 31.01.2023 or a court decree up to 30.04.2023.

⁴ Para 7, Office Memorandum

⁵ Para 11, Office Memorandum

⁶ Para 4, Office Memorandum

⁷ Para 9, Office Memorandum

⁸ Para 10b, Office Memorandum

⁹ Para 8, Office Memorandum

¹⁰ Para 10a, Office Memorandum

¹¹ Para 23, Office Memorandum

¹² Para 5, Office Memorandum

Window of Application

- The Scheme, currently, will be open between 15.07.2023 to 31.10.2023.¹³ However, depending upon when the government is able to have the portal up and running, this may be extended.

Computation for Payout

Arbitral ¹⁴ Award	65% of the net amount awarded or amount claimed under the Scheme, whichever is lower. (-) Amount already paid. (+) Pre-reference interest and pendent lite interest at actuals. (+) 9% simple interest as post award interest.
Court Award ¹⁵	85% of the net amount awarded or amount claimed under the Scheme, whichever is lower. (-) Amount already paid. (+) Pre-reference interest and pendent lite interest at actuals. (+) 9% simple interest as post award interest.

- Net amount is calculated after deducting setting off any claims and counterclaims awarded.¹⁶
- 9% p.a. post-award simple interest is payable after time period provided in Arbitral Award or Court Award for payment lapses until date of acceptance of settlement offer. If no time period is stipulated in the Award, the default time period which is interest free shall be 30 days.
 - If some part payment has already been made, post-award interest will be calculated on balance amount.¹⁷ However, deposit in court shall not be considered as payment.¹⁸
 - Post-award interest of 9% simple interest p.a. shall override the rate prescribed in the Arbitral Award or Court Award

Procedure for processing Claims

- Claims are to be submitted through Government e-Marketplace or relevant portals.
- Choice of opting for settlement lies with the Contractor who has to key in details of eligible matters on said portals.
- Each matter is treated distinctly. Even multiple arbitrations/litigations under one contract are treated distinctly.
- The Procuring Entity shall verify and update details.
- The Procuring Entity shall make an offer within 2 weeks of receipt of claims.
 - The Procuring Entity is bound to make an offer if the claim is below INR 500 cr.
 - If the claim is above INR 500 cr., the Procuring Entity has the discretion not to make an offer, but such a decision has to be reasoned and is to be reviewed. However, the Contractor can avoid such a situation by choosing to reduce the claim amount to below INR 500 cr. even if the Arbitral Award / Court Award is greater than INR 500 cr.
 - From the language of the Office Memorandum, it appears that the Procuring Entity has no discretion to reduce the offer below an amount arrived at through the mathematical calculations prescribed in the Office

¹³ Para 17, Office Memorandum

¹⁴ Para 10b, Office Memorandum

¹⁵ Para 10a, Office Memorandum

¹⁶ Note 1 to Para 10, Office Memorandum

¹⁷ Note 2 and 3 to Para 10, Office Memorandum

¹⁸ Para 12, Office Memorandum

Memorandum. However, there may be differences of opinion when the Procuring Entity changes the claim amounts upon verification thereof.

- The Contractor is not bound to accept the offer. However, Contractor has to convey acceptance of the offer within 30 calendar days. The Procuring Entity can amend/withdraw the offer prior to acceptance. If prior to acceptance, the net amount changes on account of any order of any court, the Procuring Entity can amend the offer. Notably, the Contractor cannot withdraw its request.
- Upon acceptance within the time period specified, auto generated acknowledgment shall be issued which shall bind parties. If after acknowledgment, the net amount changes on account of any order of a court, neither party can back out of settlement.
- Upon issuance of acknowledgement, Contractor or Procuring Entity, as the case may be, is to file application for withdrawal of case within 45 days.
 - In the case of Contractor filing the withdrawal, Contractor shall upload proof of withdrawal and settlement agreement shall be executed within 30 days thereafter.
 - In the case of the Procuring Entity filing the withdrawal, settlement agreement shall be executed within 30 days of filing of such application.
- A settlement agreement is to be drawn up. Stamp duty is to be borne by the Contractor.
- Payout shall happen within 30 days of execution of the settlement agreement.

Comments and Concerns

Although the Office Memorandum is definitely a forward-looking step for reducing backlog and settling matters, it requires a few clarifications and there are a few concerns and suggestions.

- As per Paragraph 8, the Scheme shall not apply to '*cases under international arbitration*'. This should ordinarily be interpreted to mean cases where the seat is situated outside India. However, if this is interpreted to mean '*international commercial arbitration*' under the Arbitration and Conciliation Act, 1996, this Scheme would not apply to cases where the Contractor is a foreign national or a corporate entity not registered in India. The distinction between the applicability to domestic and international arbitrations should be removed, or at the very least clarified.
- The distinction between the percentage amount payable for Arbitral Awards (65%) and Court Awards (85%) has no reasonable basis and should be removed.
- There is a potential confusion that arises from Illustration 1. It appears that the net amount excludes pre-reference and pendent lite interest, i.e., the net amount is the basic awarded. If so, the pre-reference and pendent lite interest up to date of the Arbitral Award will be paid separately and is not based on the percentage payout but on the net amount. However, this is not distinctly brought out in the Office Memorandum.
- It should be clarified in Step 3 of Para 14 of the Office Memorandum that:
 - The evaluation by the Procuring Entity of any request for settlement made by the Contractor should only be limited to:
 - verification of whether there exists an Arbitral Award or Court Award,
 - whether the same is eligible under the Office Memorandum, and
 - whether the claim amounts are true and correct as per the Arbitral Award or Court Award.
 - If there is a difference of opinion on the claim amounts, the verification of the same ought to be done along with the Contractor and an independent body within one week.

- Apart from the limited verification set out above, the Procuring Entity should have no leeway (except where the claim amount is in excess of INR 500 cr.) to make an offer that falls below the mathematical calculations set out in the Office Memorandum.
- The Office Memorandum ought to urge State Governments to exempt settlement agreements executed pursuant to the Office Memorandum from stamp duty implications.

Concluding remarks

Notwithstanding the above concerns, this is a much-needed boost to a sector that is plagued by years of uncertainty when it comes to realization of amounts under arbitral awards. Although the percentage realizations may be lower than the industry's expectations, they may still be sufficient to alleviate immediate cash flow constraints. If executed well, the impact of this Office Memorandum on judicial backlog could be sizeable. Importantly, this may very well rescue contractors in deep financial trouble and give relief to banks and creditors who were struggling to realize value in infrastructure development companies that were undergoing Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016. This would also lead to a direct injection of cash into this sector and bring back competition in newly floated tenders. Provided the state coffers can bear the sudden burden and the processing of requests is glitch free, there may just be a deluge of requests to settle. Perhaps Vishwas or trust can indeed be rebuilt in this manner.

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at insights@elp-in.com or write to our authors:

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