Advanced Contracts, Tendering and Public Procurement
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Lecture 43
Tendering, Contracts, Public Procurement

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This lecture session is being attempted is to give brief overview of the various regulatory, legislative and executive framework for government contracts, tendering and public procurement. An overview of the legislative executive framework, it is important to evaluate what are the implications or good and bad contract, and why the law and contract is something that is a prerequisite, before contracts can be entered into.

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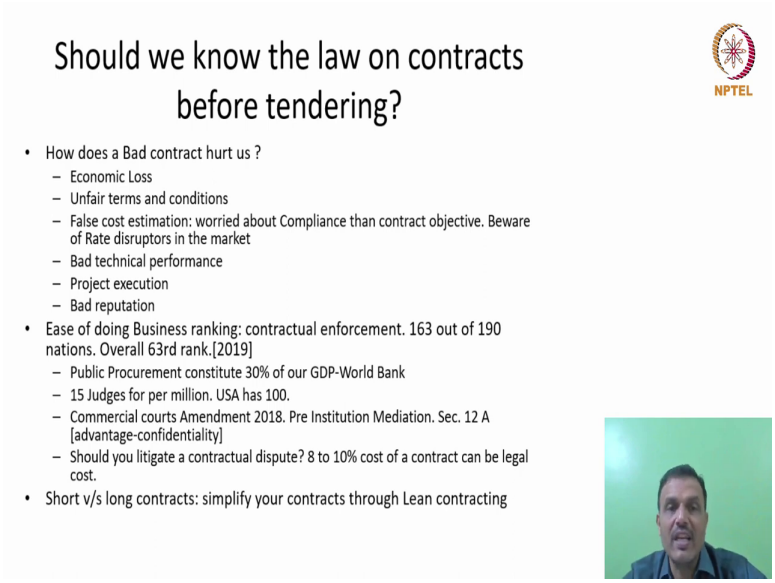

I think knowing the law makes a better common sense. Knowing the law ensures compliance, knowing the law probably avoids disputes and knowing the law makes an effective profitable commercial venture. How does bad contract hurts anybody? A bad contract means it could be badly negotiated contract, it could be badly drafted contract, or it could be a contract that is in non compliance of the law. All of these, would be considered as bad contracts. Does or will it hurt businesses, enterprises, and the contracting parties? the answer is pretty straightforward, it does hurt.

The first and the foremost implications of a bad contract would be that it would result in an economic loss to the parties. Friends, contracts or about commercial terms, contracts about the pricing the profitability, the business situation between both the parties. So, when the parties do not agree to the price and the cost of the products or services in the contract and calculate it effectively, of course contract will result in economic loss.

Now interestingly, economic loss in private and public sector means that in the public sector, economic loss would mean loss to the exchequer**.** As we have seen in cases like the Commonwealth Games, loss to the government, as an entity and a contracting party, but more so, it is lost to the economy and to the citizens who are the real taxpayers.

So, economic loss implication in tendering and government contract has huge ramification for judicial review, scrutiny by the CAG and probably ending up with a vigilance inquiry with the central vigilance commission. And hence, it is important to avoid, prevent our temptation of entering into bad contracts. Secondly bad contracts may always result in unfair terms and conditions. Of course, when terms and conditions are to be agreed upon, it is always possible that these terms and conditions could run into several pages. Reading the terms and conditions, understanding its implication is required to any fair, good contract.

However, it is always understood that contracts are an instrument of ensuring proper profitability of business enterprises. And hence, one who drafts the contract may always make the contract favorable to the circumstances, they may reserve rights, actually create circumstances which be fair to him, whereas it could be unfair to the other party. This is quite visible in consumer contracts, but it has also been visible in government contracts, especially when the drafting of the contract is left to private entrepreneurs, private parties and private law firms. They would actually make the contract in favor of the client. And this would result in government having an unfair contract.

Can unfair contracts hurt the government? It has already, in several cases. This has meant, not only an unflavored, biased, one sided arbitrary contract, it has also meant that it has costed the government time and delay in execution of essential infrastructure and civil work which probably would enhance citizens-centric approaches to common contract. False estimation or false cost estimation is a real worry for government contracts because of the lack of resources in making this cost implications. And hence, most of the times when such contracts of high value are given, the government would actually end up appointing a consultant so that they can avoid such kinds of challenges and problematic situations.

Interestingly, fake or false fast, cost estimation is an unfair practice. It can actually amount to disruption in the market as well. And hence, tendering, when it comes to the proper estimate of work, has an important implication because that kind of publication that goes to the tender notification is always binding on both parties.

Of course, bad contracts will end up in bad technical performances, because unless you agree to the technical parameters, that the contractor must do, unless you understand the technicalities

and technology, and science or engineering that is involved in the performance of the contract, a bad contract will result in bad technical performance.

This is definitely the way in which you see public works actually being executed very poorly. And that is something that the citizens have always evaluated the performance of the government. Because I think the government contracting is about government's technical understanding, appreciation of such facts.

Bad technical performance can also be in terms of the bad technical product that has been ordered, because the current advanced technology is a requirement. And it can affect, right from the Defence to the IT sector, to any other sector, including textiles and others, in which the government is keenly procuring goods and services for the nation's economy and strategic development.

Bad contracts result in bad project execution because if projects have to be executed, they have to be executed on time, executed efficiently, both in terms of performance efficiency and quality efficiency. So, project execution becomes very critical. So, it is not about having just good terms and conditions in the contract. The contract should be quite flexible and practical in terms of its expectations of implementation. The time schedule for performance also have to be very, very realistic so that the project is completed on time, as well. Of course, bad contracts have always resulted in bad reputation. In the international contracting space, with cases like Antrix, and Devas Corporation, where government entered into the contracts with Devas has now resulted in a bad reputation, not only for the Antrix Corporation, which is the commercial organ of ISRO, but it has also resulted in bad reputation to the government because the government, at the international platforms, especially at arbitrations, was considered not respecting the white letter,

So, bad reputation is something that one needs to be clearly cautious and aware of. And hence, notice that when it comes to the ease of business ranking, India actually was ranked very low, especially in terms of contractual enforcement. And to a larger extent, that had to do with a lot of government disputes that has gone into arbitration.

Thanks to many of these contracts, thanks to many of the bilateral investment treaties that India did enter into. And this has all resulted in implications that has hurt the nation, that has hurt the

nation's economy as well. The ease of business ranking, India has been ranked overall 63rd ranking.

Whereas in contractual enforcement, we were ranked 163 out of 190 countries, which probably states very clearly how contractual enforcement in India is probably one of the weakest among developing and developed nations. Despite having a common law system, despite having democracy, despite having a very robust, active judiciary, contractual enforcement has always suffered in this country. Only a good contract and avoid the challenges of enforcement. Because I think the judiciary can come up with judgments, but in terms of implementation and enforcement of the judgment, India has always faced numerous challenges.

The World Bank has estimated that 30 percent of our GDP is driven by public procurement and government contracting. That is one-third of the entire market is driven by government procurement and government contracts. So, government is a very big player and government contracting opportunities actually increases the right to business. It increases enterprises, ability to actually develop, and hence government is not only the biggest buyer, but government is also the one, the biggest agency that is giving you the largest grants, the licenses for extraction of natural resources, so on and so forth. So, I think that is the driving force of the economy. And in India, especially with socialism as one of the cornerstones and the pillars of the preamble of the Constitution of India the government is not just looking at governance, it is looking at taking part in active businesses.

And very recently, the government did take up 33 percent equity in Vodafone-Idea, a telecom or telecommunication company so that we have a third competitor in the telecommunication market, especially the private space, apart from Airtel and Jio. the government is investing, the government is buying and granting licenses.

And that is quite a sizable portion of what we are speaking about in this course. Unfortunately, though, to talk about contractual enforcement, the challenges and the ease of doing business report very clearly talks about the number of judges per million in India, which is pretty low in terms of the of the population, whereas U.S. has the highest

India has just 15 judges. Is this, the reason why contract enforcement is weak in India, maybe one of the factors. And this is totally to improve the of purpose of contractual enforcement, government have created the commercial courts. And these are, this is a special law, a special court that has been brought into existence. Arbitration as a special kind of dispute resolution mechanism, a commercial arbitration that will resolve disputes before it reaches the court. Right now, in the courts, you know that are specialized court, family court is a specialized court, Court of Small Causes is also specialized. In the similar fashion, the government did come up with this commercial court law.

And under the commercial courts, the specialized judges will only decide commercial disputes, they will apply the specific law, they look at remedies damages, specific performance and substituted performance. Interestingly, this law has now been, become a very robust legislation.

So, it should be resulting in timely disposal of cases. We are pitching the commercial courts as equal and competent institution like an arbitration but this is a proper court, this is not an alternate dispute resolution. So, the commercial court has seen some success in places like Delhi, Bombay and Bangalore. It is yet to be replicated in other parts of the country.

However, what is important is that, under the Commercial Courts Act, there is a possibility of pre institution mediation under Section 12A, which means the parties can settle the matter before the court actually takes the matters on merits and decides, which can actually avoid delay. It can actually force the parties to actually build the trust, despite the dispute.

And mediation is considered as a very important tool today, apart from what is there as conciliation. Should you litigate a contractual dispute? Now, this is kind of a question that all must understand. And government more so must answer this question. Now, to litigate a contractual dispute, involves cost, it involves time, it involves a lot of executive action and purpose.

For example, let us just understand this, once the government contract goes into court, it is not easy for the government to actually hire a lawyer, again, they will have to probably have a panel of lawyers, most of the panel of lawyers maybe junior advocates, then you have to make an exception to have a senior advocate.

So, there is going to be delay in just deciding who the lawyer will be representing the government in some of these contractual disputes. So, avoiding dispute is the best. And it is not about just the time but also the cost, because the legal cost is just escalating. And in many cases, the legal cost escalated the contractual damages that is actually claimed.

Now, that is a scenario that can be clearly avoided by the government. And hence, they must have a contract in which there is clarity of obligations, there is clarity of expectation, and there is clarity of alternate dispute resolution in case the dispute arises. And that should be the main focus of area in which this resolution of disputes should actually take place.

Talking of management in most corporate organizations, the most important question that a lot of people have asked is, what is better a short or a long contract? Maybe 20 to 25 years back before LPG, that is Liberalization, Globalization and Privatization came into this country, there was always shorter contracts.

And interestingly, lengthy contracts were not something that was existing. Thanks to Google, online, thanks to drafts that are available, today, lawyers are actually charging based on the number of pages that they draft in a contract. So, long contracts, has become kind of a standard practice. It is not probably long contracts, but long contractual clauses have become a very standard practice. Now, to be honest, “if you ask me for my experience, whether it is long or short, it does not matter in terms of dispute” longer the contract, more will be the complication in terms of interpretation, construction of the clauses in the contract and trying to arrive at the specific obligation of the parties. So, longer contracts are not necessary to avoid disputes.

So, is the problem or the challenge of shorter contract. Short contract does not necessarily mean it is good, because short may avoid the necessary obligations, keeping it short is always good, because it is very clear and specific. But sometimes, you may miss of the details as well. So, somewhere a, bridge between short and long contracts, is what people must attempt to. Lean contracting is something that one must attempt, simplifying contractual clauses is something that one should attempt.

Because keep it lean and simple, disputes can be decided based on the merits of it, and not necessarily based on the documents that has been entered into. Dispute must be decided at the time the dispute arises. And it should not be something that is referred by the White Letter Law.

It must be based on facts and proof rather than on the circumstances of drafting the contract. All of these are critical in understanding how tendering and government procurement and contracting must probably take place. This is probably the background to start understanding the law and the different legislations that govern government contracts.