

IN-DEPTH

# Construction Disputes

INDIA



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# Construction Disputes

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Contributing Editors

**Ryan Whelan** and **Graham Lovett**

Akin Gump Strauss Hauer & Feld LLP

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*In-Depth: Construction Disputes* (formerly The Construction Disputes Law Review) is a useful guide to the most consequential aspects of international construction disputes, highlighting the practical implications of the relevant case law, statutes and procedures. Topics covered include time bars as condition precedent to entitlement; right to payment for variations; concurrent delay; suspension and termination; penalties and liquidated damages; defects correction and liabilities; overall liability caps; and much more.

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# India

[Farhan Khan](#), [Rohit Singhal](#), [Wasee Jan](#), [Md. Saquib](#), [Devesh Matta](#) and [Gunjan Chhabra](#)

[Masin](#)

[MRP Advisory](#)

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## Introduction

India is arguably the fastest growing construction market globally. Currently the fourth largest, it is forecast to become the third-largest construction market by 2025 with a Compound Annual Growth Rate (CAGR) of over 6 per cent. The Union Budget, which identifies the planned government spending has allocated 1,111 billion rupees (approximately US\$134 billion) for strengthening the sector, which is 3.4 per cent of the GDP of the country.

This incredibly expansive plan to modernise the country is part of a persuasive story of economic transformation that has significantly gained momentum over the past decade. Some of the key areas driving this growth include a massive push towards modernising of urban infrastructure, transportation and affordable housing. With the growing size and quantum of projects, complexities along with resultant risks are also growing. There has been a steady increase of disputes in the construction sector owing to several factors, especially after the onset of covid-19.

Although India does not have courts or tribunals specifically dedicated to construction matters, construction contracts typically include an arbitration clause, providing for either ad-hoc or institutional arbitration mechanisms.

In recent years, both the legislature and judiciary have taken active steps to position India as a pro-arbitration jurisdiction.

## Year in review

The past year has seen quite a few important developments in the area of construction disputes in India, including many landmark judgments.

### Enforceability of arbitration agreements with insufficient stamp duty

Enforceable arbitration agreements in the construction sector is a key priority for stakeholders in the industry. In *Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re*,<sup>[1]</sup> a seven-judge bench of the Supreme Court of India was called upon to decide the interplay between the arbitration agreements under the Arbitration and Conciliation Act, 1996 (the A&C Act) and the Indian Stamp Act, 1899 after a five-judge bench in *NN Global Mercantile (P) Ltd v. Indo Unique Flame Limited and Others* by 3:2 majority held that the unstamped arbitration agreements are void and unenforceable.<sup>[2]</sup>

The five-judge bench judgment had created several doubts in the minds of parties with regard to arbitration agreements contained in construction contracts and otherwise, which were insufficiently stamped or unstamped. The earlier ruling would have the effect of delaying appointment of arbitrators as the agreement would first need to be impounded to cure the stamping defect.<sup>[3]</sup>

Finally, the seven-judge bench came to the rescue citing the case's 'larger ramifications and consequences' and observed the following:

1. unstamped or inadequately stamped agreements would not be rendered void or unenforceable; these are curable defects;
2. objections to the stamping do not fall for adjudication when a court is deciding a case for reference of disputes to arbitration or for appointment of arbitrators;
3. the concerned court must only examine the *prima facie* existence of the arbitration agreement under both occasions; and
4. the arbitral tribunal will have jurisdiction to decide on this issue after it has taken cognisance of the matter.

## Claim of non-signatories in an arbitration

In a landmark decision, the Supreme Court of India, in a five-judge bench decision has addressed the contentious issue of Group of Companies Doctrine in the case of *Cox and Kings Ltd v. SAP India Pvt Ltd.*<sup>[4]</sup> The ruling addressed the inconsistent application of the doctrine in prior decisions and laid down clear principles. The key takeaways are:

1. Consent in Arbitration: The Court reaffirmed that arbitration agreements must be based on mutual consent and contract law principles. Non-signatories cannot be compelled to arbitrate unless there is sufficient legal grounding.
2. Non-Signatories and Arbitration: Under the Indian Arbitration & Conciliation Act, 1996, both signatories and non-signatories can be bound by an arbitration agreement. However, non-signatories must have a derivative claim through or under a signatory.
3. Derivative Capacity of Non-signatories: The Court distinguished between a 'party' to an arbitration and those 'claiming through or under' a party, with non-signatories only being involved in a derivative capacity.
4. Basis of the Doctrine in India is Common Intention: The judgment clarified that the doctrine does not rely on 'piercing the corporate veil' or 'alter ego' concepts, nor does it depend on the 'single economic entity' theory. Instead, it focuses on the common intention of the parties, the relationship between the signatories and non-signatories, and the composite nature of transactions.
5. Criteria for Application: The Court emphasised that determining the applicability of the doctrine hinges on mutual intent, relationships between parties, subject matter commonality, and the contract's performance.
6. Preliminary Issue: The Court ruled that courts should decide, at the referral stage, whether a non-signatory is bound by the arbitration agreement.
7. Retention of the Doctrine: Despite criticisms, the Group Companies Doctrine remains part of Indian arbitration law due to its utility in multi-party arbitrations, especially within complex construction disputes.

This ruling significantly advances arbitration law by reinforcing the principles of consent and offering a clearer framework for the inclusion of non-signatories in arbitration. The

decision is expected to have a profound impact on multi-party construction disputes in India going forward.

### Scope of curative jurisdiction in arbitration

A unanimous award by a three-member arbitral tribunal in a domestic arbitration went through four rounds of litigation before being set aside by the Supreme Court in exercise of its extra-ordinary curative jurisdiction under Article 142.<sup>[5]</sup> Curative jurisdiction is an extraordinary legal recourse available with the Supreme Court of India to correct its own judgment after they have attained finality in order to ensure complete justice. The power being extra-ordinary in nature is exercised with extreme caution.

In *DMRCL v. Delhi Airport Metro Express Pvt Ltd*<sup>[6]</sup> the court dealt with two major issues: (1) the maintainability of the curative petition; and (2) whether the two-judge bench of the Supreme Court was right in setting aside the judgment of the division bench of the High Court. It answered the first issue in the affirmative, holding that the curative jurisdiction extended to cases where the court has acted beyond its jurisdiction resulting in miscarriage of justice. Deciding the second issue in the negative, the court held that the two-judge bench of the Supreme Court wrongly interfered with the well-reasoned judgment of the division bench of the High Court wherein the High Court was right in concluding that the arbitral award suffered from patent illegality and perversity as the arbitral tribunal had overlooked crucial facts and evidence including express terms of the contract.

The Supreme Court effectively went on to do a merit-based review of the arbitral award which negatively affects the significant advancements made by the Supreme Court in the past few years in encouraging a more restrained judicial role in arbitration cases.

### Limiting court interference in arbitration process

The entire purpose of parties including arbitration agreements in their construction contracts is to avoid courts' prolonged litigation process. In such circumstances the practice of unnecessarily prolonging the arbitration process by filing futile applications in court ought to be discouraged. The Supreme Court<sup>[7]</sup> has recently criticised the practice of filing applications in disposed Special Leave Petitions to bypass the arbitration process, noting that such applications should not be entertained.

The court reaffirmed its stance that, under normal circumstances, courts should not interfere with arbitral proceedings, especially till the time an award is not passed.

### Supreme Court clarifies documents required to support loss of profit claim

The Supreme Court of India has held in a recent judgment<sup>[8]</sup> that a claim of loss of profit by a party can only be considered when supported by sufficient evidence. Such a claim needs to be supported by compelling evidence, such as, had the contract been executed promptly, the contractor could have earned profits for a different project by utilising its existing resources.

The court further observed that while formulae such as Hudson Formulae<sup>[9]</sup> are helpful to some extent, formulae alone would not be enough to grant a claim of loss of profit.

To establish a claim for loss of profit, one must establish the following:

1. there was a delay in the completion of the contract;
2. this delay is not attributable to the claimant;
3. the claimant's status as an established contractor, handling substantial projects;  
and
4. credible evidence to substantiate the claim of loss of profit.

## Court need not look at claims of accord and satisfaction while appointing arbitrator

In several construction contracts, employers are in a regular practice of taking no claims certificates, or no dues certificates from contractors before releasing even a part of their claims or final bills. In such a circumstance, contractors are compelled to invoke arbitration for their remaining claims, but the employers attempt to block their claims with the plea of 'Accord and Satisfaction.'

This issue came up recently before the Supreme Court of India in *SBI General Insurance Co Ltd v. Krish Spinning*,<sup>[10]</sup> where the Court held that the scope of judicial scrutiny at the reference stage while appointing an arbitrator is very limited.

The Court held that the scope of inquiry at the stage of appointing an arbitrator is limited to a *prima facie* examination of the existence of an arbitration agreement, and nothing more. If a referral court goes beyond this scope to examine 'accord and satisfaction' it would effectively usurp the role meant for the arbitral tribunal, undermining the principle of arbitral autonomy and conflicting with the intent of the Indian Arbitration & Conciliation Act, 1996.

This was a welcome development as prior to this judgment there was sufficient controversy on this subject.<sup>[11]</sup>

## Government guidelines for arbitration and mediation in contracts of domestic public procurement

On 3 June 2024, the government sent shockwaves through the industry when it issued guidelines to reduce reliance on arbitration in domestic public procurement contracts.<sup>[12]</sup> In these guidelines, the government stated that arbitration should no longer be automatically included in contracts, with its use limited to disputes valued under 100 million rupees (approximately US\$12 million). Disputes exceeding 100 million rupees should only be referred to arbitration with recorded reasons and approval from a senior officer. Instead, the government has advocated for other ADR methods, like mediation, to resolve issues more quickly and cost-effectively.

The government has attributed this shift to several reasons, such as delays in arbitration proceedings, higher expenditure in arbitration compared to litigation, inconsistent decisions by arbitral tribunals, increased litigation due to the mechanical challenging of awards in courts, and others.

The government believes that the benefits of arbitration, such as speed and finality, have not been fully realised. It aims to reduce arbitration in favour of mediation and court settlements, which, if implemented, could limit arbitration's role in resolving disputes and make it less attractive as a quick and effective solution.

These guidelines could complicate contract negotiations and potentially discourage foreign investors who prefer arbitration as the method of dispute resolution.

## Courts and procedure

Parties to construction contract usually prefer to resolve the dispute through alternative dispute resolution mechanisms (ADR). However, in cases where the arbitration clause is not provided in the contract, the matter is handled by the civil or commercial courts. This section is restricted to only deal with courts and procedures applicable to high-value construction disputes.

### Fora

India follows a three-tier judicial system comprising of District Courts, High Courts and the Supreme Court. Each administrative district is headed by a District Court, each state by a High Court and then, at the national level, there is the Supreme Court.

After a long-standing demand, the Commercial Courts Act (CCA) was promulgated in 2015<sup>[13]</sup> to adjudicate commercial disputes in India. With the advent of the CCA, specialised commercial courts have been set up to deal with high-value commercial disputes, including those arising from construction contracts. In 2018, an amendment was brought to the CCA wherein the concept of pre-institution mediation was introduced:<sup>[14]</sup>

1. Commercial Courts (District Level): established to deal with commercial disputes including those related to construction contracts, with a value threshold set under the Commercial Courts Act.
2. Commercial Divisions of High Courts: in cases involving large monetary claims, commercial disputes are handled by specialised commercial benches in High Courts.

Aside from the above, if the subject matter of an arbitration is a 'commercial dispute', then any application (such as for interim relief, challenge to arbitral award or enforcement) or appeals arising out of the Arbitration and Conciliation Act, 1996 (the A&C Act) would be heard by a Commercial Court at district level or the Commercial Division of a High Court, depending upon its monetary value (in case of domestic arbitration); or the Commercial Division of a High Court (in case of international commercial arbitration).<sup>[15]</sup>

### Jurisdiction

Jurisdiction of courts in India is determined by the following major factors:

- 1.

Territorial jurisdiction: it depends on where the cause of action arises or the contract was executed.

2. Pecuniary jurisdiction: it is based on the claim's value, with higher courts handling larger disputes.
3. Subject-matter jurisdiction: construction disputes falls within the purview of specialised commercial courts.
4. Jurisdiction in arbitration matters: many construction contracts include an arbitration clause that requires disputes to be resolved through arbitration. In such cases, courts have limited powers to interfere except, at reference stage<sup>[16]</sup> or appointment stage, to grant interim relief (pre- and post-arbitration)<sup>[17]</sup> challenging the arbitral award,<sup>[18]</sup> appeal,<sup>[19]</sup> enforcement,<sup>[20]</sup> etc. In extremely rare cases, a party can invoke extraordinary remedy of Writ jurisdiction<sup>[21]</sup> in arbitration cases.<sup>[22]</sup>

## Procedural rules

The procedural rules governing adjudication of commercial matters are primarily governed by the Civil Procedure Code, 1908 (CPC); Bharatiya Sakshya Adhinyam, 2023 (BSA); and High Court and Supreme Court Rules. However, if the construction contract provides for Arbitration, the A&C Act expressly stipulates that the arbitral tribunal shall not be bound by the CPC or the BSA. The act empowers the parties to agree on the procedure to be followed by the arbitral tribunal. However, despite the express provision regarding the non-applicability of the CPC and Indian Evidence Act (IEA), the principles of the CPC and BSA are applicable unless the parties specifically agree for applicability of rules of specific institutions.

## Evidence

Until recently, the procedure governing evidence was as per the Indian Evidence Act, 1872. The Government of India with effect from 1 July 2024 introduced BSA replacing IEA. Although BSA retains most of the provisions of IEA, there have been some key changes when it comes to documentary evidence, admissibility of electronic or digital records, secondary evidence, and so on.<sup>[23]</sup>

1. Documentary evidence: with the introduction of the BSA, electronic records also came within the definition of documents and if produced from proper custody, it would be classified as primary evidence, unless disputed.
2. Expert testimony: in complex construction disputes, expert testimony is frequently used. Experts, such as project management professionals and civil engineers, may be called upon to explain technical aspects including delays, construction defects or cost overruns. The court evaluates their testimony along with other evidence.
3. Witness testimony: oral evidence, including witness testimony, may be required to substantiate claims of non-performance, delays, or breaches of contract. Cross-examination of witnesses is a key part of the evidentiary process in civil litigation. The witnesses are now permitted to testify through electronic means.
- 4.

Burden of proof: the burden of proof generally lies on the party asserting a claim. In construction disputes, the party asserting the claim must prove non-compliance, breach or failure of the other party to perform as per the contract.

5. Inspection and reports: courts may order the inspection of sites, appoint commissioners to prepare reports, or request third-party evaluations to ascertain the status of construction works. These reports can be crucial in deciding the case.

## Alternative dispute resolution

Parties to commercial contract in India usually prefer the ADR mechanism to resolve disputes, which is increasingly favoured for its efficiency, cost-effectiveness and confidentiality. Below is a brief expansion on the preferred ADR mechanisms in India:

1. Negotiation: this is the first step in resolving disputes without any external intervention. No formal legal framework governs negotiations, making it the simplest and most cost-effective method, but the chances of success are rather slim.
2. Mediation: to promote and facilitate mediation in India in an organised form, The Mediation Act, 2023 was promulgated. It provides a formal framework for this process in India, especially in commercial disputes, promoting speedy resolution and reducing litigation burden on courts.
3. Conciliation: this is codified under Part III of the Arbitration and Conciliation Act, 1996 (the A&C Act). The advantage of conciliation is that it combines mediation's flexibility with a more active role from the neutral third party, but remains non-binding unless the parties agree on a settlement. The majority of commercial contracts in India provide for a mandatory conciliation clause before moving to arbitration.
4. Arbitration: this is the most formal ADR mechanism in India and is governed by the A&C Act. It involves submitting the dispute to an arbitrator (or a panel of arbitrators) whose decision (the arbitral award) is binding on the parties. Arbitration provides a quasi-judicial process with flexible procedures and is particularly favoured for commercial disputes due to its enforceability and confidentiality.
5. There are other methods of ADR such as Lok Adalat or People's Court, Disputes Boards, etc.

## Construction contracts

### Public procurement

At the pinnacle of the Indian legal framework governing public procurement lies Article 299 of the Constitution of India. This Article mandates that all Contracts executed in the

exercise of the executive power of the Union or a state government must be made in the name of the President of India or the Governor of the respective state, or by an individual duly authorised by them.<sup>[24]</sup>

While there is no specific federal legislation dedicated to public procurement in India, certain state legislatures, such as those of Tamil Nadu, Karnataka, Rajasthan, Andhra Pradesh, Mizoram, Odisha, Punjab, Uttarakhand and Assam, as well as some public sector undertakings (PSUs), have created their own financial regulations to oversee public procurement in accordance with the General Financial Rules (GFR).

Despite the absence of a unified federal statute, comprehensive rules and directives have been established at the federal level to govern public procurement practices.

Currently, the Indian government's rules, procedures and manuals applicable to government departments and PSUs form the basis of the legislative framework on public procurement, which is primarily conducted through a tender process for large procurements. They provide for procurement of goods, works and consulting services and include instructions on how to procure and purchase commodities, labour, consulting and other services. These are as follows:<sup>[25]</sup>

1. the Delegation of Financial Power Rules (DFPR) from 1978;
2. the GFR from 2017;
3. the Manual for Procurement of Goods;
4. the Manual for Procurement of Consultancy and Other Services;
5. the Manual for Procurement of Works; and
6. manuals outlining the procedures for purchasing goods and services, as issued by individual ministries and departments, such as defence, communications, railroads and public sector entities.

Aside from the aforementioned, the Government e-Marketplace (GeM) is an Indian online platform for public procurement providing with an accessible and transparent procurement. Additionally, respective Indian legislation dealing with the subject matter are applicable to all government contracts.

## Contract interpretation

Construction contracts in India are primarily governed by the Indian Contract Act of 1872, which outlines general principles of contract law, including formation, performance and breach. Specific provisions related to contracts are detailed in Parts 1 and 2 of this Act.

Real estate projects fall under the Real Estate (Regulation and Development) Act, 2016 (RERA), which regulates the sector and protects homebuyers' interests by establishing regulatory authorities and a framework for dispute resolution. Public-private partnership (PPP) projects often use standard forms of contracts provided by government bodies.

In cases of disputes, Indian law generally adopts an objective approach but also considers subjective evidence to understand the parties' true intentions. Courts may favour the

non-drafting party if contract terms are ambiguous, prompting many contracts to explicitly state that the drafter's identity should not influence interpretation.<sup>[26]</sup>

Since 2017, the adoption of FIDIC (Fédération Internationale Des Ingénieurs-Conseils) contracts for public sector infrastructure projects has positively impacted the construction industry by providing a standardised approach to project management and dispute resolution. These contracts have reduced ambiguity and streamlined project delivery.<sup>[27]</sup>

## Common substantive issues and remedies

### Time bars as conditions precedent to entitlement

Time bars are clauses in construction contracts that set deadlines for contractors to submit claims. In Indian contracts, contractual time barring of claims is a very new addition. Time bar clauses set specific time bars for all types of claims including variations and extra items instructed and approved by the engineer.<sup>[28]</sup>

Time-bar clauses, for instance of the FIDIC Yellow Book and Red Book, state that failing to notify a claim within 28 days means no time extension or additional payment will be granted. Further, sub-clause 20.2 (2017 edition) specifies that if a detailed claim is not submitted within 84 days, the notice of claim lapses. Clauses in National Highways Authority of India (NHAI) Engineering, Procurement, and Construction (EPC) Contracts are also similarly placed.

Courts in India often scrutinise applicability of time bar clauses to prevent unfairness, especially if they restrict a party's right to seek remedies during genuine disputes. Contracts typically require parties to notify each other of claims or delays within set periods. Conditions precedent in Indian contracts must be clearly defined and agreed upon to be enforceable, ensuring all prerequisites are met before a claim is recognised. Disputes over these conditions are resolved by examining contract terms and case-wise circumstances.

### Prolongation costs

Prolongation costs in the construction industry refer to the additional expenses incurred due to project delays beyond the initially planned completion date. These costs can arise from various factors such as unforeseen site conditions, design changes, weather delays, labour shortages or conflicts in the supply chain and typically include claims for additional labour, equipment rentals, material storage, administrative costs, extended overheads and potential penalties for failing to meet deadlines.

Claims for loss of profit require proving that delays prevented the contractor from seizing other business opportunities, with high standards of evidence needed to demonstrate these losses. Courts have stressed the importance of showing clear evidence of missed opportunities to support such claims, as highlighted in the case of *M/s Unibros v. All India Radio*.<sup>[29]</sup>

Additionally, contractors can claim for increased overhead expenses and escalation of material prices if the project prolongs beyond the agreed period. The use of established formulas like Hudson, Emden and Eichleay is accepted to determine increased overhead costs, but the choice of formula is up to the arbitral tribunal or the Court. Claims for price escalation are generally restricted by the contract terms, but may be allowed if a supplementary agreement permits it. Compensation for idling or reduced productivity is valid if caused by the owner's delays, though claims must be distinct to avoid overlap with other damage claims. Overall, careful documentation and clear evidence are essential for substantiating these claims.<sup>[30]</sup>

In the event of clauses barring escalation despite delay by the employer, Sections 55, 56 and 73 of the Indian Contract Act, 1872 have often come to the rescue. The Courts have held that timely notification of loss due to delay can help parties claim loss due to escalation despite there being a clause barring the same.<sup>[31]</sup>

Furthermore, principles of apportionment are also very relevant while looking at any case for prolongation costs. For instance, in the one 2021 case of the Delhi High Court where delays were caused by both parties, the court upheld the view taken by the arbitral tribunal that although an extension of time could be given, claims for additional costs incurred due to work stoppage and extension charges are to be denied.<sup>[32]</sup>

## Extension of time

Contractors must notify the employer of delays within a specified period and provide detailed analysis to justify an extension.

In Indian contracts, failing to manage extensions properly can result in a lack of enforceable completion dates and liquidated damages. Construction contracts in India often include provisions for extension of time (EOT) under certain conditions, such as extreme weather, scope changes or delays caused by the employer.

The NHAI EPC contracts require contractors to inform about delays within 15 days and specify conditions under which extensions are granted, such as delays from environmental clearances or *force majeure* events.

The Central Public Works Department (CPWD) General Conditions of Contract for EPC Projects emphasise that the time allowed for completion is critical, and failure to start work on time can lead to forfeiture of the performance guarantee. Requests for rescheduling milestones and extensions must be made monthly through the Enterprise Resource Planning (ERP) Portal, based on accepted hindrances.<sup>[33]</sup>

Indian courts have ruled that contractual clauses denying compensation for employer-caused delays are void if they contravene public policy and statutory provisions, affirming contractors' rights to claim damages.<sup>[34]</sup>

## Right to payment for variations

In construction contracts, 'variations' refer to changes in the scope of work, including adjustments to the original scope, work amount, dimensions, quality or completion timeline.<sup>[35]</sup> Indian contracts typically outline detailed procedures for managing and pricing these variations to minimise disruptions and delays.

These claims can also be subject to disputes when it is unclear as to whether a particular instruction or work amounts to a variation in terms of the contract or not.

### Concurrent delay

Concurrent delays occur when multiple parties cause delays simultaneously. Section 55 of the Indian Contract Act, 1872, addresses this by dividing delays into three categories: (1) if time is the essence of the contract, the contract is voidable; (2) if not, the breaching party must compensate; and (3) if delays are accepted without notice, claims for compensation are forfeited.<sup>[36]</sup>

Indian courts have provided as to how to deal with allocation of responsibility and entitlement of damages when delays are caused by both parties involved in the contract. The courts have called for apportionment of damages between the parties involved.

Furthermore, courts have also emphasised the role of the engineer in assessing extensions of time and the need for clarity on delays attributable to each party to determine liability for prolongation costs.<sup>[37]</sup>

### Suspension and termination

Suspension provisions under construction contracts allow both parties to temporarily halt work due to issues like unsafe conditions or non-payment. Contracts typically specify the suspension process, including formal notices and time frames for resolution. The contractor may need to cover extra costs if the suspension is due to their fault.

For instance, CPWD contracts require written instructions from the engineer-in-charge for a formal suspension of work. If it is not due to the contractor's fault, the contractor may receive an extension and compensation for idle time if claimed within specified periods.<sup>[38]</sup> NHAI EPC contracts allow employers to suspend contractor's rights for non-compliance or safety issues, with rights restored once issues are resolved.<sup>[39]</sup>

Termination, on the other hand, can occur for serious breaches, long delays, insolvency or failure to meet performance standards. Contracts outline the reasons, notice requirements and consequences, such as payments for completed work and recovery of costs for incomplete or defective work.

CPWD contracts provide for termination of contract for unresolved defects, unjustified suspension or insolvency. The contractor's guarantees may be forfeited, and they may be barred from future tenders. However, the contractor's rights of termination are very limited, such as, if work cannot start due to reasons not attributable to the contractor within a specified time. Under NHAI contracts, grounds for termination include persistent breaches, insolvency or failure to fix defects. The employer may complete the work at the contractor's expense and deduct additional costs from payments.

### Penalties and liquidated damages

In India, Sections 73 and 74 of the Indian Contract Act, 1872, govern penalties and liquidated damages. While Section 73 covers compensation for actual loss from breach

of contract, Section 74 limits compensation to agreed sum for Liquidated Damages (LD, which courts may reduce if deemed unreasonable).

LD clauses are generally upheld as enforceable if it is a reasonable pre-estimate of losses that would be suffered due to breach.<sup>[40]</sup> However, if they are not a genuine estimate of loss but are punitive and not reasonable, they may be set aside by courts.

To ensure enforceability, LD clauses should clearly specify the triggering events, such as delays or quality failures, and be drafted to avoid being perceived as a penalty. The clause must be precise and unambiguous. Consulting legal counsel is advisable to confirm that the clause is both fair and legally enforceable.<sup>[41]</sup>

## Defect liability period and curing of defects

The defect liability period (DLP) in construction contracts usually ranges from 12 to 24 months post completion. During DLP, the contractor must rectify any defects that arise in the completed project at usually no charge to the employer.<sup>[42]</sup>

In India, while the Limitation Act sets a three-year period for latent defect claims from the cause of action, the Delhi Development Authority has introduced a ten-year 'decennial latent defect liability' for structural defects. This period begins from the issuance of the occupation certificate. Contractual agreements may specify this duration for addressing latent defects.<sup>[43]</sup>

During this time, contractors are liable for defects arising from design deficiencies, material deficiencies, specification problems and workmanship deficiencies. Contracts should clearly define what constitutes a defect and the contractor's responsibilities for rectification. However, usually this does not cover defects arising from normal wear and tear, external factors such as natural disasters, accidents or vandalism.

For instance, in Article 17 of the NHA EPC Contract,<sup>[44]</sup> the DLP period varies from five years for flexible pavement and 10 for rigid pavement, and perpetual for certain design and standalone structures such as bridges and tunnels. If the contractor fails to comply with the authority's instruction to carry out repairs within 15 days of notice, repairs may be carried out at the contractor's expense, including additional 20 per cent damages.

## Bonds and guarantees

In the construction industry, bonds and guarantees are essential for managing risk and ensuring contract compliance. Bonds generally expire upon practical completion or when a completion statement is issued, and claims must be made before expiry.<sup>[45]</sup>

In India, performance bonds and guarantees are crucial, especially in large public sector projects, to ensure contractors meet their obligations and protect public funds. The bond agreement should clearly outline rights, responsibilities and enforcement procedures.<sup>[46]</sup>

Regulated by the Indian Contract Act, 1872, and the Specific Relief Act, 1963, these bonds are managed under guidelines from the Insurance Regulatory and Development Authority of India (IRDAI), facilitating effective risk management and stakeholder protection.<sup>[47]</sup>

## Liability caps in construction contracts

A liability cap, or limitation of liability clause, limits the maximum amount that a party can be held liable for issues such as breach, negligence etc. which helps to prevent unlimited liability.

As per the Indian Contract Act, 1872, liability caps are permitted, provided these do not contravene public policy or statutory protections.<sup>[48]</sup>

Some instances of liability caps in Indian contracts are provided in the CPWD EPC contract which imposes an indirect cap through penalty and compensations such as 0.75 per cent of tender amount per month for delays, capped at 5 per cent and retention of 50 per cent of security depot for defects. These provisions collectively function to limit the contractor's financial exposure in specific scenarios.<sup>[49]</sup>

Another example is the NHAI EPC contract, which limits liability up to the contract price, except in cases of fraud or deliberate default, or reckless misconduct by the defaulting party.<sup>[50]</sup>

## Outlook and conclusions

The Indian construction contract landscape is increasingly guided by a mix of judgments of various courts in India, constitutional mandates, central and state regulations and evolving practices in model form contracts such as FIDIC contracts. Future developments are likely to focus on improving clarity in contractual terms and dispute resolution.

The current framework requires careful navigation of various contract clauses in construction contracts to ensure viability of claims.

Recent regulatory changes, including the Ministry of Road Transport and Highways' recognition of covid-19 as *force majeure* and amendments to the Specific Relief Act, reflect a shift towards more pragmatic dispute resolution. Enhanced mechanisms such as the Conciliation Committee of Independent Experts (CCIE) aim to streamline conflict resolution, indicating progress towards more efficient management of construction projects.<sup>[51]</sup>

## Endnotes

1 2024 (6) SCC 1. [^ Back to section](#)

2 *NN Global Mercantile (P) Ltd. v Indo Unique Flame Limited and Others*, (2023) 7 SCC 1. [^ Back to section](#)

3 2023 SCC OnLine Blog Exp 38, available at:

<https://www.sconline.com/blog/post/2023/04/28/n-n-global-dictum-has-the-stamping-issues-resolution-opened>

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4 *Cox & Kings Ltd v. SAP India Pvt Ltd*, 2024 SCC OnLine SC 2452. [^ Back to section](#)

- 5 Article 142 of Constitution of India. ^ [Back to section](#)
- 6 *DMRCL v. Delhi Airport Metro Express Pvt Ltd* 2024 INSC 292. ^ [Back to section](#)
- 7 *Narsi Creation Pvt Ltd and Anr v. State of Uttar Pradesh and Others*, 2023 SCC OnLine SC 441. ^ [Back to section](#)
- 8 *M/s Unibros v. All India Radio*, 2023 SCC OnLine SC 1366. ^ [Back to section](#)
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**Farhan Khan**  
**Rohit Singhal**  
**Wasee Jan**  
**Md. Saquib**

farhan.khan@masinproject.com  
ceo@masinproject.com  
Wasee.Jan@masinproject.com  
md.saquib@masinproject.com

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Masin

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**Devesh Matta**  
**Gunjan Chhabra**

devesh.matta@mrp-advisory.com  
gunjan.chhabra@mrp-advisory.com

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