A MINI-REFERENCER FOR THE INDIAN LAW ON DELAY AND DAMAGES IN CONSTRUCTION ARBITRATION

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Abstract

*Delay and disruptions are a common occurrence in the completion of the projects under a construction contract. This leads to non-completion of the project within the stipulated period of time, thus attracting liquidated damages and termination clauses of the contracts. This application of the liquidated damages clause or the termination clause of the contracts by the employers sometimes gives rise to disputes wherein the contractor contends that the levy of liquidated damages or the termination was improper. These disputes include, but are not limited to, whether time was of the essence of the contract, whether the employer had the right to terminate the contract, whether proper notice was given to the contractor that damages will be levied for delayed performance, whether granting of extension amounted to a waiver of the right to levy damages, whether the employer suffered any actual loss to claim damages, whether the employer itself caused delay in performance, etc. In India, Sections 55, 63 and 74 of the Indian Contract Act, 1872 ["**ICA**"] are at the heart of the discussion on resolution of these disputes. Therefore, the article attempts to answer a range of questions which are frequently witnessed in construction arbitration matters in India.*

I. Introduction

Construction contract is an expansive term that can be used for contracts ranging from road, bridge, or, ship-building contracts, to a refit contract or even a construction management contract and much more. However, the first step in the formation of all construction contracts is the invitation to a tender document.[1] In the construction industry, *tender* is a term used to refer to "*an offer to perform or carry out works on a construction project.*"[2] This offer is susceptible to the same standards as any other offer and, thus, must be unconditional and definite.[3] However, unlike general offers under the ICA,[4] an offer in the form of a tender must be made at a proper place and time, and in the requisite format to the concerned person, while conforming with the terms of obligations. Further, it should be by a person who is capable of, and willing to perform his obligations.[5]

The tender processes may be public or private, depending on the nature of work, and the nature of the organisation releasing the tender. Once the bidding process is complete, the contract is entered into which determines the scope of work, the duration of work, and other related terms and conditions for the successful completion of the contract. One of the most familiar clauses

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1 B.S. PATIL & S.P. WOOLHOUSE, B.S. PATIL'S BUILDING AND ENGINEERING CONTRACTS 1 (7th ed. 2020) [*hereinafter* "B.S. PATIL & S.P. WOOLHOUSE"].

2 CYRIL CHERN, THE LAW OF CONSTRUCTION DISPUTES 54 (3d ed. 2020) [*hereinafter* "CYRIL CHERN"].

3 *Id.*

4 Indian Contract Act, No. 9 of 1872, INDIA CODE (2022) (India) [*hereinafter* "Contract Act"].

5 *See* Tata Cellular v. Union of India, (1994) 6 SCC 51 (India), ¶ 69; *see also* R.S. Daikho v. State of Manipur, (2018) 1 BC 166 (India).

found in these contracts is that of *liquidated damages* ["**LD**"], the purpose of which is to compensate the injured party for the loss suffered by it due to the actions of the other party(ies) to the contract.[6] This clause comes into action if there is any delay on the part of the contractor in completing the work within the agreed-upon period, or failing to complete it at all.[7] The applicability of this clause depends on the language of the specific clause, and other related conditions of the contract.[8] While the language of this clause may differ from contract to contract, there exist internationally accepted standard form contracts like the *Fédération Internationale des Ingénieurs-Conseils* form,[9] which is often used as a base for the drafting of construction contracts.[10]

Looking into it from the Indian perspective, for instance, the National Highways Authority of India and Oil and Natural Gas Corporation Ltd. ["**ONGC**"] have their own standard form contracts,[11] and so does the defence sector for the procurement of construction agreements.[12] These agreements lay down the rights and obligations of both the parties to the contract, *viz.* the contractor as well as the employer. While most of the obligations under the contracts are pinned on the contractors, the one that stands out is the duty to complete the work within the agreed timeframe. On the other hand, the obligations of the employers are mostly limited to providing the contractors with the facilities to complete the work on time and to make the payments on time as per the contract.[13]

Like any other contract, the violation of the clauses of the construction contracts by either of the parties gives rise to a dispute. From a bird's eye view, the disputes are related to the levy of LD; or the invocation of the performance guarantee of the contractor by the employer; or withholding of an amount by the employer, without any substantial justification. However, when looked into in detail, the aforesaid disputes arise from a bundle of smaller disputes, which include, but not limited to: whether time was of the essence of the contract;[14] whether the extension/non-extension of the contract period was justified;[15] whether the employer had the right to terminate the contract;[16] whether proper notice was given to the contractor that damages will be levied for delayed

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6 B.S. PATIL & S.P. WOOLHOUSE, *supra* note 1, at 341.

7 *See* Maharashtra State Electricity Distrib. Co. Ltd. v. M/s. Datar Switchgear Ltd., (2018) 3 SCC 133, ¶ 22 (India).

8 *See* M/s Hind Constr. Contractors v. State of Maharashtra, (1979) 2 SCC 70, ¶¶ 7–10 (India) [*hereinafter* "Hind Const."].

9 *See* FÉDÉRATION INTERNATIONALE DES INGÉNIEURS–CONSEILS (FIDIC), CONSTRUCTION CONTRACT (2d ed. 2017) [*hereinafter* "FIDIC Red Book"].

10 *See Standard Form Contracts: FIDIC*, PINSENT MASONS (Aug. 12, 2011), *available at* https://www.pinsentmasons.com/out-law/guides/standard-form-contracts-fidic.

11 For the National Highways Authority of India (NHAI), *see Engineering Procurement and Construction (EPC) Agreement*, MINISTRY OF ROAD TRANSPORT & HIGHWAYS (Mar. 5, 2019), https://morth.nic.in/sites/default/files/Revised_standard_EPC_Agreement_for_NH_and_Centrally_sponsored_road_works_proposed_to_be_implemented_on_EPC.pdf; for ONGC, *see Integrated Materials Management Manual*, OIL AND NATURAL GAS CORPORATION LTD. (Feb. 1, 2015), *available at* https://www.ongcindia.com/wps/wcm/connect/e46e8491-cf11-4394-af4a-5d5868526786/Integrated+MM+Manual_Updated+upto_04.10.2018.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-e46e8491-cf11-4394-af4a-5d5868526786-mpnYymo.

12 *Defence Procurement Manual*, GOVERNMENT OF INDIA, MINISTRY OF DEFENCE (2009) https://www.mod.gov.in/sites/default/files/DPM2009.pdf [*hereinafter* "Defence Procurement Manual"].

13 *The Role of the Owner in the Construction Project: Doing More Than Writing Checks*, STIMMEL LAW, *available at* https://www.stimmel-law.com/en/articles/role-owner-construction-project-doing-more-writing-checks.

14 *See* Hind Constr., (1979) 2 SCC 70, ¶¶ 7–8 (India).

15 *See* Arosan Enter. Ltd. v. Union of India, (1999) 9 SCC 449, ¶ 16 (India) [*hereinafter* "Arosan Enter."].

16 M/s. Citadel Fine Pharm. v. M/s. Ramaniyam Real Estates Pvt. Ltd., (2011) 9 SCC 147, ¶¶ 55–56 (India).

performance;[17] whether granting of extension amounted to a waiver of the right to levy damages;[18] whether the employer suffered any actual loss to claim damages;[19] whether the damages levied were extraordinary;[20] whether the employer itself caused a delay in performance,[21] etc.

In addition to the contract which serves as the foundation for determining the liability of the parties, in India, these above-mentioned issues are governed by the ICA. While the construction contracts will have to undergo the scrutiny of all the provisions of the ICA, the most frequently applicable provisions for determination of liquidated damages are embedded under Chapters IV, V and VI of the ICA, wherein, Sections 55, 63 and 74 are at the heart of the discussion.[22]

In this article, the author conducts an in-depth study of the aforementioned issues leading to disputes in construction contracts, and provides a comprehensive view of the present legal position in India. For the purpose of this article, the author presents his ideas in six parts. Part II discusses the issues pertaining to the significance of time in the performance of the contracts and reciprocal promises. Part III analyses whether an extension of time to perform the contract amounts to a waiver of the right to levy LD by the employer. Part IV studies the consequences of the breach of contract in the form of LD and consequential damages, and also explores the avenues whereby the contractor can claim from the employer for the latter's delay or for additional work undertaken by the former. Part V delves into the aspect of sub-contractor's rights and liabilities in a construction contract as though generally the contract of the Contractor with the sub-contractor and the one with the Employer are different breach of either by any of the parties involved will have an adverse impact on the performance of the other contract. Concluding remarks are presented in Part VI.

II. What are the implications of non-performance of the contract within the stipulated period of time on the levy of LD?

As mentioned in Part I, the tenders or the contracts ought to provide a proper time and place for the performance of the contract in construction matters. In such contracts, the employer may require the performance on a particular date or within a specific number of days/working days or months, or even years from the effective date of the contract.[23]

Sections 46 to 49 of the ICA deal with the various scenarios for the performance of the contract when there is uncertainty regarding the time and place of performance. The general principles are:

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17 *See* Oil & Natural Gas Corp. Ltd. v. Soconord OCTG, 2014 SCC OnLine Bom 1277, ¶ 42 (India) [*hereinafter* "ONGC Soconord"].

18 *See* Oil & Natural Gas Corp. Ltd. v. Saw Pipes, (2003) 5 SCC 705, ¶¶ 67–74 (India) [*hereinafter* "ONGC"].

19 *See* Kailash Nath Assoc. v. Delhi Dev. Auth., (2015) 4 SCC 136, ¶¶ 31, 32, 34–37, 43.6 (India) [*hereinafter* "Kailash Nath Assoc."].

20 *See* McDermott Int'l Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 (India) [*hereinafter* "McDermott Int'l Inc."].

21 *See* J.G. Eng'r Pvt. Ltd. v. Union of India, (2011) 5 SCC 758 (India) [*hereinafter* "J.G. Eng'r"].

22 Achintya Rawal, *The Changing Landscape Of Construction Arbitration*, MONDAQ (Nov. 5, 2019), https://www.mondaq.com/india/arbitration-dispute-resolution/860526/the-changing-landscape-of-construction-arbitration; *Construction Disputes in India*, NISHITH DESAI ASSOCIATES (Apr. 2020), *available at* https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Construction-disputes-in-india.pdf; Binsy Susan, Akshay Sharma & Amogh Srivastava, *Construction Arbitration: India*, GLOBAL ARBITRATION REVIEW (June 28, 2021), https://globalarbitrationreview.com/insight/know-how/construction-arbitration/report/india; *see* Badrinath Srinivasan, *The Law on Time as Essence in Construction Contracts: A Critique*, 8(1) RGNUL FIN. & MERCANTILE L. REV. 1 (2021) [*hereinafter* "Badrinath Srinivasan"].

23 B.S. PATIL & S.P. WOOLHOUSE, *supra* note 1, at 300.

first, that when no time and place is specified in the contract then the contractor has to fulfil his obligations within a reasonable period of time, wherein, a reasonable period would be as per the specific industry standards, and the nature of the work.[24] *Second*, if no application is to be made for performance by the employer, and where the time is specified, then the contractor is obliged to deliver the work at the usual place of business of the employer during the usual hours of business, at the agreed upon time.[25] *Third*, if the contract requires an application by the employer, and where the time is specified, then the contractor is obliged to deliver the work at the requested place and time upon receiving an application for performance.[26] *Fourth*, if no application is to be made for performance by the employer, and no place is specified, the contractor is obliged to request the employer to fix a reasonable time and place for the performance of the contract.[27]

If the timelines mentioned in the contractual clauses or the manner of performance as provided under the above-mentioned provisions of the ICA are not met, leading to a delay in performance or non-performance of the contract, it gives rise to a breach of contract. Once it is established that there was a breach of contract by either of the parties to the contract, the LD clause and the termination clause of the contract would come into action. However, the applicability of these clauses depends and varies based on the nature of the contract, i.e., whether time was of the essence of these contracts or not.

A. When is time of the essence of the contract and when is it not?

The law relating to whether time is of the essence of a contract or not has been taken up for consideration by the Indian courts in myriad cases. Time has been considered to be of the essence in the contracts of commercial nature like those of sale of goods,[28] and not to be of essence in cases pertaining to immovable property,[29] with exceptions based on the intention of the parties.[30] However, when it comes to construction contracts, which is also a commercial contract in its broader meaning, the courts have shied away from imposing the same standards to the construction contracts where time has generally been considered not to be of the essence of the contract.[31]

Courts have laid down various tests to determine whether time would be of the essence in commercial contracts, like the presence of an extension of time clause;[32] or the presence of clauses levying LD for each day/week/month of delay.[33] In doing so, the courts have gone beyond the plain language of the contract to interpret the real intention of the parties; inasmuch as, the courts, on occasions, have held that despite there being an express mention in the contract that time is of the essence, it is not necessary that it is actually of the essence. These cases are discussed herein below:

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24 Contract Act, § 46.
25 Contract Act, § 47.
26 Contract Act, § 48.
27 Contract Act, § 49.
28 Ratilal M. Parikh v. Dalmia Cement and Paper Mktg. Co. Ltd., AIR 1943 Bom 229, ¶ 17 (India) [*hereinafter* "Ratilal M. Parikh"]; *see* China Cotton Exporters v. Biharilal Ramcharan Cotton Mills Ltd., AIR 1961 SC 1295, ¶¶ 6, 8 (India).
29 *See* Govind Prasad Chaturvedi v. Hari Dutt Shastri, (1977) 2 SCC 539, ¶ 6 (India).
30 *See* Chand Rani v. Kamal Rani, (1993) 1 SCC 519, ¶ 25 (India).
31 McDermott Int'l, (2006) 11 SCC 181, ¶¶ 85–6 (India).
32 Hind Constr., (1979) 2 SCC 70, ¶¶ 7–9 (India); Arosan Enter., (1999) 9 SCC 449, ¶¶ 13–14 (India).
33 Hind Constr., (1979) 2 SCC 70, ¶¶ 7–9 (India).

i. *A holistic reading of the contract in Hind Construction Contractors v. State of Maharashtra ["**Hind Construction**"]*

The dispute, in this case, arose out of a contract dated July 12, 1955, wherein the contractor undertook to complete the construction within twelve months, i.e., by July 4, 1956.[34] However, due to various circumstances, the work could not be completed within the stipulated time, owing to which, the contractor sought an extension of time for the performance of the contract.[35] This request for an extension was denied by the employer who elected to terminate the contract on the basis that Clause 2 of the 1955 Contract, which provided that the time will be the essence of the contract.[36] While terminating the contract, the employer invoked the performance guarantee and reserved the payment of the bills to the contractor.[37]

The questions of law to be decided by the Hon'ble Supreme Court of India were whether the time was of the essence of the contract in the case, and whether the termination of the contract was legal.[38]

While the contract under Clause 2 expressly provided that the time was of the essence of the contract, the court went on to read into other provisions of the contract to determine the real intention of the parties. On perusal of the contract, the Court found two relevant clauses, *viz.* a clause providing for levy of LD for each week of delay by the contractor, and a clause pertaining to the extension of time for performance of the contractor by the employer.[39]

In light of the above two clauses, the Court opined that since the contract itself systematically provides for an extension of time in certain contingencies, it cancels out the express mention of time being of the essence. Thus, the SC laid down two tests for determining whether the time is of the essence of the contract, *viz.* presence of an extension of time clause, and levying of LD for the delay.[40]

However, it is to be noted here that the Court might have overreached its powers under the law.[41] The general principle of law is that in the interpretation of a contract, a court has to respect the plain language of the contract, and it is only when the plain language of the contract is ambiguous in nature that the reference has to be made to other provisions of the contract to determine the real intention of the parties.[42] In Hind Construction, there was an express stipulation under Clause 2 that time is of the essence; but, as mentioned above, the court interpreted it on the basis of other clauses of the contract. It is also of prime importance here, that if the contract provides for an extension of time only for a small duration, it indicates towards time being of the essence rather than not being of the essence.[43] That the mere forbearance of the employer and allowing of

34 *Id.* ¶ 2.
35 *Id.*
36 *Id.* ¶¶ 2–5.
37 *Id.* ¶ 4.
38 *Id.* ¶¶ 7–8.
39 *Id.* ¶¶ 8–9.
40 *Id.* ¶¶ 7–10.
41 *See* Badrinath Srinivasan, *supra* note 22.
42 *See* Abdulla Ahmed v. Animendra Kissen Mitter, AIR 1950 SC 15 (India); *see also* Central Bank of India Ltd. v. Hartford Fire Ins. Co. Ltd., AIR 1965 SC 1288 (India); Modi & Co. v. Union of India, AIR 1969 SC 9 (India); Pravash Chandra Dalui v. Biswanath Banerjee, 1989 Supp (1) SCC 487 (India); ONGC, (2003) 5 SCC 705 (India).
43 *See* Devender Kumar v. Parsvnath Realcon Pvt. Ltd., No. 13 of 2019, decided on Jan. 16, 2020 (Real Est. Regulatory Comm'n, Delhi) (India).

additional time so that the work could be completed, should not be considered as rendering ineffective the express provision relating to the time being of the essence.[44]

Irrespective of the above, the decision of the Supreme Court in *Hind Construction* has been upheld by various courts, and it holds prime importance in any case for determination of whether time was of the essence or not.[45]

ii. *Extension of the principle in Arosan Enterprises Ltd v. Union of India ["**Arosan Enterprises**"]*

While the Supreme Court did not refer to its previous decision in *Hind Construction* here, it came to a similar conclusion that when the employer voluntarily extends the time for performance of the contract, time cannot be of the essence of the contract irrespective of any express stipulation to this extent.[46]

Unlike *Hind Construction*, the contract in this case did not expressly state that time was of the essence of the contract, and it was only provided that the supply of the items shall be made before a particular date.[47] Further, it had a self-contradictory clause for termination and extension of time in the same provision, which read as: "*in case of delay the seller was to be deemed to be in contractual default with a right to the buyer to cancel the contract. The buyer could however extend the delivery period at a discount as may be mutually agreed between the buyer and the seller.*"[48] By interpreting these clauses of the contract, the Court opined that if the contract itself provides for an extension of time, time cannot be termed as the essence of such a contract.[49]

While the ratio in both *Hind Construction* and *Arosan Enterprises* is the same, the approach taken by the Supreme Court in *Arosan Enterprises* could be justified due to the absence of any express stipulation under the contract that time was of the essence. The clause in *Arosan Enterprises* merely provided that the delivery has to be done by a particular date, but there was no urgency portrayed by any other clause under the contract in the absence of any express stipulation, thus, leading to ambiguity. Hence, reference to other clauses of the contract, and specially the wordings of the extension of time clause was sound, unlike *Hind Construction*, wherein, the Supreme Court deviated from the plain language of the contract.

iii. *Presumption for construction contracts in McDermott International Inc. v. Burn Standard Co. Ltd. ["**McDermott International**"]*

Though in this case, the employer did not allege that the time was of the essence of the contract, the Court, while discussing the issue regarding levy of LD, discussed the scope of Section 55 of the ICA. Relying upon the decision in *Hind Construction* and *Arosan Enterprises*, the Court noted that due to the presence of an extension of time clause and levy of LD for each week of delay clauses, time was not the essence of the contract and, thus, the case fell within the ambit of paragraph two of Section 55.[50]

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44 *See* ONGC, (2003) 5 SCC 705 (India).

45 *See* K.S. Vidyanadam v. Vairavan, (1997) 3 SCC 1 (India); *see also* Chand Rani v. Kamal Rani (1993) 1 SCC 519 (India); Citadel Fine Pharm., (2011) 9 SCC 147 (India).

46 Arosan Enter., (1999) 9 SCC 449 (India), ¶¶ 13–4.

47 *Id.* ¶ 2.

48 *Id.*

49 *Id.* ¶ 14.

50 McDermott Int'l Inc., (2006) 11 SCC 181, ¶¶ 31, 83–88 (India).

The Court in this case, however, went a step further and held that "*in construction contracts generally time is not of the essence of the contract*,"[51] thus closing all the options for the employer to rescind the contract under Section 55, even if the contractor has not done any work till the completion of the agreed upon date under the contract. Therefore, the only two options left with the employers if the work is not completed within the stipulated time period are: *first*, serve a notice on the contractor expressly making time of the essence of the contract and terminate the contract on non-completion even on the extended date;[52] and *second*, proceed on the basis of the second paragraph of Section 55 and grant extensions and levy damages as per the contract, without the option to rescind the contract, unless the condition(s) to terminate the contract under the contract is satisfied.[53]

B. What is the impact of time being the essence of the contract on termination and liquidated damages clauses?

Section 55 of the ICA deals with the effect of failure to perform the work within a stipulated period, as agreed under the contract between the parties. These effects can be sub-divided into three scenarios: *first*, if time is of the essence of the contract and the contractor fails to perform it within the time, then the contract becomes voidable and the employer has the option to terminate it on completion of the period and claim liquidated damages;[54] *second*, if time is not the essence of the contract, then the contract does not become voidable on failure to perform within the stipulated time period, but the employer still has the right to levy LD as per the terms of the contract;[55] and, *third*, if time is of the essence but the employer agrees to accept a delayed delivery, then in such a case the contract is not voidable. However, to claim LD, the employer is obligated to provide the contractor with a reasonable notice that the former is reserving the right to levy LD from a particular date despite the extension of time.[56]

Therefore, it is amply clear that irrespective of whether the time is of the essence of the contract or not, the employer is eligible to claim liquidated damages from the contractor for any delay caused in the performance of the contract.[57] Thus, it is only the additional right to terminate the contract which is provided to the employer when time is of the essence of the contract.[58]

However, it is the quantum, the procedure, and the timeline of levying LD which is affected in such cases. Where time is of the essence of the contract, the employer can either terminate the contract on the very date fixed under the contract and claim the maximum possible damages under the contract; or grant an extension while serving a notice upon the contractor that the work has to be completed by a stipulated extended date, but the employer will levy LD damages, which can either start from the original completion date or from the extended date.[59]

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51 *Id.* ¶ 86.
52 B.S. PATIL & S.P. WOOLHOUSE, *supra* note 1, at 330–1.
53 Anand Constr. Works v. State of Bihar, 1973 SCC OnLine Cal 87, ¶ 27 (India) [*hereinafter* "Anand Constr. Works"]; McDermott Int'l Inc., (2006) 11 SCC 181, ¶ 85 (India).
54 Contract Act, § 55, ¶ 1.
55 Contract Act, § 55 ¶ 2.
56 Contract Act, § 55, ¶ 3.
57 Anand Constr. Works, 1973 SCC OnLine Cal 87, ¶ 27; McDermott Int'l Inc., (2006) 11 SCC 181, ¶ 85.
58 Hind Constr., (1979) 2 SCC 70, ¶ 10 (India).
59 *Id.* ¶¶ 7–10.

On the other hand, when time is not of the essence of the contract, the employer is under no obligation to serve a notice to reserve the right to levy LD and can start levying the damages from the agreed upon date under the contract.[60] This is because when time is not of the essence, the contract is not voidable and therefore the pre-condition of serving a notice is not activated.[61] The pre-condition is applicable only in scenarios covered by Paragraph 3 of Section 55, which deals with contracts wherein time is of the essence which is clear from the opening lines of the third paragraph "*[i]f, in case of* ***a contract voidable*** *on account of the promisor's failure to perform his promise at the time agreed*," wherein, ambit of "*voidable contract*" is provided in the first paragraph of Section 55.[62]

C. How can time be made the essence of the contract where it was originally not?

For the contracts which fall under the second paragraph of Section 55, though the employer cannot rescind the contract on non-performance of the contract by the original agreed upon date, it does not mean that the employer has to keep extending the contract until it is completed.[63] While there is no specific provision under the ICA allowing for it,[64] the Indian courts have manifested that upon exhaustion of the original time period, the employer can serve a notice on the contractor specifically mentioning the new date of completion and that time is of the essence therein.[65] This notice has to be served in unequivocal terms,[66] and the terms and conditions have to be mutually agreed upon by the parties either expressly or impliedly, i.e., it cannot be a unilateral extension of performance by either of the parties.[67]

It is also to be noted here that the extended period of time also has to be one that is reasonable, and is such that the contractor is able to finish the work within the extended time period.[68] Therefore, for grant of extension, under the notice the employer has to take into consideration other facts and circumstances of the case.[69]

Once such notice is served, the contract becomes voidable at such extended date, and thus falls under paragraph one of Section 55. If the contractor fails to complete the work on such extended date as well, the employer has the power to rescind the contract on such extended date while levying the maximum liquidated damages provided for under the contract.[70]

For instance, the Defence Procurement Manual provides for levy of liquidated damages:

> "*[A] sum equivalent to 0.5% (zero point five percent) of the unfinished/undelivered/unfulfilled part of Contract for each week of delay beyond duration of Work specified in Article 8.1, subject to a maximum of 10% (Ten percent) of the Contract Price.*"[71] (emphasis added)

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60 *See* Anand Constr. Works, 1973 SCC OnLine Cal 87 (India).
61 Contract Act, § 55, ¶ 2.
62 Contract Act, § 55, ¶ 3.
63 N. Sundareswaran v. Sri Krishna Ref., AIR 1977 Mad. 109, 114 (India).
64 *See* Burn & Co. Ltd. v. H.H. Thakur Shaheb Sree Lukhdirjee, 1923 SCC OnLine Cal 82 (India).
65 *See* Mulla Badruddin v. Master Tufail Ahmed, 1960 SCC OnLine MP 170 (India).
66 *See* Tandra Venkata Subrahmanayam v. Vegesana Viswanadharaju, 1967 SCC OnLine AP 7, ¶ 7 (India).
67 *See* Claude-Lila Parulekar v. Sakal Papers (P) Ltd., (2005) 11 SCC 73 [*hereinafter* "Claude-Lila Parulekar"].
68 *See* Dipnarain Sinha v. Dinanath Singh, 1980 SCC OnLine Pat 8 (India); Claude-Lila Parulekar, (2005) 11 SCC 73, ¶ 10 (India).
69 CHITTY ON CONTRACTS 1106 (H.G. Beale ed., 28th ed. 1999) [*hereinafter* "CHITTY ON CONTRACTS"].
70 Hind Constr., (1979) 2 SCC 70, ¶ 10 (India).
71 GOV'T OF INDIA, MINISTRY OF DEFENCE, *Defence Procurement Manual – 2009 (Revenue Procurement)*, https://www.mod.gov.in/sites/default/files/DPM2009.pdf.

Therefore, applying the above principle here, if the work is not completed by the contractor on the extended date as well, the employer can rescind the contract and levy LD to the tune of 10 per cent of the contract price.

On the other hand, if time is not made the essence of the contract even while granting extensions, the contract still remains in the category specified under paragraph two of Section 55. Therefore, the employer would not get the option to rescind the contract even at the extended date and will again have the option to either make time of the essence and rescind it at the further extended date; keep levying liquidated damages as under the contract; or satisfy the conditions for termination of the contract as provided under the contract itself. Since the provision does not restrict the employer from levying LD even when time is not of the essence, there is no bar to levy LD.[72] However, this levy is subject to the issue of whether the employer has waived its right to levy LD or not while extending the time,[73] which will be discussed in Part III of this article below.

D. What is the nature of the notice to be sent to the contractor for reserving the right to levy LD?

When time is of the essence of the contract, and the employer elects to extend the time for the performance of the contract instead of rescinding or terminating the agreement, paragraph three of Section 55 becomes applicable. The plain language of the provision itself provides that the employer has the right to levy LD on a simple pre-condition that he shall serve a notice on the contractor while extending the time, stating that he is reserving the right to levy LD despite the extension.[74]

The Section is silent as to the nature of the notice which has to be served on the contractor. The courts have held that the employer must serve a notice clearly indicating their intention to levy LD as per the contract while extending the period of contract.[75] However, it is neither necessary for the employer to do an in-depth study of what all losses they might suffer due to the delay in performance, nor is it necessary to quantify their losses and provide a specific number which it would claim as LD.[76] Rather, it is sufficient for the employer to generally reserve its right to claim damages on account of delay at the time of extension of the contract.[77]

To summarise, when time is of the essence, the employer can either rescind the contract if the work is not performed by the agreed upon date and levy maximum damages under the contract, or extend the contract keeping time of the essence and reserve the right to levy LD from the original date or from the extended date. On the other hand, when time is not of the essence, the employer cannot rescind the contract, but can only levy LD for the delay in completion. However,

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72 Contract Act, § 55, ¶ 3.

73 *See* State Trading Corp. of India v. Campagnie Française d'Importation et de Distrib., [1983] 2 Lloyd's Rep. 679 (U.K.).

74 Contract Act, § 55, ¶ 3 ("**Effect of acceptance of performance at time other than that agreed upon** – If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee **cannot claim compensation for any loss occasioned by the non–performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so**." (emphasis added)).

75 PN Writer & Co. Pvt. Ltd. v. Mesuka Eng'g Co. Pvt. Ltd., 2015 SCC OnLine Bom 4695, ¶¶ 40–1 (India); Union of India v. Chenab Constr., 2019 SCC OnLine Del 10515, ¶¶ 31–36, 39 (India).

76 ONGC v. Soconord OCTG, 2014 SCC OnLine Bom 1277, ¶¶ 40 (India).

77 *Id.* ¶¶ 40–42.

by serving a notice, they can rescind the contract by making time of the essence at the extended date of completion.

III. Does extension of time for performance of the contract amounts to a waiver under the ICA?

When an extension is granted by the employer to the contractor for completing the work beyond the stipulated date of performance, as discussed in the preceding section, the extension becomes binding in nature.[78] The extension renders the time clause of the original contract ineffective, which is then substituted by the extended time period and any other terms and conditions which the parties mutually agree to at the time of extension.[79]

This power to extend the time for performance of the contract is derived from Section 63 of the ICA, which reads as follows:

> "***63. Promisee may dispense with or remit performance of promise*** – *Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him,* ***or may extend the time for such performance****, or may accept instead of it any satisfaction which he thinks fit*."[80] (emphasis added)

The extension of time can be either before or after the expiry of the stipulated time period under the contract,[81] and the effective date for levying of liquidated damages would then be the final date to which the contract was extended.[82] However, this levy of LD is subject to whether the extension of time amounted to a waiver of the right to levy LD, or was a mere forbearance on the part of the employer who reserved the right to levy LD despite the extension(s).[83]

A. What amounts to a waiver?

A waiver can be defined as "*an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed.*"[84] Though a waiver can be either express or implied,[85] it must portray the clear intention of the employer,[86] which then amounts to an agreement between the parties.[87] Thus, a mere forbearance on the part of the employer leading to extension of time would not amount to a waiver of right to levy LD as provided under the contract.[88]

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78 *See* Aryan Mining & Trading Corp. Ltd. v. BN Elias & Co. Ltd., AIR 1959 Cal 472, ¶ 38 (India).

79 *See* ONGC, (2003) 5 SCC 705 (India).

80 Contract Act, § 63.

81 *See* Mahadeo Prasad Singh v. Mathura Chaudhari, AIR 1931 All 589 (India); *see also* Central Bank of India v. Guruviah Naidu & Sons (Leather) Pvt. Ltd., AIR 1992 Mad 139 (India); but *see* Trimbak Gangadhar Ranade v. Bhagwandas Mulchand, (1898) 23 Bom 348 (India).

82 *See* Muhammad Habidullah v. Bird & Co., AIR 1922 PC 178 (India); *see also* Ratilal M Parikh, *supra* note 28; Paper Sales Ltd. v. Chokhani Bros, AIR 1946 Bom 429 (India); Aryan Mining, AIR 1959 Cal 472 (India).

83 *See* Keshav Lal Lallubhai Patell v. Lalbhai Trikumlal Mills Ltd., AIR 1958 SC 512 (India).

84 P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 SCC 725, ¶ 13 (India).

85 *See* Bruner v. Moore, [1904] 1 Ch 305 (U.K.).

86 *See* Waman Shrinivas Kini v. Ratilal Bhagwandas & Co., AIR 1959 SC 689 (India).

87 Krishna Bahadur v. Purna Theatre, (2004) 8 SCC 229, ¶¶ 9–10 (India).

88 *See* Anandram Mangturam v. Bholaram Tanumai, AIR 1946 Bom 1 (India); *see also* Maharashtra State Elec. Distrib. Co. Ltd. v. Datar Switchgear Ltd., Appeal No. 166/2009 in Arbitration Petition No. 374/2004, decided on 19 Oct 2013 (Bom) (India).

To determine whether the extension in fact amounted to a waiver, the facts and circumstances have to be looked into. For instance, if the employer has been consistently following up with the contractor regarding the progress of the work, and has done his part of the promise, but the contractor still fails to deliver on time resulting in the employer being forced to extend the time for performance, then the extension might not be considered a waiver of right to levy LD.[89]

The language of Section 63 is that the "*promisee may dispense with or remit,*" which makes it clear that the employer can waive certain contractual rights at his discretion and there is no requirement of any additional consideration or any agreement to that extent.[90] The only requirement is that the extension of time should be mutual and not unilateral.[91] These extensions amount to concessions in favour of the contractor who is given an additional opportunity to finish the work within the mutually agreed extended period of time.[92] Since the contractor is agreeing to the extension of time clause of the contract, the related terms and conditions like levy of LD from a particular date are also ought to be agreed to by him at the time of acceptance of extension.[93] Therefore, it is safe to state that an extension of time is not necessarily a waiver of right to levy LD, subject to the scrutiny of the intention and the conduct of the parties.

B. What is the position of law with respect to waiver in cases of government contracts affecting general interests of the public?

Under Indian law, the right to waiver of a party is also affected by the type of interest which forms the subject-matter of waiver, *viz.* public or private.[94] The question to be asked to differentiate between a public and private right here is that:

> "*[W]hether the right which is renunciated is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct.*"[95]

The basic principles of waiver are that the waiver can only be voluntary or intentional relinquishment of those rights which were existing at the time of waiver, and were rights of the one waiving it.[96] Thus, if any element of public interests is involved in a contract and one of the parties waives such public right, then such waiver cannot be given effect to irrespective of any express mention of a waiver.[97]

On the other hand, if it is a private right arising out of a mere commercial transaction, then waiver or surrender of a right or advantage which the waiving party could have enjoyed under the original contract is tenable in law.[98]

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89 CHITTY ON CONTRACTS, *supra* note 69, at 1106; *see* Charles Rickards Ltd. v. Oppenheim, [1950] 1 All ER 420.
90 Jagad Bandhu Chatterjee v. Nilima Rani, (1969) 3 SCC 445, ¶ 5 (India).
91 *See* Venkateswara Minerals Firm v. Jugalkishore Chiranjitlal Firm, AIR 1986 Kant 14 (India); *see also* VR Mohankrishnan v. Chimanlal Desai & Co., AIR 1960 Mad 452 (India); Bali Ram Dhote v. Bhupendra Nath Banerjee, AIR 1978 Cal 559 (India); Claude–Lila Parulekar, (2005) 11 SCC 73 (India).
92 *See* N Sundareswaran v. Sri Krishna Refineries, AIR 1977 Mad 109 (India).
93 Himachal Futuristic Commc'n Ltd. v. BSNL, 2015 SCC OnLine Del 8760, ¶ 28 (India).
94 All India Power Eng'r Fed'n v. Sasan Power Ltd., (2017) 1 SCC 487, ¶¶ 14–25 (India) [*hereinafter* "Sasan Power"].
95 Indira Bai v. Nand Kishore, (1990) 4 SCC 668, ¶ 5 (India) [*hereinafter* "Indira Bai"].
96 P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 SCC 725, ¶ 13 (India).
97 Indira Bai, (1990) 4 SCC 668, ¶ 5 (India); Sasan Power, (2017) 1 SCC 487, ¶ 25 (India).
98 Lachoo Mal v. Radhey Shyam, (1971) 1 SCC 619, ¶ 6 (India).

Therefore, the real question to be answered here is whether the rights under a construction contract entered into by a government entity falls under the category of public rights or private rights. In general, construction contracts are considered to be of commercial nature.[99] Thus, when a contract is entered into subsequent to a government tender, the resulting transaction is a commercial contract.[100] While the equality in tendering process has been considered a matter of public interest and writ jurisdiction has been made applicable to it, the same has been done based on the right to equality enshrined under Article 14 of the Indian Constitution.[101] However, a writ petition for enforcement of a contract or remedy for a breach of contract might not be maintainable for the simple reason that the rights and obligations of the parties enshrined under a commercial contract are not their fundamental rights or rights of the public at large, and the transaction is fairly private and commercial in nature.[102]

Therefore, it would be a stretch to say that all the constructions entered into by the government organisations are immune from the law of waiver embedded under Section 63 of the ICA. Thus, in such cases as well, the arbitrator will have to determine the legality of levy of LD based on the facts and circumstances of the case and on the basis of the wordings of the specific contract.[103] Further, if the arbitrator deviates from the express language of the contract or the holistic reading of the contract,[104] and allows or disallows levy of LD out of kindness,[105] the award would be liable to be set aside as it would be outside his jurisdiction.

C. Can LD be levied even after grant of multiple extensions of time by the employer?

As discussed above, since time has not been considered generally to be of the essence in construction contracts, the employer cannot rescind the contract if the contractor fails to deliver the work within the stipulated timeframe.[106] Thus, the only two options with the employer are to serve a notice making time of the essence, or simply grant extensions until the work is completed, both of which require extension of time. Can in such a situation then the employer be deemed to have waived its right to levy LD? A simple answer to this would be based on the serving/non-serving of the notice, as the courts have held that the claims filed by employer for levy of LD due to delay in completion by the contractors when the employer has not served a notice are untenable in law, as they fail the conditions laid down under Section 55.[107]

However, the above can be true only if the contract falls under the category of third paragraph of Section 55, wherein, an express obligation is put on the employer to serve a notice reserving the right to levy LD if it is extending the time for performance in a contract wherein time was of the essence. Thus, for construction contracts, which are generally governed by the second paragraph

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99 JOHN ADRIAANSE, THE NATURE OF CONSTRUCTION CONTRACTS, IN CONSTRUCTION CONTRACT LAW 1 (4th ed. 2016).

100 B.S. PATIL & S.P. WOOLHOUSE, *supra* note 1, at 195.

101 *See* R.D. Shetty v. Int'l Airport Auth., (1979) 3 SCC 489 (India).

102 *See* G. Ram v. Delhi Dev. Auth., AIR 2003 Del 120, ¶ 20 (India).

103 *See* ISPAT Eng'g & Foundry Works v. Steel Auth. of India Ltd., (2001) 6 SCC 347 (India); *see also* Rajasthan State Mines & Minerals Ltd. v. Eastern Eng'g Enter., AIR 1999 SC 3627 (India).

104 *See* Shyama Charan Agarwala & Sons v. Union of India, (2002) 5 SCC 444 (India); *see also* State of Rajasthan v. Nav Bharat Constr. Co., (2006) 1 SCC 86 (India).

105 *See* Govt. of Andhra Pradesh v. P.V. Subba Naidu, AIR 1990 NOC 90 (AP) (India).

106 Hind Constr., (1979) 2 SCC 70; Arosan Enterprises, (1999) 9 SCC 449 (India).

107 M/s Kailash Nath & Assoc. v. New Delhi Municipal Comm., ILR (2002) 1 Delhi 441, ¶¶ 5, 11–16 (India) ["*Kailash Nath v. NDMC*"].

of Section 55, the law could be different depending on the facts and circumstances of the case. This question of law has been conclusively answered by the Indian courts in a series of cases, have been discussed herein below:

i. *Single extension in ONGC* v. *Saw Pipes ["**ONGC**"]*[108]

The contract in this case was for the procurement of equipment for offshore oil exploration and a specific date was provided under the contract for delivering the same.[109] Owing to circumstances like labour strikes, the equipment could not be delivered on the said date and the contractor sought an extension of 45 days, which was granted by the employer with a specific condition that the clause for levy of LD will still be applicable and the contractor would be liable for the amount as pre-assessed under the contract.[110] The employer subsequently deducted certain amounts from the final payment towards levy of LD, aggrieved by which, the contractor invoked the arbitration clause.[111] While the Arbitral Tribunal ordered the employer to refund the LD amount, the Supreme Court set aside the arbitral award and allowed for the levy of LD.[112]

Thus, in this case, the Court allowed for levy of LD even where extension was granted as it was based on the request of the contractor, and the employer reserved its right to levy LD at the first instance itself.[113] Therefore, the extension of time did not amount to a waiver of right to levy LD.

It is to be noted here that though the decision of the Supreme Court in ONGC has been overruled by subsequent cases, it is only the ratio with respect to the interpretation of the term "*public policy of India*" and its applicability to foreign awards which has been overruled, and the observations in the judgement pertaining to domestic arbitration still hold good in law.[114]

ii. *Multiple extensions in Chennai Metropolitan Water Supply & Sewerage Board v. Aban Constructions Pvt. Ltd.*[115]

The general conditions of the contract in this case provided that the time was of the essence of the contract, but due to the presence of extension of time and liquidated damages clauses, the Court found that time was not the essence of the contract. In the factual circumstances of the case, the construction projects were for a specific period, but the contract was completed only after a grant of a total of four extensions. While granting the first extension, the employer did not reserve the right to levy LD, but it reserved the right to levy while granting the subsequent extensions.

The Arbitral Tribunal ordered the refund of the amount levied as LD by the employer, but relying on the decision of the Supreme Court in *ONGC*, the Madras High Court held that the employer was eligible to levy LD from the second extension onwards. This was because the employer had reserved the right to levy at the time of the second and the subsequent extensions, but could not levy it for the duration of the first extension in the absence of any reservation. Therefore, the

108 ONGC, (2003) 5 SCC 705, ¶¶ 33–4, 43, 64–9 (India).
109 *Id.* ¶¶ 32–33.
110 *Id.* ¶¶ 34, 43.
111 *Id.* ¶ 34.
112 *Id.* ¶¶ 64–75.
113 *Id.* ¶¶ 34, 43.
114 Sri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433, ¶¶ 28–30 (India); Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1, ¶¶ 39–41 (India).
115 Chennai Metro. Water Supply & Sewerage Bd. v. Aban Constr. Pvt. Ltd., 2006 SCC OnLine Mad 486, ¶¶ 26–33 (India).

general principle remains the same that during the grant of extension of time, the employer has to reserve their right to levy LD in order to claim damages at the rates decided under the contract for the delay in performance of the contract.

The above position of law as propounded by the Supreme Court in *ONGC* and expanded in *Chennai Metropolitan Water Supply & Sewerage Board* v. *Aban Constructions Pvt. Ltd.*, has been further upheld in a series of cases, wherein the courts have: *first*, upheld the decision of the arbitral tribunal allowing employer to levy LD even when multiple extensions are granted because the right to levy LD was reserved;[116] *second*, set aside the arbitral awards which required refund of the amount levied as LD by the employer due to delay in performance;[117] and *third*, reversed the decision of the lower courts requiring the employer to refund the amount deducted by it in the form of LD for delay in completion of the construction project.[118]

IV. How can the parties claim liquidated damages once a breach of contract is established?

Levy of liquidated damages is a consequence of a breach of contract by either of the parties to a contract.[119] Therefore, once it has been determined that there was a breach of contract on the part of the contractor and the employer has crossed the barriers of Sections 55 and 63 of the ICA to be eligible to claim liquidated damages, then Chapter VI of the ICA is attracted.[120] Under this Chapter, Section 73 discusses the concept of unliquidated damages, which allows for reasonable compensation to the aggrieved party for any loss which it has suffered due to the actions of the other party;[121] Section 74 makes the provision for claiming liquidated damages, the tune of which has been pre-estimated in the contract itself;[122] and Section 75 enables the party rescinding the contract to claim damages as agreed upon in the contract, thus when read with Section 55, the employer rescinding the contract when time is the essence has the right to claim liquidated damages under Section 75.[123]

A. Is the party claiming liquidated damages required to prove actual loss to levy LD?

The basic purpose of damages is to compensate the aggrieved party for the loss suffered by it due to the conduct of the party in breach of the contract,[124] and thus, to put the innocent party in the same position had the breach not occurred.[125] Thus, the general principle remains that the aggrieved party can claim damages only for those losses which were in the reasonable

116 BWL Ltd. v. MTNL & Anr., 2007 SCC OnLine Del 1199, ¶¶ 22–35, 38–40 (India); Escorts Commc'n Ltd. v. Union of India, 2009 SCC OnLine Del 1426, ¶¶ 7–9, 12, 13, and 24 (India); Himachal Futuristic Commc'n Ltd. v. BSNL, 2015 SCC OnLine Del 8760, ¶¶ 31–36 (India); Philips Elec. India Ltd. v. Union of India Through Director General of Health Serv., 2018 SCC OnLine Del 12638, ¶¶ 10–12 (India).

117 BSNL v. Haryana Telecom Ltd., 2010 SCC OnLine Del 1120, ¶¶ 17–30 (India).

118 GAIL (India) Ltd. v. Punj Lloyd Ltd., 2017 SCC OnLine Del 8301, ¶¶ 30–38 (India).

119 State of Karnataka v. Shree Rameshwara Rice Mills, (1987) 2 SCC 160 (India); BSNL v. Motorola India (P) Ltd., (2009) 2 SCC 337, ¶ 24 (India); J.G. Eng'r, (2011) 5 SCC 758, ¶¶ 19–21 (India).

120 *See* Kailash Nath v. NDMC., ILR (2002) 1 Delhi 441, ¶ 15 (India).

121 *See* Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd., AIR 1962 SC 1314, 1319, ¶ 11 (India).

122 *See* Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd., [1914] UKHL 1 [*hereinafter* "Dunlop Pneumatic Tyre"]; *see also* Fateh Chand v. Balkishan Das, AIR 1963 SC 1405 (India) [*hereinafter* "Fateh Chand"].

123 *See* Mirza Javed Murtaza v. U.P. Financial Corp., AIR 1983 All 234, 241, ¶ 16 (India).

124 ALI D. HAIDAR AND PETER BARNES, DELAY AND DISRUPTION CLAIMS IN CONSTRUCTION: A PRACTICAL APPROACH 9 (3d ed. 2018).

125 Robinson v. Harman, (1848) 1 Exch. 850, 855; Attorney General of the Virgin Islands v. Global Water Assoc. Ltd., 2021 AC 23, ¶¶ 35–36.

contemplation of the parties at the time of entering into the contract or at the time when the breach occurred.[126]

Thus, for determining the quantum of LD to be levied, the courts first have to determine that a breach has occurred and then assess the damages which arise out of the breach, as these are two different concepts which require separate adjudication.[127] This determination is only within the adjudicatory powers of the court, which cannot be handed over to either of the parties to the contract.[128]

i. Analysing the plain language of Section 74 of the ICA

Emerging from the above principles, is the law enshrined under Section 74 of the ICA, which reads as follows:

> "***74. Compensation for breach of contract where penalty stipulated for – When a contract has been broken****, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the* ***party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby****, to receive from the party who has broken the contract* ***reasonable compensation not exceeding the amount so named*** *or, as the case may be, the penalty stipulated for*."[129] (emphasis added)

From the plain language of the provision itself, it is clear that there is no burden of proof on the party claiming LD, to prove that any actual loss has been suffered by it due to the breach of the contract by the party at fault. However, the Supreme Court in *Fateh Chand* v. *Balkishan Das* ["**Fateh Chand**"], has opined that Section 74 "*does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach*" (emphasis added).[130] Similar position, among others, was also taken by the Delhi High Court,[131] Bombay High Court,[132] and Kerala High Court[133] in later cases, wherein these Courts were of the opinion that the aggrieved party can claim the liquidated damages provided under the contract, given that the damages suffered by that party are realistically close to the actual damages sustained. Thus, the courts read into Section 74 an additional qualification which was not intended by the legislation in the first place.

ii. Actual loss need not be proved if there is genuine pre-estimate of loss.

While the Indian courts on certain occasions have required the party claiming liquidated damages to prove actual losses, as observed above, there is a series of decisions which provides that the

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126 *See* Hadley v. Baxendale, [1854] EWHC Exch J70 [*hereinafter* "Hadley"].

127 State of Karnataka v. Shree Rameshwara Rice Mills, (1987) 2 SCC 160 (India); BSNL v. Motorola India (P) Ltd., (2009) 2 SCC 337, ¶ 24 (India); J.G. Eng'r, (2011) 5 SCC 758, ¶¶ 19–21 (India).

128 *See* J.G. Eng'r, (2011) 5 SCC 758 (India); *see also* Tulsi Narayan Garg v. M.P. Road Dev. Auth., 2019 SCC OnLine SC 1158 (India).

129 Contract Act, § 74.

130 Fateh Chand, AIR 1963 SC 1405, ¶ 10 (India).

131 *See* Kailash Nath v. NDMC, ILR (2002) 1 Delhi 441 (India).

132 *See* Union of India v. Motor & Gen. Sales Ltd., 2016 SCC OnLine Bom 6787, ¶ 17 (India).

133 *See* State of Kerala v. United Shippers and Dredgers Ltd., 1982 SCC OnLine Ker 112, ¶ 18 (India).

actual loss need not be proved if it is a genuine pre-estimate of damages, and if it is not possible to prove actual losses. These sets of decisions will be discussed in this sub-section.

a. Position of law in common law jurisdiction

The ideal example of a factual scenario where it would not be possible to determine and quantify actual loss is the 20th century decision of the House of Lords in *Clydebank Engineering and Shipbuilding Co. Ltd.* v. *Don Jose Ramos Yzquierdo y Castenada.*[134] Here, the Spanish Government entered into a contract with Clydebank Engineering for the building of four military torpedo boats, the delivery of which was to be done within a stipulated period of time, failing which, a decided amount would be levied as LD for each week of delay.[135] The boats, however, were delivered after a great amount of delay, owing to which, the Spanish Government levied LD as per the formula under the contract.[136]

Aggrieved by the levy of LD, the contractor approached the courts submitting that since these were military vessels, they did not have any commercial value and the non-availability of the same could not possibly lead to any actual loss being suffered by the Government.[137] However, the House of Lords noted that the very existence of the warship and capability to be used would prove that the party would suffer loss if they were deprived of it, and, thus, was of the opinion that it is difficult to prove actual loss in this case.[138] Therefore, the levy of LD was upheld as it was considered a genuine pre-estimate of damages rather than a penalty *in terrorem*, as alleged by the Appellant.

The observation made by the House of Lords to this extent is of utmost importance to determine in which cases it is not possible to quantify the losses:

> "*The subject-matter of the contracts, and the purposes for which the torpedo-boat destroyers were required, make it extremely improbable that the Spanish Government ever intended or would have agree that there should be inquiry into, and detailed proof of, damage resulting from delay in delivery. The loss sustained by a belligerent, or an intending belligerent, owing to a contractor's failure to furnish timeously warships or munitions of war,* ***does not admit of precise proof or calculation****; and it would be preposterous to expect that conflicting evidence of naval or military experts should be taken as to the probable effect on the suppression of the rebellion in Cuba or on the war with America of the defenders' delay in completing and delivering those torpedo-boat destroyers.*"[139] (emphasis added)

The above legal position has been further upheld by the courts in England on various occasions.[140] In *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.*,[141] however, the House of Lords went a step further to expressly state that irrespective of an express mention by the parties in the

134 Clydebank Eng'g & Shipbuilding Co. Ltd. v. Don Jose Ramos Yzquierdo y Castenada, [1905] AC 6, 9–13, 15–6, 20.
135 *Id.* at 7.
136 *Id.* at 8.
137 *Id.* at 11–2.
138 *Id.* at 12.
139 *Id.* at 20.
140 *See* Lord Elphinstone v. Monkland Iron & Coal Co. Ltd., & Liquidators, (1886) 11 AC 332; *see also* Soper (Pauper) v. Arnold, (1889) 14 AC 429; Comm'r of Public Works v. Hills, (1906) AC 368; Rowland Valentine Webster v. William David Bosanquet, (1912) AC 394.
141 *See* Dunlop Pneumatic Tyre, [1914] UKHL 1.

contract that the damages are liquidated damages and not penalty, the court has to look into the actual intention of the parties in light of the nature of the contract.[142] This would ensure that no *in terrorem* damages or penalty is levied in the guise of liquidated damages, as the party claiming damages would in fact be claiming damages for things which they didn't suffer actual loss for.[143] This in turn would be against the basic principles of compensation, *viz.* putting the innocent party in the same position as if the breach did not happen.

b. Position of law in India

The wording of the provision of law in India for levy of LD, i.e., Section 74, is different from the one in England,[144] in as much as there is an express mention in the Indian provision that the party complaining of the breach is entitled to levy LD "*whether or not actual damage or loss is proved to have been caused thereby*."[145] However, the position of law prevalent in India right now is more in line with the English position than the one taken in Fateh Chand or the *Kailash Nath* Delhi High Court decisions.

The law in India with respect to this point of law can be traced back to the 1934 decision of the Calcutta High Court in *Mahadeoprasad* v. *Siemens (India) Ltd.*, wherein the Court opined that the estimating of damages by the parties in the contract in itself is a sufficient evidence of damages.[146] That the only thing which is not a conclusive evidence is the sum mentioned in the contract as liquidated damages, which if proved unreasonable or excessive, can be reduced.[147] However, the burden of proof in such cases would still be on the party aggrieved by the levy of damages to prove that the sum mentioned is excessive in nature and unreasonable.[148]

This position was expressly stated by the Supreme Court in its 1969 decision of *Maula Bux* v. *Union of India*, wherein it noted as follows:

> "*It is true that in every case of breach the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and* ***the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract****. … In case of breach of* ***some contracts it may be impossible for the Court to assess compensation arising from breach****, while in other cases compensation can be calculated in accordance with established rules*."[149] (emphasis added)

142 *Id.* at 86–7.
143 *Id.*
144 *See* Fateh Chand, AIR 1963 SC 1405, ¶ 8 (India).
145 Contract Act, § 74.
146 *See* Mahadeoprasad v. Siemens (India) Ltd., AIR 1934 Cal 285 (India).
147 *Id.*
148 Constr. & Design Serv. v. Delhi Dev. Auth., (2015) 14 SCC 263, ¶¶ 14–7 (India) [*hereinafter* "Const. & Design Serv."].
149 Maula Bux v. Union of India, (1969) 2 SCC 554, ¶ 6 (India).

The above-mentioned point of law is now an established position of law, which has been upheld time and again by the Supreme Court,[150] the Delhi High Court,[151] as well as the Bombay High Court[152] the relevant portions of which are not extracted here to avoid repetition.

B. How to determine whether the method of levying LD in the contract is a genuine pre-estimate of losses or is in the nature of a penalty?

One of the most common issues observed in a construction arbitration matter is the challenge to the method of levying the liquidated damages as defined in the contract. It is a common argument of the contractors that the liquidated damages levied by the employer are unreasonable and fall under the category of penalties, and thus, the latter can claim only a reasonable amount based on the actual losses instead of claiming the maximum leviable LD under the contract.[153]

The simple reason for the above argument being that genuine pre-estimate of losses are recoverable under the law, but levy of damages in the form of penalty is not.[154] This categorisation is a matter of construction, which has to be derived from the reading of the terms and conditions of the specific contract.[155] The basic principle is that if the amount claimed as LD is extravagant, unconscionable, and disproportionately large, then it shall operate as a penalty.[156]

Thus, the courts have considered the clauses providing for a fixed amount as a payment for even the minutest of breaches, to be penalties.[157] On the other hand, if the clause provides for a particular reasonable percentage of levy of damages for each week or day of delay, then those have been considered a genuine pre-estimate of loss.[158]

C. What is the impact of contributory delays on the part of the party claiming LD on the levy of LD?

The language of the contracts generally just provides for the levy of damages by the employer in case there is a delay in completion of the project or failure to complete the project by the contractor.[159] However, this levy of damages for delay in completion has an implied rider on it in the form of contributory delays on the part of the employers.

One of the duties of an employer under the ICA is to provide the contractors with all the facilities necessary to complete the work.[160] Further, arguably, the main duty of an employer under an actual construction contract is to make the payments to the contractor on time to procure the necessary raw materials, labour, etc. If the employer thus fails to fulfil these responsibilities and any other

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150 ONGC, (2003) 5 SCC 705, ¶¶ 64–72 (India); BSNL v. Reliance Comm'n Ltd., (2011) 1 SCC 394, ¶¶ 47–9, 53 (India); Kailash Nath Assoc., (2015) 4 SCC 136, ¶ 43 (India); Constr. & Design Serv., (2015) 14 SCC 263, ¶¶ 14–7 (India).

151 Rama Associates (P) Ltd. v. Delhi Dev. Auth., 1998 SCC OnLine Del 409, ¶¶ 19, 25, 31–33 (India); BWL Ltd. v. Mahanagar Tel. Nigam Ltd., 2007 SCC OnLine Del 1199, ¶ 39 (India); Herbicides (India) Ltd. v. Shashank Pesticides P. Ltd., 2011 SCC OnLine Del 2249, ¶ 20 (India).

152 Mascon Multiservices & Consultants Pvt. Ltd. v. Bharat Oman Ref. Ltd., 2014 SCC OnLine Bom 4832, ¶¶ 72–81 (India); Raheja Universal Pvt. Ltd., Mumbai v. BE Billimoria & Co. Ltd., Mumbai, 2016 (5) Mh LJ 229, ¶¶ 7–11 (India) [*hereinafter* "Raheja Universal"].

153 *See* Fateh Chand, AIR 1963 SC 1405.

154 *Id.*

155 *See* Commr. of Public Works v. Hills, 1906 AC 368 (PC).

156 *See* Dunlop Pneumatic Tyre, [1914] UKHL 1.

157 *See* Fateh Chand, AIR 1963 SC 1405 (India).

158 *See* ONGC, (2003) 5 SCC 705 (India).

159 *See, e.g., Defence Procurement Manual*, *supra* note 12, cl. 8, at 177.

160 Contract Act, §§ 37, 51, 52, 53.

time sensitive reciprocal promises it made to the contractor under the contract, and there indeed is a delay in completion due to the same, then it amounts to contributory delay.[161]

The position taken by the Indian courts in cases of contributory delays is quite straightforward. The courts have considered the impact of the delays caused by the employer on the final delay in completion of the project, and have deducted the amount levied as LD for the period of delay caused by the employer as well. Further, the courts have allowed levy of damages only for the period of delay which is solely attributable to the contractor.[162] Moreover, if the delay is completely attributable to the employer and there is no fault of the contractor, then the former can neither claim the liquidated damages as provided for in the contract, nor can they set aside the contract for non-completion.[163]

D. Can the aggrieved party claim consequential damages in addition to the liquidated damages provided for in the contract?

Consequential losses can be understood as special losses which are related to the circumstances of the particular case.[164] While liquidated damages are the pre-estimated or the pre-agreed upon rates at which damages would be levied in case of a breach or violation of the contract, consequential losses are the reasonable damages which the employer may claim from the contractors if they suffer any direct losses due to the actions of the contractor.[165] The additional test to justify levying of the consequential losses would be to determine whether at the time of entering into the contract, such losses or damages were in the contemplation of the parties.[166]

Under the Indian law, there is no restriction on claiming consequential losses in addition to the LD given that the employer can prove actual losses which go beyond the maximum leviable LD under the contract, and that such losses are not too remote and are directly arising out of the actions of the contractor.[167]

However, it is also to be noted here that the mere terming of certain damages clause in a contract as *consequential damages* does not amount to such losses being actually consequential.[168] Just like the interpretation of a liquidated damages clause, as laid down in *Hind Construction*, a clause for consequential damages will also have to be read in consonance with other terms of the clause and other provisions of the contract. Therefore, if the consequential losses are in the form of a genuine pre-estimate of loss which arise out of violation of a contract in the usual course of things, those might not indeed be consequential losses but merely liquidated damages.[169]

E. In what circumstances can a contractor claim damages against the employer?

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161 *See* J.G. Eng'r, (2011) 5 SCC 758 (India).

162 *Id.* ¶¶ 22–3; Raheja Universal, 2016 (5) Mh. L.J. 229, ¶¶ 7–11 (India); Fateh Chand, AIR 1963 SC 1405 (India); Kailash Nath v. NDMC, ILR (2002) 1 Delhi 441, ¶¶ 5, 11–6 (India).

163 J.G. Eng'r, (2011) 5 SCC 758, ¶¶ 19, 22–3 (India).

164 *See* Hadley, [1854] EWHC Exch J70.

165 Daichi Sankyo v. Malvinder Singh, (2018) 247 DLT 405, ¶¶ 110–27 (India) [*hereinafter* "Daichi Sankyo"].

166 *Id.*

167 *Id.*; State of Kerala v. K Bhaskaran, (1984) SCC OnLine Ker 198, ¶¶ 11–3, 19 (India); McDermott Int'l Inc., (2006) 11 SCC 181, ¶¶ 116–120 (India).

168 Daichi Sankyo, (2018) 247 DLT 405, ¶¶ 110– 127 (India).

169 *Id.*

A little infrequent, but not unprecedented is a scenario where the contractors also come forward to claim damages from the employer for the loss incurred by the former due to the conduct of the latter. These claims generally arise in cases wherein the major part of the delay in completing the work is attributable to the employer, due to which, the contractor had to work for a longer duration and indulge his resources for such duration at an additional cost. For instance, these claims of a contractor may arise due to the delay in handing over of the work site in time by the employer to the contractor;[170] breaches and violations of the contract on the part of the employer;[171] delay in issuing of drawings to complete the agreed upon scope of work;[172] delay in supply of items to be procured by the employer;[173] and delay in making payments,[174] among others.

Every construction contract would have some sets of reciprocal promises, and if the employer fails to properly complete these promises, it gives rise to a cause of action in favour of the contractor.[175] If the breach on part of the employer is such that it renders the project unworkable by the contractor, the latter has the right to set aside the contract and claim damages for the time and money spent by him on the attempt to complete the work. If the breach and delay on the part of the employer is such that the contractor can still complete the work, he can choose to complete the work and claim damages for the overhead and additional costs incurred by him to complete the project at the delayed time.[176] These damages may also be in the form of providing payment to the contractor at the revised rates at which he had to procure the items due to the delay by the employer.[177] The contractor would also be entitled to a refund of the security amount deposited by him with the employer if the contract was terminated due to the delay and breaches of the employer.[178]

However, in order to claim damages, the contractor will have to prove actual losses,[179] as the construction contracts generally don't have a pre-estimate of losses which can be levied by the contractor on the employer in case of the latter's delay in fulfilment of the reciprocal promises. While some amount of guessing work would be admissible in quantifying the damages, the contractor would be required to adduce some evidence of the losses suffered by him.[180]

V. How do the sub-contractors fit into the relationship between the contractor and the employer?

[170] *See* Roberts v. Bury Comm'r, (1870) LR 5 CP 310; *see also* Miller v. London County Council, [1934] All E.R. Rep 657; Cowell v. Rosehill Racecourse Co. Ltd., (1937) 56 CLR 605, 621; Uttar Pradesh State Elec. Bd. v. Om Metals & Minerals Ltd., 2000(3) RAJ 32 (SC) (India); I.N. DUNCAN WALLACE, HUDSON'S BUILDING AND ENGINEERING CONTRACTS 596 (10th ed. 1979).

[171] I.N. DUNCAN WALLACE, CONSTRUCTION CONTRACTS: PRINCIPLES AND POLICIES IN TORT AND CONTRACT 116 (1986); *see* P.C. Sharma v. D.D.A, 2006 (1) RAJ 521 (Del) (India).

[172] *See* Krishna Bhagya Jala Nigam Ltd. v. G. Harishchandra Reddy, (2007) 2 SCC 720 (India); *see also* State of U.P. v. Ram Nath Int'l Const. Pvt. Ltd., (1996) 1 SCC 18 (India).

[173] *See* Union of India v. Indian Proofing & Gen. Indus., 1998 (Supp) Arb LR 181 (India).

[174] *See* Hyderabad Mun. Corp. v. M. Krishnaswami Mudaliar, (1985) 2 SCC 9 (India).

[175] *See* G.M. Northern Rly. v. Sarvesh Chopra, (2002) 4 SCC 45 (India).

[176] *See* Kishan Chand v. Union of India, 1999(1) RAJ 510 (Del) (India).

[177] *See* State of Karnataka v. R.N. Shetty & Co., AIR 1991 Kant 96 (India); *see also* Mun. Corp. of Greater Mumbai v. Jyoti Const. Co., 2003(3) Arb LR 489 (India); Puranchand Nangia v. Delhi Dev. Auth., 2006 (2) Arb LR 456 (Del) (India).

[178] *See* Delhi Dev. Auth. v. U. Kashyap, 1999 (1) Arb LR 88 (India).

[179] *See* Ennore Port Ltd. v. Skanska Cementation India Ltd., 2008 (2) Arb LR 598 (Mad) (India).

[180] *See* A.S. Sachdeva & Sons v. Delhi Dev. Auth., 1996 (1) Arb LR 148 (Del) (India).

While the tender document provides the job of the completion of the construction project to one of the bidders who ultimately becomes the contractor, it is a common occurring in the construction contracts that the contractors indulge sub-contractors to complete various parts of the work.[181] These sub-contractors are indulged by the contractors via separate agreements, which are related contracts but do not form part of the main agreement with the employer. These sub-contracts can be understood to be entered into on the basis of the main contracts itself because the former won't come into existence if not for the latter.[182]

However, when looked at closely, the arbitration clauses of the main contracts would generally have only the main contractor and the employer as the parties and provide only them the right to refer the matter to arbitration. Therefore, in India at least, the sub-contractors are not provided the right to invoke the arbitration clause of the main contract in case they have suffered any losses due to the acts of the employer.[183] This is owing to the simple fact that the sub-contractors are non-signatories to the arbitration agreement.

A. What is the position of non-signatories to an arbitration clause in India?

It is an established principle of law that a contract gives rise to *rights in personam* which the parties exercise only against each other and not the world at large; and as a corollary, these rights cannot be exercise against them by the world at large.[184] Moreover, consent is the cornerstone of arbitration and the tribunal derives its jurisdiction from such consent.[185] Therefore, applying these principles, it would be safe to say that only the parties to an arbitration agreement can be bound to arbitrate under it.[186]

The Indian law pertaining to the position of non-signatories has evolved drastically over the years. The Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] which governs arbitrations in India has undergone significant changes in view of the Arbitration and Conciliation (Amendment) Act, 2015 ["**Amendment Act**"].[187] Section 2(1)(h) of the Act defines a *party* as a "*party to an arbitration agreement*."[188] Section 8 of the Act also empowers courts to refer parties to arbitration where a valid arbitration agreement between the parties exists, in the realm of domestic arbitration. However, Section 8, as amended by the Amendment Act, now empowers the courts to refer the matter to arbitration if a "*party to the arbitration agreement or any person claiming through or under him*"[189]

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181 Andrew John Milner, *Subcontracts in the UK Construction Industry: An Investigation into the Root Causes of Disputes*, UNIVERSITY OF SALFORD SCHOOL OF THE BUILT ENVIRONMENT (Mar. 2019), https://usir.salford.ac.uk/id/eprint/52464/1/Milner_DEBEnv_Thesis_Salford_FINAL.pdf; Lew Yoke–Lian, S. Hassim, R. Muniandy & Law Teik–Hua, *Review of Subcontracting Practice in Construction Industry*, 4 IACSIT INT'L J. ENG'G & TECH. 442 (2012).

182 Stavros Brekoulakis & Ahmed El Far, *Subcontracts and Multiparty Arbitration in Construction Disputes*, GLOBAL ARBITRATION NEWS (Oct. 31, 2019), *available at* https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/third-edition/article/subcontracts-and-multiparty-arbitration-in-construction-disputes.

183 *See* discussion *infra* Part V.A.

184 MINDY CHEN-WISHART, CONTRACT LAW, 31, 33 (5th ed. 2015).

185 William W. Park, *Non–Signatories and International Contracts: An Arbitrator's Dilemma, in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 1, 2 (R. Doak Bishop ed., 2009).

186 *See* MD Army Welfare Hous. Org. v. Sumangal Serv. (P) Ltd., AIR 2004 SC 1344, ¶ 58 (India); *see also* Sundaram Fin. Ltd. v. NEPC India Ltd., (1999) 2 SCC 479, ¶¶ 14, 18 (India).

187 Arbitration and Conciliation (Amendment) Act, No. 3 of 2016 (India).

188 Arbitration and Conciliation Act, No. 26 of 1996, § 2(1)(h) (India).

189 *Id.* § 8.

applies for a referral of the matter to arbitration. Thus, it now allows non-signatories to an arbitration agreement to approach an arbitral tribunal.[190]

However, this was not originally the position, as the Supreme Court in the first decade of the 21st century did not allow reference to arbitration by non-signatories. In the 2003 decision of the Supreme Court in *Sukanya Holdings Pvt. Ltd.* v. *Jayesh H Pandya*,[191] ["**Sukanya Holdings**"], it observed that causes of action against different parties cannot be bifurcated in a single arbitration and that an arbitration agreement will only bind the parties which have entered into the same. This case clearly suggests that party autonomy was considered to be supreme and judicial interpretation was in favour of excluding the non-signatories irrespective of the commercial intent between the contracting parties.

While the decision in *Sukanya Holdings* was passed in the context of domestic arbitration, the Supreme Court in *Sumitomo Corporation* v. *CDS Financial Services* ["**Sumitomo Corporation**"],[192] which involved matters of international commercial arbitration also came to a similar decision despite the fact that the reference was made under Section 45 which provided "*one of the parties or any person claiming through or under him*"[193] to refer the matter to arbitration. The Supreme Court declined to refer non-signatories to arbitration stating that any reference to arbitration necessarily had to be between *parties* as defined under Section 2(1)(h) of the Arbitration Act. The error in this decision lies in the wording of Section 45 itself, which provides for reference to arbitration upon a request of any person claiming through or under a party. The only basis available for refusing referral under Section 45 is if the agreement in question is found to be null and void, inoperative, or incapable of being performed. None of these were considered in this case.

Fortunately, the decision in *Sumitomo Corporation* was overruled by the Supreme Court in its subsequent decision in *Chloro Controls India Pvt Ltd.* v. *Severn Trent Water Purification Inc.* ["**Chloro Controls**"].[194] Here, the SC noted that the wording employed in Section 45 of the Act was on the same lines as that in Article II of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, and at a substantial variance to the wording of Section 8 of the Arbitration Act, which only allows parties to the dispute to refer the matter to arbitration. The use of the term *any person* was construed as evincing the intention of the legislature to broaden the scope of Section 45. Therefore, the Supreme Court referred the matter for adjudication by an arbitral tribunal. In essence, the *Chloro Controls* case is a high watermark of judicial insistence in the sphere of extension of arbitration agreements to non-signatories.

This above principle laid down under the *Chloro Controls* case was further extended to group of companies by the Supreme Court in its decision in *Mahanagar Telephone Nigam Ltd* v. *Canara Bank*[195] In this case, the Court held that the courts can refer non-signatory group companies to a single composite arbitration if special circumstances are proved. This group of companies doctrine was

190 *See* Ameet Lalchand Shah v. Rishabh Enter., (2018) 15 SCC 678, ¶¶ 24–25 (India).
191 *See* Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, AIR 2003 SC 2252, ¶¶ 16–17 (India).
192 *See* Sumitomo Corp. v. CDS Fin. Serv., AIR 2008 SC 1594, ¶¶ 20–21 (India).
193 Arbitration and Conciliation Act, 1996, § 8.
194 *See* Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, ¶ 57 (India) [*hereinafter* "Chloro Controls"].
195 *See* Mahanagar Tel. Nigam Ltd. v. Canara Bank, 2019 SCC OnLine SC 995, ¶¶ 10.3–10.5 (India).

relied upon by the Telangana High Court[196] and Calcutta High Court,[197] in recent judgments, and thus, elaborates on the current position of law in India.

While the above decisions provided the non-signatories the right to be referred to an arbitral tribunal, the Court in *Cheran Properties Ltd.* v. *Kasturi and Sons Ltd.*[198] made it clear that an arbitral award may be binding on a third party if such party falls within the meaning of *parties and persons claiming under them* under Section 35 of the Arbitration Act. Therefore, under the Indian law, courts have allowed the non-signatories to refer a matter to arbitration and have also enforced the arbitral awards against the non-signatories.

B. Whether sub-contractors fall under the category of "persons claiming through or under" as provided under Section 8 and Section 45 of the Arbitration Act?

Despite the above position of law giving the non-signatories the right to refer the matter to arbitration, the question that remains to be answered is whether the sub-contractors would fall under the category of "*persons claiming through or under*" the main contractor. While the Court in *Chloro Controls* allowed making of the non-signatories a party to the arbitral proceedings, it was contingent on the fact that those non-signatories formed part of a group of companies and that they gave their consent to be a part of the arbitral proceedings.[199]

However, what is to be noted from the language of Section 8 and Section 45 of the Arbitration Act is that though an application to refer the parties to the arbitration agreement to a dispute may be initiated by a *party to the arbitration agreement or any person claiming through or under him*, the courts can only *refer the parties to arbitration.*" This makes it amply clear that though an application to initiate arbitration can be filed by a non-signatory also. A non-signatory cannot come forward and just initiate arbitration against the parties to the arbitration clause and become a party to the dispute.[200] The law only allows inclusion of the non-signatories in the arbitration proceedings arising out of the main contract if the original parties as well as the non-signatories agree.[201] The simple reason for this being that the rights of any non-signatory to the main contract, which is a signatory to a subsidiary or a related contract, may get affected due to a decision rendered by any court in a dispute arising out of the main contract.[202]

However, it is to be noted here that there is an extremely strong burden of proof on the non-signatory to prove that it is a "*party claiming through or under,*" of the original parties to the main arbitration contract, and would have to show that the adjudication of disputes between the original parties to the arbitration agreement will have a direct impact on the non-signatory.[203]

Therefore, as per the current Indian law, a sub-contractor who is a non-signatory to the arbitration agreement between the main contractor and the employer cannot initiate arbitration proceedings against the employer for seeking any reliefs against the conduct of the employer, which has resulted

196 *See* Tecpro Sys. Ltd. v. Telangana State Power Generation, 2019 SCC Online TS 1658 (India).
197 *See* IL&FS Fin. Serv. v. Aditya Khaitan, TA No. 12 of 2019 & CS No. 177 of 2019 (order dated Sept. 3, 2019) (India).
198 *See* Cheran Prop. Ltd. v. Kasuri and Sons Ltd., (2018) 16 SCC 413, ¶ 29 (India).
199 Chloro Controls, (2013) 1 SCC 641, ¶¶ 143–158 (India).
200 Payal Chawla & Hina Shaheen, *Can non–signatories be compelled to arbitrate in Domestic Arbitrations?*, BAR & BENCH (Aug. 22, 2017), *available at* https://www.barandbench.com/columns/non-signatories-domestic-arbitrations.
201 Chloro Controls, (2013) 1 SCC 641, ¶ 66 (India).
202 *Id.* ¶ 104.
203 *Id.* ¶¶ 143–158.

in a loss to such sub-contractor. Further, any reliefs which the sub-contractor intends to claim against the main contractor would be governed by the sub-contract, and vice-versa.

The ideal of example of the latter situation in the preceding paragraph is that of the *McDermott International*. In this case, the main contractor (Burn Standard) obtained a project for off-shore oil and gas production from a government employer (ONGC) and then the main contractor entered into a sub-contract with the petitioner (McDermott). Due to various delays in completion of the work by the main contractor the timelines for procurement of the services from the sub-contractor were delayed, due to which, the sub-contractor had to incur increased overhead costs, decrease of profit, and additional management costs.[204] Therefore, the sub-contractor invoked the arbitration clause of the sub-contract claiming damages from the main contractor. Since the main contractor was responsible for delay and disruptions leading to various additional costs to the sub-contractor, the main contractor was made responsible for compensating the same.

The corollary of the decision in *McDermott International* would be a situation where due to the delay by the sub-contractor, the main contractor could not complete the project on time. Therefore, in such a scenario, whatever damages the main contractor had to pay to the employer, he would be eligible to get indemnified for the same from the sub-contractor provided that there is a clause to such an extent in the sub-contract.[205] Thus, as per the present legal position in India, the employer and the sub-contractor would not be mandatorily referred to arbitration and it would depend only on the consent of both the parties.

C. Does any other jurisdiction allow sub-contractors to directly initiate arbitration against the Employer?

As discussed above, the Indian law as of now does not allow the sub-contractors to directly initiate arbitration proceedings against the employer. However, a discussion on this topic would be incomplete without going through the findings of the United States Supreme Court in its recent decision in the matter of *GE Energy* v. *Outokumpu Stainless.*[206] In this case, the main contractor and the original employer entered into three construction contracts and then the main contractor entered into a sub-contract with the Petitioner, wherein, the latter was to design, manufacture, and supply motors for the cold rolling mills. Accordingly, the sub-contractor delivered the goods which were then installed at the premises of the employer. Meanwhile, the original employer was taken over by the Respondents who then moved against the sub-contractor before the courts, claiming damages because the items installed by the sub-contractor stopped working causing serious damage to the Respondent.

When the matter went to the courts, the sub-contractor applied to the courts to refer the matter to arbitration based on the arbitration clauses of the three contracts entered into between the main contractor and the original employer. The U.S. Court of Appeals, Eleventh Circuit, was of the opinion that it would be unfair to the non-signatory if it is not allowed to compel arbitration because the signatory parties have often succeeded in enforcing their claims and arbitral awards

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204 McDermott Int'l Inc., (2006) 11 SCC 181, ¶¶ 31–32 (India).

205 *See* Hall Constr. Co., Inc. v. Beynon, 507 So. 2d 1225 (Fla. 5th DCA 1987).

206 *See* GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, U.S. Supreme Court Case No. 18–1048, Slip. Op. 590 U. S. (June 1, 2020) [*hereinafter* "GE Energy Power"].

on the non-signatories.[207] Thus, unlike the position in India, it allowed the sub-contractor to compel arbitration against the employer despite it being a non-signatory to the original arbitration agreements between the main contractor and the employer.[208]

The judgement is a highly welcomed one in the field of international commercial arbitration. The judgement would be a seminal one for bringing uniformity in the resolution of disputes arising out of multi-tiered commercial arrangements like that of sub-contracting, i.e., especially in the construction field. This decision not only allows better access to out of court resolution of disputes by non-signatories, but it also opens up the possibility of resolution of disputes arising out of international commercial agreements before a single international arbitration tribunal.

D. Does the type of sub-contractor impact the liability of the main contractor for any delay in disruptions in the completion of the project?

Sub-contractors can be broadly categorized into two: *first*, the sub-contractors who are directly and independently appointed by the main contractor himself in order to complete some parts of the construction project, known as the domestic sub-contractors; and, *second*, the sub-contractors, which have been suggested by the employer or chosen by the main contractor out of a list provided by the employer, knows as the nominated sub-contractors.[209]

While the law on domestic sub-contractors is quite straightforward, that, since those are the sub-contractors appointed by the main contractor out of his free will to complete the project, any delay caused by such a sub-contractor would be attributable to the main contractor himself, and he would not be provided with the defence that the delay was caused by the sub-contractor and not him.[210] This, however, does not affect the right of the main contractor to claim damages from the domestic sub-contractor as per the sub-contract through, which the latter's services were procured by the former.

On the other hand, the law related to nominated sub-contractor is not developed in India. An example of such nominated sub-contractors would be the Original Equipment Manufacturers ["**OEM**"], as provided under the Defence Procurement Manual.[211] The contractors are required to procure all goods and services for the specific contract undertaken by them from certain authorised OEMs only, and the responsibility of coordinating the delivery of goods and services by such OEMs is also that of the contractor only. In such a scenario, thus, if the OEMs cause delay and disruption, then liabilities of the main contractor may differ.

As the jurisprudence on this subject is not well-developed in India, reference is drawn from the foreign jurisdictions. In the United Kingdom, the courts have been of the opinion that if the nominated sub-contractor fails to do the work on time, or complete the work at all, then it is the duty of the employer to nominate a replacement sub-contractor who will then undertake the

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207 *See* McBro Planning & Dev. Co. & McCarthy Bros. Co. v. Triangle Elec. Constr. Co., Inc., 741 F. 2d 342 (11th Cir. 1984).

208 *See* GE Energy Power, U.S. Supreme Court Case No. 18–1048, Slip. Op. 590 U. S.

209 CYRIL CHERN, *supra* note 2, at 127.

210 *Id.* at 129–131; *see Courts clarify the law on main contractors' liability for sub–contractors' negligence – vicarious liability and non–delegable duties*, WOMBLE BOND DICKINSON (Mar. 13, 2017), *available at* https://www.womblebonddickinson.com/uk/insights/articles-and-briefings/courts-clarify-law-main-contractors-liability-sub-contractors.

211 *See* Defence Procurement Manual, *supra* note 12.

work.[212] It is to be noted here that the main contractor would not be liable to pay any damages for delay in completion of work arising due to the time lost in such re-nomination and completion of the pending work.[213]

Similar position was taken by the courts in Dubai as well, wherein, the Court of Cassation held in express terms, that "*when the subcontractor is selected by the employer or its consultants, the employer shall be liable for any delay in the performance of the subcontracted part and the main contractor shall not be liable for any delay fines if they can prove that the delay is caused by such subcontractor and the main contractor played no part in the delay.*"[214]

Therefore, the liability of the main contractor with respect to the nominated sub-contractors is very limited, provided that the main contractor is able to establish that there was no delay on his part.[215]

VI. Conclusion

From the above discussion, it is amply clear that Sections 55, 63 and 74 of the ICA are at the forefront of the discussion related to delay, disruptions, and damages in construction arbitration in India. While the prima facie reading of the provisions of the ICA or even the provisions of the individual contracts may portray a picture where the law might seem to be favour the employer, this is quite far from the practical truth.

While Section 55 provides the employers the right to rescind the contract in case of a delay and non-completion of a project within the stipulated period of time, the express observation of the Supreme Court in the *McDermott International*, that, in construction contracts time is generally not of the essence of the contract, puts serious barriers in the application of this provision.[216] This hindrance in exercising the right to set aside the contract despite the express stipulation under the contract that time would be of the essence runs contrary to the interests of the employers.

The alternative provided under the Section 55, that when time is not of the essence the employer can claim, LD looks like an easy way out for the employer for claiming damages. However, when read with the provisions of Section 63 of the ICA, it shows the true picture. As, in light of the *McDermott International* judgment, time is not considered to be of essence of construction contracts, therefore, the only option left with the employers is to extend the contract and hope that the contractor will ultimately complete the project. However, this extension could be construed as a waiver of the right to levy liquidated damages unless the employer expressly reserves the right to claim damages while granting the extension and make the terms clear to the contractor.[217] Thus, this works as a double-edged sword against the employer who on the one hand is forced to continue with the project as it cannot be terminated under Section 55, and, on the other hand, he might not be entitled to claim damages if there is an implied waiver due to granting of extensions.

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212 *See* Fairclough Bldg. Ltd. v. Rhuddlan Borough Council, (1985) 30 BLR 26.

213 *See* North West Metro. Reg'l Hosp. Bd. v. TA Bickerton & Son Ltd., [1970] 1 All ER 1039 [*hereinafter* "North West Metro. Reg'l Hosp. Bd."].

214 *See* Dubai Court of Cassation, Case No. 266/2008 (March 17, 2009).

215 *See* North West Metro. Reg'l Hosp. Bd., [1970] 1 All ER 1039.

216 McDermott Int'l Inc., (2006) 11 SCC 181, ¶ 86 (India).

217 *See* Kailash Nath v. NDMC, ILR (2002) 1 Delhi 441 (India).

Further, this levy of LD itself is also contingent on whether there was contributory delay on the part of the employer or not. If it is proved that there was even a slightest of delay on the part of the employer, irrespective of the amount of delay and disruptions caused by the contractor, the employer would not be entitled to LD for the specific period of delay, where he played a role no matter how small.[218]

Arguably, the law on Section 74 is in the favour of the employer in as much as he is given the liberty not to prove actual loss if it is established that the LD levied by him as per the contract were a genuine pre-estimate of loss. However, this burden of proof has not been exhausted completely and the law states that it is only if the loss suffered is impossible to prove that the employer is exonerated of such proof.[219] Therefore, in normal circumstances involving commercial transactions and construction projects for commercial purpose where actual losses can be proved, there is an additional burden put on the employer. This is despite the express agreement between the contractor and the employer that in case of a breach of the contract, the contractor would be liable to pay a certain stipulated amount according to a particular method.

Thus, the Indian law in its current form is institutionally supporting delay and disruptions of construction projects by providing layered safeguards to the contractors even against the actions of the employers, which are provided for under the contract itself. [220] The excessive reading into the text of the contracts as epitomised by the decisions in *Hind Construction*, *Fateh Chand* and *McDermott International*, has altered the basic application of the construction contracts and has directly gone against the express intention of the parties, and, thus, requires reconsideration in light of principles of party autonomy in contract making.

While it would be unfair to say that the courts were completely incorrect in conducting a holistic reading of the contract to come to its conclusion in cases like *Hind Construction*, then the generalisation of law that where LD are to be paid at a certain rate for a particular amount of delay in days then time would not be the essence of the contract is arguably a stretch and needs a revisit. This has led to a scenario where the employers are devoid of a statutory right to set aside the contract despite expressly agreeing that time would be of the essence.[221] It is also pertinent to note here that the intention of the parties in providing for levy of damages for each day/week of delay may also be arising out of the time sensitive nature of the project, and could indicate towards the fact that the delivery of the construction project in time is valuable to the employer.

Though the law provides for making time the essence of the contract in construction contracts also, the initial extension of time which has to be provided and the contingency of the contractor agreeing to the same, proves to be a hindrance to the timely completion of the project. Ultimately, this impacts the interests of the employer who is neither getting the delivery on time, nor is allowed to terminate the contract on the agreed upon completion date due to non-completion by the contractor, nor is able to claim liquidated damages for the extension period.

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218 J.G. Eng'r, (2011) 5 SCC 758, ¶¶ 19, 22, 23 (India); Raheja Universal, 2016 (5) Mh LJ 229, ¶¶ 7–11 (India).
219 Kailash Nath Assoc., (2015) 4 SCC 136, ¶ 43 (India).
220 *See* Badrinath Srinivasan, *supra* note 22.
221 *See* Hind Constr., (1979) 2 SCC 70 (India).

All the above-mentioned riders on the exercise of rights of the employer ultimately work as a relief for the contractor who can very conveniently hide under any of these layers of tests provided for termination or claiming of liquidated damages by the employer. Therefore, there is a need to revisit certain basic concepts of the ICA, as highlighted above in the concluding remarks. These changes, which would work as a deterrent against the delays by the contractors, are necessary in order to promote efficiency on the part of the contractors and to ensure that construction projects are completed timely.