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India

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1. Context

1.1. The Country

- 1.1.1. India is a constitutional republic governed under a parliamentary system. Previously a colony of Great Britain, India gained independence in 1947 and adopted the *Constitution of India* ('*Constitution*') in the year 1950. As originally enacted, the preamble to the *Constitution* described the nation as a 'sovereign democratic republic'. In 1976, by virtue of a constitutional amendment, this was changed to read 'sovereign socialist secular democratic republic'.
- 1.1.2. The Republic of India comprises of 29 (twenty-nine) States and 7 (seven) Union territories. The *Constitution* is applicable to the entire country. All regional or local laws must conform to the *Constitution*. Where such laws are *ultra vires* the Constitution, they can be struck down by any of the High Courts or the Supreme Court of India.
- 1.1.3. The *Constitution* provides for the division of legislative powers between the central (i.e. union) and the state (i.e. regional) legislatures, with the legislatures at both levels exercising concurrent jurisdiction over certain matters.

1.2. The Legal System

- 1.2.1. India maintains a common law system similar to that of England. The judiciary consists of the Supreme Court at the Union level, High Courts at the State (regional) level, and District and Sessions Courts at the district level.
- 1.2.2. The Apex court in India is the Supreme Court, which is located in New Delhi. It is conferred upon with appellate and advisory jurisdiction, which is more specifically stipulated under Articles 131–142 of the *Constitution*, although with very limited original jurisdiction. The High Courts situated in Mumbai, Kolkata and Chennai are also the principal civil courts of original jurisdiction for these cities, while the High Courts in states other than these three exercise only appellate and writ jurisdictions over the respective States and Union Territories. Two or more States may share a common High Court. Appeals from decisions of the High Courts may progress to the Supreme Court on questions of law in dispute.
- 1.2.3. Subordinate to the High Court of each state are the District Courts, which fall within the administrative control of the High Court of the state to which the District Court belongs.

1.2.4. Additionally, there are numerous quasi-judicial bodies that are involved in dispute resolution, such as tribunals and regulators, including the Securities Appellate Tribunal, the Armed Forces Tribunal, the National Company Law Tribunal, the Debt Recovery Tribunal, Consumer Dispute Redressal Forum, Real Estate Regulating Authorities and the Motor Accident Claims Tribunal. The jurisdiction of such bodies is defined by the scope of the respective legislation under which they are established.

1.3. The Economy

1.3.1. According to the IMF (International Monetary Fund), as of 2017, the Indian economy is nominally worth US\$2.689¹ trillion.² India has one of the largest economies by market exchange rates, and, at US\$9.45 trillion,³ it has the third largest economy in the world if measured by purchasing power parity.

1.3.2. India is also one of the world's fastest-growing economies. The Central Statistics Office of the Government of India ('CSO') reported the advance estimates in relation to the growth rate of India's GDP at constant market during 2019–20 is estimated to be at 4.2 percent.⁴ During the next five years, investment through public private partnerships is expected to be US\$31 billion.⁵ India has been placed in the top 100 of the World Bank's Ease of Doing Business

1 '5. Report for Selected Countries and Subjects', *International Monetary Fund* (Web Page, October 2018) <<https://www.imf.org/external/pubs/ft/weo/2018/02/weodata/weorept.aspx?pr.x=80&pr.y=9&sy=2016&ey=2023&scsm=1&ssd=1&sort=country&ds=.&br=1&c=534&s=NGDPD&grp=0&a=>>>.

2 '5. Report for Selected Countries and Subjects', *International Monetary Fund* (Web Page, October 2017) <https://www.imf.org/external/pubs/ft/weo/2017/02/weodata/weorept.aspx?sy=2015&ey=2022&scsm=1&ssd=1&sort=country&ds=.&br=1&pr1.x=85&pr1.y=10&c=534&s=NGDP_R%2CNGDP_RPCH%2CNGDP%2CNGDPD%2CPPP%2CNGDP_D%2CNGDPRPC%2CNGDPRPPPC%2CNGDPPC%2CNGDPDPC%2CPPP%2CPPP%2CPPP%2CNPID_NGDP%2CNGSD_NGDP%2CPCPI%2CPCPIPCH%2CPCPIE%2CPCPIEPCH%2CTM_RPCH%2CTMG_RPCH%2CTX_RPCH%2CTXG_RPCH%2CLP%2CGGR%2CGGR_NGDP%2CGGX%2CGGX_NGDP%2CGGXCNL%2CGGXCNL_NGDP%2CGGSB%2CGGSB_NGDP%2CGGXONLB%2CGGXONLB_NGDP%2CGGXWDG%2CGGXWDG_NGDP%2CNGDP_FY%2CBCA%2CBCA_NGDPD&grp=0&a=>>.

3 'World Economic and Financial Surveys: World Economic Outlook Database', *International Monetary Fund* (Web Page, October 2017) <<https://www.imf.org/external/pubs/ft/weo/2017/02/weodata/index.aspx>>.

4 Central Statistics Office, Ministry of Statistics & Programme Implementation, 'PRESS NOTE ON PROVISIONAL ESTIMATES OF ANNUAL NATIONAL INCOME 2019-2020 AND QUARTERLY ESTIMATES OF GROSS DOMESTIC PRODUCT FOR THE FOURTH QUARTER (Q4) OF 2019-2020' (Press Note, 29 May 2020) mospi.gov.in/sites/default/files/press_release/PRESS%20NOTE%20PE%20and%20Q4%20estimates%20of%20GDP.pdf.

5 India Brand Equity Foundation, *Roads* (Report, December 2017) <<https://www.ibef.org/download/Roads-December-2017.pdf>>.

(‘EoDB’) global rankings,⁶ since 2017. This being a result of the country’s sustained business reforms over the past several years.

2. The Construction Industry

2.1. Size and Nature

- 2.1.1. By 2025, the real estate sector in India is expected to contribute approximately 13 %⁷ to India’s GDP, and by 2030, the Indian real estate market is expected to reach US\$1 trillion.⁸ According to CSO, financial, real estate and professional service sectors are likely to see a growth rate of 6.4 % in the year 2019–2020⁹, whereas the growth in the construction industry is estimated to be 3.2%.¹⁰ A growth spurt in the construction industry is likely to impact the growth in the labour and skilled workers market.
- 2.1.2. The construction sector can be broadly divided into two key segments:
- (a) Buildings (including residential, commercial, institutional and industrial buildings); and
 - (b) Infrastructure (including roads, railways, dams, canals, airports, power systems, telecommunication systems, urban infrastructure such as water supply, sewerage, drainage and rural infrastructure).
- 2.1.3. There are various councils and industry bodies which discuss and address issues faced by the industry and also act as intermediaries through which the industry can raise issues with the government.
- 2.1.4. As regards the ‘buildings’ sector, there previously existed a regulatory vacuum. This has now been filled by the government through the enactment – *Real Estate (Regulation and Development) Act, 2016* (India) (‘RERA’). RERA empowers state governments to create a regulatory authority and compels the registration of the project of the developers and real estate agents.¹¹ In addition, RERA casts certain obligations upon promoters,¹² al-

6 World Bank, ‘Rankings & Ease of Doing Business Score’, *Doing Business* (Web Page, 2019) <<http://www.doingbusiness.org/en/rankings>>.

7 ‘Indian Real Estate Industry’, *India Brand Equity Foundation* (Web Report, April 2018) <<https://www.ibef.org/archives/detail/b3ZlcnZpZXcmMzc5MzMzMzgw>>.

8 ‘Indian Real Estate Industry’, *India Brand Equity Foundation* (Web Page, April 2019) <<https://www.ibef.org/industry/real-estate-india.aspx>>.

9 Ministry of Finance, Government of India, Annual Report 2019-2020 <<https://dea.gov.in/sites/default/files/Annual%20Report%202019-2020%20%28English%29.pdf>>.

10 Press Information Bureau, *Ministry of statistics & Programme Implementation* (Web Report, Jan 2020) <<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1598643>>.

11 RERA s 9 <<http://egazette.nic.in/writereaddata/2016/168720.pdf>>.

12 RER Ach III.

lottees¹³ and real estate agents, who are required to comply with regulations, orders or directions made in exercise of the regulatory authorities' powers under the *Act*.¹⁴ Project layout and development plans must be submitted to the relevant regulatory authority by the developers and other interested parties.¹⁵

2.2. Participants

2.2.1. The construction industry in India is extremely fragmented. Industry participants broadly comprise real estate agents, builders, engineering, procurement and construction ('EPC') contractors, subcontractors, architects, engineers, and labour unions and their members. There are also several public sector companies, who act as key players in major government contracts.

2.3. Work, Health and Safety

2.3.1. Whilst there are several statutes governing the work, health and safety of labourers in the construction industry, some of these statutes are considered archaic. As a result, many workers are left unregulated. In this regard, the government has sought to promote the empowerment of individuals employed in this sector through legislative amendments, which has subsequently resulted in substantive changes within the construction industry.¹⁶ The statutes providing for the general work hours and conditions, health and safety of the labourers and employees include the following:

Industrial Employment (Standing Orders) Act, 1946 (India)

2.3.2. This statute requires employers to have certain contractual terms, including provisions on working hours, leaves, productivity goals, dismissal procedures and worker classifications, approved by a government body.

2.3.3. The Ministry of Labour and Employment released a notification on 16th March 2018, publishing the *Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018* (India), which amends the *Industrial Employment (Standing Orders) Act, 1946* (India). Following this amendment, fixed term employment, previously only available in the apparel manufacturing sector, is now allowed

13 *RER*Ach IV.

14 *RER*As 34.

15 *RER*Ass 3–4.

16 The government has proposed a statutory framework on occupational safety and health, providing incentives to employers and employees to achieve higher health and safety standards.

across all sectors. In this regard, a ‘fixed term employment workman’ is defined as a person who has been engaged on the basis of a written contract of employment for a fixed period.¹⁷ This amendment protects fixed term employment workers by making them eligible for all statutory benefits available to permanent workers in proportion to their period of service, even if the duration of their employment does not extend beyond the qualifying service period.

Payment of Wages Act, 1936 (India)

- 2.3.4. This statute was enacted to ensure that wages payable to employed persons are disbursed by employers within the prescribed time limit and no deductions other than those authorised by law are made. Section 6 requires that workers be paid in money rather than in kind.
- 2.3.5. The *Payment of Wages (Amendment) Act, 2017* (India) simplifies the transfer of monies to employees. This amendment Act also gives the government the discretion to notify specific industries or establishments where wages shall only be paid by cheque or by crediting them to the bank account of the employee. Additionally, it provides an option for employers to credit the wages in the employee’s bank account.

Minimum Wages Act, 1948 (India)

- 2.3.6. The *Minimum Wages Act, 1948* (India) fixes the minimum wage for different sectors of employment. Subject to these fixed minimum wages, the Union and State governments have the discretion to set wages according to the type and location of work. However, the provisions of the *Minimum Wages Act, 1948* (India) and the *Payment of Wages Act, 1936* (India) do not cover a substantial number of workers, as the applicability of both these Acts are restricted to scheduled employments or establishments.¹⁸

Payment of Bonus Act, 1965 (India)

- 2.3.7. This statute applies to all factories and establishments with over 20 (twenty) people.¹⁹ It requires bonuses be paid to employees drawing a salary or wage

17 *Industrial Employment (Standing Orders) Central Rules, 1946* Schedule 1 (2) (a) (3A) and Schedule 1 (2) (h) <<https://labour.gov.in/sites/default/files/FTE%20Final%20Notification.pdf>>.

18 Press Information Bureau, Government of India, Ministry of Labour & Employment, ‘The Code on Wages Bill 2017’ (Press Release Press Release No 170541, 5 September 2017) <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=170541>>; *Minimum Wages Act, 1948* <<https://maitri.mahaonline.gov.in/pdf/minimum-wages-act-1948.pdf>>. pib.gov.in/PressReleseDetailm.aspx?PRID=1581199> <<https://maitri.mahaonline.gov.in/pdf/minimum-wages-act-1948.pdf>>.

19 *Payment of Bonus Act, 1965* <<https://labour.gov.in/sites/default/files/ThePaymentofBonusAct1965.pdf>>.

Payment of Bonus (Amendment) Act, 2015 <https://labour.gov.in/sites/default/files/The%20Payment%20of%20Bonus%20%28Amendment%29%20Act%2C%202015.pdf>.

of up to INR 21,000 (Twenty One Thousand Indian Rupees) and provided that the employee has worked in the establishment for not less than thirty working days in that year. The statute also provides for a special provision with respect to payment of bonus linked with production or productivity. Further, bonuses are to be paid out of the entity's profits.

Payment of Gratuity Act, 1972 (India)

- 2.3.8. This statute applies to establishments with over 10 (ten) workers. Gratuities are payable to employees on superannuation, resignation, retirement or on death or disablement. The government mandates that this payment is at the rate of 15 (fifteen) days of the employee's salary for each completed year of service, subject to a payment ceiling, which was previously set at INR1 (one) million.
- 2.3.9. A recent amendment to the *Act* removed the 12 (twelve) week maternity leave cap for calculating the period of 'Continuous Service' under s 2A. It also increases the ceiling on the amount of gratuity payable to an employee and empowers the central government to increase the limit from time to time. Currently, the limit is set at INR2 (two) million.

Employee's Compensation Act, 1923 (India)

- 2.3.10. This *Act* requires certain classes of employer to pay compensation to workers for injuries caused by accidents during their employment. The *Act* also sets out the method by which the amount of compensation payable is to be calculated.
- 2.3.11. The *Employees Compensation (Amendment) Act, 2017* (India) imposes a duty on the employer to inform every employee, at the commencement of their employment, of their right to receive compensation under this *Act*. It also imposes a penalty on the employer for non-compliance thereof.

Employees' State Insurance Act, 1948 (India) ('ESI Act')

- 2.3.12. The *ESI Act* was enacted with the objective of protecting workers' interests in circumstances resulting in loss of wages or earning capacity due to injuries suffered during employment.
- 2.3.13. In this regard, the Employees' State Insurance Scheme, an integrated measure of social insurance, was conceived to protect 'employees' as defined under the *ESI Act*.²⁰ The scheme provides full medical care to employees registered under the *ESI Act* during periods of incapacity and while restoring health and working capacity. It also provides financial assistance to compen-

²⁰ 'Employees State Insurance Scheme', *National Portal of India* (Web Page, 22 October 2018) <<https://www.india.gov.in/spotlight/employees-state-insurance-scheme#tab=tab-1>>.

sate for the loss of wages during sickness, maternity and employment injuries.²¹

- 2.3.14. The Employees' State Insurance Corporation was established under the *ESI Act* and provides health and social security insurance.

Maternity Benefit Act, 1961 (India)

- 2.3.15. This Act creates rights to payment of maternity benefits for any female employee who has been working in an establishment for a period of at least 80 (eighty) days during the 12 (twelve) months immediately preceding the date of her expected delivery.
- 2.3.16. The *Maternity Benefit (Amendment) Act, 2017* (India) increases the duration of paid maternity leave that a female employee may avail of from 12 weeks to 26 weeks. It also provides for maternity leave of 12 (twelve) weeks for a mother who adopts a child below the age of three months or a commissioning mother (i.e. a woman using a surrogate to bear a child).

Building and Other Construction Workers Welfare (Regulation of Employment and Conditions of Service) Act, 1996 (India) ('BOCW Act')

- 2.3.17. The *BOCW Act* was passed to enact safety, health and welfare measures for workers employed in the building and construction sector. Given that various states in India may choose the date and manner of adoption of certain statutes,²² the *BOCW Act* has thus far only been adopted by a limited number of states in India.²³ The states which have adopted this statute have taken steps and established welfare boards for the benefit of its workers.²⁴
- 2.3.18. The Supreme Court has issued both specific and general directions to the Ministry of Labour and Employment and the state governments to ensure meaningful implementation of the *BOCW Act*.²⁵ In the landmark case of *Lanco Anpara Power Ltd v State of Uttar Pradesh*,²⁶ the Supreme Court expanded the ambit of the *BOCW Act* and held that workers engaged in the construction of

²¹ Employees' State Insurance Corporation, *Frequently Asked Questions on ESI Scheme* (Booklet, 2017) <<http://www.esic.nic.in/attachments/files/faq.pdf>> and <https://www.esic.nic.in/press/ESIC_FAQ_booklet.pdf>.

²² *Constitution* Art 245 <<https://www.mea.gov.in/Images/pdf1/Part11.pdf>>.

²³ *BOCW Act* s 62 <<https://indiacode.nic.in/bitstream/123456789/1989/1/199627.pdf>>. Since this is a central act, the States are empowered to make rules for implementing the *BOCW Act*. Please note there is no central database which allows one to review the name and total number of states which have passed rules and implemented the *BOCW Act*.

²⁴ *BOCW Act* ch 3.

²⁵ National Campaign Committee for Central Legislation on Construction Labour v Union of India (2018) 5 SCC 607.

²⁶ (2016) 10 SCC 329.

a factory registered under the *Factories Act, 1948* (India) did not fall under the exclusion carved out under the *BOCW Act*.

- 2.3.19. With a view to consolidate and reform labour laws in India, the government enacted the Code on Wages, 2019 (India)²⁷ on 8th August 2019 however, the provisions of the Code are not yet notified (as at 2020). Once notified, this will come into force. The Code seeks to consolidate and subsume four labour law statutes, being the *Minimum Wages Act, 1948* (India), the *Payment of Wages Act, 1936* (India), the *Payment of Bonus Act, 1965* (India), and the *Equal Remuneration Act, 1976* (India). After the Code is enforced, these four statutes will be repealed.²⁸ The Code under s 6 read with s 9 lays down a ‘national minimum wage’ to be set by the government for different geographical areas and without any corresponding wage ceiling.²⁹ This Code ensures the timely payment of wages to all employees, irrespective of their sector of employment. The Ministry of Labour and Employment has also sought to simplify, amalgamate and rationalise central labour laws. The *Code on Industrial Relations* (India), *Code on Social Security* (India) and *Code on Occupational Safety, Health and Working Conditions* (India) are the proposed Codes which will subsume a vast portion of Indian labour law.³⁰ This will streamline Indian labour law by removing the multiplicity of definitions and authorities, allowing for ease of compliance without undermining workers’ age security or social security.³¹

2.4. Protection of the Environment

- 2.4.1. The construction sector is one of the primary consumers of natural resources and energy. The need to use these resources optimally and efficiently has gained prominence over time, and it has become increasingly pertinent to consider and evaluate innovative ways to ensure sustainable development. In line with this understanding, the Indian government’s Ministry of Environment, Forest and Climate Change (‘MoEFCC’) has published guidelines making it mandatory to conduct an Environment Impact Assessment for each construc-

²⁷ <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/163_2017_LS_Eng.pdf>.

²⁸ Press Information Bureau, Ministry of Labour & Employment, Government of India, ‘The Code on Wages Bill 2017’ (Press Release, 5 September 2017) <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=170541>>.

²⁹ Code on Wages 2019 [section 6 read with section 9] <http://egazette.nic.in/WriteReadData/2019/210356.pdf>.

³⁰ Press Information Bureau (n 970).

³¹ Press Information Bureau (n 970).

tion project.³² The MoEFCC has empanelled Qualified Building Environment Auditors ('QBEA') to address the challenges of environment, health and safety that may arise during pre and post building construction activities. The purpose of making accreditation by QBEA mandatory under statute is primarily to ensure ease of doing 'responsible business' and to streamline the process of obtaining permissions or approvals in the construction industry.³³

- 2.4.2. Sustainable development concepts require that resources, energy, and the ecology are well maintained and well managed. The Building Materials and Technology Promotion Council was established by the Urban Development Ministry to ensure access to technologies for the sustainable development of housing as well as cost-effective, environment-friendly and disaster-resistant building materials, and to promote the use of the same.
- 2.4.3. The Construction Industry Development Council ('CIDC') was jointly set up by the Planning Commission (now Niti Aayog) with the Indian construction industry, in order to provide the impetus and organisational infrastructure necessary to raise the level of quality across the construction industry in India.³⁴ Together with the state governments, the CIDC has taken up initiatives to promote and practice green construction. In this regard, a 'green building' is defined by the Indian Green Building Council as one which utilises less water, optimises energy efficiency, conserves natural resources, generates less waste and provides a healthier space for occupants, as compared to a conventional building.
- 2.4.4. Many builders are also now cognisant of consumers' growing awareness of the adverse impacts of construction on the environment and have sought to obtain Leadership in Energy and Environmental Design Certifications for their construction projects.
- 2.4.5. The Bureau of Energy Efficiency ('BEE'), a statutory body under the Ministry of Power is another key body in the area of environmental protection, with its mission being to enhance energy efficiency. The BEE has developed guidelines regarding green buildings for the use of renewable energy, and formulated the *Energy Conservation Building Code, 2017* (India) ('ECBC'),³⁵ which is applicable to large commercial buildings with a connected load of 100kW and above, or

³² http://moef.gov.in/wp-content/uploads/2018/07/SO1533E-14092006_0.pdf. Under the *Environment (Protection) Act, 1986* (India) s 3, the central government has powers to take any and all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment. The central government may issue such binding guidelines as it may deem fit.

³³ National Accreditation Board for Education and Training, Quality Council of India, *Scheme for Accreditation of Qualified Building Environment Auditors (QBEAs)* (Report, April 2017) <<https://www.qcin.org/nabet.qci.org.in/documents/QBEA%20Final%20Scheme.pdf>>.

³⁴ Construction Industry Development Council <<http://www.cidc.in/planning.html>>.

³⁵ <https://beeindia.gov.in/sites/default/files/BEE_ECBC%202017.pdf>.

120kVA and above. The *ECBC* lays down parameters for builders, designers and architects to integrate renewable energy sources in building designs. The *ECBC* aims to optimise energy savings whilst maintaining comfort levels for occupants, preferring life cycle cost effectiveness to achieve energy neutrality in commercial buildings.

2.5. Quality Assurance

- 2.5.1. Quality assurance in the construction industry in India has been lacking. The CIDC has adopted skills improvement programs to enhance the knowledge and expertise of industry participants and members. The use of ready-mix concrete and prefabrication techniques have significantly improved quality standards.
- 2.5.2. The Bureau of Indian Standards ('BIS') has further begun formulating performance standards intended to overhaul the existing prescriptive industry standards. The BIS is the apex statutory organisation responsible for laying down standards and ensuring compliance with these standards, although it does not have the authority to enforce the same.³⁶ The standards are recommendatory in nature, which precludes strict adherence by stakeholders.
- 2.5.3. In 2016, the *Bureau of Indian Standards Act, 1986* (India) was passed, empowering the government to mandate that goods or articles, processes, systems or services of certain industries must bear a 'standard mark' under a licence or certificate of conformity. This can be necessitated on the grounds of public interest or for the protection of human, animal or plant health, safety of the environment, prevention of unfair trade practices, or national security.³⁷ It also permits the BIS to recall goods and articles already on the market if they do not conform to the standards.³⁸
- 2.5.4. In addition to domestic standards the ISO 9000 series certification, a set of international standards on quality management and assurance,³⁹ has also been accorded a significant degree of importance in the industry.

36 While the standards laid down by the BIS may not be mandatory, the government enforces mandatory certification on various occasions through quality control orders, for public health and safety: Department of Commerce, Ministry of Commerce and Industry, Government of India, 'Bureau of Indian Standards (BIS)', *Indian Standards Portal* (Web Page) <<http://indiastandardsportal.org/standardbodycontent.aspx?StandardBodyId=4>>.

37 *BIS Act* s 16 <http://www.prindia.org/sites/default/files/bill_files/BIS%20Act%2C%202016.pdf>.

38 *BIS Act* s 18.

39 'ISO 9000 Family – Quality Management', *International Organization for Standardization* <<https://www.iso.org/iso-9001-quality-management.html>>.

2.6. Construction Contracting Dynamics

- 2.6.1. Construction contracts typically involve several parties such as contractors, subcontractors, suppliers, architects and engineers. A single construction project comprises several contractual relationships to be maintained at multiple stages, which entails entering several contracts. The form of the contract will typically be influenced by the bargaining power of each party. As one party's bargaining power increases, the other party's ability to influence negotiations will likely be limited. In such cases, the principle of *contra proferentum* plays an important role in the event of a dispute. It also offers protection to parties not involved in the drafting of the contract.

3. Legal Underpinnings of Contracts

3.1. Overview

- 3.1.1. The law of contract in India is governed by the *Indian Contract Act, 1872* ('ICA'). The ICA dictates the general principles of contract law applicable in India and is based on the principles of English common law. Even though the ICA is based on common law, a substantial part of it is codified. While formulating contracts pertaining to sale and purchase of goods, the provisions of the *Sale of Goods Act, 1930* ('SGA') are taken into consideration. Matters pertaining to taxation, restrictive clauses, applicable law, jurisdiction etc, are given special attention to avoid conflicts. Most provisions of the ICA and SGA can be contracted out. The Supreme Court has held that it is an established principle of contract construction that where the terms sought to be enforced by one party are ambiguous, an interpretation against that party is to be preferred (i.e. *verba chartarum fortius accipiuntur contra proferentem*).⁴⁰ As regards construction contracts, this principle has been followed by the High Court of Delhi in determining the validity of an arbitral award.⁴¹

3.2. Freedom of Contract

- 3.2.1. There is no specific legislation dealing exclusively with construction contracts. Rather, the ICA applies equally to construction contracts, as with any other type of contract.

⁴⁰ Bank of India v K Mohan Das (2009) 5 SCC 313.

⁴¹ Delhi Metro Rail Co Ltd (DMRC) v Voestalpine Schine (2018) 250 DLT 239.

- 3.2.2. The *ICA* recognises the parties' freedom to contract. However, the freedom envisaged is not absolute and is limited by certain provisions of the *ICA*. As per the *ICA*, the essential elements of a valid contract are as follows:
- (a) Free consent of parties to enter into the contract;
 - (b) Lawful consideration;
 - (c) Lawful object; and
 - (d) Competency of parties to contract.

Pacta sunt servanda

- 3.2.3. The maxim '*pacta sunt servanda*' is a principle of international contract law relating to private contracts. It states that the contractual terms lay down the understanding between the parties. Non-fulfilment of the parties' respective obligations is a breach of the contract. The *ICA* is guided by the same principle, entitling the party who suffers from the breach of contract to receive, from the party who has committed the breach, compensation for any loss or damage caused to them.
- 3.2.4. In the case of *Central Inland Water Transport Co Ltd v Brojo Nath Ganguly*,⁴² the Supreme Court interpreted the maxim as meaning 'contracts are to be kept'. The principle underlying the maxim has been widely applied by various courts in India.

3.3. Legal Framework

- 3.3.1. In India, there is no national framework exclusively applicable to the construction industry. Indeed, the *National Building Code of India, 2005* (India) and common general conditions of contract are not mandatorily applicable to construction contracts. The Indian construction sector has grown manifold in recent years, yet the sector remains largely unorganised. The minimal statutory regulation of industry practice is vastly detrimental to the sector at a macro level.
- 3.3.2. In this regard, the Planning Commission (now Niti Aayog) has amended and enacted the *National Building Code of India, 2016* (India), providing new and improved guidelines for regulating building construction activities across the country. It serves as a model code for adoption by all agencies involved in construction works. It also introduces detailed provisions for streamlining and expediting the various approvals required and has also provided for computerising approval processes. These measures have been taken with a view to improving India's EoDB ranking in the built environment sector.

42 1986 AIR SC 1571.

- 3.3.3. Judges contribute to the development of the common law through the interpretation of ambiguous statutory provisions, as well as by providing substance to the law where there is a gap in the statute as laid down by the legislature. In this respect, it may be said that judges lay down the law of the land. In India, the Supreme Court and High Courts are courts of record and therefore the judgments passed by these courts form legal precedents, which are binding on subordinate courts. The doctrine of '*stare decisis et non quieta movere*', which translates as 'to stand by decisions and to not disturb settled matters', is applicable to the decisions of the Supreme Court as per the *Constitution*, thereby making its decisions binding on all Indian courts. These precedents are thereafter applied by the courts in deciding cases. In the event contradictory opinions are expressed by two or more High Courts or other subordinate courts, the conflict is often resolved by the Supreme Court. Occasionally, judges are required to decide on a novel issue in relation to which no relevant precedent exists. In such cases, judges must exercise discretion in applying the law to the facts at hand.
- 3.3.4. The Supreme Court in *C Ravichandran Iyer v Justice AM Bhattacharjee*,⁴³ stated:

[T]he role of the judge is not merely to interpret the law but also to lay down new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution, meaningful and a reality. The society demands active judicial roles which formerly were considered exceptional but now a routine.

- 3.3.5. As regards construction contracts, judges are often required to interpret contractual provisions that are not only commercial, but also of a technical nature.

3.4. Public Policy

- 3.4.1. The concept of 'public policy' has not been defined under any Indian statute. However, the concept has been greatly discussed and analysed on account of the *Arbitration and Conciliation Act 1996* (India) ('*Arbitration Act*') wherein it is stated that the conflict with the public policy is one of the grounds for setting aside an arbitral award.⁴⁴ Public policy is not the policy of a particular government; it connotes matters that concern the public good or the public interest. The doctrine of public policy has been described by the Supreme

⁴³ (1995) 5 SCC 457.

⁴⁴ *Arbitration Act* s 34(2)(b)(ii) <<https://www.arbitrationindia.com/pdf/acact.pdf>>.

- Court as being ‘an illusive concept’, an ‘untrustworthy guide’, and of ‘variable quality’ and even as an ‘unruly horse’.⁴⁵
- 3.4.2. In the case of *Renusagar Power Co Ltd v General Electric Co*,⁴⁶ while dealing with s 7 of the *Foreign Awards (Recognition and Enforcement) Act, 1961* (India) (now repealed and covered by Part 2 of the *Arbitration Act*), the Supreme Court held that the enforcement of a foreign arbitral award could be refused on the ground that it is contrary to public policy if the enforcement would be contrary to the fundamental policy of Indian law, the interests of India, or justice or morality. In the context of a domestic award, as distinguished from a foreign award, the expression ‘public policy’ has a wider meaning.
- 3.4.3. In the interpretation of the doctrine of public policy, courts may intervene and permit recourse against an arbitral award based on an irregularity which the court considers to have caused or will cause substantial injustice to the applicant. Extreme cases where the arbitral tribunal has erred in its conduct of the arbitration to such an extent that justice requires for it to be rectified, may justifiably fall within the ambit of the doctrine of public policy and enable courts to intervene under s 34 of the *Arbitration Act* and permit recourse against the arbitral award.
- 3.4.4. The Supreme Court in *Oil & Natural Gas Co Ltd v SAW Pipes Ltd*,⁴⁷ widening the scope of the principles defined in *Renusagar Power Co Ltd v General Electric Company*, held that:
- [A]n arbitral award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:*
- (a) *Fundamental policy of Indian law,*
 (b) *The interest of India,*
 (c) *Justice or morality, or*
 (d) *If it is patently illegal.*⁴⁸
- 3.4.5. The judgment led to the further expansion of the meaning of the expression ‘public policy’ as provided under s 34 of the *Arbitration Act*, which led to several petitions challenging arbitral awards being filed in the courts on the ground of ‘patent illegality’.
- 3.4.6. Providing clarity in the aftermath of the uncertainty created by *Oil & Natural Gas Co Ltd*,⁴⁹ the Supreme Court, in *Associate Builders v Delhi Development Authority*⁵⁰ held:

45 Gherulal Parekh v Mahadeodas Maiya (1959) AIR SC 781.

46 (1994) AIR SC 860.

47 (2003) AIR SC 2629.

48 *Oil & Natural Gas Co Ltd v SAW Pipes Ltd* (2003) AIR SC 2629 (emphasis added).

49 *Oil & Natural Gas Co Ltd v SAW Pipes Ltd* (2003) AIR SC 2629.

50 (2015) 3 SCC 49.

- (a) Where a judgment of a superior court is disregarded by an inferior court it would violate the 'fundamental policy of Indian law',
 - (b) The term 'the interest of India' concerns itself with India as a member of the world community in its relations with foreign powers,
 - (c) The terms 'justice' and 'morality' in the context of setting aside an arbitral award under the public policy ground can only mean that an award shocks the conscience of the court, and
 - (d) An award would be 'patently illegal' if:
 - (i) It contravenes the substantive law of India; the illegality must be so significant that it goes to the root of the matter and it cannot be of a trivial nature,
 - (ii) It contravenes the *Arbitration Act* itself, or
 - (iii) The tribunal fails to decide the dispute in accordance with the terms of the contract and interprets the contract in a manner that no fair-minded or reasonable person would.
- 3.4.7. Section 34(2)(b)(ii) of the *Arbitration Act* states that a domestic arbitral award may be set aside if the court finds that it is in conflict with the public policy of India, for example, if the making of the award was induced or effected by fraud or corruption.⁵¹ Section 48 of the *Arbitration Act* provides that a foreign arbitral award may similarly be set side where it is contrary to public policy.
- 3.4.8. In *Shri Lal Mahal Ltd v Progetto Grano Spa*,⁵² the Supreme Court distinguished between the grounds for setting aside an award that is opposed to public policy under s 48(2)(b) and 34(2)(b)(ii) of the *Arbitration Act*. It was held that the narrower grounds defined under the *Renusagar Power Co Ltd v General Electric Company*,⁵³ are applicable in cases involving the setting aside of foreign awards under s 48, whereas the broader grounds laid down in *Oil & Natural Gas Co Ltd v SAW Pipes Ltd*,⁵⁴ are applicable for setting aside domestic awards under s 34.

3.5. Statute Law

Arbitration

- 3.5.1. In India, arbitration is governed by the *Arbitration Act*. The *Arbitration Act* is based on the *UNCITRAL Model Law on International Commercial Arbitration 1985* and the *UNCITRAL Arbitration Rules 1976*. It is a composite piece of legislation which provides for both domestic arbitration and foreign seated com-

⁵¹ <<http://www.bombayhighcourt.nic.in/libweb/actc/yearwise/2016/2016.03.pdf>>.

⁵² (2014) 2 SCC 433.

⁵³ (1994) AIR SC 860.

⁵⁴ (2003) AIR SC 2629.

mercial arbitration. India is also a signatory to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*.

- 3.5.2. Arbitration clauses can commonly be found in construction contracts. Awards passed by arbitral tribunals are often challenged in the case of an arbitration other than international commercial arbitration before the principal Civil Court of original jurisdiction in a district which includes the High Court in exercise of its ordinary original civil jurisdiction and in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction.
- 3.5.3. Arbitration is the most popular form of alternative dispute resolution ('ADR') arrangement incorporated in construction contracts and requires the consent and mutual agreement of the parties. Such arbitration clauses will typically provide for the manner of appointment of arbitrators, the number of arbitrators and the governing curial and procedural law of the contract. For transnational EPC contracts, explicit mention of the governing law of the agreement as well as the seat (and venue, if different) of the arbitration is of utmost importance to ensure that the arbitration clause retains its intended effect as the primary means of dispute settlement.
- 3.5.4. Arbitrations under EPC contracts can be institutional arbitrations or ad hoc arbitrations. The increasing trend is to provide for institutional arbitration. Arbitral institutions increasingly preferred by contracting parties include the London Council of International Arbitration ('LCIA'), International Court of Arbitration under the International Chamber of Commerce and the Singapore International Arbitration Council ('SIAC'). Also, the Mumbai Centre for International Arbitration ("MCIA") was established in 2016 and is a first-of-its-kind arbitral institution in India, established by a joint initiative between the government of Maharashtra and the domestic and international business and legal communities.⁵⁵ In 2006 the SIAC, in cooperation with the CIDC, established an arbitration centre in New Delhi called the 'Construction Industry Arbitration Council' ('CIAC'). The CIAC provides facilities for international as well as domestic commercial arbitrations and hosts international conferences on ADR systems in the context of commercial contracts.
- 3.5.5. If an arbitration institute is made the governing body, then the rules and procedures governing the arbitral proceedings will be those of the institution. In the case of ad hoc arbitrations, specifying the governing procedural law is of paramount importance. Where the arbitration clause is silent on the applicable procedural laws, the laws of the seat of arbitration are deemed to apply, as per customary practice, and will normally determine the procedure adopted by the tribunal as well as the degree of involvement or intervention, as appropriate,

⁵⁵ 'About', *Mumbai Centre for International Arbitration* (Web Page) <<http://mcia.org.in/about/>>.

that courts exercising jurisdiction over the seat will have. However, although this is common practice, it is not mandatory to adopt the law of the seat of the arbitral proceedings as the governing law.

3.5.6. The *Arbitration and Conciliation (Amendment) Act, 2015* (India) resulted in several changes being made to the *Arbitration Act*. These changes may be explained as follows:

- (a) A clear distinction was drawn with regards to the definition of ‘court’ in the context of a domestic arbitration, as opposed to an international commercial arbitration. In particular, only a High Court of competent jurisdiction will have authority in cases of international commercial arbitration;
- (b) When an order for interim protection is passed by the court before commencement of arbitral proceedings, the time-period for commencement of those proceedings is 90 days from the date of the order. This is to encourage parties to resolve the dispute on its merits through arbitration;
- (c) Declarations on the part of the arbitrator regarding his independence and impartiality have been made more onerous. A detailed schedule was added to the Act, listing grounds on which doubts as to the impartiality and independence of the arbitrator may be justifiably raised;
- (d) If parties request the Supreme Court, High Court, or any person or institution designated by such court to appoint an arbitrator, such appointment must be done within 60 days from the date of service of notice on the opposing party;
- (e) Following the amendment, interim orders of the arbitral tribunal are enforceable as though they were a court order; and
- (f) The time-period within which the arbitral tribunal must pass the award must be 12 months from the date the matter was referred to the tribunal. This period can be extended by a period not longer than six months. If the award is not made within the extended period of 18 months, then the mandate of the arbitrator will terminate unless the court further extends the period.

3.5.7. The *Arbitration and Conciliation (Amendment) Act, 2019* (India) came into force from 9 August 2019. The Act provides for the creation of an independent body called the ‘Arbitration Council of India’, which will establish standards, grade arbitral institutions, accredit arbitrators, and thereby encourage the use of institutional arbitration. In 2016, the state government of Maharashtra set up the MCIA in the commercial hub of Mumbai. This was a major step towards making the city an International Financial Services Centre⁵⁶ and providing a platform

⁵⁶ The International Financial Services Centre (‘IFSC’) is a centre that is set up to undertake and cater only to those transactions that are carried out outside India by overseas financial institutions and overseas branches or subsidiaries of Indian financial institutions. The Reserve Bank of India treats an IFSC unit as non-resident. It is akin to the Dubai International Finance Centre.

for Indian businesses to negotiate and resolve commercial disputes via arbitration. The MCIA rules were formulated with the help of eminent arbitration specialists from India and around the world. The key provisions in the rules include:

- (a) Clear time constraints for the arbitral tribunal to deliver its final award;
- (b) Accelerated timelines for low-value, simple disputes;
- (c) Provision for an emergency arbitrator to decide upon urgent interim relief applications before the main tribunal is appointed, as consistent with the rules of the LCIA and SIAC;
- (d) The consolidation of two or more arbitrations pending under the *MCIA Rules* if the parties agree and if all claims made in the arbitrations are made under the same arbitration, as consistent with the rules of the LCIA and the SIAC; and
- (e) Provision for parties to apply for an expedited arbitration procedure, whereby the award shall then be passed within six months from the date on which the tribunal is constituted.⁵⁷

Conciliation or Mediation

3.5.8. ‘Conciliation’ is not defined in the *Arbitration Act*. Essentially, this method provides the disputing parties with an opportunity to explore options offered by an objective third party, i.e. the conciliator or mediator, to assess if settlement is possible. As with arbitration, the *Arbitration Act* also covers both domestic and international disputes in the context of conciliation.⁵⁸ International conciliation is confined only to disputes of ‘commercial’ nature, with the definition of international commercial conciliation similar to that of international commercial arbitration.⁵⁹

3.5.9. A 1999 amendment to the *Code of Civil Procedure, 1908* (India) (‘CPC’), specifically the insertion of s 89, empowered courts to refer pending cases to arbitration, conciliation, judicial settlement or mediation, ‘where it appears to the court that there exist elements of settlement which may be acceptable to the parties’. The purpose of this is to facilitate early and amicable settlement between the parties. In contrast, the *Arbitration Act* does not contain any provi-

⁵⁷ Mumbai Centre for International Arbitration, *Arbitration Rules of the Mumbai Centre for International Arbitration* (2nd ed, 15 January 2017) cl 12.3(d) <http://mcia.org.in/wp-content/uploads/2016/05/MCIA-Rules_2017.pdf>.

⁵⁸ V Nageswara Rao, ‘Conciliation Proceedings under the Indian Arbitration Conciliation Act of 1996 and CPC – An Overview’ (Conference Paper, International Conference on ADR and Case Management, 3–4 May 2003) <http://lawcommissionofindia.nic.in/adr_conf/nageswara%20rao10.pdf>; Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Report No 246, August 2014) <<http://lawcommissionofindia.nic.in/reports/report246.pdf>>.

⁵⁹ *Arbitration Act* cl 1 <<https://www.wipo.int/edocs/lexdocs/laws/en/in/in063en.pdf>>.

sion to similar effect in the absence of an agreement between the parties to that effect.

- 3.5.10. Section 89 of the *CPC* gives the court jurisdiction to formulate the terms of a possible settlement and, upon receiving the observations from the parties, re-formulate those terms, as well as refer same for arbitration, conciliation, judicial settlement, or mediation.
- 3.5.11. Despite s 89 of the *CPC*, the courts have no power, authority or jurisdiction to refer unwilling parties to arbitration if there is no arbitration agreement. In *Kerala State Electricity Board v Kurien E Kalathil*,⁶⁰ the Supreme Court held that in the absence of an arbitration agreement, the court could only refer the parties to arbitration with their written consent. A similar view was taken by the Supreme Court in *M/S Afcons Infrastructure Ltd & v M/S Cherian Varkey Construction*,⁶¹ where it was held that if there is no agreement providing for reference of disputes to arbitration, the court cannot exercise the power under s 89 to do same. However, the existence of an arbitration agreement is not a condition precedent for exercising powers under s 89 of the *CPC* regarding the four ADR processes.

Lok Adalats

- 3.5.12. The *Legal Services Authorities Act, 1987* (India) (*LSA Act*) gave statutory identity to the system of '*Lok Adalats*', literally translating to the 'people's court'. It is an ADR mechanism that encourages out-of-court settlements in India. Section 21 of the *LSA Act* provides that every award of a *Lok Adalat* shall be deemed to be a decree of a civil court. It further provides that every award made by a *Lok Adalat* shall be final and binding on all the parties to the dispute and no appeal against such award may be made to any court.
- 3.5.13. Per s 22 of the *LSA Act*, the *Lok Adalat* shall have certain powers of a civil court under the *CPC* while trying a case. All proceedings before a *Lok Adalat* shall be deemed to be judicial proceedings. Following an amendment in 2002, a chapter concerning 'pre-litigation conciliation and settlement' was introduced into the *LSA Act*, under which a Permanent *Lok Adalat*, having a pecuniary jurisdiction of up to INR10 million, was established. The Permanent *Lok Adalat* facilitates the compulsory pre-litigation conciliation and settlement of cases relating to public utility services such as transport, postal, telegraph, etc. As with general *Lok Adalats*, the award of the Permanent *Lok Adalat* is binding on the parties.⁶²

⁶⁰ *Kerala State Electricity Board v Kurien E Kalathil* AIR 2000 SC 2573.

⁶¹ *M/S Afcons Infrastructure Ltd v M/S Cherian Varkey Construction* 2010 (6) ALD 155 (SC).

⁶² 'Permanent Lok Adalat', *National Legal Services Authority* (Web Page, 2016) <<https://nalsa.gov.in/content/permanent-lok-adalat>>.

Dispute Review Boards or Dispute Adjudication Boards

- 3.5.14. Dispute Review Boards or Dispute Adjudication Boards (the ‘Board’) are very effective in the context of construction contracts.⁶³ Typically, the traditional ADR methods only come into play when the project is complete and the parties have already become adversaries. In contrast, the Board provides a ‘job-site’ dispute adjudication process, whereby the Board visits the project site regularly throughout construction and is kept advised of the contract as it progresses. The Board typically seeks to encourage the resolution and settlement of a dispute as soon as it arises before any adversarial feeling between the parties grow.
- 3.5.15. The Board generally consists of three members. Each party will individually appoint one member. The third member (the chairman) is selected by the two members and approved by the parties. All members are expected to have:
- (a) Experience with the type of construction;
 - (b) Familiarity with interpreting contractual documents;
 - (c) Adequate knowledge of the construction industry; and
 - (d) Independence (i.e., they must not have any affiliation with the parties).⁶⁴
- 3.5.16. For large projects necessitating significant multi-disciplinary technical knowledge and expertise, the parties may empanel more than one Board; one for each area of specialisation.⁶⁵
- 3.5.17. After recording the parties’ submissions, the Board may recommend a settlement. If the settlement proposal is not acceptable to both parties, they may request the Board make further efforts, or pursue litigation or arbitration, as the case may be. Although increasing in popularity, the use of the Board as a forum for construction contract dispute settlement is not yet the norm.
- 3.5.18. In India, the system of ‘Dispute Review Boards’ was first introduced in 1994 by the World Bank in the *Standard Bidding Document – Procurement of Works*, whereby the use of a three member Board was mandatory for projects financed by the World Bank with an estimated cost of US\$50 million and above.⁶⁶
- 3.5.19. In 2016, the Indian Council of Arbitration, being an allied body of the Federation of Indian Chambers of Commerce and Industry (‘FICCI’), in partnership

63 PM Bakshi, ‘Construction Contracts: Some Legal Aspects’ (2000) 37(3) *ICA Arbitration Quarterly* <http://www.icaindia.co.in/icanet/quterli/oct-dec2000/ICA_oct1.htm>.

64 PM Bakshi, ‘Construction Contracts: Some Legal Aspects’ (2000) 37(3) *ICA Arbitration Quarterly*.

65 Indian Council for Arbitration, *Improving the Functioning of Dispute Review Boards (DRB) in India: Standard Operating Procedures for Dispute Boards in India* (World Bank, April 2016) <<http://www.icaindia.co.in/DB-ica/Final-SOP.pdf>>.

66 Indian Council for Arbitration, *Improving the Functioning of Dispute Review Boards (DRB) in India: Standard Operating Procedures for Dispute Boards in India* (World Bank, April 2016).

with the World Bank, laid down a Standard Operating Procedure for Institutional Dispute Board Services in India.

- 3.5.20. The National Highways Authority of India ('NHAI') has created a dispute resolution board under which disputes concerning EPC contracts for the construction of roads may be resolved by arbitration or mediation. The NHAI enters into various contracts with contractors and consultants to implement highway projects, in relation to which disputes frequently arise. In 2017, the NHAI had claims of almost INR570 million with regard to contractual disputes before the Indian courts, and claims of INR380 billion in relation to such disputes before various arbitral tribunals.⁶⁷ To address this issue, the NHAI introduced a 'Conciliation & Settlement Mechanism for Contractual Disputes' clause into its contracts, to facilitate the early resolution of claims, preferably through out-of-court settlements.⁶⁸

Consumer Protection

- 3.5.21. A consumer is a user of goods or services. A commercial organisation can also be a consumer. The test is whether the goods or services acquired are for the purchaser's own consumption or for commercial purposes such as resale.
- 3.5.22. Any person paying consideration in exchange for goods or services is entitled to expect that the goods or services be of the nature and quality promised to him by the seller. As the common law of contract is dominated by the principle of freedom of contract, consumers can often only be protected by means of legally imposed obligations, such as statutory controls on exemption clauses in contracts for the supply of goods and services.
- 3.5.23. In India, there are various earlier pieces of legislation that protect consumer interests to a certain extent, reflecting the need to recognise and enforce consumer rights. These include the *ICA*, the *SGA*, the *Agricultural Produce (Grading and Marketing) Act, 1937* (India), the *Indian Standards Institution (Certification Marks) Act, 1952* (India), the *Prevention of Food Adulteration Act, 1954* (India), the *Standards of Weights and Measures Act, 1976* (India), and the *Trade and Merchandise Marks Act, 1958* (India). However, the need for simpler and quicker access to redress for consumer grievances lead to the enactment of the *Consumer Protection Act, 1986* (India).

⁶⁷ National Highways Authority of India (Web Page, 2019) <<https://nhai.gov.in/>>; NHAI/ Policy Guidelines/ Conciliation & Settlement of Contractual Disputes/ 2017 No. 2.1.22/2017 (2 June 2017). – <<https://nhai.gov.in/writereaddata/Portal/Images/pdf/10penLetterConcessionairesContractorsConsultants.pdf>>.

⁶⁸ National Highways Authority of India, *Conciliation and Settlement Mechanism for Contractual Disputes* (2 June 2017). <<https://nhai.gov.in/writereaddata/Portal/Images/pdf/21PolicyGuidelinesConciliationSettlementMechanism.pdf>>.

- 3.5.24. In this regard, Consumer Protection Act 2019 (India), which came into force on 20 July 2020 has replaced the *Consumer Protection Act, 1986* (India) by broadening the scope of the Act and imposing stricter penalties for misleading advertisements, adulteration of food and e-commerce activities. The Act envisages the creation of a Central Consumer Protection Authority, which will probe into instances of false or misleading advertisements and unfair trade practices. It seeks to enhance the pecuniary jurisdiction of the district and state Consumer Disputes Redress Commissions to INR10 million and INR100 million respectively. The Act also mandates that redress for a dispute has mediation requirements attached to them, to facilitate dispute resolution where the possibility of settlement exists. Further, under the new Act, ‘celebrities’ can be held liable for their endorsements.
- 3.5.25. If a consumer is not satisfied by the decision of the District Consumer Dispute Redress Forum, an appeal may be made to the State Consumer Disputes Redress Commission (‘SCDRC’). Against the order of the SCDRC, a consumer can appeal to the National Consumer Disputes Redress Commission (‘NCDRC’). The NCDRC has pecuniary jurisdiction over consumer disputes of INR100 million or more. In the context of the construction industry, the NCDRC has held builders liable on the grounds of having an unsatisfactory explanation for the delay in delivery of possession, notwithstanding a clause limiting the builder’s liability in such instances in an agreement between the parties.⁶⁹ In a recent case, the Supreme Court held that the provisions under the *Consumer Protection Act, 1986* prescribing limitation periods within which a consumer must file a complaint could not be strictly construed if the service provider has been instrumental in causing the delay.⁷⁰
- 3.5.26. The growth of consumer protection has led to the increasing inclusion of exemption clauses in commercial contracts, including those relating to construction. An exemption clause can be described as a clause in a contract or a term in a notice, which appears to exclude or restrict a liability or a legal duty that would otherwise arise. Exemption clauses can be broken down into three main categories:
- (a) Exclusion clauses which exclude liability completely;
 - (b) Limitation clauses which restrict liability in some way, such as the quantum of damages payable; and
 - (c) Indemnity clauses, which pass the risk of legal action on to the other party.
- 3.5.27. According to the doctrine of ‘fundamental breach’, if there is a prominent breach in the performance of the contract, the defence of an exemption or ex-

⁶⁹ Lalit Kumar Gupta & Ajay Kumar Gupta v DLF Universal Ltd (2003) 2 CPC 283, [13].

⁷⁰ National Insurance Co Ltd v Hindustan Safety Glass Works (2017) 5 SCC 776.

clusionary clause provided in the contract would not be available to the supplier. This principle has proven useful in cases involving deficiency of service under the *Consumer Protection Act, 1986* (India). In *Punjab Water Supply Board v Udaipur Cements Works*,⁷¹ where the contracted goods were not supplied and it was held by the Supreme Court that this failure to supply constituted a breach of contract and not a deficiency of service. The matter was then remanded back to the NCDRC for adjudication accordingly, wherein it was held by the NCDRC that there could be deficiency of service even in a case of breach of contract. Thus, principles of contract were interpreted in favour of the consumer and in agreement with consumer laws.

- 3.5.28. The Commercial Courts, Commercial Division and Commercial Division of High Courts (Amendment) Bill, 2018 (India) came into effect from 3 May 2018. It has reduced the specified value of a commercial dispute as provided in the *Commercial Courts, Commercial Division and Commercial Division of High Courts Act 2015* (India), from INR10 million to INR300,000 in order to facilitate the efficient resolution of commercial disputes with a lesser value.⁷² This amendment is in line with the goal of improving India's EoDB ranking as the World Bank takes into account the enforceability of contracts valued at US\$5,000 or higher.⁷³

Proportionate Liability

- 3.5.29. The concept of tortious liability holds a prominent place in Indian law. Archetypal construction defect cases are based on the contracts between the property owner and developer, and contracts between the contractor and subcontractors, including suppliers, architects and engineers involved in the construction process. These parties owe a general duty to exercise a reasonable degree of care, skill and knowledge that is ordinarily employed by such building professionals. This duty of care is owed to all who may foreseeably be injured by the construction defect, including subsequent purchasers. Developers and general contractors are responsible for the negligence of the subcontractors they engage.
- 3.5.30. The complainant may make an allegation of negligence, breach of contract or warranty, strict liability and in some instances, fraud or negligent misrepre-

⁷¹ (1996) AIR SC 537.

⁷² Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 S. 2 (1) (i) <<http://legalaffairs.gov.in/sites/default/files/The%20Commercial%20Courts%2C%20Commercial%20Division%20and%20Commercial%20Appellate%20Division%20of%20High%20Courts%20%28Amendment%29%20Act%2C%202018.pdf>>.

⁷³ World Bank, 'Enforcing Contracts Methodology', *Doing Business* (Web Page, 2019) <<http://www.doingbusiness.org/en/methodology/enforcing-contracts>>.

sentation against the defendant. Ultimately, the aim is to ensure that the wrongdoer remedies the situation.

Bribery and Corruption

- 3.5.31. Anti-bribery legislation in India has gained prominence in recent years due to the increased awareness of public money being misappropriated for ulterior motives, such as political gains. In the construction industry in particular, substantial sums of ‘black money’ exist in circulation for the purpose of fast-tracking building and construction clearances.⁷⁴ There have also been reports of major landowners and developers engaging in bribery to procure additional Floor Space Index (‘FSI’) for construction projects.⁷⁵
- 3.5.32. In order to curb the free flow of black money in India, the government announced demonetisation of INR500 and INR1,000 currency notes from November 2016.⁷⁶ This measure was introduced as a restraint on not only black money, but also counterfeit and illegal currency notes. In order to mitigate corruption in the country, Parliament passed the *Lokpal and Lokayuktas Act, 2013* (India), which provides statutory authority for the establishment of an anti-corruption *Lokpal* (Ombudsman) that aims to promote accountability of public officials, including the Prime Minister.
- 3.5.33. The *Right to Information Act, 2005* (India) (‘*RTI Act*’) was enacted ‘to provide for setting out the practical regime of right to information for citizens’.⁷⁷ Under the *RTI Act*, any citizen may request information from a ‘public authority’ (defined as a body of government or ‘instrumentality of State’),⁷⁸ who is required to adhere to the request within a period not exceeding 30 days. The *RTI Act* also requires every public authority to computerise their records for open dissemination and to proactively publish certain categories of information to minimise citizens’ recourse to formal requests for information. The *RTI Act* has been effectively implemented to expose instances of abuse of power or process and corruption, including that in relation to government and construction contracts.

⁷⁴ Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, Government of India, *Black Money* (White Paper, May 2012) <https://www.prsindia.org/uploads/media/White%20Paper%20Black%20Money/WhitePaper_BackMoney2012.pdf>.

⁷⁵ Reuben Abraham, Kshitij Batra and Sahil Gandhi, ‘Dismantling the Permit Raj in Housing’, *Live-mint* (online, 28 March 2017) <<https://www.livemint.com/Opinion/cdZVqLFVQrDeDP3FyzP2SK/Dismantling-the-permit-raj-in-housing.html>>.

⁷⁶ Department of Economic Affairs, Ministry of Finance, *Notification* (F.No. 10/03/2016-Cy.I, 8 November 2016) <<http://egazette.nic.in/WriteReadData/2016/172521.pdf>>.

⁷⁷ *RTI Act* preamble <<https://rti.gov.in/rti-act.pdf>>.

⁷⁸ *RTI Act* s 6.

- 3.5.34. The *Prevention of Corruption Act, 1988* (India) is a federal law enacted to combat corruption in government agencies and public sector businesses in India. In *Central Bureau of Investigation, Bank Securities and Fraud Cell v Ramesh Gelli*,⁷⁹ the Supreme Court expanded the definition of ‘public servant’ under the *Prevention of Corruption Act, 1988* (India) to include all officials of private banks. The court’s broad interpretation demonstrated a clear intention to widen the scope of vigilance against corruption.
- 3.5.35. The *Prevention of Money Laundering Act, 2002* (India) seeks to prevent money laundering and provide for the confiscation of property derived from such misconduct.
- 3.5.36. The Central Vigilance Commission (‘CVC’) was established by the government in February 1964 on the recommendations of the Committee on Prevention of Corruption to advise and guide government agencies in the field of vigilance. An ordinance promulgated by the President in 1988 led to the CVC being made a multi-member commission with ‘statutory status’.⁸⁰ Thereafter, in September 2003, the *Central Vigilance Commission Act, 2003* (India) was passed by the government, consolidating the powers, functions and role of the CVC. Under this Act, the CVC is empowered to enquire into offences alleged to have been committed under the *Prevention of Corruption Act, 1988* (India) by certain categories of public servants of the central government, corporations established by or under any central government companies, and societies and local authorities owned or controlled by the central government.
- 3.5.37. The CVC has also launched a citizen-centric anti-corruption scheme entitled Vigilance Eye (‘VIGEYE’).⁸¹ The objective of VIGEYE is to provide citizens with an accessible means of expressing grievances and complaints to the CVC, such as via mobile phones and the internet, as well as to enlist the general public’s help in fighting the menace of corruption.
- 3.5.38. The *Whistle Blowers Protection Act, 2014* (India) provides a mechanism to investigate alleged corruption and misuse of power by public servants while protecting those who expose alleged wrongdoing in government bodies, projects and offices. The wrongdoing might take the form of fraud, corruption or mismanagement. Although the *Act* received presidential assent on 9 May 2014, it has not yet come into force. The government is now seeking to dilute the provisions of the same by an Amending Bill put forward in 2015.⁸² The Bill

⁷⁹ (2016) AIR SC 1063.

⁸⁰ Central Vigilance Commission, Government of India, ‘Special Chapter on Vigilance Management in Public Sector Insurance Companies vis-à-vis the Role and functions of the CVC’ (File No. 98/VGL/62, 15 October 2001) 1–2 <<https://cvc.gov.in/sites/default/files/sinschap.pdf>>.

⁸¹ *Central Vigilance Commission* (Web Page, 2010) <<http://www.vigeyegpms.in/vigeye/>>.

⁸² <https://www.prsindia.org/sites/default/files/bill_files/Whistle_Blowers_%28A%29_bill%2C_2015_1.pdf>.

seeks to prohibit disclosures that prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, or friendly relations with foreign States, or lead to the incitement of an offence, etc.⁸³ These proposed amendments have been modelled on the provisions of s 8(1) of the *RTI Act*.⁸⁴

Agent's Lien

3.5.39. Section 221 of the *ICA* deals with an agent's lien on the principal's property. It provides that in the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of same has been paid or accounted for to him. That is, a legal lien merely confers upon the agent, being the holder of the articles in respect of which the lien is claimed, a passive right to detain said articles until the debt is paid. Such a lien cannot be enforced by sale of the goods.⁸⁵

3.6. Implied Contract Terms

- 3.6.1. Under the *ICA*, acceptance of certain terms may be implied into a contract where it is indicated otherwise than by words.⁸⁶ Parties may fail to expressly include certain terms for various reasons. For instance, they may consider the terms too obvious to be explicitly mentioned or they may have understood their respective obligations from facts or circumstances that would indicate the intention of the parties, in accordance with standard industry practice or already established practices in their mutual dealings.
- 3.6.2. In the event of a dispute regarding contractual interpretation, the court will be required to consider both express and implied contractual terms.⁸⁷ A term will only be implied if, in the opinion of the court, it is necessary to give business efficacy to the contract, such that both parties must have intended it to be a term of the contract.⁸⁸ Therefore, if the contract as it exists is effective and workable, no term will be implied.⁸⁹ The interpretation of contractual

⁸³ <https://www.prsindia.org/sites/default/files/bill_files/Whistle_Blowers_%28A%29_bill%2C_2015_1.pdf>.

⁸⁴ <<https://rti.gov.in/rti-act.pdf>>.

⁸⁵ *Kavita Trehan v Balsara Hygiene Products Ltd* (1992) AIR Del 103.

⁸⁶ *ICA* s 9 <http://legislative.gov.in/sites/default/files/A1872-09.pdf>.

⁸⁷ *Khaddah Co Ltd v Raymon & Co India Private Ltd* (1962) AIR SC 1810.

⁸⁸ *Deviprasad Khandelwal & Sons v Union of India* (1969) AIR Bom 163.

⁸⁹ *Navnitlal & Co v Kishinchand & Co* (1956) AIR Bom 151.

language will also be subject to trade usage. In this regard, terms may be implied into contracts on the basis of accepted industry practice, as the parties are presumed to have contracted in accordance to customs or usages commonly known in their locality or trade.

- 3.6.3. Terms may be also implied by statute into certain classes or types of contracts. Under the *Sale of Goods Act, 1930* (India) there are implied conditions as to the title of the seller,⁹⁰ as well as the fitness and quality of the goods, unless the circumstances of the contract are such as to show a different intention.⁹¹
- 3.6.4. The implication of terms depend on the intention of the parties to be gathered from words used in the agreement and surrounding circumstances.⁹² The court may consider, for example, the parties' relationship, their previous course of dealings and the nature of their contract.⁹³ Thus, a term will not be implied where the implied term would have the effect of contradicting or overriding an express term, or where the matter is otherwise subject to an express term, unless the agreement provides otherwise.⁹⁴ In *Nabha Power Ltd v Punjab State Power Co Ltd*,⁹⁵ the Supreme Court held that:

The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.⁹⁶

- 3.6.5. There cannot however, be an implied contract with the government, as this would contravene the constitutional requirements pertaining to formality.⁹⁷
- 3.6.6. Often, insufficient thought is given to implied terms when parties enter into construction contracts. Substantial time and effort are dedicated to ensuring that all the necessary express terms are incorporated, yet parties often neglect

⁹⁰ *Sale of Goods Act, 1930* s 14 <[https://www.incometaxindia.gov.in/_layouts/15/dit/Pages/viewer.aspx?grp=Act&name=CMSID&cval=102120000000007773&searchFilter=\[{%22CrawledPropertyKey%22:1,%22Value%22:%22Act%22,%22SearchOperand%22:2},{%22CrawledPropertyKey%22:0,%22Value%22:%22Sale%20of%20Goods%20Act,%201930%22,%22SearchOperand%22:2}\]&k=&IsDlg=0](https://www.incometaxindia.gov.in/_layouts/15/dit/Pages/viewer.aspx?grp=Act&name=CMSID&cval=102120000000007773&searchFilter=[{%22CrawledPropertyKey%22:1,%22Value%22:%22Act%22,%22SearchOperand%22:2},{%22CrawledPropertyKey%22:0,%22Value%22:%22Sale%20of%20Goods%20Act,%201930%22,%22SearchOperand%22:2}]&k=&IsDlg=0)>.

⁹¹ *Sale of Goods Act, 1930* s 16 <[https://www.incometaxindia.gov.in/_layouts/15/dit/Pages/viewer.aspx?grp=Act&name=CMSID&cval=102120000000007775&searchFilter=\[{%22CrawledPropertyKey%22:1,%22Value%22:%22Act%22,%22SearchOperand%22:2},{%22CrawledPropertyKey%22:0,%22Value%22:%22Sale%20of%20Goods%20Act,%201930%22,%22SearchOperand%22:2}\]&k=&IsDlg=0](https://www.incometaxindia.gov.in/_layouts/15/dit/Pages/viewer.aspx?grp=Act&name=CMSID&cval=102120000000007775&searchFilter=[{%22CrawledPropertyKey%22:1,%22Value%22:%22Act%22,%22SearchOperand%22:2},{%22CrawledPropertyKey%22:0,%22Value%22:%22Sale%20of%20Goods%20Act,%201930%22,%22SearchOperand%22:2}]&k=&IsDlg=0)>.

⁹² *Manubhai Prabhudas Patel v Jayantilal Vadilal Shah* 2012 GLH (1) 565.

⁹³ *Laxmi Ginning and Oil Mills v Amrit Banaspati Co Ltd* AIR 1962 P&H 56.

⁹⁴ *Nabha Power Ltd v Punjab State Power Co Ltd* (2017) 12 SCALE 241.

⁹⁵ *Nabha Power Ltd v Punjab State Power Co Ltd* (2017) 12 SCALE 241.

⁹⁶ 2017 6 AWC 5485 SC [49].

⁹⁷ *Constitution* Art 299(1).

the fact that many terms may be implied in any case, some of which cannot be contracted out of.

- 3.6.7. Several terms find common usage in the formation of construction contracts. These terms include:
- (a) 'Fixed price', whereby the contractor agrees to a fixed contract price, or a fixed rate per unit of output, which in some cases is subject to cost escalation;
 - (b) 'Cost plus', whereby the contractor is reimbursed for allowable or otherwise defined costs, plus a percentage of these costs or a fixed fee;
 - (c) 'Lump sum', whereby the service provider agrees to provide a defined service for a specific period and the client agrees to pay a fixed amount of money for the service; and
 - (d) 'Unit price', whereby the project is divided into units and the charge for each unit is defined.
- 3.6.8. For further information on the principles guiding the construction of implied contract terms, please refer to s 3.7.

3.7. Construction of Contract Terms

- 3.7.1. There are various principles to consider in the construction of contract terms, as set out further below.
- (a) *Key Rule*: the key rule is to interpret the contract so as to determine the parties' true intention.⁹⁸ The language actually used in the contract is the basis for identifying such intention. As a norm, words are to be given their ordinary meaning except for technical terms, which are to be interpreted as per their technical meaning.⁹⁹
 - (b) *Whole contract*: in determining the true meaning of the contract, the clauses and terms must be construed harmoniously with each other.¹⁰⁰ The court must consider the contract as a whole, bearing in mind the object of the entire contract even where it is only the meaning of a particular clause that is in dispute. If a clause can be given some reasonable meaning, it cannot be regarded as superfluous.¹⁰¹
 - (c) *Contemporaneous contracts*: an agreement may be arrived at through several contemporaneous instruments or contracts. All such instruments are to be read together.¹⁰²

98 Hansalaya Properties and v Dalmia Cement (Bharat) Ltd 2008 (106) DRJ 820.

99 Ganga Saran v Firm Ram Charan Ram Gopal (1952) AIR SC 9.

100 MOH Uduman v MOH Aslum AIR 1991 SC 1020.

101 Bihar State Electricity Board, Patna v Green Rubber Industries AIR 1990 SC 699.

102 S Chattanatha Karyalavar v Central Bank of India (1965) AIR SC 1856.

- (d) *Incorporation by reference*: parties may incorporate terms into a contract by cross-reference.¹⁰³
- (e) *Substance over description*: the court may refer to, but is not bound by, the descriptions given by the parties to the contract.¹⁰⁴ Instead the court, in construing an agreement, is to ascertain the real nature or substance of the transaction.¹⁰⁵
- (f) *Titles or headnotes*: where titles or headings are used, the court will consider the operative or substantive part of the agreement. Headings or titles given by the parties, as descriptive elements, cannot affect the interpretation of contractual terms.¹⁰⁶
- (g) *Businesslike construction*: commercial contracts are not to be construed pedantically, but rather in a manner that gives the contract business efficacy.¹⁰⁷ The Supreme Court has adopted the ‘business efficacy’ test,¹⁰⁸ as laid down by the English courts,¹⁰⁹ which states that ‘a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended’.¹¹⁰
- (h) *Implied terms*: terms must not be implied where doing so would contradict or override express terms, or where the matter is the subject of an express term.¹¹¹ If the contract, as it exists, is effective and workable, no term can be implied.¹¹² A term will only be implied if, in the opinion of the court, it is necessary to give efficacy to the contract, such that both parties must have intended it to be a term of the contract.¹¹³
- (i) *Statutorily implied terms*: the SGA sets out implied conditions as to the title of the seller, as well as fitness and quality of the goods.¹¹⁴
- (j) *Construction against grantor*: where the impugned contract is of the nature of a grant or other disposition unilaterally prepared by one party,

103 *Alimenta SA v National Agricultural Co-operative Marketing Federation of India Ltd* (1987) AIR SC 643.

104 *Commissioner of Income Tax, Punjab Haryana v Panipal General & Woollen Mills Ltd* (1976) AIR SC 640.

105 *Commissioner of Income Tax, Punjab Haryana v Panipal General & Woollen Mills Ltd* (1976) AIR SC 640.

106 *H M Kamaluddin Ansari & Co v Union of India* (1984) AIR SC 29.

107 *Sundaram Finance Ltd v State of Kerala* (1966) AIR SC 1178.

108 *Satya Jain (D) Thr LRs v Anis Ahmed Rushdie (D) Tr LRs* (2013) AIR SC 434.

109 *The Moorcock* (1889) 14 PD 64 (Bowen LJ).

110 *The Moorcock* (1889) 14 PD 64 (Bowen LJ).

111 *Nabha Power Ltd v Punjab State Power Co Ltd* (2017) 12 SCALE 241.

112 *Navnitlal & Co v Kishinchand & Co* (1956) AIR Bom 151.

113 *Deviprasad Khandelwal & Sons v Union of India* (1969) AIR Bom 163.

114 SGA ss 14, 16 <<http://comtax.up.nic.in/Miscellaneous%20Act/the-sale-of-goods-act-1930.pdf>>.

then in the event of an ambiguity, it may be construed against the party that prepared it.¹¹⁵

- (k) *Conduct of parties*: the court may take into consideration the parties' understanding of the contract at the time it was executed or soon afterwards. Subsequent conduct may also be considered if the terms are ambiguous.¹¹⁶
- (l) *Surrounding circumstances*: surrounding circumstances must not be used to interpret the language if the contract is clear and unambiguous. However, in interpreting ambiguous terms, the court may take into consideration all surrounding facts and circumstances,¹¹⁷ including correspondences exchanged.¹¹⁸ The purpose is to arrive at the true intention of the parties, as opposed to what the parties may subsequently contend to be the case.¹¹⁹
- (m) *Prior negotiations*: negotiations between the parties before the contract is executed cannot be relied upon in the event of a dispute arising regarding interpretation or ambiguity.¹²⁰
- (n) *Statutory bodies*: even where a party to the agreement is a statutory or public body, the contract is still to be construed in accordance with the usual principles enshrined within the *ICA*.¹²¹
- (o) *Exclusion clauses*: exclusion clauses are to be construed strictly so as not to destroy the parties' true intention as conveyed by the contract.¹²²

3.8. Private and Public Procurement

3.8.1. Government procurement may be facilitated by entry into a contractual agreement with the union or state government. Such contracts have been accorded constitutional recognition.¹²³ In addition to the requirements of the *ICA* such as offer, acceptance and consideration, a government contract must also comply with the provisions of Article 299 of the *Constitution*.¹²⁴ Further, per Arti-

115 *State of Maharashtra v M N Kaul* (1967) AIR SC 1634.

116 *Abdulla Ahmed v Animendra Kissen Mitter* (1950) AIR SC 15.

117 *Central Bank of India Ltd v Hartford Fire Insurance Co Ltd* (1965) AIR SC 1288.

118 *Transmission Corporation of Andhra Pradesh Ltd v GMR Vemagiri Power Generation Ltd* (2018) (3) SCALE 47.

119 *Transmission Corporation of Andhra Pradesh Ltd v GMR Vemagiri Power Generation Ltd* (2018) (3) SCALE 47.

120 *Bomanji Ardeshir Wadia v Secretary of State of India* (1929) AIR PC 34.

121 *Kerala State Electricity Board v Kurien E Kalathil* (2000) 3 LRI 474.

122 *Skandia Insurance Co Ltd v Kokilaben Chandravadan* (1987) AIR SC 1184.

123 SP Sathe, *Administrative Law* (Lexis Nexis Butterworths, 7th ed, 2004) 578.

124 *State of Bihar v Majeed* (1954) AIR SC 245.

- cle 299, implied contracts between the government and other parties are prohibited.¹²⁵
- 3.8.2. As regards contractual interpretation, no other general distinction is made between a government contract and a contract between two private parties. Subject to the formalities prescribed by Article 299 of the *Constitution*, the contractual liability of the government will remain the same as that of any individual under the ordinary law of contract.¹²⁶
- 3.8.3. Certain privileges are however accorded to the government under the statute of limitation.¹²⁷ These include longer periods of limitation as regards enforcement of rights by or on behalf of the Union,¹²⁸ as well as privileges in respect of the government's ability to impose liabilities with preliminary recourse to the courts.¹²⁹ Further, under s 80 of the *CPC*, notice is required to be served on the government two months prior to the institution of a suit against the government to give the government an opportunity to reconsider the legal position and make amends or settle the claim, if so advised, without litigation.¹³⁰
- 3.8.4. Despite these privileges, the State and its instrumentalities will not be allowed to function in an arbitrary manner, even in the matter of entering into contracts. The decision of the State, either in entering into the contract or refusing to enter into a contract, must be fair and reasonable.¹³¹

4. Government Involvement

4.1. Legislation and Regulation

- 4.1.1. The *Constitution* provides for the division of legislative power between the Union (i.e. federal or national legislature) and the state legislatures. National legislation is applicable to every state in the country.¹³² Each state may, subject to certain limitations, adopt national legislation with amendments, and any laws adopted will be applicable within that particular state only.¹³³ Each

125 *KP Chowdhary v State of Maharashtra* (1967) AIR SC 203.

126 *State of Bihar v Abdul Majeed* (1954) AIR SC 245.

127 *Indian Limitation Act, 1963* <<https://www.indiacode.nic.in/bitstream/123456789/1565/1/A1963-36.pdf>>.

128 *Nav Rattanman v State of Rajasthan* AIR 1961 SC 1704.

129 *Sathe* (n 1075) 382.

130 <<https://www.indiacode.nic.in/bitstream/123456789/2191/1/a1908-05.pdf>>.

131 *Y Konda Reddy v State of Andhra Pradesh* (1997) AIR AP 121.

132 *Constitution* Art 246, sch 7.

133 *Constitution* Art 246, sch 7.

- state may also, subject to certain limitations, enact legislation applicable exclusively to that state.¹³⁴
- 4.1.2. The government has enacted several pieces of legislation, at both union and state levels, which relate to matters pertinent to the construction industry.
- 4.1.3. The *BOCW Act* was introduced to protect the safety and welfare of construction workers engaged by contractors in infrastructure projects. Under the *BOCW Act*, contractors are required to register their firm or company with the designated registering authority. However, the *BOCW Act* requires the appropriate government to make rules to comply with the provisions of this *Act*. During the construction stage of any infrastructure project, contractors and principal employers must comply with the provisions of the *BOCW Act*.¹³⁵
- 4.1.4. The *Contract Labour (Prohibition and Regulation) Act, 1970* (India) regulates the process of engaging contractors and contract labour. The *Act* provides for the registration of contractors (if more than 20 workers are engaged) and for the appointment of a Tripartite Advisory Board that investigates particular forms of contract labour.¹³⁶ Where contract labour is engaged for a production process that is perennial in nature, the Tripartite Advisory Board may recommend its abolition under s 10 of the *Contract Labour (Prohibition and Regulation) Act, 1970* (India).
- 4.1.5. The *Public Liability Insurance Act, 1991* (India) seeks, inter alia, to provide for public liability insurance so that immediate relief may be extended to persons affected by accidents that occur in the handling of ‘hazardous substances’. Under s 4 of the above *Act*, any entity that owns a dangerous substance must, before the substance is handled, obtain one or more public liability insurance policies to insure against liability. The Employees’ State Insurance established under the *Employees’ State Insurance Act, 1948* (India), provides health and social security insurance in this regard.
- 4.1.6. The *Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979* (India) requires every establishment or contractor, that employs five or more interstate migrant workers, to register itself.¹³⁷ The purpose of this regime is to ensure and protect migrant workers’ rights to equal wages, displacement allowances, home journey allowances, medical facilities, etc.

134 *Constitution* Art 246, sch 7.

135 *BOCW Act* s 62 <[https://www.indiacode.nic.in/bitstream/123456789/1948/1/A1996-28.pdf#search=Building and other construction](https://www.indiacode.nic.in/bitstream/123456789/1948/1/A1996-28.pdf#search=Building%20and%20other%20construction)>.

136 *Contract Labour (Prohibition and Regulation) Act, 1970* s 3 <http://labour.bih.nic.in/acts/contract_labour_regulation_and_abolition_act_1970.pdf>.

137 *Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979* S. 1 (4) (a) [https://labour.gov.in/sites/default/files/TheInter-StateMigrantWorkmen\(RegulationofEmploymentandConditionsofService\)Act1979.pdf](https://labour.gov.in/sites/default/files/TheInter-StateMigrantWorkmen(RegulationofEmploymentandConditionsofService)Act1979.pdf).

- 4.1.7. In relation to the work, health and safety of the participants in the construction industry, the government has enacted further legislation.¹³⁸

The *Building and Other Construction Workers' Welfare Cess Act, 1996* (India) provides for the levy and collection of a cess (a contribution in the form of a tax) on the cost of construction incurred by the employers, for the purpose of augmenting the resources of the BOCW Boards constituted by the state governments under the *BOCW Act*. The cess is assessed at a rate not exceeding 2%, but not less than 1%, of the cost of construction incurred by an employer.¹³⁹

- 4.1.8. The Planning Commission (now Niti Aayog) jointly with the Indian construction industry has set up the CIDC to undertake activities for the development of the Indian construction industry. The CIDC is the first body in India to provide both the impetus and the organisational infrastructure necessary to raise quality levels across the industry.
- 4.1.9. There is no Indian equivalent of the *Unfair Contract Terms Act 1977* (UK). There is largely no restriction on the rights of the contracting parties to exclude or limit their liability through exemption clauses in their agreements. The position is different as regards contracts involving services which are regulated, like financial services. There is however the possibility of striking down unconscionable bargains or obtaining relief under the *Consumer Protection Act, 2019* (India).

4.2. Codes of Practice

- 4.2.1. Codes of practice pertaining to the construction industry have been established in India. Such codes can largely be found in all sectors of development including transport, industry, agriculture, etc.
- 4.2.2. Numerous studies of these codes of practice reveal that various existing methods of construction are outdated and that some designs are overburdened with antiquated safety factors and regulations.¹⁴⁰ These methods and designs fail to cater for advancements in the industry, such as the use of new building

138 See, e.g., Industrial Employment (Standing Orders) Act, 1946; Payment of Wages Act, 1936; Payment of Gratuity Act, 1972; Workmen's Compensation Act, 1923. See also Section 2.3.

139 *Building and Other Construction Workers' Welfare Cess Act, 1996* s 3 <http://legislative.gov.in/sites/default/files/A1996-28_0.pdf>.

140 D Jayakumar and P Ravikumar, 'Building Regulation, Violation Recent Need in Chennai Metropolitan City-Status Report' [sic] (2016) 13(4) *Journal of Mechanical and Civil Engineering* 71 <<http://www.iosrjournals.org/iosr-jmce/papers/vol13-issue4/Version-3/L1304037178.pdf>>; *National Building Code of India, 2005* <<http://www.disabilityindia.co.in/Access-India/national.php>>.

materials and the developments in building design and construction techniques.¹⁴¹ Further, it has become apparent that the codes lack uniformity and are often neither specification-oriented nor performance-oriented.¹⁴²

- 4.2.3. These studies resulted in the formation of the *National Building Code of India, 2005* (India) (*'National Building Code'*) to unify building regulations across the country. The then Indian Standards Institution (now BIS) was also established by the Planning Commission of India during this time.¹⁴³ Following the publication of the *National Building Code*, a campaign was launched by the Indian Standards Institution to drive implementation, and popularise the contents and use of the *National Building Code* in construction activities.¹⁴⁴ The *National Building Code* has regulations which can be adopted or enacted for use by various departments. It lays down a set of minimum provisions to protect the safety of the public in relation to structural sufficiency, fire hazards and accessibility of buildings.¹⁴⁵ Provided these basic requirements are fulfilled, building professionals will otherwise retain freedom of choice over the materials used and methods of construction adopted.¹⁴⁶ The *National Building Code* also covers aspects of administrative regulations and general building requirements.¹⁴⁷
- 4.2.4. The construction industry has undergone a paradigm shift due to a change in the nature of occupancies, characterised by the prevalence of high-rise buildings, and the greater dependence on building services, which are often complicated. A comprehensive revision of the *National Building Code* was conducted to address these aspects, with the amended standards reflected in the *National Building Code of India, 2016* (India). The changes included, *inter alia*, a thorough revision and updating of the requirements for building accessibility for the disabled and the elderly.¹⁴⁸

141 *National Building Code of India, 2005* (India) <<http://www.disabilityindia.co.in/Access-India/national.php>>.

142 *National Building Code of India, 2005* (India); Jayakumar and Ravikumar (n 1092).

143 *National Building Code of India, 2005* (India) <<http://www.disabilityindia.co.in/Access-India/national.php>>.

144 <https://law.resource.org/pub/in/bis/S03/is.sp.7.1.2005.pdf>; <https://archive.org/details/gov.law.is.nbc.2005/page/n2>.

145 <https://law.resource.org/pub/in/bis/S03/is.sp.7.1.2005.pdf>; <https://archive.org/details/gov.law.is.nbc.2005/page/n2>.

146 <https://law.resource.org/pub/in/bis/S03/is.sp.7.1.2005.pdf>; <https://archive.org/details/gov.law.is.nbc.2005/page/n2>.

147 <https://law.resource.org/pub/in/bis/S03/is.sp.7.1.2005.pdf>; <https://archive.org/details/gov.law.is.nbc.2005/page/n2>.

148 *National Building Code of India, 2016* (India) [<http://www.disabilityindia.co.in/Access-India/national.php>].

4.3. Licensing of Professionals and Contractors

- 4.3.1. While there are no guidelines or mandates specifically on the licensing of professionals, the Secretariat for the Committee on Infrastructure has published certain guidelines on the best practices to be adopted by ‘consultants’.¹⁴⁹ ‘Consultants’, in this context, refers to those advising project authorities on the financial, legal or technical aspects of the project.¹⁵⁰ In cases where construction project management is outsourced, the ‘manager’ of the project may constitute a ‘consultant’ for the purpose of ensuring implementation of the project in a fair and transparent manner.
- 4.3.2. The 2009 report of the Planning Commission of India on ‘Improvement in Accreditation and Certification Systems’¹⁵¹ analysed the existing system of accreditation of various professions in India, emphasising the need to ensure uniformity of skills and knowledge of engineers.
- 4.3.3. There is no legislation in India specifically governing contractor licencing. Thus, by law, contractors are not required to obtain any form of licence per se. However, in practice, some form of accreditation is required. The entity commissioning the construction is required to obtain permissions and permits from various local authorities (*viz* the municipalities in each city or district), and the relevant state and union (where the matter falls within the purview of the union government) departments depending on the nature of work involved.¹⁵²

5. Construction Contracts

5.1. Standard Contracts

FIDIC

- 5.1.1. Standard forms issued by FIDIC are commonly used as a template or base contract for construction contracts in India. Many employers will then make the necessary amendments to tailor the contract to local requirements, displacing or modifying standard FIDIC terms as required. In certain cases, gov-

149 Secretariat for the Committee on Infrastructure, Government of India, *Best Practices: Selection of Consultants* (Report, May 2009) <<http://gajendralhaldea.in/download/Final-Selection.pdf>>.

150 Secretariat for the Committee on Infrastructure, Government of India, *Best Practices: Selection of Consultants* (Report, May 2009).

151 Planning Commission Sub-Committee on Improvement in Accreditation and Certification Systems, *Report and Recommendations* (Report, May 2009) <https://niti.gov.in/planningcommission.gov.in/docs/reports/genrep/skilldev/sub_accrd.pdf>.

152 Author’s observation.

ernment agencies, such as the public works departments and the Indian railways, have their own standard form contracts.

Model Concession Agreement ('MCA')

- 5.1.2. The MCA is a standard form contract published by the Secretariat for Public Private Partnerships ('PPP') and Infrastructure, and is applicable to PPPs, i.e. construction projects between private project developers and the government. The MCA sets out the terms of execution of a project, and is signed between the concessionaire and the government, to form the core of a PPP.
- 5.1.3. The most common form of PPP is the Build-Operate-Transfer (BOT) model, whereby the private entity is responsible for designing, building and operating the project or facility for a specified period, before subsequently transferring it to the public sector body.

Other Standard Form Contracts

- 5.1.4. Government authorities will publish standard form construction contracts with every construction project tender released.¹⁵³ Most sectors of the construction industry also have standard contracts on par with international norms.¹⁵⁴

5.2. Amendment of Contracts and Bespoke Contracts

- 5.2.1. Standard form contracts, though widely used, are usually amended as specifically required by the parties to the contract. Such amendments are also required to ensure that the contract is valid under Indian law. For example, to ensure the validity of a FIDIC agreement in India, it is essential to amend the agreement such that it does not amount to a restraint of legal proceedings, as that would be held *prima facie* void as per the ICA.¹⁵⁵ Amendments are generally made to the following clauses:
- (a) Obligations;
 - (b) Representations and Warranties;
 - (c) Termination;
 - (d) Liability and Indemnity;
 - (e) Limitation;
 - (f) Dispute Resolution;
 - (g) Force Majeure;

¹⁵³ NHAI Act s 15 <<http://legislative.gov.in/sites/default/files/A1988-68.pdf>>.

¹⁵⁴ NHAI Act s 15.

¹⁵⁵ ICA s 28 <<https://www.indiacode.nic.in/bitstream/123456789/2187/1/187209.pdf>>.

- (h) Governing law and Jurisdiction; and
- (i) Copyright and Intellectual Property Rights, etc.

5.3. Most Commonly Used

FIDIC

- 5.3.1. FIDIC is a standard form construction contract commonly used between private parties. However, in construction contracts between a private entity and a government body, FIDIC contracts are not widely prevalent. Instead, the government-published model agreements, such as MCAs, are typically adopted.

Other Commonly Used Contracts

- 5.3.2. EPC contracts may vary in terms of the assignment of responsibility and related penalties. There is often a flexible relationship between different members of the industry.
- 5.3.3. There are various project delivery mechanisms that may be adopted, depending on the particular local conditions. The size and nature of the project will also influence the choice of project delivery mechanism. The types of project execution most commonly used are:
- (a) Item rate contracts, whereby the contractor, through an appointed consultancy, does the engineering. Under these contracts, bills of quantity (ies) are furnished and the prices are to be fixed by the tendered item;
 - (b) Lump sum turnkey (LSTK) contracts, being the preferred project delivery mechanism in the energy and industrial sector for projects ranging from US\$500 million–1 billion. This model has gained popularity as the contractor bears the responsibility for the design, procurement and construction processes. The LSTK model also ensures efficiency and mitigates project completion time and costs, as the onus of successful project delivery is borne by the contractor;
 - (c) Escalation and inflation protection contracts;
 - (d) Design contracts, which include the client's design requirements;
 - (e) EPC contracts, which may vary in terms of the stakeholders involved and the assignment of risk, these factors being typically dependent on the nature of the project itself. The procurement process may consist of numerous steps; and
 - (f) EPC management (EPCM) contracts, which have gained popularity. This model provides greater scope for local contractors to play an important role in effectively managing time and costs.

5.4. Example – The Standard EPC Agreement for Highways

- 5.4.1. The Ministry of Road Transport & Highways ('MoRTH') has published a Standard EPC Agreement for national highways and centrally sponsored road works ('Standard Agreement') proposed to be implemented on EPC mode. This standard form contract can be found on the website of the National Highways and Infrastructure Development Corporation, a company wholly owned by the MoRTH. The primary authority using this contract is the NHAI.

6. Key Issues

6.1. Overview

- 6.1.1. Every contract comes with its own set of actual and potential issues. This Section highlights certain key issues which are common in India across general construction and EPC contracts, and provides a brief overview of the current position in the context of the Standard Agreement referred to at Section 5.4.

6.2. Extension of Time/Delay in Completion

- 6.2.1. A term commonly found in construction contracts is the Extension of Time ('EoT') clause coupled with a claim for liquidated damages.
- 6.2.2. Various factors may contribute to a request for an EoT being made, including actual default on the part of any party or a force majeure event. The grant or denial of such a request is where the dispute typically arises.
- 6.2.3. In the context of the Indian construction sector, scenarios or factors that commonly result in requests for EoT include:
- (a) Site handover: delays may arise in the handover of the site by the employer to the contractor. This is commonly due to delays in acquiring land, obtaining the necessary licences and approvals, and even gaining physical access;
 - (b) The existence of multiple contractors: often, due to the large scale of a project, several contractors are allotted various stages of the contract. Multiple contractors may also be engaged where individual contractors lack sufficient resources, or to reduce reliance on a single contractor. Where a contractor is unable to complete their obligations in the agreed time frame, handover to the contractor responsible for the subsequent stage is delayed. This is one of the most common causes of request for EoT that eventually results in claims for liquidated damages;

- (c) Variations in the scope of work of a project: such changes inevitably require contractors to deviate from the pre-existing schedule of work and reallocate their resources, such as manpower, equipment, and raw materials, resulting in delays in the project delivery. These variations often necessitate the procurement of additional resources, which may differ from those already required. This in turn has a cascading effect on project costs and may require contractors to obtain alternative sources of funding, contributing further to project delay;
 - (d) Force majeure events: although beyond the control of the parties, force majeure events such as landslides, adverse environment and geological conditions, labour strikes, etc. are often a cause for delay in construction contracts in India. In such cases, the affected party may have a legitimate right under the contract to seek an EoT for completion of the contract. A request for EoT is either met by the grant of an extension of time requested, a claim for liquidated damages, or both.
- 6.2.4. Delays are detrimental to the interests of both the contractor and the authority, as the latter suffers a loss as it is unable to generate income from the relevant project by the expected date in accordance with the forecasted timeline. From the contractor's perspective, delays affect the profitability of the project, as the contractor is required to invest more resources than initially budgeted for. These cost escalations often result in disputes between the parties, which only further delays project completion.
- 6.2.5. The Standard Agreement primarily discusses EoT under cls 10.5, 11.14, 23.2 and sch E s (4).
- 6.2.6. Under cl 10.5, requests for EoT can be made at the highway construction stage on the grounds of delays in obtaining right of way, environmental clearances or approval of railway authorities, or delays due to variations in the scope of work or the occurrence of a force majeure event, any delays, impediments or prevention caused by or due to the NHAI, NHAI personnel or any of other contractors employed by NHAI on the site.
- 6.2.7. Clause 11.14 specifies timelines within which a probable delay must be notified to the NHAI. This clause reflects best practice and seeks to ensure the NHAI's cognisance of potential claims by the contractor.
- 6.2.8. Clause 11.17.4 provides for the grant of EoT in cases involving the suspension of works due to reasons not attributable to the contractor.
- 6.2.9. Schedule E s (4) provides that in case of any deficiency or defect in the construction of the works¹⁵⁶ which may require more time than the time origin-

¹⁵⁶ Construction under the Standard Agreement includes design, developing, engineering, procurement, supply of plant, materials, equipment, labour, delivery, transportation, installation, processing, fabrication, testing, and commissioning of the highway, including maintenance during the construction period, removing defects, if any, and other activities incidental to the construction.

ally agreed, the contractor is required to rectify the defect within such time as may be reasonably expected from reasonably skilled and experienced contractors engaged in the same type of work as provided for in the Standard Agreement.

6.3. Variations

- 6.3.1. Most large-scale construction contracts contain clauses that provide for changes to the scope of work set out in the contract. Such changes often concern the specifications relating to any item of construction work and may comprise of the addition or omission of particular items of work to or from the project. As is often the case in India, variations may also arise where the ground or land conditions differ from those assumed or agreed upon.
- 6.3.2. Variation clauses typically set out the procedure for making alterations to the scope of work, as well as any payments and restrictions attaching to such amendments.
- 6.3.3. In some cases, changes to the scope of work may constitute a variation of contract. The contractor and project heads must ensure that the recording, tracking, and reporting processes can be properly implemented in cases of any potential contractual variation. Inadequate pre-planning and project design may cause further delays.
- 6.3.4. Generally, the contract will specify the remedies available to the party affected by material variations. Material variations usually give the affected party the right to a change order, which may specify a certain amount of costs. Substantial costs may lead to one of the parties opting to terminate the contract. Although the contract will typically provide for a formal change order process, in practice the formal process is rarely followed.
- 6.3.5. An example of a case involving variations to the contracted scope of work is that of *State of U P v Ram Nath International Construction Private Ltd*,¹⁵⁷ where the Supreme Court rejected the claim that a contractor was not entitled to higher rates in spite of the existence of material changes to the drawings and designs.
- 6.3.6. Clauses 2 and 13 of the Standard Agreement specify the scope of work and set out the procedure for change of scope and the payments required to be made for any change in scope.

157 (1996) AIRSC 782.

6.4. Latent Conditions

- 6.4.1. As the project progresses, contractors may encounter latent conditions in the site substrata, which may adversely impact the rate of progress, and ultimately impinge upon the expected timeline and schedule of the project. Latent conditions may also delay handover of the site by one contractor to the next, thereby resulting in requests for EoT or claims for liquidated damages.
- 6.4.2. The Standard Agreement does not explicitly mention the issue of latent conditions. However, cl 8.8 covers the manner in which geological and archaeological discoveries must be dealt with. This circumstance may be construed as a latent condition if encountered during the process of site excavation for construction of the highway.

6.5. Force Majeure

- 6.5.1. Force majeure clauses can be found in most construction contracts in India. A force majeure event is one which is beyond the control of either party. Force majeure is typically defined to include acts of God, terrorism, etc. The way in which these clauses are drafted will significantly impact the determination of requests for EoT and the granting of claims for liquidated damages, where these are permitted under the agreement.
- 6.5.2. The principle of force majeure does not have statutory recognition in India. Rather, the principle is enshrined in a different (and limited) form within the *ICA*, as the doctrine of frustration of contract.¹⁵⁸
- 6.5.3. Section 56 of the *ICA* provides that an agreement to implement an act which is impossible is void. Section 56 further provides that in the event the act becomes impossible or unlawful, the contract requiring such an act will become void. Further, no compensation will be required to be paid for an act that the promisor knew or would have known with the exercise of reasonable diligence, to be impossible or unlawful. Frustration of contract has been recognised by various courts in India as the ‘aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done’.¹⁵⁹
- 6.5.4. Clause 21 of the Standard Agreement is an example of a force majeure clause. The clause defines force majeure events as including political, non-political, and indirectly political events. These terms are also given meaning by the

¹⁵⁸ *ICA* s 56.

¹⁵⁹ *Satyabrata v Mugneeram* (1954) AIR SC 44.

clause. Given the broad nature of the clause, it is typically an aspect of the agreement that will be renegotiated by the relevant parties.

6.6. Land Acquisition

- 6.6.1. The land acquisition process is fairly long and drawn out in India. This is due to the delays often caused by disputes as to the appropriate amount of compensation to be awarded, as well as the various clearances and approvals to be obtained.
- 6.6.2. All property is said to vest with the government unless previously allotted or sold to a private person. In cases of land acquisition, compensatory amounts may be awarded to the existing occupants. The *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013* (India) ('LARR Act') provides for a mandatory 'rehabilitation and resettlement' ('R&R') scheme in relation to land acquisitions under s 16. The R&R provisions are applicable to all land acquisitions by union and state governments. With regard to land acquisition by private entities, including companies, the R&R provisions will only apply if the acquisition is of more than the prescribed limit as determined by the relevant state government. There are however, certain exemptions. Acquisitions of land for the construction of national highways are explicitly exempted from the R&R obligations. Further, land acquisitions under the legislation prescribed in Schedule IV of the *LARR Act* (for example the *Railway Act, 1989* (India), and the *National Highway Act, 1956* (India)) are also excluded from the mandatory R&R scheme.
- 6.6.3. However, the process of determining the amount of compensation to be awarded for such acquisition often results in litigation, which inevitably delays project completion. A recent example of this is the acquisition of land for the new airport at Navi Mumbai. In this case, the dispute arose due to the earlier occupants' reluctance to accept the amount of compensation offered by the government in acquiring the land, contending the amount to be insufficient in light of the anticipated increase in property rates.¹⁶⁰
- 6.6.4. The land acquisition process also requires certain clearances and approvals, such as 'No-Objection Certificates', to be obtained from various authorities. For example, in a case where the land in question is in close proximity to any defence or armed forces property, approvals from such authorities will be required. Clearance or approvals may also be statutorily mandated. For instance, approval from the Environment Ministry may be required under the *Environment Protection Act, 1986* (India).

160 *Indirabai Narayan Bivalkar v State of Maharashtra* 2015 (4) ALL MR 77.

- 6.6.5. The government is creating a process such that the award of contracts takes place only after a certain percentage of land has been acquired.
- 6.6.6. The Standard Agreement does not specifically address the issues that land acquisitions may trigger, such as compensation and obtaining the necessary clearances and approvals. This is problematic as such issues could foreseeably be, and in fact are, one of the leading causes for a request of an EoT.

6.7. Limitation of Liability

- 6.7.1. Construction contracts generally contain limitation of liability clauses in the form of exceptions, indemnities and penalties, etc. Contractors must bear the risk of additional costs arising in the future unless otherwise specified and agreed in the contract. It is difficult to exclude liability for these items in standard form contracts where the counterparty is a government entity. However, it is possible if dealing with a private counterparty.
- 6.7.2. It is normal to exclude indirect or consequential loss and loss of profits. The owner is expected to take out an insurance policy to cover any potential loss of profits. Clauses that contemplate potential contractor liabilities in the event of a change in law and taxes clauses, are also typically inserted. When multiple contractors are working on-site, contractors are only liable for their scope of work and they do not assume integration risk, unless this has been expressly agreed to. Assumption of this risk carries a price that must be borne by the owners.
- 6.7.3. The Standard Agreement embodies the provisions on indemnity and limitation of liability in cls 20.1.3, 20.1.4, 25.1.1, 25.2 and 25.5.
- 6.7.4. The indemnity clauses in 20.1.3 and 20.1.4 provide indemnities to the authority and contractor respectively. Clause 20.1.3 provides that the contractor will indemnify the NHAI against any losses, damages, costs, charges or claims, arising out of, or in consequence of any breach by the contractor of the Standard Agreement during the execution of the works or remedying of any defects therein in case of death of, or injury to, any person, or loss of, or damage to, any property (other than the actual works).
- 6.7.5. Clause 20.1.4 provides that the NHAI shall indemnify the contractor from and against any and all losses, damages, costs, charges, proceedings or claims, arising out of, or with respect to, the use or occupation of land or any part thereof by the NHAI, the right of the NHAI to execute the work or any part of it on, over, under, in or through the land, or damage to the property which is an unavoidable result of the execution and completion of the work, or remedying any defects, or death or injury to any person, or loss of or damage to property, resulting from any act or due to the negligence of NHAI or its agents, servants or other contractors who are not employed by the contractor.

- 6.7.6. Clauses 25.1 and 25.2 provide for general indemnities by the contractor in favour of NHAI. Clause 25.5 excludes claims or recovery of any indirect, incidental or consequential costs, expenses, loss or damage, including any loss of profit except where specifically provided in the Standard Agreement.

6.8. Duration of Exposure/Time Bars

- 6.8.1. Indian law prescribes certain time frames within which claims may be brought forward by affected parties. This is generally provided under the *Limitation Act, 1963* (India).
- 6.8.2. Under the *Limitation Act, 1963* (India), an action for breach of contract may be brought within three years from the date of the breach.¹⁶¹ Any agreement which provides that a claim for the breach of any terms of the agreement should be brought within a time frame shorter than the period prescribed by law, is void to the extent that the period defined in the agreement is lesser than the period prescribed under the *Limitation Act, 1963* (India). This is provided under s 28(b) of the *ICA*.
- 6.8.3. Most construction contracts in India have a provision specifying the time frame within which an action for contractual breach must be brought, and the Standard Agreement is no different. The primary issue with such a provision arises when one of the parties is non-Indian and a standard form of contract (such as FIDIC) is adopted in its base form without amendments tailoring the standard terms to Indian laws. In such a scenario, when a dispute arises, the non-Indian party will be unable to bring its claim as the Indian party can take recourse to s 28(b) of the *ICA*.
- 6.8.4. In *Union of India v Simplex Concrete Piles India Private Ltd*,¹⁶² the Supreme Court held that any clause in an arbitration agreement limiting the time within which a claim may be made by a party is against public policy and void. In some cases, the parties may agree to extend the period of limitation. In *Gobardhan v Dau Daya*,¹⁶³ a full bench of the Allahabad High Court held that contracts extending the period of limitation are void under s 22 of the *Limitation Act, 1963* (India), as they defeat the provisions of the *Limitation Act, 1963* (India). Hence, by virtue of the maxim *vigilantibus non dormientibus jura subveniunt* (“the law aids the vigilant and not those who slumber”), the limitation period in which a dispute must be referred to adjudication is important.

¹⁶¹ Limitation Act, 1963 sch item 55.

¹⁶² (2003) 3 ARBLR 536 Delhi.

¹⁶³ (1932) AIR All 273.

7. Dispute Resolution

- 7.1.1. As discussed in detail in Section 3.5, there are several ADR mechanisms available for the resolution or settlement of disputes arising in relation to construction contracts, with arbitration being the most commonly adopted mechanism.
- 7.1.2. Clause 26.1 of the Standard Agreement provides that where disputes arise in relation to the Standard Agreement the parties shall, in the first instance, attempt to resolve the dispute amicably by conciliation as per the procedure set forth in cl 26.2 of the Standard Agreement. Clause 26.2 states that when a dispute arises, the parties may appoint the Engineer of NHAI, or any other person that they find mutually acceptable, as a conciliator to facilitate settlement of the dispute. Parties also have the option to approach the Chairman of the NHAI or the Contractor's Board of Directors to facilitate dispute resolution. Clause 26.2 also outlines timelines for the resolution of the dispute and the signing of the written terms of settlement, failing which, the parties may thereafter refer the dispute to arbitration under cl 26.3 of the Standard Agreement.
- 7.1.3. Clause 26.3 states that the arbitration must be settled under the rules of the Society for Affordable Redressal of Disputes ('SAROD'). Clause 26.3.6 of the Standard Agreement provides that a party who challenges the arbitral award in a court must make an interim payment of 75 % of the amount of the award to the other party, pending final settlement of dispute, as well as an irrevocable bank guarantee of 120 % of the arbitral award amount.
- 7.1.4. Invocation of arbitration can be an issue in itself, depending on the way the arbitration clause is drafted. Further, Indian laws permit appeals from arbitral awards before the High Courts. This again leads to prolonged litigation and adversely impacts project timelines and costs.
- 7.1.5. The key aspect of a dispute resolution clause is providing for the appropriate governing law. Often parties agree to institutional arbitration but fail to expressly identify the substantive law governing such institutional arbitration. This may be particularly problematic where the parties involved are transnational. In one such case, the Supreme Court of India held that in the event that most provisions are governed by or construed by Indian law, then it can be reasonably interpreted that the parties' intention is to maintain Indian law as the substantive law of the agreement.¹⁶⁴ Accordingly, the arbitration would be conducted with Indian law as the substantive law.
- 7.1.6. Some construction contracts also provide for internal dispute resolution mechanisms to be utilised prior to the institution of any arbitration proceedings.

¹⁶⁴ *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552.