
LIQUIDATED DAMAGES IN PUBLIC INFRASTRUCTURE PROJECTS: LEGAL AND PROCEDURAL CHALLENGES IN INDIA

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ABSTRACT

India's aspiration to emerge as the world's third-largest economy by 2028 is underpinned by substantial infrastructure investments by both Central and state governments. However, persistent delays in project execution remain a systemic concern. Air Chief Marshal Amar Preet Singh aptly observed that "not a single project that I can think of has been completed on time," characterising the situation as unacceptable.¹ If this is reflective of defense procurements, civil infrastructure projects are unlikely to fare better.

Major public infrastructure contracts typically contain liquidated damages clauses, enabling the government to recover pre-estimated damages in the event of delay or breach. However, enforcement frequently gives rise to disputes, invoking arbitration provisions. The arbitral award is often challenged under Section 34 of the Arbitration and Conciliation Act, 1996, followed by an appeal under Section 37, and, in some cases, a Special Leave Petition before the Supreme Court.² Such litigation is costly, time-consuming, and exacerbates judicial pendency.

This article offers a focused analysis of liquidated damages in the context of public infrastructure contracts. It examines standard contractual formulations, outlines the legal conditions for their enforceability, and reviews judicial precedents. The study identifies recurring grounds of contestation and concludes with practical recommendations for stakeholders, including a proposal to amend Sections 55 and 74 of the Indian Contract Act, 1872,³ and a model liquidated damages clause to be incorporated in bid documents.

Keywords: Contracts, Delay, Extension of Time, Liquidated Damages, Penalty, Reasonable Compensation.

¹ Times of India Online, May 30, 2025.

² The Arbitration and Conciliation Act, No. 26 of 1996, §§34, 37 (India).

³ The Indian Contract Act, No. 9 of 1872, §74.

1. INTRODUCTION

India is rapidly progressing toward becoming the third-largest economy by the year 2028. To achieve this growth, among other things, Governments, both central and state, are investing heavily on infrastructure projects such as railway lines, highways, airports and seaports.

These projects are financed through a combination of internal revenues and substantial borrowings from external funding agencies like the World Bank, the Asian Development Bank as well as domestic institutions such as National bank for Agriculture and Rural Development (NABARD), Housing and Urban Development Corporation (HUDCO), Life Insurance Corporation of India (LIC), Nationalised banks.

One of the key stipulations in such contracts is the clause “Time shall be considered as the essence of the contract.”⁴ But, in reality projects are rarely completed on time. Air Chief Marshal Amar Preet Singh expressed deep disappointment over constant delays in defense projects, condemning the unrealistic timelines promised at contract signing and the failure to complete a single project on time.⁵ His comments underline the gravity of current state of affairs in defense projects and serve as a stark call for immediate remedial measure. However, this clause plays pivotal role in determining the legal and financial consequences of delays or non- performance by either party. When time is deemed essential to the contract, any delay in performance constitutes a fundamental breach. This may entitle the aggrieved party, often the public authority, to either rescind the contract or extend the completion period by granting Extension of Time while imposing liquidated damages for the delay.

This study seeks to explore the complexities, legal interpretations, and practical implications of liquidated damages in public utility projects, highlighting why this remains a contentious issue despite long-standing contractual stipulations and judicial precedents by the Supreme Court and several High Courts.

2. RESEARCH FRAMEWORK

2.1 Scope

⁴ Padala Rama Reddy & Padala Srinivasa Reddy, *A.P. Detailed Standard Specifications & General Principles of Engineering Contracts* cl. 60(a), 16th ed. (Asia Law House 2022).

⁵ *Times of India Online*, May 30, 2025 (India).

This study primarily focuses on the imposition and recovery of liquidated damages in construction contracts where the client is the Government or an instrumentality of the Government. The analysis is confined to disputes and differences where the seat of arbitration is in India, and the nature of arbitration qualifies as domestic commercial arbitration. Both substantive and procedural aspects are examined within the framework of Indian law.

However, where relevant, judicial precedents from other contexts have also been considered, and the principles derived from such case laws have been appropriately cited and applied to support analysis, findings, recommendations and conclusions.

2.2 Objectives

- a) To analyse the legal framework governing liquidated damages in public utility projects, particularly under standard government contracts and public procurement policies.
- b) To examine the practical application of the enforcement of liquidated damages clause by public authorities, arbitral tribunals and courts.
- c) To identify key areas of disputes and differences between contractors and public entities regarding the imposition of liquidated damages.
- d) To assess the impact of liquidated damages on project delivery, cost, and stakeholder relationships, including delays and financial strain on contractors.
- e) To evaluate judicial interpretations and reported case laws related to liquidated damages in public infrastructure and utility contracts.
- f) To suggest recommendations for improving clarity, fairness, and enforceability of liquidated damages provisions in public utility project agreements.

2.3 Significance

The enforcement of liquidated damages clauses in infrastructure projects remains a contentious area in Indian contract law. Given the pivotal role of infrastructure in national development, efficient legal mechanisms governing contract enforcement are essential. However, Indian

courts have adopted varied interpretation of Section 74 of the Indian Contract Act, 1872,⁶ often blurring the line between liquidated damages and penalties. This jurisprudential ambiguity has led to legal uncertainty, prolonged litigation, and adverse implications for public-private partnership (PPP) and large-scale infrastructure investments.

This doctrinal study undertakes a systematic, chronological analysis of judicial decisions relevant to the enforcement of liquidated damages in Indian infrastructure projects. The research follows the evolution of legal principles through a step-by-step examination of cases, beginning with a foundational Privy Council judgement, proceeding through landmark Supreme Court rulings, and including relevant decisions from various High Courts. The scope of the study expanded organically as new decisions emerged during the course of research.

By proposing concrete amendments to Section 74 and recommending standardised contract terms used in Indian infrastructure projects,⁷ the study seeks to harmonise judicial interpretation and promote legal certainty. The findings are particularly significant for policy makers, legal practitioners, and infrastructure stakeholders, aiming to reduce litigation and enhance the enforceability of commercial agreements in the infrastructure sector.

2.4 Period of Study

The study covers the period from the Indian Contract Act, 1872 to recent judgements up to 2025. This timeframe, outlined in the scope and methodology section supports the objective of analysing legal evolution through statutory interpretation and case law. It ensures relevance and depth in assessing the current significance of the Indian contract Act.

3. METHODOLOGY

This paper adopts doctrinal legal research, focusing on the interpretation of statutory provisions and judicial precedents to critically analyse the concept and applicability of liquidated damages in infrastructure projects in India. The methodology comprises the following steps:

3.1 Statutory Analysis

A detailed examination of relevant provisions of *The Indian Contract Act, 1872*, particularly

⁶*Contract Act*, §74.

⁷ *Id.*

Sections 73 and 74,⁸ which govern compensation for breach of contract and liquidated damages.

3.2 Case Law Analysis

- a) Analysis of key decisions by the Supreme Court, focusing on how Supreme Court has interpreted and applied the concept of liquidated damages in the context of large-scale infrastructure projects.
- b) Judgements of several High Courts will also be reviewed where relevant, particularly where they highlight divergent interpretations or novel reasoning.
- c) Doctrinal consistency, judicial trends, and shifts in interpretations over time will be discussed.

3.3 Critical Evaluation

- a) Assessment of how effectively the current legal framework addresses practical issues in infrastructure contracts, such as delay, cost overruns and enforceable liquidated damages clauses.
- b) Identification of ambiguities and inconsistencies in judicial reasoning and statutory interpretation.

3.4 Interpretation for Reform

Based on the above analysis, the paper will propose amendments to *The Indian Contract Act, 1872*,⁹ redrafting contract terms pertaining to liquidated damages and suggest guidelines for more consistent judicial interpretation.

4. LITERATURE SURVEY

The enforcement of liquidated damages (LD) in Indian infrastructure contracts presents a complex interface between statutory provisions, doctrinal interpretations, and operational realities. Section 74 of The Indian Contract Act, 1872 provides a legal foundation for LD

⁸ *Contract Act*, §§74.

⁹ *Contract Act*.

clauses by allowing compensation without strict proof of loss.¹⁰ However, scholarly analysis reveals persistent ambiguity in how courts and arbitral tribunals apply this provision, especially in public projects where institutional asymmetries are pronounced. Ram Mohan et al. highlight that while *Saw Pipes*¹¹ introduced a rebuttable presumption of loss supporting LD enforcement, arbitral outcomes demonstrate significant inconsistency, with tribunals frequently requiring a detailed factual matrix to validate stipulated sums.¹² Sanjana Reddy further critiques the absence of coherent judicial standard to distinguish enforceable LD from punitive penalty, underscoring the resultant unpredictability for contracting parties and its adverse impact on commercial uncertainty.¹³ Such doctrinal uncertainty complicates infrastructure dispute resolution and necessitates more calibrated legal frameworks.

A significant challenge identified in the literature concerns the nexus between “time is of the essence” clauses and LD enforceability. Ashfaq and Bharathi’s empirical research indicates that the frequent failure to establish explicit time-related obligations and to rigorously document delays in public contracts undermines the effectiveness of LD provisions.¹⁴ Their study reveals procedural weakness-such as omission of timely notices and inadequate delay analyses that render LD claims vulnerable to challenge.¹⁵ These procedural lapses reflect broader concerns regarding contract administration in government projects, where ambiguous completion milestones and ad hoc time extensions further dilute the deterrent function of LD clauses. The literature suggests that strengthening procedural discipline and clarity in drafting contract terms are pivotal to ensuring enforceability and fostering accountability.

Beyond procedural issues, the institutional imbalance between the state and contractors draws scholarly attention. Ram Mohan et al. note that LD clauses in public private partnership (PPP) Agreements are often standardised and non-negotiable placing contractors at a distinct disadvantage. Legal scholars stress that enforcement of LD by government agencies must align with constitutional principles of equality and fairness under Article 14 of Constitution of

¹⁰ *Contract Act*, §74.

¹¹ *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705 (India).

¹² M. P. Ram Mohan, Gaurav Ray, Promode Murugavelu & Jeeri Sanjana Reddy, *Liquidated Damages in India: Concepts, Enforceability, Drafting Considerations*, Indian Inst. Of Mgmt. Ahmedabad 4-9 (2024), <https://www.iima.ac.in>.

¹³ Sanjana Reddy, *Judicial Approaches to Liquidated Damages in India: Concepts, Enforceability, Drafting Considerations*, Indian Inst. of Mgmt. Ahmedabad 4-9 (2024), <https://www.iima.ac.in>.

¹⁴ Shaik Ashfaq & Vishnu Bharathi S, *Analysing Damages Claims in Construction Contracts in India: Challenges and Best Practices*, 6 *Indian J. L. & Legal Res.* 1, 4-5 (2024).

¹⁵ *Id.*

India,¹⁶ especially given the state's superior bargaining power. Comparative studies from Singapore and the United Kingdom provide instructive insights: jurisdictions like Singapore apply a proportionality test to LD clauses, ensuring they serve legitimate commercial objectives without being punitive,¹⁷ while the UK Supreme Court emphasizes reasonableness and negotiated balance in *Cavendish Square*.¹⁸ Indian academia advocates for adopting similar structured proportionality frameworks to harmonize fairness with contractual certainty in state-involved infrastructure contracts.

The evidentiary burden to substantiate LD claims is another focal point of analysis. Reddy emphasizes that beyond contractual validity, robust documentation—including critical path method (CPM) analyses, impact quantifications, and certification by independent engineers—is essential to substantiate LD claims effectively.¹⁹ Such forensic rigor, she argues, is key to preventing arbitrary or excessive LD enforcement and aligns with international contracting best practices.²⁰ Scholars advocate reforms such as tiered dispute resolution mechanisms, improved risk allocation, and harmonization with standard forms like FIDIC and NEC to enhance transparency and predictability.²¹ Collectively, the literature advocates a balanced enforcement model—one that respects the sanctity while upholding procedural fairness and evidentiary integrity.

In conclusion, this body of scholarship elucidates the multifaceted challenges inherent in enforcing LD in India's infrastructure sector. The path forward lies in embracing procedural rigor, evidentiary transparency, and institutional fairness—principles that not only mitigate enforcement disputes but also cultivate trust between state agencies and contractors. For practitioners, arbitrators, legal advisors, these insights provide a vital foundation for crafting, advising upon, and adjudicating LD clauses that are both legally robust and pragmatically sound. This balanced perspective addresses the dual imperatives of legal fidelity and practical enforceability, reflecting the contemporary realities of infrastructure contracting in India.

¹⁶ India Const. art. 14.

¹⁷ Dentons Rodyk & Davidson, *Penalty Clauses: The Singapore Position vs. the UKSC's Fine-Tuned Doctrine* (Dec.2015), [cs-fine-tuned-doctrine](#).

¹⁸ *Cavendish Square Holding B.V. v. Makdessi*, [2015] UKSC 67.

¹⁹ Reddy, *supra* note, at 55-56

²⁰ *Id.* at 59

²¹ *Id.* at 59-61

5. ANALYSIS AND FINDINGS

Delays in project completion often led to disputes, with each party attributing the delay to the other. Government agencies typically invoke liquidated damages, claiming compensation for damages suffered attributing delay solely to the contractor. The contractors, in turn, argue that the delay resulted from lapses on the part of the employer and seeks damages for price escalation, extended overheads, loss of profits, interest on sums claimed, and loss of opportunities to undertake other projects. These competing claims and counter claims reflect the commercial and legal complexities inherent in delayed construction contracts.

If the terms of contract contain clause to the effect that “Time shall be considered as the essence of the contract.” and the project is not completed within stipulated period, the promisee can opt to avoid the contract or accept performance of such promise at any time other than the stipulated period. If the promisee chooses this latter option, then he cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of such acceptance he gives notice to the promisor of his intention to do so. This principle finds statutory backing in Section 55 of The Indian Contract Act, 1872 which is extracted below:

Section 55. Effect of failure to perform at fixed time, in contract in which time is essential: - When a party to a contract promises to do a certain thing at or before a specific time, or certain things at or before certain times, and fails to do any such thing at or before the specified time, the contract or so much of it has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that the time should be of the essence of the contract.

Effect of such failure when time is not essential: - If it was not the intention of the parties that the time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time, but the promisee is entitled to compensation from the promisor for any loss occasioned by such failure.

Effect of acceptance of performance at time other than that agreed upon: - If, in case of a contract, voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time

other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of such acceptance he gives notice to the promisor of his intention to do so.

In practice, such compensation is often predetermined and provided in the form of liquidated damages in the contract terms. The term “liquidated damages” is neither mentioned nor defined in The Indian Contract Act, 1872.

In *Bhai Panna Sing v. Bhai Arjun Singh*,²² the Judicial Committee of the Privy Council, then the highest appellate tribunal for British India, considered a contractual dispute involving a clause stipulating a fixed sum payable upon breach. This judgement is historically significant as the first reported Indian decision to mention the term “liquidated damages.”

The Judicial Committee upheld the enforceability of the stipulated amount on the basis that it represented a genuine pre-estimate of loss rather than an unconscionable or punitive charge. The reasoning focused on the factual circumstances, without elaborating on the conceptual framework or distinguishing between liquidated damages and penalties under Section 74 of the Indian Contract Act, 1872.

“There was no reason to regard the stipulated sum as penalty... it was inserted by way of genuine pre-estimate.” (*id*)

No general principle or test was formulated regarding the application of Section 74, leaving the doctrinal development of liquidated damages to future rulings.

In *Union of India v. Vasudeo Agarwal*,²³ the Patna High Court clarified the distinction between liquidated damages and penalties under Sections 73 and 74 of the Indian Contract Act, 1872. The dispute centered on whether a fixed sum stipulated for breach was a genuine pre-estimate of loss or an unenforceable penalty. The Court held that enforceability depends not on terminology but on the clause’s intent, context, and proportionality to anticipated loss. Liquidated damages, being reasonable forecasts, may be upheld without proof of actual harm, whereas penalty clauses are subject to judicial scrutiny and limited to proven loss. This substance-over-form approach promotes contractual fairness while cautioning against

²² *Bhai Panna Sing v. Bhai Arjun Singh*, AIR 1979 PC 179 (India).

²³ *Union of India v. Vasudeo Agarwal*, AIR 1960 PAT 87

exaggerated sums meant to deter breach. The judgment thus strengthens commercial certainty and provides valuable guidance on drafting enforceable damages clauses.

In *Sir Chunnilal V. Mehta and Sons Ltd. v. The Century Spinning and Manufacturing Co. Ltd.*,²⁴ Clause 14 of the Managing Agency Agreement referred to “liquidated damages” and was submitted as part of the pleadings. However, the Supreme Court did not interpret or engage with the term. This omission is notable, as “liquidated damages” typically refer to a pre-agreed sum payable upon breach, central to contractual enforcement. The Court's focus remained on broader contractual principles rather than clarifying how such clauses function under Indian law, particularly Sections 73 and 74 of the Indian Contract Act, 1872.²⁵ As a result, the decision leaves a gap in jurisprudence on the enforceability and judicial scrutiny of liquidated damages, reducing its value as a precedent for similar cases.

The case of *Fateh Chand v Balkishan Dass*,²⁶ decided by the Supreme Court of India in 1963, is a landmark judgment that reshaped the understanding of Section 74 of the Indian Contract Act, 1872.²⁷ This section addresses the consequences of a breach of contract where a specific amount is named in the agreement either as liquidated damages or as a penalty. In this case, the dispute revolved around the forfeiture of earnest money following a breach of an agreement for the sale of immovable property. The seller (Balkishan Dass) retained a portion of the purchase money as forfeited, invoking a clause in the agreement. The buyer (Fateh Chand) challenged this forfeiture, arguing that no actual loss had been incurred by the seller, and therefore, no such amount should be retained.

The Supreme Court examined the legal position under Section 74 and emphasized that even if a contract specifies a sum payable upon breach, the role of the court is to award *reasonable compensation*, not necessarily the amount stipulated. The judgment drew a crucial distinction between liquidated damages and penalties. It stated that the Indian law does not uphold a punitive approach in civil breaches—compensation must be awarded based on actual or foreseeable loss, not as a deterrent. The Court clarified that while the requirement to prove actual loss is relaxed under Section 74, it does not authorize compensation where no legal injury or consequential loss has occurred. The provision is meant to shield the aggrieved party

²⁴ *Sir Chunnilal V. Mehta and Sons Ltd. v. The Century Spinning and Manufacturing Co. Ltd.*, AIR 1962 SC 1314 (India).

²⁵ *Contract Act*, §§73, 74.

²⁶ *Fateh Chand v Balkishan Dass*, AIR 1963 SC 1405.

²⁷ *Contract Act*, §74.

but also ensures the defaulting party is not unjustly penalized. Thus, even a forfeiture clause cannot be enforced in the absence of demonstrated loss or legal injury.

The *Fateh Chand*,²⁸ carved out a significant jurisprudential principle that shaped the future of contractual enforcement in India. By asserting that compensation must be reasonable and reflective of genuine loss, the Court ensured a fair balance between contractual certainty and equitable justice. It reaffirmed that contractual clauses, however clearly drafted, must operate within the bounds of statutory limitations. This case remains a guiding authority on the limitation of penalty clauses and continues to influence how courts interpret damages and forfeiture in contractual breaches.

The case of *Maula Bux v. Union of India*,²⁹ provides critical judicial insight into the enforcement of pre-stipulated compensation under Section 74 of the Indian Contract Act. The Supreme Court reaffirmed the foundational ruling in *Fateh Chand*,³⁰ underscoring that for a party to claim such a sum, there must be evidence that it either reflects a genuine pre-estimate of loss or arises from circumstances where loss is difficult to quantify. In this case, the Union of India had withheld a deposit citing contractual non-performance, but failed to demonstrate any actual loss. The Court held that, in the absence of loss or damage, the forfeiture could not be sustained. The judgment clarified that entitlement to fixed compensation requires judicial scrutiny to determine whether the stipulated sum is compensatory or punitive. Where loss is quantifiable, proof must be furnished; where it is not, a genuine pre-estimate may suffice. The Court also reaffirmed that penalty clauses—those serving to deter rather than compensate—are not enforceable, preserving the principle that damages must remain equitable and compensatory in nature.

The Supreme Court's ruling in *Union of India v. Raman Iron Foundry*,³¹ underscores a fundamental principle of contract law: a claim for damages, including liquidated damages, does not attain the status of a "sum presently due" merely by being asserted. The Court drew a clear distinction between a right to claim damages and an enforceable obligation to pay them, clarifying that the latter arises only upon acknowledgment or legal adjudication. This ruling acts as a critical check on the unilateral assertion of financial claims by government entities,

²⁸ *Id.*

²⁹ *Maula Bux v. Union of India*, AIR 1970 SC 1955 (India).

³⁰ *Fateh Chand*, AIR 1963 SC 1405.

³¹ *Union of India v. Raman Iron Foundry*, AIR 1974 SC 1265 (India).

particularly against contractors, preventing arbitrary deductions from running bills or other receivables. In reaffirming the sanctity of due process, the Court reinforced the balance of power in contractual disputes, ensuring that claims are subjected to fair determination rather than administrative fiat.

In *Kamaluddin Ansari & Co. v. Union of India*,³² the Supreme Court revisited and overruled its earlier decision in *Raman Iron Foundry*,³³ thereby reshaping the legal principles governing the government's right to recover contractual claims. In *Raman Iron Foundry*,³⁴ the Court had held that a claim for damages did not constitute a "sum presently due," and hence could not be the basis for withholding or appropriating payments owed to the contractor. This position placed a limitation on the government's right to recover amounts unless the claim had been accepted by the other party or adjudicated in proper judicial forum. However, in *Kamaluddin Ansari*,³⁵ the Court departed from this restrictive interpretation and held that the Union of India is legally entitled to appropriate amounts presently due, or that may become due, to a contractor under the same or even other contracts, for the purpose of recovering sums it claims as payable, such as liquidated damages.

This ruling is significant because it affirms that the government may exercise such a right to recover even in the absence of admission by the other party or formal determination of those claims in an appropriate judicial forum. It reflects the Court's recognition of the unique position of the State in contractual arrangements and its need to safeguard public funds. By allowing unilateral appropriation of sums based on a mere claim—without awaiting admission by the other party or adjudication by proper judicial forum—the Court effectively empowered the government to act swiftly in protecting its financial interests in complex, multi-contractual arrangements.

In *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*,³⁶ the Supreme Court clarified a critical aspect of Indian contract law: that liquidated damages clauses, when representing a genuine pre-estimate of loss, are enforceable even in the absence of proof of actual damage. Although the case is widely noted for broadening the "public policy" ground under Section 34

³² *Kamaluddin Ansari & Co. v. Union of India*, AIR 1984 SC 29 (India).

³³ *Raman Iron Foundry*, AIR 1974 SC 1265.

³⁴ *Raman Iron Foundry*, AIR 1974 SC 1265.

³⁵ *Kamaluddin Ansari & Co.*, AIR 1984 SC 29.

³⁶ *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705.

of the Arbitration and Conciliation Act, 1996,³⁷ its enduring legal contribution lies in reaffirming the utility of liquidated damages provisions, particularly in large-scale infrastructure and public utility contracts where quantifying loss may be impractical or impossible.

The dispute concerned ONGC's withholding of amounts under a liquidated damages clause due to delayed supply of casing pipes by Saw Pipes Ltd., which attributed the delay to a strike at a foreign manufacturing facility. The arbitral tribunal found in favour of the supplier, holding that ONGC had not established actual loss. The Supreme Court, however, set aside the award, holding that the tribunal had failed to apply Section 74 of the Indian Contract Act, 1872.³⁸ It reiterated that in contracts where parties have agreed to a reasonable pre-estimate of damages, such an amount may be enforced without proof of actual loss, unless it is shown to be penal in nature.

In paragraph 67 of the judgment, the Court made a particularly noteworthy observation that continues to shape contract law and public project enforcement:

In certain contracts, it would be impossible to prove the actual damage or loss suffered by the party. In such circumstances, if the parties have pre-estimated such loss and agreed to pay the same, there is no reason to deny the same. For example, in a road or bridge work, it would be very difficult to prove how much loss is suffered by the State or public if there is delay in completing the work. Similarly, in a contract for supply of machinery for a factory, if there is delay... and if the factory cannot commence production, it would be difficult to prove how much loss is suffered... Similarly, in the case of a contract relating to construction of a building for commercial purposes, if the possession is not given within the stipulated time, it would be difficult to prove how much loss is suffered by the owner of the building... In such circumstances, the court has to examine the terms and conditions of the contract and the intention of the parties.

This pronouncement reflects a deep commercial realism: in high-value or time-sensitive public contracts, delays frequently cause systemic or opportunity losses that defy precise calculation. Requiring strict proof in such scenarios would subvert the object of liquidated damages clauses

³⁷ The Arbitration and Conciliation Act, 1996, §34 (India).

³⁸ Contract Act, 1872, §74.

and burden parties with a near-impossible evidentiary task. The Court's approach promotes predictability, discourages delay, and upholds the integrity of negotiated risk allocation between sophisticated parties.

The *Saw Pipes* ruling has since guided tribunals and courts across a range of public and private contracts, affirming that liquidated damages—when not penal—are not merely symbolic clauses but enforceable terms that serve essential commercial and regulatory purposes. Its reasoning remains foundational to any discussion on delay, breach, and remedies in Indian contract law.

The decision of the Supreme Court in *ABL Int'l Ltd. v. Export Credit Guarantee Corp. of India Ltd.*,³⁹ affirms that the obligations of fairness, justice, and reasonableness under Article 14 of the Constitution of India⁴⁰ bind the State and its instrumentalities even in contractual matters. By holding that arbitrary repudiation of contractual claims by public authorities is subject to judicial review under Article 226 of the Constitution of India,⁴¹ the Court dissolved the formalistic boundary between private and public law in cases involving State conduct. Paragraph 23 of the judgment articulates that State entities, once party to a contract, are constitutionally obligated to act fairly—thus reinforcing that public law principles are not displaced by the commercial character of the transaction. This development in constitutional jurisprudence calls for administrative reforms to embed Article 14⁴² compliance in contractual decision-making by public bodies. Contractual instruments involving the State should incorporate procedural safeguards to avoid arbitrariness, and legal practitioners should evaluate the viability of writ remedies where constitutional norms are implicated in ostensibly private disputes.

In *Construction & Design Services v. Delhi Development Authority*,⁴³ the Supreme Court considered the extent to which stipulated damages in a contract may be treated as compensation rather than penalty, particularly in the absence of specific proof of actual loss. The case arose in the context of a public utility project, where the contractor had delayed performance. The Court underscored that in such contracts, the delay itself could be presumed to cause loss—

³⁹ *ABL Int'l Ltd. v. Export Credit Guarantee Corp. of India Ltd.*, (2004) 3 SCC. 553, (India).

⁴⁰ India Const. art. 14

⁴¹ India Const. art. 226

⁴² India Const. art. 14

⁴³ *Construction & Design Services v. Delhi Development Authority*, (2015) 3 SCC 49 (India).

most notably in the form of interest on blocked capital and environmental degradation—even if no direct evidence was led to quantify such loss. Importantly, the Court clarified that the burden to disprove the presumption of loss or to establish that the stipulated sum was in the nature of penalty rests with the party committing the breach.

As observed by the Court, “the project being a public utility project, the delay itself can be taken to have resulted in loss in the form of environmental degradation and loss of interest on the capital.” This principle marks a significant development in contract law where public interest infrastructure is involved. It reinforces that the nature of the project can justify a presumption of inherent loss due to delay, which in turn justifies awarding reasonable compensation under Section 74 of the Indian Contract Act,⁴⁴ even in the absence of detailed proof. The decision thereby reaffirms that stipulated damages in such contexts may operate as a genuine pre-estimate of loss unless successfully challenged by the breaching party.

In *M/s Kailash Nath Associates v. Delhi Development Authority & Another*,⁴⁵ the Supreme Court clarified the scope and application of Section 74 of the Indian Contract Act, 1872,⁴⁶ governing compensation for breach of contract where a liquidated damages clause or penalty is stipulated.

The Court synthesized prior authorities and observed:

[w]here a sum is named in a contract as a liquidated damage, the party complaining of a breach can receive as reasonable compensation, such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both the cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

⁴⁴ Indian Contract Act, 1872, §74.

⁴⁵ *M/s Kailash Nath Associates v. Delhi Development Authority & Another*, (2015) 4 SCC 136 (India).

⁴⁶ Contract Act, §74.

This passage highlights two principal rules. First, a stipulated sum designated as liquidated damages must be a genuine pre-estimate of loss, determined by the court, to be recoverable in full as reasonable compensation. Second, if the sum is deemed a penalty or an arbitrary amount, the court will award only reasonable compensation not exceeding the sum specified. Thus, the contractual amount serves as an upper cap, rather than an automatic entitlement.

Further, the Court clarified that the measure of “reasonable compensation” must be assessed with reference to established contract law principles, particularly those enshrined in Section 73 of the Indian Contract Act, 1872,⁴⁷ which requires proof of actual damage:

Since Section 74⁴⁸ awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a *sine qua non* for the applicability of the Section. This clarification affirms that the application of Section 74⁴⁹ is contingent upon the existence of actual damage or loss.

The Court also emphasized the symmetric application of the Section irrespective of whether the claimant is plaintiff or defendant, and whether the sum is already paid or payable in the future.

In sum, *Kailash Nath Associates*,⁵⁰ reaffirmed judicial control over contractual damages clauses, ensuring that stipulated sums are reasonable estimates of loss rather than punitive penalties, and anchoring compensation firmly in actual damage sustained.

When considered together, the rulings in *Saw Pipes*,⁵¹ *Construction and Design Services*,⁵² and *Kailash Nath*,⁵³ establish a clear legal framework regarding liquidated damages under Section 74.⁵⁴ The courts recognize that liquidated damages may be awarded even where actual loss is difficult to quantify, provided that the sum stipulated is a genuine pre-estimate of loss and some degree of loss is demonstrable. This approach allows flexibility in situations—such as public utility contracts—where precise proof of loss may be challenging. However, the

⁴⁷ Contract Act, §73.

⁴⁸ *Id.* §74.

⁴⁹ *Id.*

⁵⁰ *Kailash Nath Associates*, (2015) 4 SCC 136 (India).

⁵¹ *Saw Pipes Ltd.*, (2003) 5 SCC 705.

⁵² *Construction & Design Services*, (2015) 3 SCC 49.

⁵³ *Kailash Nath Associates*, (2015) 4 SCC 136

⁵⁴ Contract Act, §74.

courts consistently emphasize that damages must correspond to the real consequences of the breach and must not operate as a penalty. Where no loss is suffered, liquidated damages are not permissible. This principle upholds fairness in contractual remedies, ensuring that damages serve compensatory rather than punitive functions.

In *Gas Authority of India Ltd. (GAIL) v. Newton Engineering & Chemicals Ltd.*,⁵⁵ GAIL (India) Limited (the petitioner) had entered into a contract with Newton Engineering & Chemicals Ltd., (the respondent) for the supply of equipment. The contract stipulated liquidated damages for delays in delivery, calculated at 0.5% per week, subject to a maximum of 10% of the contract value. The respondent faced delays in fulfilling the contract, leading GAIL to impose liquidated damages. The respondent challenged these deductions, arguing that GAIL had waived its right to impose such damages by granting extensions without notice.

The Delhi High Court examined the contract terms, particularly clauses 29 and 30, which provided GAIL with the option to terminate the contract in case of delays. However, GAIL did not exercise this right and instead granted an unconditional extension. The Court referred to Section 55 of the Indian Contract Act, 1872, which addresses the effect of failure to perform at a fixed time. The Court noted that if the contract is voidable due to delay, and the party awarding the work has granted an extension without notice, liquidated damages cannot be imposed unless notice is given at the time of the extension. The Court also cited the case of *Simplex Concrete Piles (India) Ltd. v. Union of India*,⁵⁶ which held that rights under Section 55 cannot be waived contractually. The Court concluded that since GAIL had not given notice at the time of granting the extension, it could not levy liquidated damages for the entire 15-week delay period.

The judgment underscores the importance of adhering to contractual formalities when imposing liquidated damages. It highlights that even in the presence of a liquidated damages clause, a party may lose the right to enforce it if it waives that right by granting extensions without proper notice. This case serves as a reminder that parties must be vigilant in protecting their contractual rights and obligations.

⁵⁵ *Gas Authority of India Ltd. v. Newton Engineering & Chemicals Ltd.*, O.M.P. 288/2009, (Del HC Aug. 24, 2018) (India).

⁵⁶ *Simplex Concrete Piles (India) Ltd. v. Union of India*, CS(OS) No. 614A/2002, (Del HC Feb. 23, 2010) (India).

In *M/s. 3i Infotech Ltd. v. Tamil Nadu e-Government Agency*,⁵⁷ the Madras High Court was called upon to determine whether a contractual stipulation—namely Clause 4.1(a), read with Schedule 1 of the Master Service Agreement—amounted to liquidated damages or a penalty. Although the term “liquidated damages” was referred to as early as in *Panna Singh*, the Privy Council did not clarify its distinction from a penalty, leaving the matter unresolved. The recurrence of this issue in 2014 highlights the enduring ambiguity in Indian contract law, which stems primarily from the absence of a statutory definition of “liquidated damages” under the Indian Contract Act, 1872. This gap calls for legislative intervention to define both “liquidated damages” and “genuine pre-estimate of loss,” and to insert an explanation under Section 74 clarifying that where actual loss is difficult or impossible to quantify, a genuine pre-estimate may be enforced as liquidated damages and not treated as a penalty.

The Madras High Court, after considering judgements of the Supreme Court and various High Courts on the issue of liquidated damages, laid down the governing principles in paragraph 23 of its decision in this case. The Court clarified that for a claim of liquidated damages to be sustained, a breach must be established along with the occurrence of loss, though exact quantification may not be necessary. The Court further held that a pre-estimated sum stipulated in the contract does not automatically amount to a penalty if it bears a reasonable relationship to the anticipated loss at the time of contracting, and the burden lies on the party that has broken the contract to rebut the presumption of reasonableness.

In *Welspun Specialty Solutions Ltd. v. ONGC Ltd.*,⁵⁸ the Supreme Court reiterated that the question of whether time is of the essence in a contract must be determined by construing the contract as a whole, alongside relevant surrounding circumstances. An express clause indicating that time is essential does not automatically make it so; rather, the Court emphasized the need to evaluate the realistic intention of the parties. When a standard form contract is used, particularly by a party like ONGC with superior bargaining power, the contract is to be interpreted strictly against that party unless a contrary intention is clearly evidenced. The Court affirmed the presumption that time is not ordinarily of the essence unless the contract unequivocally states otherwise.

⁵⁷ *M/s. 3i Infotech Ltd. v. Tamil Nadu e-Government Agency*, AIR ONLINE 2019 MAD 1045 (India).

⁵⁸ *Welspun Specialty Solutions Limited v. ONGC Ltd.*, (2022) 2 SCC. 382 (India).

Additionally, the Court addressed the waiver of liquidated damages. It held that where liquidated damages were expressly waived during an initial extension of time, such damages cannot be re-imposed in subsequent extensions unless a clear contractual basis for doing so exists. The Court underscored that contractual obligations must be established in unambiguous terms, and where a party has previously waived a right, reassertion of that right requires clear acceptance by both parties. In this case, the arbitral tribunal's interpretation was found to be reasonable and not perverse, particularly given ONGC's conduct and the absence of clear contractual terms reinstating liquidated damages.

In *M/s Concrete Products & Construction Company v. Union of India*,⁵⁹ the petitioner challenged an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996,⁶⁰ principally on the ground of the wrongful imposition of liquidated damages. In paragraph 14 of its judgment, the Madras High Court delineated the settled legal principles applicable to claims for damages. The Court reiterated that a party seeking damages must establish four essential elements: (i) the existence of a contractual breach, (ii) the occurrence of loss, (iii) a causal nexus between the breach and the loss, and (iv) a reasonably certain quantification of that loss.

However, the Court acknowledged a nuanced exception in the context of liquidated damages. While the burden of proving liability remains unchanged, the requirement to prove the precise quantum of loss is relaxed, though not entirely dispensed with. Relying on the Supreme Court's decisions in *Maula Bux*,⁶¹ and *Kailash Nath Associates*,⁶² the Court emphasized that Section 74 of the Indian Contract Act, 1872,⁶³ does not permit automatic enforcement of pre-estimated damages. The claimant must still either demonstrate actual loss or establish that, owing to the nature of the contract, such loss is inherently difficult or impossible to prove.

This doctrinal position reflects a careful balance: while upholding the sanctity of contractually stipulated sums, courts must ensure such clauses do not operate punitively in disguise. Thus, Section 74⁶⁴ serves both a compensatory and a regulatory function—authorizing pre-estimated

⁵⁹ *M/s Concrete Products & Construction Company v. Union of India*, O.P. No. 185 of 2015 (Madras High Court Dec. 6, 2021) (India), <https://www.mhc.tn.gov.in/judis/>.

⁶⁰ The Arbitration and Conciliation Act, 1996, §34 (India).

⁶¹ *Maula Bux*, AIR 1970 SC 1955.

⁶² *Kailash Nath Associates*, 4 SCC 136.

⁶³ Indian Contract Act, 1872, §74.

⁶⁴ Contract Act, §74.

damages where justified, while safeguarding against their use as penalties absent sufficient evidentiary or contextual justification.

In *Veekay Prestress v. Union of India*,⁶⁵ the Delhi High Court reiterated the settled legal principles relating to liquidated damages under Section 74 of the Indian Contract Act, 1872.⁶⁶ The dispute arose from a government contract for supply of pre-stressed concrete sleepers, where delays in delivery led to invocation of a pre-estimated liquidated damages clause.

The petitioner contended that since actual loss had not been proved, the imposition of liquidated damages was arbitrary. The Court, however, held that where the contract specifies a genuine pre-estimate of damages, and the breach is established, the burden does not lie on the party imposing such damages to prove actual loss. It relied on precedents such as *ONGC v. Saw Pipes Ltd.* and *Kailash Nath Associates v. DDA*, reaffirming that liquidated damages clauses are enforceable provided they are not by nature penal and the amount stipulated is a reasonable pre-estimate of probable loss.

In *Cobra Instalaciones Y Servicios v. Haryana Vidyut Prasaran Nigam Ltd.*,⁶⁷ the JV undertaking (Cobra & Shyam Indus) was contracted to install substations under Project G-09 with a 450-day timeline and an LD clause in the event of delay. Delays occurred, partly due to Cobra and partly due to third-party vendors, triggering maximum LD imposition by HVPNL — which Cobra then contested through arbitration.

In the arbitral award dated 29 July 2020, the tribunal applied the Supreme Court-sanctioned “rough-and-ready” methodology (from *Construction & Design Services v. Delhi Development Authority*), finding that while losses were real, precise quantification wasn’t possible. It therefore granted Cobra a 50% refund of the recovered LDs, along with interest at 13% and pendente lite/future interest at 9%.

The Single Judge (May 2022) remanded this refund for reconsideration, rejecting arbitrary apportionment. On appeal under Section 37, the Division Bench reinstated the award — acknowledging that honest guesswork is permissible when discernible evidence shows loss but

⁶⁵ *Veekay Prestress v. Union of India*, 2023 SCC OnLine Del 3205 (India).

⁶⁶ Contract Act, §74.

⁶⁷ *Cobra Instalaciones Y Servicios v. Haryana Vidyut Prasaran Nigam Ltd.*, 2021 SCC OnLine Del 3644 (India).

granular proof is lacking. The Court emphasized that such estimation tools are fully backed by Supreme Court precedent and appropriate here.

Despite the High Court's affirmation, the July 2020 arbitral award remains suspended because of a pending SLP (C) No. 6978/2016 filed by HVPNL, which directly challenges the award's methodology and LD calculations. The Supreme Court has stayed the award, and until that SLP is resolved, both the award and the High Court's decision remain unenforceable.

While the decision does not lay down a new legal principle, it consolidates existing jurisprudence by applying it to a factual scenario involving public procurement contracts. It underscores the courts' consistent approach in enforcing such clauses when drafted with clarity and in the absence of *mala fide* or arbitrariness.

The decision reflects a clear judicial position that liquidated damages clauses are not self-executing entitlements. Even in commercial contracts where such clauses are routinely included, courts will not uphold them in the absence of actual loss or a clear, contract-specific reason for the inability to prove loss. The judgment reaffirms the need for factual and legal substantiation before granting relief based on predetermined damages. It also confirms that arbitrators are expected to apply the same legal standards that courts would, particularly in matters involving substantive contractual rights.

In *M/s R.B. Enterprises v. Union of India*,⁶⁸ the petitioner contested the deduction of Rs. 10,000 per day as liquidated damages for project delay under a government contract. The employer imposed this deduction unilaterally, without proving actual loss or initiating adjudication. The petitioner argued that the amount was penal and unenforceable.

The Delhi High Court held that liquidated damages must reflect a genuine pre-estimate of loss under Section 74 of the Indian Contract Act, 1872. The Court emphasised that such amounts cannot be deducted automatically, proof of breach and loss, or at least a reasonable estimate is necessary. Unilateral imposition, the Court stated, is impermissible without adjudication.

The Court set aside the deduction, finding no evidence of actual loss or justification for the fixed sum. It reaffirmed that even stipulated damages require legal scrutiny and cannot bypass

⁶⁸*M/s R.B. Enterprises v. Union of India*, OMP (COMM) No. 115/2022, (Delhi HC Dec. 18, 2023) (India).
<https://indiankanoon.org/doc/151676970/>.

due process.

In *VR Dakshin Pvt. Ltd. v. SCM Silks Pvt. Ltd.*,⁶⁹ the dispute arose from a lease agreement signed in September 2018 for retail space in the VR Chennai Mall. The tenant SCM Silks terminated the lease prematurely during the 36-month lock-in period, prompting VR Dakshin to invoke Clause 4.3—drafted as a liquidated damages clause—and initiate arbitration. The sole arbitrator awarded approximately ₹11.88 crore in damages plus interest. SCM Silks challenged the award under Section 34, arguing firstly that Clause 4.3 did not constitute a genuine pre-estimate of loss and that VR Dakshin failed to prove actual loss or mitigation efforts.

The Madras High Court, in its November 26, 2024 decision under O.S.A. (CAD).62/2023, found Clause 4.3 to indeed be a liquidated damages provision but reinforced well-settled legal principles requiring claimants to prove both that the clause represented a genuine pre-estimate and that actual loss had occurred—along with evidence of mitigation efforts. VR Dakshin failed to prove any actual loss and did not mitigate damages by attempting to re-let the premises after repossession on November 12, 2019. Accordingly, the award was set aside on these grounds, alongside unrelated challenges to the arbitrator's appointment.

The case was then appealed to a Division Bench, which quashed the impugned order and remanded the matter back to the Single Judge to reconsider the merits—particularly the quantification of damages—while also addressing allegations of improper arbitrator appointment. There is no record of further appeal to the Supreme Court, so the matter remains unresolved at the Madras High Court stage.

While this case does not introduce new legal principles, it is highly relevant to discussions on enforcing liquidated damages in infrastructure contracts. The judgment reaffirms that even with a liquidated damages clause, parties must satisfy dual criteria: a genuine pre-estimate of loss and proof of actual loss plus mitigation. This stringent approach—parallel to rulings like *Saw Pipes*⁷⁰ and *Kailash Nath*⁷¹—applies universally, whether in commercial leases or large-scale infrastructure projects.

⁶⁹ *VR Dakshin Pvt. Ltd. v. SCM Silks Pvt. Ltd.*, Madras High Court, O.S.A. (CAD) 62/2023, Order dated 26 November 2024 (India).

⁷⁰ *Saw Pipes Ltd.*, (2003) 5 SCC 705.

⁷¹ *Kailash Nath Associates*, 4 SCC 136.

In *Vishnu Devaba Sabale v. [Plaintiff Name unavailable]*,⁷² the Bombay High Court (Order dated 31 January 2025) examined a clause requiring double the earnest money as liquidated damages if the seller failed to execute a land sale deed. The seller had sold the land to the third party instead.

The Court applied Section 74 of The Indian Contract Act, 1872,⁷³ and reduced the awarded amount from Rs. 6,01,000 to Rs. 3,00,000, holding that liquidated damages must be reasonable and reflect a genuine pre-estimate of loss. Courts, it reiterated, may reduce excessive or penal amounts.

As this is a recent ruling, it is not yet known whether it has been appealed to the Supreme Court. The judgement reinforces that liquidated damages clauses are not automatically enforceable and must be evidence based, a key point in infrastructure and commercial contracts.

In *Sahakarmaharshi Bhausaheb Thorat Sahakari Sakhar Karkhana Ltd. v. Thyssen Krupp Industries India Pvt. Ltd.*,⁷⁴ the Supreme Court reaffirmed that under Section 74,⁷⁵ liquidated damages clauses are enforceable without requiring proof of actual loss, so long as the stipulated sum is not punitive and represents a reasonable pre-estimate of potential harm. The Court emphasized that once such a clause is invoked, parties are confined to the agreed compensation, irrespective of actual damages.

The Court also clarified that loss or damage must have occurred, even though quantification may be impracticable; it upheld that Section 74 doesn't permit unjust enrichment when no injury exists.⁷⁶

In *Consolidated Construction Consortium Ltd. v. Software Technology Parks of India*,⁷⁷ the Supreme Court addressed whether liquidated damages (LD) can be imposed despite extensions of time (EoT) and clarified the limited scope of judicial review under Sections 34 and 37 of the

⁷² *Vishnu Devaba Sabale v. [Plaintiff]*, Bombay High Court (India), Order dated Jan. 31 2025, summarised at RawLaw.In.

⁷³ Contract Act, §74.

⁷⁴ *Sahakarmaharshi Bhausaheb Thorat Sahakari Sakhar Karkhana Ltd. v. Thyssen Krupp Industries India Pvt. Ltd.*, Civil Appeal No. 3194 of 2014, 2025 INSC 219 (SC) (decided Feb. 14, 2025) India.

⁷⁵ Contract Act, §74

⁷⁶ *Id.*

⁷⁷ *Consolidated Construction Consortium Ltd. v. Software Technology Parks of India*, (2025) 1 SCC 574 (India).

Arbitration and Conciliation Act, 1996.⁷⁸ The dispute arose after Software Technology Park of India (STPI) deducted LD from Consolidated Construction Consortium Ltd. (CCCL) despite granting multiple EoTs. The arbitral tribunal upheld this deduction; a Single Judge set aside the award, concluding EoT extinguished LD liability; a Division Bench reinstated it under Section 37;⁷⁹ and CCCL appealed to the Supreme Court.

The Court held that EoT does not extinguish the right to levy LD where (i) the contract expressly reserves LD even post-EoT and (ii) contemporaneous notice is issued—consistent with paragraph 3 of Section 55 of the Indian Contract Act, 1872,⁸⁰ which preserves the promisee's right to compensation where performance is accepted after the agreed time provided notice is given. LD, being a genuine pre-estimate, survives EoT. It emphasized that Section 34 limits review to statutory grounds such as fraud, illegality, or public policy; courts cannot overturn a “possible and plausible” arbitral interpretation. Under Section 37, appellate scrutiny is even narrower—the Division Bench rightly corrected only the jurisdictional overreach of the Single Judge without re-examining merits.⁸¹

The Supreme Court accordingly dismissed CCCL's appeal, affirming that arbitral awards based on legally plausible contract interpretations must stand absent specific statutory grounds for interference. The ruling confirms that express EoT-with-LD reservation clauses are enforceable, underscores judicial restraint under Sections 34 and 37, and reinforces contractual certainty and arbitration finality.⁸²

5.2 Findings

Based on a rigorous analysis of statutory provisions and judicial pronouncements by India's superior courts, the following findings have crystallised: first, the prevailing jurisprudence demonstrates that courts steadfastly prioritise the plain meaning of contractual stipulations on liquidated damages, yet neither tolerate clauses manifestly penal in nature—as such provisions are routinely struck down or relegated to liquidated damages under established principles; second, superior courts consistently confront and reject unrealistic or unconscionable assessments of pre-estimate, deeming them contrary to commercial fairness; third, when

⁷⁸ The Arbitration and Conciliation Act, 1996, §§34, 37 (India).

⁷⁹ *Id.* §37.

⁸⁰ Contract Act, §55.

⁸¹ The Arbitration and Conciliation Act, 1996, §37 (India).

⁸² The Arbitration and Conciliation Act, 1996, §§34, 37 (India).

statutory safeguards (such as The Code of Civil Procedure, 1908 provisions⁸³ and Sections 73–74 of the Indian Contract Act, 1872⁸⁴) are invoked, courts have frequently undertaken a substantive inquiry into proportionality, refusing to uphold clauses that impose exorbitant penalties unlinked to actual loss; and finally, judicial decisions reveal systemic delays in enforcement, with superior courts often remanding matters for fresh determination, thereby prolonging disputes and increasing judicial burden. Together, these findings underscore that while liquidated damages clauses enjoy contractual sanctity, their enforceability remains contingent on their alignment with legal standards of reasonableness, non-penalty, and procedural efficacy endemic to India's commercial jurisprudence.

1. Persistent Time Overruns and Contractual Uncertainty

Delays in public infrastructure projects remain endemic. Contractual clauses that state "time shall be considered as the essence of the contract" often lose legal potency when the employer accepts delayed performance without issuing notice under Section 55 of the Indian Contract Act, 1872.⁸⁵ This legal nuance, though frequently overlooked during project execution, severely weakens subsequent claims for compensation. Uniform contract administration protocols are lacking across agencies.

2. Ambiguity Around “Liquidated Damages” Persists

The term “liquidated damages” continues to be judicially interpreted without statutory definition under Indian law. Although the term has been recognised since *Bhai Panna Singh*,⁸⁶ its practical application remains contingent on judicial assessment. This legal uncertainty frequently leads to avoidable litigation, undermining the predictability and deterrent value such clauses are intended to ensure in engineering and procurement contexts.

3. Section 74:⁸⁷ Emphasis on Reasonableness over Labels

Courts have repeatedly clarified that the enforceability of a stipulated sum hinges not

⁸³ The Code of Civil Procedure, 1908 (India).

⁸⁴ Contract Act, §§73, 74.

⁸⁵ *Id*, §55.

⁸⁶ *Bhai Panna Singh*, AIR 1979 PC 179.

⁸⁷ Contract Act, §74.

on nomenclature but on whether the sum represents a reasonable pre-estimate of loss. As affirmed in *Fateh Chand*,⁸⁸ *Maula Bux*,⁸⁹ and *Kailash Nath*,⁹⁰ even where the parties term a sum “liquidated damages,” courts scrutinise its proportionality to anticipated loss. This judicial stance supports fairness but complicates enforceability, particularly where actual loss is hard to quantify.

4. Public Utility Projects Justify Presumption of Loss

In infrastructure contracts with public impact, such as roads, bridges, or utilities, the Supreme Court has recognised that delay inherently causes unquantifiable losses. *Construction & Design Services*⁹¹ and *Saw Pipes*⁹² provide the doctrinal basis for accepting a rebuttable presumption of loss in such cases. This principle aligns with engineering realities, where delays cause systemic disruption, blocked capital, and opportunity loss.

5. Enforcement Must Respect Due Process

The overruling of *Raman Iron Foundry* by *Kamaluddin Ansari* expanded the government's right to appropriate amounts under different contracts.⁹³ However, judgments such as *R.B. Enterprises*⁹⁴ and *Concrete Products*⁹⁵ reaffirm that such powers are not absolute. Unilateral deductions without adjudication, mutual agreement, or contractually preserved rights are liable to be set aside. Public authorities must, therefore, exercise restraint and procedural discipline when enforcing LDs.

6. Waiver through Extensions Without Notice is Fatal

Consistent with Section 55⁹⁶ and decisions such as *GAIL v. Newton Engineering*⁹⁷ and

⁸⁸ *Fateh Chand*, AIR 1963 SC 1405.

⁸⁹ *Maula Bux*, AIR 1970 SC 1955.

⁹⁰ *Kailash Nath Associates*, 4 SCC 136.

⁹¹ *Maula Bux*, AIR 1970 SC 1955

⁹² *Saw Pipes Ltd.*, (2003) 5 SCC 705.

⁹³ *Kamaluddin Ansari & Co. v. Union of India*, (1983) 4 SCC 417, overruling *Union of India v. Raman Iron Foundry*, (1974) 2 SCC 231.

⁹⁴ *M/s R.B. Enterprises*, OMP (COMM) No. 115/2022, (Delhi HC Dec. 18, 2023), <https://indiankanoon.org/doc/151676970/>.

⁹⁵ *M/s Concrete Products & Construction Company*, O.P. No. 185 of 2015 (Madras High Court Dec. 6, 2021) (India), <https://www.mhc.tn.gov.in/judis/>.

⁹⁶ Contract Act, §55.

⁹⁷ *Gas Authority of India Ltd.*, O.M.P. 288/2009, (Del High Court Aug. 24, 2018).

Welspun v. ONGC,⁹⁸ it is well settled that granting extensions of time without contemporaneous notice of intent to levy damages constitutes a waiver. Many contract administrators fail to issue such notice, resulting in legally untenable deductions. This calls for improved contract management protocols at the engineering and administrative levels.

7. Role of Arbitral Tribunals and Judicial Deference

Arbitrators are expected to apply the same legal standards as courts while assessing liquidated damages. In *Cobra v. HVPNL*⁹⁹ and *Consolidated Construction v. STPI*,¹⁰⁰ tribunals applied rough estimations where exact quantification was impractical. Courts have largely upheld such findings, provided they were reasonable and free from perversity. This promotes finality and reduces judicial interference under Sections 34 and 37 of the Arbitration and Conciliation Act, 1996.¹⁰¹

8. Proof of Loss and Mitigation Remain Central

While courts accept that exact quantification is sometimes impractical, they continue to require proof that some form of loss has occurred. In *VR Dakshin v. SCM Silks*, the claim failed because the claimant neither proved loss nor showed mitigation efforts.¹⁰² This underscores that even when LD clauses are valid, actual harm and reasonable mitigation remain necessary to sustain claims.

9. Standard Form Contracts and Unequal Bargaining Power

In public infrastructure contracts, one party—typically the employer—drafts standardised terms. *Welspun v. ONGC* reiterates that such terms must be interpreted strictly against the drafting party.¹⁰³ From a legal and engineering perspective, this places a duty on public authorities to ensure clarity, fairness, and enforceability in the clauses they impose, especially concerning extensions of time and LDs.

⁹⁸ *Welspun Specialty Solutions Ltd.*, (2022) 2 SCC 382.

⁹⁹ *Cobra*, 2021 SCC OnLine Del 3644.

¹⁰⁰ *Consolidated Construction Consortium Ltd.*, (2025) 1 SCC 574.

¹⁰¹ The Arbitration and Conciliation Act, 1996, §§34, 37.

¹⁰² *VR Dakshin*, Madras High Court, O.S.A. (CAD) 62/2023, order dated 26 November 2024.

¹⁰³ *Welspun*, (2022) 2 SCC 382.

10. Legislative Gaps Invite Recurrent Litigation

The absence of a statutory definition for “liquidated damages” or “genuine pre-estimate of loss” leads to varied judicial interpretation. The Madras High Court’s recommendation in *3i Infotech v. TNeGA* underscores the need for legislative intervention.¹⁰⁴ Standardisation would help engineers and administrators understand the legal implications of delay and incorporate enforceable, fair clauses.

11. Judicial Position: LD Clauses Are Not Automatic Entitlements

From *Maula Bux*¹⁰⁵ to *Vishnu Devaba Sabale*,¹⁰⁶ courts have consistently held that LD clauses are not self-executing. Deduction without breach or without even an attempt to assess actual or presumed loss is legally impermissible. Contractual certainty demands that public authorities document delay, loss (or its impracticability), and compliance with statutory requirements.

12. Sector-Specific Realities Must Guide Enforcement

Enforcement of LDs in public infrastructure contracts must reflect the realities of execution—third-party dependencies, funding delays, shifting administrative approvals, and terrain-specific challenges. Courts increasingly appreciate these sectoral challenges but hold that only those breaches which cause actual or presumed loss can trigger LD recovery. Employers must be circumspect in invoking these clauses and ensure proper evidence exists to support them.

6. RECOMMENDATIONS

The preceding analysis highlights persistent ambiguity in the legal treatment of liquidated damages under Indian contract law, especially in public infrastructure projects. Sections 55 and 74 of the Indian Contract Act, 1872,¹⁰⁷ though central, remain outdated and imprecise. Judicial decisions have attempted to clarify these provisions—especially in *Fateh Chand*,¹⁰⁸ *Saw*

¹⁰⁴ *3i Infotech. Ltd.*, AIR ONLINE 2019 MAD 1045.

¹⁰⁵ *Maula Bux*, AIR 1970 SC 1955.

¹⁰⁶ *Vishnu Devaba Sabale*, Order dated Jan. 31 2025, summarised at RawLaw.In.

¹⁰⁷ Contract Act, §§55, 74.

¹⁰⁸ *Fateh Chand*, (2003) 5 SCC 705.

Pipes,¹⁰⁹ and *Kailash Nath*¹¹⁰—but the lack of statutory guidance continues to create uncertainty. Legislative and contractual reforms are essential to reduce disputes, align statutory language with jurisprudence, and enhance enforceability.

6.1 Legislative Clarification: Objectives

The current language of Sections 55 and 74 of the Indian Contract Act, 1872,¹¹¹ fails to provide clear statutory guidance on the enforceability of liquidated damages clauses, particularly in scenarios involving condonation of delay or absence of actual loss. This ambiguity often leads to inconsistent judicial outcomes and protracted litigation.

Legislative intervention is required to clarify the status of such clauses and establish parameters that reflect commercial reality and judicial reasoning. Specifically, amendments should pursue the following objectives:

- a) Codify enforceability of liquidated damages as genuine pre-estimates of loss;
- b) Clarify compensation rights under Section 55 where delay is accepted with notice;
- c) Define operative terms to reduce interpretational ambiguity; and
- d) Balance party autonomy with judicial discretion to ensure fair outcomes.

6.2 Amendment to the Paragraph 3 of Section 55

To resolve ambiguity around delayed performance, Section 55¹¹² should be amended to allow recovery of agreed damages where timely notice is given and the sum represents a genuine pre-estimate of loss:

If, in the case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by such non-performance unless, at the time of such acceptance, the promisee gives notice of

¹⁰⁹ *Saw Pipes*, 5 SCC 705.

¹¹⁰ *Kailash Nath Associates*, 4 SCC 136.

¹¹¹ Contract Act, §§55, 74.

¹¹² Contract Act, §55.

his intention to [recover the sum named in, or ascertained from, the contract by way of liquidated damages representing a genuine pre-estimate of the damage or loss likely to be suffered due to the breach].

This would confirm that stipulated sums can be recovered even if performance is accepted after the deadline, provided notice is served.

6.3 Amendment to Section 74

Section 74¹¹³ allows recovery of reasonable compensation regardless of proof of actual loss, but does not clearly establish the status of liquidated damages clauses. The following amendment provides definitional clarity while retaining the section's equitable framework:

When a contract has been broken, if a sum is named in [, or ascertained from,] the contract as the amount to be paid [by way of liquidated damages which represent a genuine pre-estimate of damage or loss suffered by the promisee] in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named [or ascertained,] or the penalty stipulated for.

Explanation: — A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception: — When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Central Government or any State Government, for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein. The person who enters into such contract shall be liable, whether or not actual damage or loss is proved to have been caused by such breach.

¹¹³ Contract Act, §74.

[Explanation: — “Liquidated damages” mean a sum named in, or ascertained from, the contract at the time of its formation, which represents a genuine pre-estimate of the loss or damage likely to be suffered by the party not in breach, in the event of a breach of contract by the other party.

Explanation: — A genuine pre-estimate of loss or damage is an amount determined in advance by the parties, acting with commercial prudence and foresight, having regard to the nature of the contract, its subject matter, and the probable consequences of a breach. It need not be precise but must bear a rational and proximate relation to the anticipated loss or inconvenience likely to be suffered by the non-breaching party.

Explanation: — “Reasonable compensation” means compensation, not exceeding the sum named in the contract, awarded to the party not in breach, where loss or damage is shown to have occurred or is likely to occur as a direct consequence of the breach. It must be fair and proportionate, having regard to the nature of the breach and the conduct of the parties.

Explanation: — The expression “penalty” includes any sum that is disproportionately high and not a genuine pre-estimate of the probable loss or damage likely to be suffered by the aggrieved party.]

This amendment will harmonize judicial interpretations with statutory text, reducing litigation over enforceability.

6.4 Model Liquidated Damages Clause for Infrastructure Contracts

To improve contractual certainty, a standard liquidated damages clause should be included in public infrastructure agreements. The following model ensures consistency and reflects best practices in line with judicial pronouncements:

Clause 18 – Liquidated Damages

18.1 Liability for Delay

If the Contractor fails to complete the Works within the stipulated time or any approved extension, the Contractor shall pay liquidated damages to the Employer at 0.1% of the

Contract Value per day of delay, up to a maximum of 10%. The amount is recoverable without proof of actual loss, compensating for blocked capital and other delay-related impacts.

18.2 Pre-Estimate of Loss

The stated sum is a genuine pre-estimate of expected loss, including loss of benefits, cost escalations, overheads, and idle resources. It is not penal but a reasonable compensation determined at contract formation.

18.3 Recovery

The Employer may recover liquidated damages from:

- a) Amounts due under this or any other contract; or
- b) The Performance Security or retention monies.

Separate notice is unnecessary if the liability is conveyed in the extension-of-time approval.

18.4 Without Prejudice to Other Remedies

The Contractor's liability to pay liquidated damages does not relieve it from completing the work or prevent the Employer from invoking other contractual or legal remedies.

18.5 Legal Interpretation

This clause shall be interpreted in accordance with Section 74 of the Indian Contract Act, 1872,¹¹⁴ and applicable Supreme Court judgments. The stipulated sum shall be presumed reasonable compensation unless the Contractor proves that no loss was incurred.

The above recommendations collectively seek to harmonise statutory language, judicial reasoning, and practical exigencies in public infrastructure contracting. By proposing targeted

¹¹⁴ Contract Act, §74.

legislative amendments and a model contractual clause, this paper aims to mitigate recurring disputes over enforceability and scope of liquidated damages. A coherent and updated legal framework—both in statute and in standard contracts—will strengthen project delivery mechanisms and reduce litigation. The concluding section reflects upon these insights to offer a cohesive summary and future outlook.

7. CONCLUSIONS

India's ambition to become the world's third-largest economy by 2028 is both bold and attainable. Central to this vision is the efficient and timely execution of public infrastructure projects, which are vital to long-term economic growth. Yet, persistent delays in these projects—and in strategic sectors like defense procurement—point to a systemic malaise: institutional tolerance for slippages, diluted accountability, and legal ambiguities that impair enforcement of contractual timelines.

1. Although most infrastructure contracts declare that “time shall be considered as the essence of the contract”, this often functions as symbolic rather than enforceable language. The routine inclusion of extension of time (EoT) provisions, coupled with automatic imposition of liquidated damages (LD), tends to blunt the intended rigidity of contractual deadlines. This creates a dichotomy between formal contractual stipulations and the practical conduct of the parties, a factor that frequently influences arbitral and judicial outcomes.
2. Indian courts and arbitral tribunals generally consider the surrounding circumstances and parties' conduct in delay disputes, thereby turning what should be strict timelines into negotiable milestones. In the absence of deliberate delay or gross negligence, tribunals are hesitant to impose strict liability. While this discretionary approach may appear equitable, it reduces legal predictability and weakens the deterrent effect of LD provisions.
3. Where contracts explicitly stipulate “time shall be considered as the essence of the contract”, the employer is faced with a binary choice upon breach: terminate the agreement or accept delayed performance. However, courts have consistently held that if the employer accepts delayed performance without expressly reserving the right to claim damages, that right is generally deemed waived. This principle

underlines the importance of both precise contract drafting and careful procedural conduct during execution.

4. For LD recovery to be upheld, the clause must specify a fixed or ascertainable amount, mutually accepted as a genuine pre-estimate of loss at contract forming. Courts and arbitral tribunals typically uphold such clauses when freely negotiated between parties of equal bargaining power. However, greater judicial scrutiny is applied where the contract involves the State or its instrumentalities, especially under standard-form agreements, owing to the inherent asymmetry in bargaining power.
5. Government contracts attract an added layer of scrutiny under Article 14 of the Constitution,¹¹⁵ which mandates fairness, reasonableness, and non-arbitrariness in public dealings. This constitutional overlay complicates LD enforcement in public contracts. Courts have struck down or modified LD clauses where they are found to be penal, excessively harsh, or unsupported by actual loss. Even arbitral awards are not immune, with courts setting them aside on grounds of 'patent illegality,' thereby eroding finality in LD adjudication.
6. This pervasive judicial oversight—though rooted in equity—carries practical consequences. It generates legal uncertainty, undermines the efficiency gains intended by the Arbitration and Conciliation Act, 1996,¹¹⁶ and draws public authorities into prolonged litigation despite the presence of standard LD clauses. Such outcomes deter private participation in public projects and erode the effectiveness of alternative dispute resolution.
7. To remedy this, legislative reform is warranted—particularly in the third paragraph of Section 55 and in Section 74 of the Indian Contract Act, 1872.¹¹⁷ These provisions should be amended to clarify the consequences of accepting delayed performance without reservation and to reinforce enforceability of LD clauses

¹¹⁵ India Const. art. 14

¹¹⁶ The Arbitration and Conciliation Act, 1996, §§34, 37 (India).

¹¹⁷ Contract Act, §§55, 74.

where they reflect a genuine pre-estimate of loss. Codifying these principles, as developed through judicial interpretation, would reduce ambiguity and litigation.

8. In support of these reforms, a model liquidated damages clause has been proposed to guide public procurement contracts. Its aim is to strike a balance between legal certainty and procedural fairness. If adopted across infrastructure sectors, such a clause could bring consistency to contract enforcement, reduce avoidable disputes, and signal a renewed governmental commitment to efficiency and accountability in public contracting.
9. Ultimately, achieving India's infrastructure and economic goals will require the legal and institutional framework to evolve alongside execution capabilities. It is no longer sufficient to rely on boilerplate clauses or aspirational timelines. Contracts must be backed by credible enforcement mechanisms and institutional discipline that make delays costly and compliance worthwhile.
10. Only through such integrated legal, procedural, and institutional reforms can the principle that "time shall be considered as the essence of the contract" regain its enforceable character in Indian contract law—aligning legal practice with India's development vision and restoring confidence in its infrastructure delivery system.

8. SCOPE FOR FURTHER RESEARCH

While this study has primarily examined the legal and procedural challenges associated with the imposition and recovery of liquidated damages by the Employer in cases of Contractor's default, the reciprocal dimension of contractual breach—where delay or disruption is attributable to the Employer—warrants independent scrutiny. In such instances, Contractors typically pursue claims for prolongation costs, encompassing a range of heads including, but not limited to, price escalation, loss of profit, loss of opportunity, idling of resources, extended site and head office overheads, interest (pre- and post-reference), and legal costs. These claims, although arising from breach, invoke a distinct set of legal and evidentiary considerations, particularly in relation to causation, quantification, and concurrency of delay.

A comprehensive analysis of such Contractor's claims—both in arbitral practice and judicial interpretation—would complement the present study and contribute to a more balanced

understanding of contractual remedies in public infrastructure projects. The authors are currently engaged in a follow-up study addressing this aspect, with a view to examining prevailing standards for assessment of prolongation claims and identifying potential reforms to improve consistency and fairness in adjudication.

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