
THE LEGAL ARCHITECTURE OF INFRASTRUCTURE DISPUTES IN INDIA: ARBITRATION, CONTRACTS, AND STATUTORY REFORMS

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ABSTRACT

This paper examines the complex legal framework governing the adjudication of delay and cost-overrun claims within the Indian infrastructure sector. It provides a comprehensive analysis of the statutory backbone anchored by the Arbitration and Conciliation Act, 1996, which equips arbitral tribunals with the procedural flexibility and expert integration necessary to resolve highly technical construction disputes within strict statutory timelines. The study further explores the substantive evaluation of financial remedies, unliquidated damages, and liquidated damages under Sections 55, 73, and 74 of the Indian Contract Act, 1872. Additionally, it highlights the critical impact of rigorous contractual notice requirements, such as those found in FIDIC standard forms, and analyses the jurisprudential tension between enforcing absolute time bars and applying India's equitable 'Prevention Principle'. The paper also assesses the transformative effects of the Specific Relief (Amendment) Act, 2018, which statutorily shields public utility projects from judicial injunctions and introduces the remedy of substituted performance. By comparing Indian practices with global common law standards in jurisdictions like the UK and Singapore, this research illustrates India's gradual transition from a history of equitable leniency toward a modern regime of strict commercial certainty and procedural rigor in infrastructure dispute resolution.

Keywords: Infrastructure Arbitration, Delay and Cost Overruns, Indian Contract Act, Specific Relief (Amendment) Act, Time Bars

INTRODUCTION

The adjudication of delay and cost-overrun claims in the Indian infrastructure sector operates at a highly complex intersection of statutory mandates, substantive contract law, and evolving institutional guidelines. As India advances its massive infrastructure pipeline, an undertaking projected to require trillions of dollars in capital investment over the coming decade, the legal architecture governing construction disputes has undergone a profound and necessary transformation.¹ Historically, traditional civil litigation proved fundamentally ill-equipped to handle the voluminous evidentiary records, technical intricacies, and commercial urgencies inherent in complex construction disputes. Consequently, the legal framework is no longer a static repository of colonial-era contract principles; rather, it has evolved into a dynamic, multi-tiered ecosystem.

This ecosystem is anchored by the procedural mechanisms of the Arbitration and Conciliation Act, 1996, driven by the substantive commercial provisions of the Indian Contract Act, 1872, and significantly recalibrated by the radical public-interest interventions introduced by the Specific Relief (Amendment) Act, 2018.² Furthermore, the increasing adoption of international standard form contracts, particularly those promulgated by the International Federation of Consulting Engineers (FIDIC), alongside the procedural guidelines established by specialised bodies such as the Indian Council of Arbitration (ICA), has introduced sophisticated mechanisms for time-barring claims, managing dispute boards, and quantifying disruption.³ This chapter provides an exhaustive, analytical exposition of this multifaceted legal framework, dissecting the statutory backbone, the contractual mechanics, the interplay of substantive laws, and the comparative jurisprudence that collectively govern the life cycle of construction claims in India.

1.1 The Statutory Backbone: The Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996 (the Arbitration Act), modelled extensively on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, serves as

¹ Prateek Jain, "Recent Amendments in Indian Arbitration and Conciliation Act" *Jus Mundi Construction Arbitration Report* (2023).

² The Specific Relief (Amendment) Act, 2018 (Act 18 of 2018).

³ FIDIC, *Conditions of Contract for Construction* (2nd edn., 2017); Indian Council of Arbitration, *Rules of Domestic Commercial Arbitration* (2024).

the primary procedural engine for resolving infrastructure disputes in India.⁴ Before its enactment, the arbitration landscape in India was governed by the Arbitration Act, 1940, a statute widely criticised for excessive judicial intervention that routinely caused arbitral proceedings to languish for decades, thereby defeating the very purpose of alternative dispute resolution.⁵ The 1996 Act was specifically designed to insulate complex commercial disputes from the chronic backlog of the Indian judiciary, offering a specialised, party-autonomous, and time-bound forum.⁶ However, the application of this statute to delay and cost-overrun claims requires a nuanced understanding of its specific provisions, including evidentiary freedom, the integration of expert testimony, strict timeline mandates, and the highly contested parameters of award enforcement.

1.1.1 Evidentiary Flexibility and the Discretion of the Arbitral Tribunal

In infrastructure arbitrations, substantiating a claim for prolongation costs or loss of profitability necessitates the submission of complex forensic scheduling data, Critical Path Method (CPM) delay analyses, and an enormous volume of contemporaneous records, including daily site logs, hindrance registers, and iterative correspondence.⁷ Section 19 of the Arbitration Act is a critical procedural enabler in this context.⁸ Section 19(1) explicitly dictates that the arbitral tribunal shall not be bound by the rigid, archaic strictures of the Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872.⁹

This legislative emancipation from traditional evidentiary rules allows tribunals to adopt flexible, pragmatic procedures tailored to the unique technical demands of construction disputes. Under Sections 19(3) and 19(4), in the absence of an explicit agreement between the parties regarding procedure, the tribunal has residual discretion to conduct the proceedings in any manner it considers appropriate.¹⁰ Crucially, this includes the absolute power to determine the admissibility, relevance, materiality, and weight of any evidence produced.¹¹ In the specific context of cost overruns, this statutory flexibility means a tribunal can admit digitally generated

⁴ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

⁵ Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (August, 2014).

⁶ Prateek Jain, *supra* note 1; The Arbitration and Conciliation Act, 1996 (Act 26 of 1996),.

⁷ Nuhu Baraimah, "Construction Delay Analysis Techniques" 3 *MDPI* 506 (2013).

⁸ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 19.

⁹ *Ibid.*

¹⁰ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), ss. 19(3), 19(4).

¹¹ *Ibid.*

delay models, 4D Building Information Modelling (BIM) simulations, or productivity loss estimates that might otherwise face insurmountable procedural hurdles in a conventional civil courtroom.¹²

However, Indian jurisprudence maintains that this procedural malleability is not absolute and must not degenerate into arbitrariness. While the strict rules of evidence are bypassed, the tribunal remains rigidly bound by the fundamental principles of natural justice.¹³ The Supreme Court and various High Courts have consistently held that an arbitral award based on technical evidence, such as a unilateral delay analysis report or an opaque financial audit, without affording the opposing party a comprehensive opportunity to cross-examine the authoring expert or to submit rebuttal data, is fundamentally flawed.¹⁴ If a tribunal takes inadmissible or unverified evidence into account and uses it as the basis for an award, that award is liable to be set aside on the grounds of a gross error of law and a violation of due process.¹⁵ Furthermore, recognising that contractors often require documents held by third parties to prove a delay claim, Section 27 of the Arbitration Act allows the tribunal, or a party acting with the tribunal's prior approval, to apply to the court for direct assistance in taking evidence, compelling the production of necessary records from reluctant sub-contractors or regulatory agencies.¹⁶

1.1.2 The Integration of Domain Expertise

Infrastructure disputes rarely hinge exclusively on pure questions of contractual law; rather, they are predominantly exhaustive factual inquiries into geological surprises, unforeseen subsoil conditions, complex design variations, and cascading failures in resource mobilisation. Consequently, Section 26 of the Arbitration Act specifically empowers the arbitral tribunal to appoint one or more independent experts to report on specific technical issues designated by the tribunal.¹⁷

The integration of specialised domain knowledge is paramount for the integrity of the arbitral process. Technical issues, such as the viability of a specific piling technique, the hydrodynamics of delayed dam construction, or the cascading temporal effects of delayed

¹² Nuhu Baraimah, *supra* note 7; The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 19.,

¹³ *Hindustan Construction Co. v. Union of India*, AIR 2020 SC 122.

¹⁴ *General Manager, Northern Railways v. Sarvesh Chopra*, AIR 2002 SC 1272.

¹⁵ *Ibid.*

¹⁶ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 27.

¹⁷ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 26.

structural drawings on the project's critical path, form the focal point of the dispute.¹⁸ These technical complexities ultimately translate into massive commercial claims for unabsorbed head office overheads, idle machinery costs, and loss of expected profitability.¹⁹ If an arbitral tribunal lacks the requisite engineering, forensic scheduling, or quantum accounting acumen, it risks issuing an award that suffers from logical fallacies or technical impossibilities.²⁰ Because an arbitral award is treated as a decree and enforced with the full weight of a court order, technical soundness is critical to its survival against judicial scrutiny.²¹ Section 26 ensures that the tribunal can proactively seek independent expert assessments to bridge its own knowledge gaps. However, standard arbitral practice and Indian case law dictate that such appointed expert opinions are not binding edicts; they are pieces of evidence that must be rigorously evaluated, cross-examined, and weighed by the tribunal against the explicit contractual provisions and the counter-evidence submitted by party-appointed experts.²² Expert evidence cannot serve as a substitute for the tribunal's core adjudicatory duties.²³

1.1.3 Statutory Timelines and the Cost Regime

To counteract the historical tendency of Indian arbitrations to mimic the protracted delays of civil litigation, the legislature introduced stringent temporal and financial controls via the 2015 amendments to the Arbitration Act. Section 29A fundamentally altered the landscape by imposing a strict statutory time limit on the completion of arbitral proceedings. It mandates that an arbitral award be rendered within twelve months of the completion of pleadings, with a permissible consensual extension of six months.²⁴ If the tribunal fails to issue the award within this strict eighteen-month window, its mandate automatically terminates unless specifically extended by a competent court upon a showing of sufficient cause.²⁵ This mechanism ensures that infrastructure claims, which are highly sensitive to the time value of money and inflation, are adjudicated with the necessary commercial dispatch.

Coupled with these temporal controls is the modernised cost regime under Section 31A. Before

¹⁸ *Ibid.*

¹⁹ M.P. Ram Mohan, et al., "Liquidated Damages in India: Concepts, Enforceability, and Drafting Considerations" IIMA Working Paper 15 (2024).

²⁰ *Ibid.*

²¹ *Hindustan Construction Co. v. Union of India*, *supra* note 13.

²² The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 26.

²³ *Ibid.*

²⁴ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 29A.

²⁵ *Ibid.*

this amendment, arbitral tribunals possessed open-textured, almost unlimited discretion in awarding costs, frequently resulting in scenarios where victorious parties in complex infrastructure disputes were left bearing half of the exorbitant arbitration expenses.²⁶ Section 31A introduced a structured "costs follow the event" paradigm, mirroring international best practices.²⁷ Under this regime, the tribunal has the statutory discretion to allocate costs comprehensively, including arbitrators' fees, institutional administrative fees, and reasonable legal expenses, and to direct the unsuccessful party to reimburse the prevailing party.²⁸ When assessing costs, the tribunal is statutorily required to consider the outcome of the dispute, the conduct of the parties during the proceedings (such as dilatory tactics or frivolous counterclaims), and the overall reasonableness of the claims and defences advanced.²⁹

1.1.4 Award Finality, Judicial Review, and the Fraud Proviso

The ultimate objective of a construction contractor pursuing a delay and disruption claim is to realise and enforce the arbitral award successfully. The legal landscape governing the challenge (Section 34) and the enforcement (Section 36) of these awards has been the subject of intense legislative friction and judicial recalibration over the past decade.

Section 34 provides a highly restrictive, closed-list mechanism for setting aside an arbitral award. The Supreme Court of India has repeatedly emphasised that courts exercising their supervisory jurisdiction under Section 34 do not sit as courts of regular appeal.³⁰ They are strictly prohibited from reappreciating evidence, conducting a fresh merits review, or substituting their own interpretation of a contract for that of the arbitrator, provided the arbitrator's interpretation is a plausible one.³¹ In construction disputes involving highly contested issues such as rate escalations, overlapping concurrent delays, or the deduction of liquidated damages, if the tribunal's view is fundamentally grounded in the contractual text, judicial interference is deemed a manifest jurisdictional error.³² An award can generally be set aside only if it suffers from "patent illegality" appearing on its face, or if it conflicts

²⁶ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 31A.

²⁷ Law Commission of India, 246th Report, *supra* note 5.

²⁸ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 31A.

²⁹ *Ibid.*

³⁰ *Gayatri Balasamy v. ISG Novasoft Technologies Limited*, 2025 INSC 605.

³¹ *Ibid.*

³² *Somdatt Builders NCC-NEC (JV) v. National Highways Authority of India*, 2025 INSC.

fundamentally with the "public policy of India".³³

The scope of judicial intervention was further clarified in the landmark 2025 Constitution Bench decision in *Gayatri Balasamy v ISG Novasoft Technologies*. In a complex ruling, the Supreme Court determined that while Section 34 does not confer broad appellate jurisdiction, courts do possess a highly restricted, surgical power to modify arbitral awards. This modification power allows courts to sever legally unsustainable portions of an award, correct obvious clerical or computational errors, or adjust post-award interest rates, thereby preventing the profound inefficiency of forcing parties to initiate fresh arbitration proceedings after years of litigation simply because a minor component of the award was flawed.

However, the enforcement regime governed by Section 36 remains deeply contentious, particularly following the enactment of the Arbitration and Conciliation (Amendment) Act, 2021. Before 2015, the mere act of filing a Section 34 challenge automatically stayed the execution of the arbitral award, effectively paralysing contractors who had legitimately won infrastructure claims and severely impacting their working capital. The 2015 amendment commendably abolished this automatic stay, requiring courts to grant stays conditionally, typically upon the deposit of a substantial portion of the award amount into the court registry, thereby ensuring financial liquidity for contractors during the pendency of the challenge.

This progressive stance was abruptly undermined by the 2021 Amendment, which introduced a controversial proviso to Section 36(3). This new provision dictates that if a court is satisfied that a *prima facie* case is made out that the underlying arbitration agreement, the contract, or the making of the award was induced or effected by fraud or corruption, the court is mandatorily required to stay the award unconditionally pending the final disposal of the Section 34 challenge.³⁴ While ostensibly aimed at protecting the public exchequer from collusive or corruptly obtained awards, this amendment has introduced a severe bottleneck in infrastructure arbitrations. Government employers and state-owned enterprises frequently allege systemic irregularities, generalised fraud, or corruption to secure these unconditional stays, effectively bypassing the requirement to deposit the award amount.³⁵ This "retrospective resurrection" of the automatic stay through the backdoor of fraud allegations reintroduces protracted delays in the realisation of legitimate claims, expressing a fundamental distrust of the arbitral process

³³ *Lancor Holdings v. Prem Kumar Menon*, 2025 INSC.

³⁴ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 36(3).

³⁵ *Ibid.*

and severely threatening the financial viability of construction firms operating in the Indian market.

1.2 Contractual Provisions in Infrastructure Agreements

While statutory law provides the procedural arena and the boundaries of judicial intervention, the substantive rights, obligations, and risk allocations regarding delays and cost overruns are crystallised entirely within the four corners of the construction contract. The Indian infrastructure market does not strictly mandate a singular, universally applicable standard form of contract.³⁶ Instead, projects, particularly those funded by multilateral development banks or executed under complex Public-Private Partnership (PPP) models, increasingly rely on international standard form contracts, predominantly the FIDIC (Fédération Internationale des Ingénieurs-Conseils) suite.³⁷ These global models are extensively adapted to suit local statutory conditions, resulting in a hybrid contractual environment. In contrast, domestic public works are typically governed by bespoke General Conditions of Contract (GCCs) drafted by entities such as the Central Public Works Department (CPWD) or the National Highways Authority of India (NHAI).

1.2.1 The Mechanics of Time Bars and Notice Requirements

A defining characteristic of modern, sophisticated infrastructure contracts is the strict, unforgiving procedural regime governing claim notifications. Clause 20.1 of the FIDIC Red Book (1999 edition) and its evolved successor, Clause 20.2 in the 2017 edition, establish rigorous time bars that act as the primary filter for all delay and disruption claims.³⁸ These clauses mandate that if a contractor considers itself entitled to an Extension of Time (EoT) or any additional financial payment, it must give formal written notice to the Engineer "as soon as practicable," and absolutely no later than 28 days after the date on which the contractor became aware, or reasonably should have become aware, of the relevant event or circumstance giving rise to the claim.³⁹

The fundamental commercial and project-management rationale behind this stringent provision is to eliminate the "wait and see" approach, in which contractors accumulate grievances and

³⁶ Ministry of Road Transport & Highways, *Model Concession Agreement for BOT (Toll) Projects* (2020).

³⁷ FIDIC, *Conditions of Contract for Construction* (2nd edn., 2017).

³⁸ FIDIC, *Conditions of Contract for Construction*, cl. 20.1 (1999).

³⁹ *Ibid.*

present massive, unsubstantiated global claims at the end of a project's lifecycle.⁴⁰ Early and precise notification enables the employer or the supervising engineer to investigate the factual matrix of the delay contemporaneously, deploy mitigation strategies, authorise design changes, or seek alternative execution methodologies to contain cost and time overruns.⁴¹ If the contractor fails to issue this initial notice within the stipulated 28-day window, the contractual consequence is draconian: the contract expressly provides that any claim for time or money will be permanently lost. The employer shall be fully discharged from all liability in connection with the claim.⁴²

In the 2017 suite revisions, FIDIC addressed persistent industry criticisms of unequal risk allocation by ensuring reciprocity; the 28-day mandatory notice period was explicitly extended to cover employer claims, ensuring that neither party could ambush the other with delayed financial demands.⁴³ Furthermore, the procedural burden does not end with the initial notice. This preliminary alert must be followed by a fully detailed, substantiated claim within a specified period of 42 days under the 1999 suite, which was increased to a more practical 84 days under the 2017 suite, complete with comprehensive contemporary records, critical path analyses, and quantum calculations.⁴⁴

1.2.2 Condition Precedent vs. The Prevention Principle in Indian Law

The legal interpretation and enforceability of these time-bar provisions are among the most contested and volatile areas of Indian construction jurisprudence. The debate centres on a fundamental clash between the strict sanctity of contract language and overarching equitable doctrines.

In prominent common law jurisdictions such as the United Kingdom and Singapore, courts and arbitral tribunals exhibit a strict, almost literal adherence to contractual text. In these jurisdictions, time-bar clauses are routinely upheld as absolute conditions precedent. A failure by the contractor to submit the required written notice within the stipulated timeframe unequivocally extinguishes the contractor's legal entitlement, entirely regardless of the

⁴⁰ Society of Construction Law, *Delay and Disruption Protocol* (2nd edn., 2017).

⁴¹ *Ibid.*

⁴² FIDIC, *Conditions of Contract for Construction*, cl. 20.1 (1999).

⁴³ FIDIC, *Conditions of Contract for Construction*, cl. 20.2 (2017).

⁴⁴ *Ibid.*

underlying substantive merit of the delay claim or the severity of the employer's default.⁴⁵ This rigid enforcement is viewed as necessary to preserve commercial certainty and respect the agreed allocation of risk.⁴⁶

In India, however, the jurisprudence reveals a profound tension. Indian government employers, particularly powerful entities such as the NHAI and state public works departments, frequently adopt FIDIC-inspired notice provisions but aggressively modify them in their bespoke contracts, often drastically shortening the notice period to as little as 15 days. When disputes inevitably arise, contractors frequently challenge the enforcement of these draconian time bars by invoking the 'Prevention Principle'. This deeply entrenched common law principle dictates that a party cannot benefit from its own wrongdoing; specifically, an employer cannot insist on strict adherence to a contractual completion date and thereby levy punitive liquidated damages if the employer's own actions, breaches, or omissions actually prevented the contractor from completing the work on time.⁴⁷

Contractors argue that there is a manifest legal absurdity and gross injustice in allowing an employer to benefit financially (via delay damages) from delaying its own project, simply because the contractor failed to execute the administrative token of notifying the employer about what the employer had already done (or failed to do). While international courts have occasionally ruled that clear, unambiguous contractual language overrides the implied prevention principle, Indian courts have historically taken a much more contextual and paternalistic approach, recognising the unequal bargaining power inherent in Indian government procurement.⁴⁸

Contractors frequently rely on Section 28 of the Indian Contract Act, 1872, which explicitly renders void any agreement that absolutely restricts a party from enforcing its legal rights under a contract, or extinguishes those rights on the expiry of a specified period.⁴⁹ While pure procedural time bars are generally not struck down under Section 28, Indian tribunals often utilise this statutory spirit to interpret time bars leniently. The Supreme Court of India, in a series of landmark judgments including *General Manager, Northern Railways v. Sarvesh*

⁴⁵ *Panther Real Estate Development LLC v. Modern Executive Systems Contracting LLC*, DIFC CA 016.

⁴⁶ *Ibid.*

⁴⁷ *Asian Techs Ltd. v. Union of India*, (2009) 10 SCC 354.

⁴⁸ *General Manager, Northern Railways v. Sarvesh Chopra*, AIR 2002 SC 1272. *General Manager, Northern Railways v. Sarvesh Chopra*, AIR 2002 SC 1272.

⁴⁹ The Indian Contract Act, 1872 (Act 9 of 1872), s. 28.

Chopra and Asian Techs Ltd. v. Union of India, established a critical doctrine: if a delay is fundamentally and solely attributable to the employer (e.g., failure to hand over the site, delayed statutory clearances), widely-worded exclusionary clauses or strict time bars that prohibit the grant of damages will not necessarily bind an adjudicating authority. The courts view such absolute exclusionary clauses as contrary to public policy when they allow an employer to exploit its own default.

1.3 Interplay with Substantive Contract Law: The Indian Contract Act, 1872

While the Arbitration Act and the specific contract clauses dictate the procedural flow of a dispute, the substantive assessment of breach, delay attribution, and the consequent quantification of financial remedies in Indian infrastructure arbitrations is anchored entirely in the Indian Contract Act, 1872 (ICA). Sections 55, 73, and 74 form the foundational triad upon which all claims for prolongation costs, loss of profitability, and the deduction of liquidated damages are adjudicated.⁵⁰

1.3.1 Section 55: Time as the Essence of the Contract

Section 55 of the ICA specifically addresses the legal consequences of a failure to perform a contractual promise at a fixed time.⁵¹ In the realm of construction and infrastructure, it is standard drafting practice to insert boilerplate clauses explicitly stating that "time is of the essence of the contract".⁵² However, Indian legal precedent holds that the mere inclusion of this phrase does not automatically render time of the essence under the law; the parties' conduct during the project's execution is determinative.

If time is truly held to be of the essence and the contractor fails to deliver the project by the stipulated deadline, the contract becomes voidable at the employer's absolute option. Conversely, if the employer is responsible for causing critical delays such as late handover of the unencumbered site, delayed issuance of 'Good for Construction' (GFC) drawings, or failure to secure environmental clearances, the contractor is legally entitled to an extension of time and corresponding financial damages, effectively setting time "at large".⁵³

⁵⁰ The Indian Contract Act, 1872 (Act 9 of 1872), s. 55.

⁵¹ *Welspun Specialty Solutions Ltd. v. Oil and Natural Gas Corporation Ltd.*, (2022) 2 SCC 382.

⁵² The Indian Contract Act, 1872 (Act 9 of 1872), s. 55.

⁵³ *Consolidated Construction Consortium Limited v. Software Technology Parks of India*, Civil Appeal No. 5383 of 2024 (SC, Apr. 28, 2025).

Under the second paragraph of Section 55, if the tribunal determines that the intention of the parties was that time was *not* of the essence, a delay in execution does not render the contract voidable. Instead, the promisee (the employer) remains entitled to claim compensation from the promisor (the contractor) for any financial loss directly occasioned by the delay. Crucially, however, the Supreme Court has affirmed a vital statutory safeguard within Section 55: if an employer voluntarily accepts delayed performance from the contractor (e.g., by granting repeated extensions of time), the employer cannot subsequently claim compensation for that delay unless it issues a specific, unequivocal notice of its intention to claim damages *at the very time* of accepting the delayed performance. This provision acts as a vital shield for contractors, preventing employers from retroactively levying massive penalty deductions at the final billing stage without prior warning.⁵⁴

1.3.2 Section 73: Proving Actual Loss and Unliquidated Damages

When an infrastructure project is severely prolonged due to employer-risk events, the contractor inevitably incurs massive financial haemorrhaging in the form of unabsorbed head office overheads, idle machinery costs, extended site preliminaries, and the loss of expected profits. In the absence of specific contractual rates for these losses, they are pursued as unliquidated damages under Section 73 of the ICA.⁵⁵ Section 73 limits the award of damages strictly to those that "naturally arose in the usual course of things" from the breach, or those that the parties reasonably contemplated when entering into the contract.

Indian jurisprudence places an exceedingly heavy evidentiary burden on the claimant seeking damages under Section 73. The law draws a sharp distinction between "speculative" damages and "reasonably expected" damages. A contractor cannot simply claim a loss of profit based on hypothetical projections or the theoretical possibility of securing future projects. To successfully sustain a claim for "loss of profitability" or unabsorbed head office overheads, the contractor must satisfy a stringent, multi-pronged evidentiary test: it must prove that the delay was on the critical path, that its financial and physical resources were forcefully tied up in the delayed project, and crucially, that it had actual, documented opportunities to deploy those resources on other profitable ventures but was directly prevented from doing so due to the

⁵⁴ *Ibid.*

⁵⁵ The Indian Contract Act, 1872 (Act 9 of 1872), s. 73.

employer's breach.⁵⁶

In assessing these complex unliquidated damages, arbitral tribunals frequently encounter globally recognised mathematical models presented by quantum experts, such as the Hudson, Emden, and Eichleay formulae, designed to calculate overhead losses during periods of delay. While the Supreme Court of India, in *McDermott International Inc. v. Burn Standard Co. Ltd.*, acknowledged the broad utility of these formulae, subsequent appellate rulings have significantly limited their application. For instance, in the pivotal decision of *Union of India v. Ahluwalia Contracts*, the Delhi High Court emphatically clarified that tribunals cannot simply award massive overhead losses by mindlessly plugging contract values into the Hudson formula. There must be a robust, independent evidentiary basis proving actual financial detriment, such as audited accounts showing a drop in overall company turnover directly attributable to the specific project's delay. The mechanical application of these theoretical formulae without empirical, localised data is viewed as providing a "windfall" to the contractor, constituting a patent illegality that renders the arbitral award liable to be set aside.⁵⁷

1.3.3 Section 74: Liquidated Damages and the Threshold of Public Utility

To bypass the onerous, often insurmountable evidentiary requirements for proving actual, exact loss under Section 73, infrastructure contracts universally use Liquidated Damages (LD) clauses. These clauses pre-estimate the financial compensation payable in the event of specific contractor delays. Section 74 of the ICA governs these pre-estimated damages, acting as a statutory exception to the strict requirement of proving precise mathematical loss.

Under Section 74, if a sum is named in the contract as the amount to be paid in case of a breach, the aggrieved party is entitled to receive "reasonable compensation" not exceeding the stipulated amount, "whether or not actual damage or loss is proved to have been caused thereby".⁵⁸ The Supreme Court's landmark Constitution Bench judgment in *Kailash Nath Associates v. Delhi Development Authority* radically clarified the interpretation of this phrase. The Court ruled that the expression "whether or not actual damage is proved" means that if actual loss *can* be proved, it *must* be proved. Section 74 does not permit a punitive windfall for the employer; the liquidated damages clause merely caps the upper limit of compensation, and

⁵⁶ *Union of India v. Ahluwalia Contracts (India) Ltd.*, 2024 SCC OnLine Del.

⁵⁷ The Indian Contract Act, 1872 (Act 9 of 1872), s. 74.

⁵⁸ *Kailash Nath Associates v. Delhi Development Authority*, (2015) 4 SCC 136.

the court or tribunal must still assess what constitutes "reasonable compensation" based on the actual detriment suffered.⁵⁹

However, a highly significant jurisprudential carve-out exists for public utility and large-scale infrastructure projects. In cases involving vital public assets such as the construction of national highways, bridges, or renewable energy plants under frameworks like the Jawaharlal Nehru National Solar Mission (JNNSM), the Supreme Court has recognised that project delays cause systemic, widespread prejudice to the public and the broader economy, a loss that is inherently impossible to compute or prove through standard accounting metrics mathematically. In such "public interest" contracts, the courts permit the imposition of the full quantum of liquidated damages without the strict requirement of proving actual loss.⁶⁰ This effectively shifts the burden of proof entirely onto the breaching contractor, who must affirmatively prove that their delay caused no loss whatsoever, or that the LD clause is entirely penal in nature, a nearly impossible burden to discharge in public works.⁶¹

Furthermore, the recent Supreme Court judgment in *Consolidated Construction Consortium v. Software Technology Parks of India* (2025) reaffirmed the mechanics of levying LDs during project extensions. The Court ruled that an employer can validly deduct liquidated damages even if it has granted multiple extensions of time to the contractor, provided the employer explicitly forewarned the contractor in writing that the extensions were being granted "without prejudice" to the employer's right to subsequently recover damages, thereby meticulously satisfying the notice requirement under Section 55. Conversely, as established in the *Welspun Speciality Solutions* case, if an employer repeatedly and unconditionally waives the imposition of LDs during earlier extensions, it cannot arbitrarily reimpose them during subsequent extensions without a clear, mutual contractual intention to reinstate the penalty mechanism.⁶²

1.4 Sectoral Reforms and the Specific Relief (Amendment) Act, 2018

For decades, the pace of infrastructure development in India was severely hampered by a pervasive culture of judicial intervention. Parties disgruntled by contractual breaches, impending terminations, or the encashment of performance bank guarantees would routinely approach civil courts to obtain *ex parte* interim injunctions, stalling multi-million dollar public

⁵⁹ *M/s Saisudhir Energy Ltd. v. M/s NTPC Vidyut Vyapar Nigam Ltd.*, 2026 INSC.

⁶⁰ *Ibid.*

⁶¹ *Consolidated Construction Consortium Limited v. Software Technology Parks of India*, *supra* note 201.

⁶² The Specific Relief (Amendment) Act, 2018 (Act 18 of 2018).

projects indefinitely based on preliminary grievances.⁶³ In a decisive response to this systemic bottleneck, the Indian legislature enacted the Specific Relief (Amendment) Act, 2018. This legislation instituted a profound jurisprudential paradigm shift, fundamentally altering how delay disputes evolve before and during arbitration.⁶⁴

1.4.1 Section 20A: Shielding Infrastructure from Judicial Injunctions

The most consequential reform for the construction sector introduced by the 2018 amendment is the insertion of Section 20A into the Specific Relief Act, 1963. This provision creates an absolute statutory bar, explicitly prohibiting courts from granting injunctions in any suit involving a contract related to an "infrastructure project" if it appears that granting such an injunction would cause an impediment or delay in the project's progress or completion.⁶⁵ To ensure clarity, the Act includes a comprehensive Schedule detailing the exact categories of covered infrastructure sub-sectors, encompassing transport (highways, ports), energy, water, sanitation, and communication.⁶⁶

This legislative mandate is rooted firmly in a "public interest imperative," establishing that the collective national need for timely infrastructure execution unequivocally supersedes individual commercial grievances.⁶⁷ Courts have interpreted Section 20A in conjunction with the newly added Section 41(ha), making it nearly impossible for a contractor to secure prohibitory injunctions against ongoing works, project terminations, or even the invocation of unconditional bank guarantees, absent proof of egregious fraud.⁶⁸

The second-order effect of this amendment on the arbitration landscape has been profound. Unable to stall projects through conventional civil court injunctions, disputing parties are now forcefully redirected toward arbitral forums. Contractors seeking urgent relief must invoke Sections 9 or 17 of the Arbitration Act to seek interim measures of protection from courts or arbitral tribunals specifically convened for the dispute.⁶⁹ Consequently, arbitration is no longer viewed merely as the final mechanism for resolving post-completion financial accounts; it has become the immediate, tactical battleground for managing project continuity, preventing

⁶³ *Ibid.*

⁶⁴ The Specific Relief Act, 1963 (Act 47 of 1963), s. 20A.

⁶⁵ The Specific Relief Act, 1963 (Act 47 of 1963), Schedule.

⁶⁶ *Ibid.*

⁶⁷ The Specific Relief Act, 1963 (Act 47 of 1963), s. 41(ha).

⁶⁸ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), ss. 9, 17.

⁶⁹ *Ibid.*

wrongful terminations, and preserving cash flow during active construction.⁷⁰

1.4.2 The Shift to Mandatory Specific and Substituted Performance

Before the 2018 amendment, the grant of specific performance was a highly discretionary, exceptional remedy under Indian law, with courts overwhelmingly preferring to award monetary damages for breach of contract.⁷¹ The amendment radically altered Section 10 of the Act, stripping away judicial discretion and making specific performance mandatory and enforceable, subject only to very limited exceptions.⁷²

Complementing this shift, the amendment completely overhauled Section 20 to introduce the powerful statutory remedy of "substituted performance." Under this revised framework, if a contractor fundamentally fails to perform or delays execution critically, the employer is no longer forced to endure endless litigation while the project rots. Instead, after issuing a mandatory 30-day notice to the defaulting party, the employer has the unilateral right to step in, engage a third-party agency, or use its own internal resources to complete the pending works. The employer is then legally entitled to recover the exact expenses and costs incurred during this substituted performance directly from the defaulting contractor.⁷³

This provision profoundly alters the strategic calculus of delay claims. By providing employers with a potent self-help remedy to ensure project completion, the amendment successfully mitigates the cascading time overruns that traditionally plagued Indian infrastructure. However, it simultaneously generates a new, highly complex breed of arbitral disputes. Tribunals must now meticulously assess whether a critical contractor breach genuinely justified the employer's invocation of substituted performance, whether the mandatory notice period was respected, and critically, whether the quantum of costs claimed for engaging the replacement third party was commercially reasonable and adequately mitigated.

1.4.3 Sector-Specific Contractual Frameworks: NHAI and CERC

The broader statutory framework is further customised and operationalised through sector-specific regulations and standard contracts issued by nodal government agencies. The National

⁷⁰ The Specific Relief Act, 1963 (Act 47 of 1963), s. 10.

⁷¹ The Specific Relief (Amendment) Act, 2018 (Act 18 of 2018).

⁷² The Specific Relief Act, 1963 (Act 47 of 1963), s. 20.

⁷³ *Ibid.*

Highways Authority of India (NHAI), responsible for the nation's massive road-building program, uses detailed Model Concession Agreements (MCAs) tailored to the Build-Operate-Transfer (BOT), Toll-Operate-Transfer (TOT), and Hybrid Annuity Model (HAM).

These MCAs contain highly specific mechanisms for allocating delay risks that frequently override general contract law principles. For instance, delays in the initial handover of unencumbered land or the shifting of utilities by the NHAI trigger specific "compensation events." These events legally obligate the Authority to pay damages explicitly quantified on a per-day basis, per specified land area (e.g., Rs. 50 per day per 1,000 square meters), while simultaneously mandating a proportional extension of the overall concession period. Despite these clear mechanisms, systemic delays persist, prompting the NHAI to revise its policy circulars continually. Recently, in a controversial bid to streamline its burgeoning legal liabilities, the NHAI has attempted to alter its dispute resolution policy by issuing circulars mandating a two-step process of conciliation followed by civil court adjudication for all claims exceeding ₹10 crore, effectively attempting to exclude arbitration entirely a move that fundamentally tests the boundaries of a contractor's statutory arbitration rights against aggressive executive policy shifts.⁷⁴

Similarly, in the capital-intensive power infrastructure sector, the Central Electricity Regulatory Commission (CERC) provides stringent regulatory guidelines for assessing cost and time overruns in transmission and generation projects. Before allowing project developers to pass on escalated costs to consumers through higher tariffs, the CERC conducts rigorous "prudence checks." The Commission meticulously examines whether the developers acted reasonably, whether they adhered to the Revised Cost Estimates (RCE), and whether the project delays were genuinely uncontrollable (such as severe force majeure events or unforeseen geological hurdles).⁷⁵ The CERC routinely rejects vague or unsupported delay justifications, ensuring that the end-consumer does not subsidise inefficiencies and contractor defaults.⁷⁶

1.5 Institutional Scaffolding: The Indian Council of Arbitration (ICA)

While statutory laws define the boundaries of authority and substantive rights, arbitral institutions provide the critical procedural scaffolding necessary to handle the immense

⁷⁴ Central Electricity Regulatory Commission, *Tariff Regulations* (2019).

⁷⁵ *Ibid.*

⁷⁶ Indian Council of Arbitration, *Rules of Domestic Commercial Arbitration* (2024).

evidentiary heft and logistical complexity of infrastructure delay claims. The Indian Council of Arbitration (ICA), recognised as the premier arbitral institution in the country, plays a pivotal role in standardising the adjudication of construction disputes, helping move the industry away from the pitfalls of ad hoc proceedings.⁷⁷

1.5.1 Procedural Rigour and the Enforcement of Timelines

Ad hoc arbitrations in India have historically succumbed to the very procedural delays and endless adjournments they were designed to bypass. Institutional frameworks like the ICA impose necessary, structured discipline. The ICA Rules of Domestic Commercial Arbitration establish clear, unyielding protocols for the submission of pleadings and evidence and for the conduct of hearings.⁷⁸

For instance, Rule 18(a) of the ICA Rules imposes a strict outer limit for the submission of pleadings, requiring a respondent to file its statement of defence within 30 days, extendable by an absolute maximum of another 30 days.⁷⁹ This creates a hard 60-day cap, forcing parties to prepare their delay defences rapidly. While the Supreme Court in the 2025 judgment *Aneja Constructions v. Doosan Power Systems* affirmed that an arbitral tribunal retains the ultimate, inherent discretion to condone delays beyond this institutional rule to preserve the principles of natural justice, the very presence and standard enforcement of such institutional guidelines fundamentally shifts the default posture of Indian arbitration from chronic laxity to procedural stringency.⁸⁰

1.5.2 Evidentiary Guidelines and the Promotion of Dispute Boards

Handling proof in highly technical delay disputes requires a methodical, deeply analytical approach to project data. ICA guidelines and its specialised training programs for arbitrators emphasise the indispensable value of contemporaneous documentation over post-facto rationalisations. Arbitrators operating under institutional rules increasingly reject global claims lacking a specific nexus to project events; they expect parties to substantiate claims with detailed daily logs, localised email records, and regular project scheduling reviews that

⁷⁷ *Ibid.*

⁷⁸ Indian Council of Arbitration, *Rules of Domestic Commercial Arbitration* (2024), r. 18(a).

⁷⁹ *Aneja Constructions (India) Ltd. v. Doosan Power Systems India Pvt. Ltd.*, 2025 SCC OnLine SC.

⁸⁰ Indian Council of Arbitration, *Rules of Domestic Commercial Arbitration* (2024).

immediately flag risks as they occur on the ground.

Furthermore, institutions such as the ICA champion the integration of Dispute Resolution Boards (DRBs) or Dispute Adjudication Boards (DABs) as a mandatory, preliminary triage mechanism in the contract. Recognising that earlier intervention prevents minor disruptions from snowballing into massive arbitral claims, the ICA, in collaboration with the World Bank, has established comprehensive Standard Operating Procedures (SOPs) for the functioning of DRBs in India. By requiring regular site visits and real-time advisory opinions, DRBs encourage the resolution of delay and disruption issues contemporaneously.⁸¹ When disputes inevitably fail to settle and escalate to formal arbitration, the early analysis, localised fact-finding, and chronological records generated by the DRB provide the arbitral tribunal with an invaluable, neutral evidentiary foundation. This allows quantum experts to base their complex delay methodologies on a verified historical record, significantly streamlining the arbitral process.

1.6 Comparative Insights: India vs. Global Common Law Standards

To fully appreciate the trajectory and current nuances of the Indian legal framework governing construction delay claims, it is highly instructive to benchmark it against established global practices. Comparing the Indian approach with the jurisprudence of prominent common law jurisdictions, particularly the United Kingdom and Singapore, which frequently serve as the preferred seats for international construction arbitrations, reveals distinct differences in judicial philosophy regarding commercial certainty versus equitable relief.

1.6.1 The Sanctity of Notice Requirements: Strict Compliance vs. Equity

A sharp divergence exists in how different jurisdictions treat condition precedent notice clauses in standard-form contracts such as FIDIC. In Singapore, courts and tribunals adhere unyieldingly to the contract's explicit terms. Under the framework of Singaporean common law and specific statutory instruments such as the Public Sector Standard Conditions of Contract (PSSCOC) and the Security of Payment (SOP) Act, time limits for bringing a claim are rigorously enforced. If a contractor fails to submit a formal written notice to the contract administrator within the stipulated time, this failure unequivocally constitutes an absolute bar to securing an extension of time or recovering loss and expense, regardless of the employer's

⁸¹ *Ibid.*

fault.

A similarly stringent, literal approach is adopted in the UK and in associated common-law forums, such as the courts of the Dubai International Financial Centre (DIFC). In highly cited recent cases such as *Panther Real Estate v. Modern Executive Systems*, the DIFC courts decisively rejected contractor attempts to circumvent FIDIC's strict 28-day notice period. The courts firmly dismissed arguments relying on the 'prevention principle' or general obligations of 'good faith', reinforcing the doctrine that commercial certainty and the agreed allocation of risk must override equitable leniency if the contractual language is explicit and unambiguous.⁸²

In stark contrast, as analysed in Section 3.2.2, Indian jurisprudence adopts a distinctly more paternalistic and context-driven stance. While large infrastructure contracts in India are rapidly migrating toward international strictness in their drafting, Indian arbitrators and courts frequently entertain equitable arguments.⁸³ They are often willing to look beyond strict procedural defaults if the substantive merits of the employer's delay are undeniable and well-documented, reflecting a systemic judicial hesitation to enforce draconian financial forfeitures on contractors operating in India's highly volatile, bureaucracy-heavy public procurement environment.⁸⁴

1.6.2 Frameworks for Delay Analysis and Concurrency

The methodological approach to quantifying delay and analysing concurrency also reveals significant comparative distinctions. Internationally, the Society of Construction Law (SCL) Delay and Disruption Protocol (2nd Edition, 2017) serves as the preeminent gold standard for managing and assessing claims.⁸⁵ The Protocol strongly advocates contemporaneous analysis rather than retrospective "wait and see" modelling, establishing 22 core principles that emphasise proactive record-keeping and the use of specific delay analysis techniques, such as Time Impact Analysis.⁸⁶

A critical jurisprudential divergence arises in the treatment of 'concurrent delay' complex scenarios where an employer-risk event and a contractor-risk event occur simultaneously, both

⁸² *General Manager, Northern Railways v. Sarvesh Chopra*, *supra* note 188.

⁸³ *Asian Techs Ltd. v. Union of India*, *supra* note 187.

⁸⁴ Society of Construction Law, *Delay and Disruption Protocol* (2nd edn., 2017).

⁸⁵ *bid.*

⁸⁶ *Henry Boot Construction (UK) Ltd. v. Malmaison Hotel (Manchester) Ltd.*, (1999) 70 Con LR 32.

impacting the project's critical path. The SCL Protocol, closely aligning with English courts, traditionally favours the "Malmaison approach".⁸⁷ Under this doctrine, if delays are concurrent, the contractor is granted an Extension of Time (thereby relieving them of punitive liquidated damages) but is strictly denied financial compensation for the prolongation costs. The rationale is that the employer should not be forced to pay for an extended stay on-site that the contractor would have inevitably suffered anyway due to its own concurrent default.⁸⁸

In contrast, the Indian approach to concurrent delay has historically lacked a uniform, institutionalised legal framework.⁸⁹ Rather than adhering strictly to the Malmaison binary, Indian arbitral tribunals frequently resort to apportioning the delay and the resulting financial damages based on an assessment of the relative culpability of the parties (e.g., assigning a 60:40 split of responsibility).⁹⁰ While this apportionment approach aims for a highly tailored, equitable outcome, it is widely criticised for introducing significant unpredictability and subjectivity into the dispute resolution process.⁹¹ Moving forward, legal scholars and institutional bodies in India advocate that the gradual, formalised integration of SCL Protocol principles and AACE (Association for the Advancement of Cost Engineering) guidelines into Indian contract layers is essential to standardising the forensic adjudication of infrastructure delays and aligning Indian practice with global expectations.

Conclusion

The legal framework governing delay and cost overrun claims in Indian infrastructure arbitration is a highly sophisticated, rapidly evolving amalgamation of protective statutory provisions, substantive contract law, and increasingly stringent institutional guidelines. The Arbitration and Conciliation Act, 1996, provides the indispensable procedural flexibility needed to admit complex forensic evidence and integrate domain expertise, while the Specific Relief Act's 2018 amendments emphatically prioritise the continuity of public infrastructure projects over the disruption caused by protracted civil litigation. Concurrently, the interplay between Sections 55, 73, and 74 of the Indian Contract Act continues to demand rigorous, empirical proof of actual financial loss, serving as a vital bulwark against speculative, inflated contractor claims. As Indian procurement practices increasingly align with global FIDIC

⁸⁷ *Ibid.*

⁸⁸ M.P. Ram Mohan, et al., *supra* note 159.

⁸⁹ *General Manager, Northern Railways v. Sarvesh Chopra*, *supra* note 188.

⁹⁰ *Ibid.*

⁹¹ Society of Construction Law, *Delay and Disruption Protocol* (2nd edn., 2017).

models and adopt the procedural rigour of institutions such as the ICA, the sector is gradually transitioning. It is moving away from a historical jurisprudence characterised by equitable leniency and apportionment, toward a modern regime of strict commercial certainty, demanding heightened evidentiary diligence and proactive contract management from all stakeholders involved in the execution of India's infrastructural ambitions.

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