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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have contracts which place both design and construction obligations upon contractors? If so, please describe the types of contract. Please also describe any forms of design-only contract common in your jurisdiction. Do you have any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

The construction industry in India does not subscribe to any standard form of construction contract; however, some of the commonly used forms include the suite of contracts published by FIDIC (International Federation of Consulting Engineers), ICE (Institution of Civil Engineers) and the model published by the IIA (Indian Institute of Architects). Governmental construction authorities, such as the National Highways Authority of India ("NHAI"), employ their own standard form contract as per their departmental requirements, particularly for public-private partnership projects. One standard FIDIC form extensively used in the Indian construction industry is the Plant and Design/Build Contract. Design-only contracts prevalent in India are largely inspired by the FIDIC Conditions of Contract for Plant and Design/Build (the FIDIC Yellow Book).

Besides the NHAI, several government departments such as the Public Works Department, Delhi Metro Rail Corporation, Indian Oil Corporation, National Building Construction Corporation, Central Public Works Department, etc. have their own standard form contracts.

Management contracts are executed in the form of Engineering, Procurement and Construction Management Contracts. As the name suggests, such contracts are executed between employers and contractors, wherein contractors are hired to holistically manage the completion of a construction project while overseeing developments regarding engineering, procurement and construction of a project.

1.2 Are there either any legally essential qualities needed to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations), or any specific requirements which need to be included in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

The Indian law of contracts is codified (Indian Contract Act, 1872 – the "Act"). It is largely based on English Common Law. For any binding contract to come into existence, there should be an agreement between two or more parties who are competent to contract, and the parties must have entered into the agreement with their free consent, for a lawful consideration and a lawful object. These requirements are mandated by the Act (Section 10 thereof). As all other contracts, construction contracts must also satisfy the aforesaid requirements to be legally enforceable. Further, rudimentary requirements of a valid offer, followed by an acceptance of an offer, with the intention of entering into a legally enforceable agreement not void in law, are other essentials of a valid contract under the Act. As the Act provides, contracts need not be evidenced in writing, which similarly applies to all construction contracts.

1.3 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

The legal position in India as regards a "Letter of Intent" ("LOI") is well settled and can be understood while referring to common law principle to the effect that an agreement to enter into an agreement does not create any legal relation between parties, nor is it legally enforceable before a court of law.

A LOI merely indicates a party's intention to enter into a contract with the other party in future. Normally, it is an agreement to "enter into an agreement" which is neither enforceable nor does it confer any rights upon the parties. However, some aspects of a LOI may contain binding obligations, if so specifically provided therein. Thus, confidentiality, exclusivity of dealings, governing law/jurisdiction amongst others may create binding obligations. In certain circumstances, a LOI may be construed as a letter of acceptance of the offer resulting in a concluded contract between the parties. It largely depends on the intention of the parties to be

drawn from the terms of the LOI, the nature of the transaction and other relevant circumstances. If parties have acted on a LOI (as if there is a binding obligation), it can be held as constituting a binding contract between them. In India, a binding contract can result from conduct alone.

1.4 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

The standard type of insurance policy opted by the employer, contractor or a sub-contractor separately or jointly is the Contractor's All Risk Policy ("CAR Policy"). All major construction contract projects expressly provide for putting in place a CAR policy during the construction stage. Federal legislation requires any business including construction projects employing more than 10 people to procure registration under the Employees' State Insurance Act, 1948 ("ESI Act").

The ESI Act mandates every employer to provide for its worker's insurance. The said Act covers both workers employed directly under an employer and through a contractor. The insurance procured by an employer/contractor under the mandate of the ESI Act covers contingencies such as maternity leave, sickness, temporary or permanent physical disablement, or death owing to the hazards of employment which may lead to loss of wages and earning capacity of an employee.

1.5 Are there any statutory requirements in relation to construction contracts in terms of: (a) general requirements; (b) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (c) tax (payment of income tax of employees); or (d) health and safety?

The following are some of the statutory requirements which must be complied with:

(a) General requirements: As stated above, all construction contracts must satisfy the requirements of the Indian Contract Act, 1872 to be legally enforceable. There are no statutory requirements specifically in relation to construction contracts.

(b) Labour: All employers and contractors are required to comply with the relevant labour legislations in force in India or in the state/city concerned. The onus of complying with such labour laws falls upon an employer or a contractor depending on the legislation. Labourers get their legal recognition from the definition of the word "workman" under the Industrial Disputes Act, 1947 (Federal legislation) which entitles them to various statutory benefits and fair treatment at the hands of their employer/contractor. Further, the Contract Labour (Regulation and Abolition) Act, 1970 must be complied with by any principal employer/contractor who hires 20 or more contract labourers for an "establishment". The said Act requires the principal employer to register its establishment in accordance with the Act, whereas all such contractors must obtain a licence from the authorised licensing authority specified in the Act. In order to regulate the condition of service of inter-state labourers, the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, requires all contractors who employ five or more inter-state migrant workmen to register themselves. It is aimed to protect and/or provide a migrant worker's right to equal wages, displacement allowance, home journey allowance, medical facilities, etc. The Workmen's Compensation Act, 1923, requires that compensation be paid to workers if injured in the course of employment. Under the Minimum Wages Act, 1948, the employer is required to pay the minimum wage rates as may be fixed by the relevant government. Further, the Payment of Wages Act, 1936, read with the Amendment Act of 2017 ensures that the employees receive wages on time and without any unauthorised deductions.

(c) Tax: A person responsible for paying any sum to a contractor for carrying out any work (including supply of labour for carrying out any work) is required to, at the time of payment, deduct tax commonly known as Tax Deducted at Source ("TDS") under Section 194C of the Income Tax Act. The Works Contract Tax is applicable to contracts for labour, work or service. Prior to 1 July 2017, the Central Government and State Government levied Service Tax and VAT respectively on works contracts. However, after the roll-out of the Goods and Services Tax ("GST"), works contracts (in relation to immoveable property) are treated as supply of services and at present tax slabs range from 12% to 18%. In the first instance, tax is payable by the person supplying the services/goods. The Building and Other Construction Workers Welfare Cess Act, 1996, which applies to 10 or more building workers or other construction work, has been enacted for the welfare of construction workers, including regulating the workers 'safety, health, and other service conditions. A cess of 1% is collected from the employer on the cost of construction incurred.

(d) Health and Safety: Social security legislations such as the Employee's Compensation Act, 2009, Employees' State Insurance Act, 1948, Maternity Benefit Act, 1961, Payment of Gratuity Act, 1972, and the Employees' Provident Fund Act, 1952 mandatorily apply to all employers and contractors hiring labourers or workmen in the construction industry.

1.6 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability is complete?

Yes. In construction contracts, provision for retaining part of the purchase price for the given situations is fairly common. Parties may also agree to deposit the purchase price in an escrow account to ensure a level playing field for both the employer and the contractor. The contract may provide that the employer, prior to completion of the works, releases the retention money provided the contractor furnishes an unconditional bank guarantee equivalent to the retention money.

1.7 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee performance, and/or company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such bonds and guarantees?

Yes, performance bonds/performance guarantees are commonly provided for in construction contracts in India to provide security against failure of a contractor to perform its contractual obligations. Similarly, an employer may require company guarantees from parent companies against the duties and obligations of a subsidiary company involved in a construction contract.

The nature of restrictions that may apply to a performance guarantee will depend upon the wording of the terms of guarantee. A performance guarantee, in nature, is a contract between an employer and a guarantor, independent of the contract between an employer and a contractor. Therefore, unless otherwise provided, a guarantor

shall be obliged to unconditionally honour a guarantee as and when called upon by the employer.

Normally, construction contracts require the contractor to furnish an unconditional performance bank guarantee to ensure timely and satisfactory performance by the contractor. The employer normally requires the contractor to keep the performance bank guarantee valid until the defect liability period is over or the completion certificate is issued. The beneficiary of the bank guarantee, i.e. the employer, must make a demand for payment under the bank guarantee, should a need so arise, before the expiry of validity period stipulated in the bank guarantee. A demand made by the employer for payment after the validity period will not be honoured by the bank.

1.8 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that until they have been paid they retain title and the right to remove goods and materials supplied from the site?

Yes it is possible. Right to lien over goods arises from the contractor's right to be duly paid for the goods supplied to an employer. The existence of right of lien over goods, and the scope of such right, is determined by a contractual clause to that effect. Lien over goods whose ownership passes over to an employer on delivery to, or affixation on, a construction site may exist if contractually provided for. However, most construction contracts do not provide for the contractor's title rights to the goods and supplies made for the works.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party? Does any such third party (e.g. an engineer or architect) have a duty to act impartially between contractor and employer? Is that duty absolute or is it only one which exists in certain situations? If so, please identify when the architect/engineer must act impartially.

Yes, construction contracts are commonly supervised by third parties in India who may be appointed by an employer in the role of either an architect or an engineer. The scope of their functions and duties are contractually defined.

Whilst the engineer or architect usually have a contractual duty to act impartially between the contractor and employer, in practice in government contracts, the engineer in particular often toes the line of the employer.

2.2 Are employers entitled to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

Yes. Such clauses are valid under the Indian Contract Act.

2.3 Are the parties permitted to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss suffered?

Yes. Stipulating a certain amount to be paid by a contractor to its employer as liquidated damages is permissible. Such damages are governed by Section 74 of the Indian Contract Act, 1872 ("Act") which provides that if a sum is named in the contract as the amount to be paid in case of such breach of contract, the party complaining of breach is entitled to receive the said amount, "whether or not actual loss is proved to have been caused". Section 74 has been judicially interpreted and the following principles have been laid down:

- Only reasonable compensation can be awarded as liquidated damages.
- Notwithstanding a liquidated damages clause, the factum of damage or loss caused must be proved (the burden for which is on the Claimant).
- The court must find the liquidated damages to be a genuine pre-estimate of the damages.
- The expression "whether or not loss is proved" in Section 74 has been interpreted to mean that if there is a possibility to prove actual damage or loss, such proof is required. Where, however, it is difficult or impossible to prove the actual damage or loss, the liquidated damages amount named in the contract, if it is found to be a genuine pre-estimate of the damage or loss, can be awarded.
- The proof of loss or damage may be circumstantial and the court does not look for arithmetical exactitude.
- The amount named in a contract serves as a ceiling or a cap on the sum which can be awarded and not the amount which will mechanically be awarded.

If parties have agreed to a genuine pre-estimated sum of money as liquidated damages, then they are deemed to have excluded their right to claim an unascertained sum of money as damages.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be done under the contract? Is there any limit on that right?

Variations in the works to be performed under a construction contract may be made by an employer or an engineer employed for such works. If such variations are made, a contractor is entitled to seek additional payments for the same so far as such variations have been duly authorised by the employer/engineer-in-charge. However, such variations must not be of such a nature so as to substantially alter the character of the contract in question and must be within the ability of the contractor to execute.

3.2 Can work be omitted from the contract? If it is omitted, can the employer do it himself or get a third party to do it?

Yes, works may be omitted from a construction contract by an employer or an engineer if there is an express term in the contract

permitting omission. However, such omissions must not be made to deliberately deprive a contractor from its entitled share of works. The employer cannot omit the work on non-*bona fide* grounds (and have it carried out by someone else without the contractor's consent).

3.3 Are there terms which will/can be implied into a construction contract?

Yes. Indian law recognises use of both express and implied terms in a construction contract. While express terms are easily identifiable, implied terms must be read into a contract while examining the intention of the contracting parties. However, such terms must not offend the intended commercial purpose of the contract as understood between the parties. While there is no agreed set of terms which can be implied in a construction contract, certain obligations are understood as impliedly binding on both the employer and the contractor. For example, a contractor is expected to perform its tasks while exercising a standard of care, and must provide such materials which are fit to be used for the stipulated works.

3.4 If the contractor is delayed by two events, one the fault of the contractor and one the fault or risk of his employer, is the contractor entitled to: (a) an extension of time; or (b) the costs occasioned by that concurrent delay?

The Indian position on concurrent delay is not certain. In situations where there are concurrent delays on the part of an employer and a contractor, an employer may rely upon them to substitute an extension of time for payment of any monetary damages to a contractor, whereas a contractor may rely upon them to defend against imposition of liquidated damages upon itself by an employer. Therefore, in cases of concurrent delays, a contractor would be entitled to an extension of time and not to compensation for any loss it may have suffered due to the delays (see: *De Beers UK Ltd v. Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC)). A contractor would be entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event (see: *Walter Lilly & Co Ltd v. Mackay*, [2012] EWHC 1773 (TCC)). Indian courts usually refer to and rely upon English cases.

3.5 If the contractor has allowed in his programme a period of time (known as the float) to allow for his own delays but the employer uses up that period by, for example, a variation, is the contractor subsequently entitled to an extension of time if he is then delayed after this float is used up?

The float in a programme would be dealt with on a 'first come first served' approach. However, the existence of float may mean that the contractor cannot claim an extension of time, but it does not stop the contractor from claiming loss or expense due to variation.

3.6 Is there a limit in time beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and from what date does time start to run?

The Limitation Act, 1963 ("Act") governs a time period for filing a court action and also a claim before the arbitral tribunal. As per the said Act, the limitation period for the purpose of initiating a suit in relation to a breach of contract is three years from the date on which the breach occurs or the cause of action arises.

3.7 Who normally bears the risk of unforeseen ground conditions?

It is for the parties to agree in the contract as to who shall bear the risk of unforeseen ground conditions. Construction contracts generally put all the risk on the contractor.

3.8 Who usually bears the risk of a change in law affecting the completion of the works?

Most construction contracts provide for relevant stipulations for a change in law contingency. Generally, an employer bears the risk arising out of a change in law, and any delays resulting out of it can be condoned by granting an extension of time to the contractor. Section 64A of the Sale of Goods Act, 1930 provides that in the event of increase or decrease in tax or imposition of new tax in respect of goods after the making of any contract for the sale or purchase of goods, in the absence of any stipulation as to payment of such tax, any increase would entitle the seller to add the equivalent amount of the contract price and the buyer would be liable to pay the increased sum to the seller. However, in case of a decrease in tax, the buyer would be entitled to deduct the equivalent amount of decreased sum from the contract price and the seller would be liable to pay that sum to the buyer. The provision is applicable to any duty of customs or excise on goods and to any tax on the sale or purchase of goods.

3.9 Who usually owns the intellectual property in relation to the design and operation of the property?

Generally, a contract for service contains clauses so as to empower an employer to claim ownership over all intellectual property as may be created by an employee in the course of his employment. Indian law also provides for employment as an exception to an author's ownership over his intellectual property. Therefore, in the case of construction contracts, ownership of intellectual property in the form of design of concerned works should vest with the employer.

3.10 Is the contractor ever entitled to suspend works?

A contractor may suspend performance of its obligations under a construction contract on grounds provided for in the contract in accordance with its statutory right to do so under the Indian Contract Act, 1872. Occasions when a contractor may suspend performance include non-performance of the obligations or considerable delay by an employer, non-payment of dues for works performed, non-fulfilment of conditions upon which the performance is contingent, *force majeure*, etc.

3.11 On what grounds can a contract be terminated? Are there any grounds which automatically or usually entitle the innocent party to terminate the contract? Do those termination rights need to be set out expressly?

The Indian Contract Act, 1872 ("Act") allows a party to rescind/terminate a contract in the event of breach by the other party, including refusal to perform or disabling himself from performing (Section 39 of the Act). Over and beyond the statutory grounds of breach recognised in the Act, parties may choose to provide contractual stipulations recognising events which would amount to breach of the contract to entitle the injured party to terminate the

contract. A statutory or common law ground of breach need not be expressly provided in a contract; however, other instances of breach should be specified in the contract.

3.12 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the injured party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The concept of a *force majeure* event is well recognised in the Indian legal system. The doctrine of frustration of contract is imbibed in Section 56 of the Indian Contract Act, 1872 ("Act"). In accordance thereof, a contract stands frustrated if the performance of an agreed set of obligations becomes impossible or unlawful, either before or after the conclusion of a contract. Section 56 of the Act thus recognises *force majeure* (or act of God) events as a ground for frustration of contracts. Frustration of a contract under Section 56 of the Act results in such a contract becoming void in law, and thus cannot be enforced. Therefore, a frustrated contract stands discharged and relieves the parties from performance of all underlying obligations. However, an exception to Section 56 states that if frustration was within the reasonable contemplation of the promisor, or if the contract is frustrated due to acts attributable to the promisor, the promisee shall be entitled to compensation for any loss it suffers due to non-performance of promisor's obligations under the contract.

However, Section 56 does not apply to instances of mere inconvenience, economic unfeasibility, or if performance of the contract has become more burdensome, but without impossibility.

3.13 Are parties which are not parties to the contract entitled to claim the benefit of any contract right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the original contracts in relation to defects in the building?

Third parties cannot bring claims or enforce terms of a contract against a party to a contract. This principle emanates from the doctrine of "privity of contract", which confers rights and obligations arising out of a contract only upon parties to a contract. Therefore, in the landscape of construction law, a contractor cannot be subjected to claims from third parties to a construction contract. However, third parties are entitled to a remedy under tort law for injury suffered due to negligent acts of a contract. Therefore, a contractor may be subjected to claims under tort law for negligence.

3.14 Can one party (P1) to a construction contract which owes money to the other (P2) set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Yes, parties in a construction contract can set off their claims and dues against each other. This can be done either by way of mutual negotiations and agreement, or through a proceeding before a court of law or in an arbitration proceeding. An instance for the latter would arise where parties disagree upon the amount due to either party. In such cases, a cross-claim is filed by the party who wishes to set off its claims against the amount it owes to the other party. Such cross claims must be for a recognised sum and must be based on a legitimate claim against the other party.

3.15 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine?

The doctrine of "duty of care" originates from tort law and requires a person to exercise a standard of care while performing any act which could foreseeably cause harm to others. This duty extends to all such persons who, on a reasonable contemplation, can be expected to be affected by the acts of a person. Therefore, the doctrine of "duty of care" applies to all construction works performed by a contractor, and a liability for negligence may arise for any harm caused to persons who could foreseeably be affected by his acts.

3.16 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Any ambiguity must be attempted to be resolved by resorting to well recognised rules of contractual interpretation, such as the rule of literal interpretation, harmonious construction, giving effect to the intention of the parties, and resorting to an interpretation which upholds business efficacy of the contract. (These principles are to be applied in that order.) If the ambiguity sustains on the application of the said rules, resort may be made to the rule of *contra proferentem*.

3.17 Are there any terms in a construction contract which are unenforceable?

The following terms or clauses shall be unenforceable in a construction contract:

(a) clauses empowering an employer to unilaterally terminate a contract without any remedy to a contractor;

(b) unilateral and substantial alteration of the character of a contract by adding/omitting obligations of a contractor;

(c) clause for payment of an unreasonable sum in the form of liquidated damages;

(d) clause absolutely restricting a party from enforcing his rights under or in respect of any contract;

(e) clause which limits the time within which a party may enforce his rights; and

(f) any other clause which falls foul of the provisions of the Indian Contract Act, 1872.

3.18 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

As regards a designer's contractual liability, the same shall be limited to the obligations owed by the designer towards other parties to the construction contract, such as the employer. Due to the application of the doctrine of privity of contract, the contractual liability of the designer would not extend to third parties.

As for a designer's liability in tort law, please see the response to question 3.15 above. Harm to third parties must have directly arisen out of the impugned negligence towards the design in question, and must have been reasonably foreseen as being caused to persons who may avail of the facility designed.

Any guarantee given by a designer under a construction contract would have relevance only against potential contractual claims for a defect in design; however, such a guarantee would not keep his liability under tort law at bay.

4 Dispute Resolution

4.1 How are disputes generally resolved?

There are multifarious ways of resolving disputes that are recognised in India. These include resolving disputes by way of court litigation, arbitration, mediation, conciliation, dispute resolution boards and judicial settlement. Arbitration is the most commonly used mechanism to resolve construction contract disputes.

4.2 Do you have adjudication processes in your jurisdiction? If so, please describe the general procedures.

In the absence of a statutory enactment to refer a payment dispute to adjudication, adjudication process is subject to a parties' agreement. Generally, a clause containing the adjudication process would be part of the dispute resolution clause wherein parties would resolve disputes in the first instance through an adjudicator named in the contract. The contract would stipulate a time period within which the contractor may refer a decision of the engineer to the adjudicator. It would also stipulate the time limit within which the adjudicator must give his decision. If either party is aggrieved by the decision of the adjudicator, it may refer the dispute to arbitration within a stipulated time period failing which the adjudicator's decision will be final and binding.

4.3 Do your construction contracts commonly have arbitration clauses? If so, please explain how arbitration works in your jurisdiction.

One of the widely accepted means of dispute resolution in construction disputes is arbitration. The Arbitration and Conciliation Act, 1996 ("Arbitration Act") is the governing law of arbitration in India. The Arbitration Act is essentially based on the UNCITRAL Model Law, 1985 and UNCITRAL Model Arbitration Rules, 1976. Broadly, the Act has two parts. Part I is an elaborate code providing for all arbitrations seated in India (domestic or international arbitrations). Part II provides basically for enforcement of foreign awards (see question 4.4). India is an arbitration-friendly jurisdiction with a pro-arbitration Act and a good track record of enforcement for foreign awards. There is, however, a problem of judicial delays. An important feature of the Act is the requirement to conclude India-seated arbitrations within 12 months of the tribunal entering into the reference, i.e. on the date the sole arbitrator or all the arbitrators receive notice in writing of their appointment. Parties may extend the stipulated period by six months by consent. Thereafter, time can only be extended by court and upon terms. There is currently a proposed amendment to the 12-month timeframe. The proposal is to commence the 12-month time period from the completion of the pleadings stage. This would provide some relief to parties involved in sizeable construction arbitrations. The Bill was approved on 7 March 2018 by the Union Cabinet. However, it is yet to be passed by both houses of the Parliament.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles to enforcement.

The Arbitration and Conciliation Act, 1996 ("Arbitration Act") recognises and provides for enforcement of foreign arbitral awards in India; *vide* Part II thereof. The said Act gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention") and the Convention on the Execution of Foreign Arbitral Awards, 1927 ("Geneva Convention") with a specific reservation of principle of reciprocity under Sections 44(b) and 53(c) of the Act. Under the New York Convention, Indian Courts may recognise and enforce foreign arbitral awards if the country is a signatory to the New York Convention and if the award is made in the territory of another contracting state which is a reciprocating territory. Section 57 of the Act, enumerates the pre-requisites to enforce a foreign award under the Geneva Convention.

India is a signatory to the New York Convention, with reservations that there should be a valid agreement to arbitrate, and that such agreement must be evidenced in writing. Another reservation made by India is to the effect that the New York Convention would be applicable only to disputes and differences arising out of a legal "commercial" relationship between the parties, whether contractual or not. The Act mandates an award to be rendered in a country which is a signatory to the New York Convention, and which has been duly notified in the Official Gazette of India as being a signatory to the New York Convention. This can cause hardships as whilst all important arbitration seats are recognised and notified, the Official Gazette has not notified all countries which are signatories to the Convention.

Section 48 of the Act provides for conditions which must be satisfied for enforcement of a foreign arbitral award in India under the New York Convention (these are all as per the New York Convention). The public policy ground is narrowly construed in India for enforcement of foreign awards.

4.5 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction?

The procedure for enforcement of foreign judgments in India differs on the basis of reciprocating and non-reciprocating territories. In case of "reciprocating territories", judgments may be enforced directly as a decree and an execution decree may be obtained to this effect from an Indian Court. On the other hand, judgments from "non-reciprocating" territories are not executed directly by a court of law. A fresh law suit needs to be filed on the basis of the foreign judgment within three years of the judgment for its enforcement. This suit can only be defended on the grounds specified under the Code of Civil Procedure, 1908 ("CPC"), i.e. due process ground. Subject to the exceptions under Sections 11 and 13 of the CPC, these foreign judgments operate as *res judicata* in India.

4.6 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to reduce: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Proceedings before a court are initiated upon the receipt of a plaint by one of the parties. The court then serves summons to the opposite

party to file their written statement. Issues are thereafter framed by the court and the case posted for trial. Evidence-in-chief is in the form of sworn affidavits and cross-examination is conducted in front of court-appointed commissioners. This is followed by the filing of documents and evidence by the claimant and the respondent respectively. On conclusion of arguments on merits, the court reserves the matter to pronounce its judgment on a later date.

A claimant may request the court for a summary judgment in case of a certain debt and on lack of defence being available to the respondent wherein a judgment is sought without trial.

Parties may prefer an appeal to a High Court within a period of 90 days from the date of the impugned judgment of a lower court, or within a period of 30 days to any other court in India (Division II of the Schedule, Limitation Act, 1963). If parties are not satisfied with the judgment of a High Court, a Special Leave Petition ("SLP") may be filed to the Supreme Court of India against any such judgment within a period of 90 days from the date of the impugned judgment (Order XXI, Rule 1, Supreme Court Rules, 2013). In case of refusal by a High Court to grant a certificate of appeal to prefer a SLP before the Supreme Court, an appeal to the Supreme Court may be preferred within 60 days of the impugned order of the High Court (Order XXI, Supreme Court Rules, 2013).

A decision from the court of first instance can be expected within a period of three to four years and within one to two years from the final court of appeal.

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Sumeet Kachwaha has approximately 39 years' experience in the legal profession, mainly in corporate and commercial law. Mr. Kachwaha has held a Band One ranking in the Arbitration section of *Chambers Asia* since 2009. He also features in *Who's Who Legal* in the Construction, Arbitration, Procurement, Government Contracts and Asset Recovery sections, and has a Band One ranking in the Dispute Resolution section of the *The Legal 500 Asia Pacific*. He also features in GAR's *Who's Who Legal* Arbitration Section. He has handled some of the leading and landmark commercial litigations ever to come up before Indian courts.

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Dharmendra Rautray completed his LL.M. in 1996 from the London School of Economics and was thereafter called to the England and Wales Bar in 2001. He is a member of Lincoln's Inn. He has served as faculty for the CLE Programme conducted by the New York City Bar, New York. He successfully argued the Constitution Bench matter *Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services Inc.* before the Supreme Court of India.

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Other titles in the ICLG series include:

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