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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) 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 entirely subscribe to any one standard form. Some commonly used forms are heavily influenced by the International Federation of Consulting Engineers ("FIDIC"), the Institution of Civil Engineers ("ICE"), and the model published by the Indian Institute of Architects ("IIA").

The construction industry is driven by the Government as the Employer/Owner (directly or indirectly). Management contracts are prevalent, but the owner will usually look at a single point of responsibility under the lead consortium member.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracting is common in the real estate sector in India, where the landowner and real estate developer enter into a joint development agreement. The formats have evolved through industry usage and practice, keeping in mind the role of the statutory regulator. Normally, the landowner provides the land, and all other responsibilities fall on the developer.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

Please see the answer to question 1.1.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

The authority responsible for public works is the Central Public Works Department at the national level, and the State Public Works Departments at the state level. The Central Public Works Department has released several General Conditions of Contract for engineering, procurement and construction ("EPC") contracts and construction works. The public-private partnership ("PPP") model is common in the development of large and complex infrastructure projects. The Government has issued guidelines and Model Concession Agreements for various projects, specifically for the airport, railway, and ports sectors. The modes of contracting regularly employed by government organisations include Build-Own-Operate, Build-Operate-Transfer, Hybrid Annuity Model, Design-Build-Finance-Operate-Transfer, etc. Standard contracts issued by FIDIC are often used for large infrastructure projects.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected 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). 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). The other essential for a valid contract is a valid offer, followed by an acceptance, with the intention of entering into a legally enforceable agreement. The courts recognise common law doctrines, including implied terms and *contra proferentem*.

1.6 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.

A letter of intent ("LOI") merely indicates a party's intention to enter into a contract with the other party in the future. Normally, it is a conditional offer or an agreement to "enter into an agreement" which is neither enforceable, nor does it confer any contractual rights upon the parties. However, depending on the wording, an LOI may result in binding obligations in relation to confidentiality, exclusivity of dealings and governing law/jurisdiction, amongst others. In certain circumstances, an 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 that can be drawn from the terms of the LOI, the nature of the transaction and other relevant circumstances. If parties have acted on an 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 also result from conduct alone.

1.7 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 for 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 that a CAR policy must be put in place 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").

Presently, the ESI Act mandates every employer to provide for its workers' insurance. The 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 the earning capacity of an employee.

The Code on Social Security 2020, *inter alia*, proposes to simplify, amalgamate and replace the existing central labour legislation, including the ESI Act. Chapter IV of the Code requires that the employer pay the employer's and the employee's contribution in respect of every employee, whether directly employed by him or by a contractor. It is applicable to every establishment in which 10 or more employees are employed. Benefits such as sickness, maternity benefits, payment arising out of employment injury, medical benefits, funeral expenses or disablement are covered under the Code. Notably, through this Code, social security has, for the first time, been extended to workers in the unorganised sector, which includes contract workers. It further mandates every employer (except those belonging to, or under the control of, the Central Government or a State Government) to obtain compulsory insurance for his liability for payment towards gratuity from any insurance company.

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

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

(a) **Labour**: All employers and contractors are required to comply with the relevant labour (workmen) legislation in force in India or in the state/city concerned. The onus of complying with such laws falls upon an employer or a contractor, depending on the legislation. Workmen are afforded legal recognition through 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 which hires 20 or more contract workers for an "establishment". The Act requires the principal employer to register its establishment as provided, and the contractor must also obtain a licence from the authorised licensing authority specified under the Act.

In order to regulate the condition of service of inter-state (migrant) 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 aims 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 compensation be paid to workers if injured in the course of employment, as per a minimum guaranteed schedule. Under the Minimum Wages Act, 1948, the employer is required to pay the minimum wages as may be fixed by the relevant government. Further, the Payment of Wages Act, 1936, read with the Amendment Act, 2017, ensures that the employees receive wages on time and without any unauthorised deductions.

The Code on Wages, 2019 ("Wages Code") seeks to consolidate and replace four Acts: The Payment of Wages Act, 1936; the Minimum Wages Act, 1948; the Payment of Bonus Act, 1965; and the Equal Remuneration Act, 1976. It extends to all establishments, employees and employers unless specifically exempt. The Wages Code, *inter alia*, provides for a national floor rate for wages, which is to be determined by the Central Government after taking into account the minimum living standards. It further provides for a review of the minimum wages at intervals not exceeding five years. The Codes, however, have not yet came into force due to delays by various State Governments in formulating and notifying requisite rules for their implementation (see question 1.7 above).

(b) **Tax**: Under the Income Tax Act, 1961, 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, at the time of payment, to deduct a tax commonly known as Tax Deducted at Source ("TDS"). 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 immovable property) are treated as supply of services and, at present, taxable at rate of 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 workers, 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. The Code on Social Security, 2020 (once implemented) will mandate the collection of a cess for the purposes of social security and the welfare of building workers at a rate not exceeding 2% but not less than 1% of the cost of construction incurred by an employer (see question 1.7 above).

(c) **Health and Safety**: Social security legislation, such as: the Employee's Compensation Act, 2009; the ESI Act; the Maternity Benefit Act, 1961; the Payment of Gratuity Act, 1972; the Employees' Provident Fund and Miscellaneous Provisions Act, 1952; and the Sexual Harassment at Workplace (Prohibition, Prevention and Redressal) Act,

2013, mandatorily applies to all employers and contractors hiring labourers or workmen in the construction industry. The Code on Social Security, 2020, seeks to amalgamate and replace legislation such as: the Employee's Compensation Act, 2009; the ESI Act; the Maternity Benefit Act, 1961; the Payment of Gratuity Act, 1972; the Employees' Provident Fund and Miscellaneous Provisions Act, 1952; and the Sexual Harassment at Workplace (Prohibition, Prevention and Redressal) Act, 2013.

Further, the Code on Occupational Safety, Health and Working Conditions, 2020 mandates compliance with the occupational safety and health standards declared under the Code or the rules, regulations, bye-laws or orders made under the Code (see question 1.7 above).

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

For every construction project, parties are required to obtain various permits (including environmental permits) from various government departments in order to ensure that the construction is being carried out in a safe manner. In major infrastructure projects, it is common for a safety audit to be required at the design stage and also post-construction, to ensure conformity with safety requirements specified.

The Building and Other Construction Workers (Regulation of Employment and Condition of Services) Act, 1996, was enacted to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare. It applies to any establishment which employs, or in the preceding 12 months employed, 10 or more building workers in any building or other construction work. The Act empowers the "Appropriate Government" to make rules regarding the precautions to be taken in case of a fire. The Central Rules, 1998, mandate the employer to devise an emergency action plan in case of a fire or explosion, among other related matters.

1.10 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 period 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 also 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.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Yes, performance bonds/performance guarantees are commonly stipulated. Similarly, an employer may require a corporate guarantee from the parent company of the contractor.

A bank guarantee is independent of the contract between an employer and a contractor, and normally unconditional. Therefore, unless otherwise provided, a guarantor shall be obliged to unconditionally honour a guarantee as and when called upon by the employer. The employer normally requires the contractor to keep the performance bank guarantee valid until the defect liability period is over or the completion certificate issued. The beneficiary of the bank guarantee must make a demand for payment under the bank guarantee, should a need so arise, before expiry of the validity period stipulated in the bank guarantee.

The courts have held that, in order to restrain the encashment of a bank guarantee, there should be a strong *prima facie* case of fraud or special equities in the form of irretrievable injustice. Commitments of banks must be otherwise honoured free from interference by the courts.

The Courts have held that an employer cannot hold on to the bank guarantee after due performance of the contract has been acknowledged (*Union of India v. RCCIVL-LITL (JV)*, 2022). Further, a recent 2023 decision of the Delhi High Court restrained encashment of an unconditional bank guarantee as the employer kept coercing the contractor for multiple extensions, even post-project completion.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Yes. Please see question 1.11 above.

1.13 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?

While there is no legal impediment, 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 (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Yes, large construction contracts are usually supervised by third parties appointed by the employer in the role of either an architect or an engineer. The scope of their functions, and of their duties, is contractually driven.

Whilst the engineer or architect usually has a contractual duty to act impartially between the contractor and employer, in practice this rarely happens.

2.2 Are employers free 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, 1872. However, without going into the validity of such clauses,

the Delhi High Court in *Gannon Dunkerley & Co. Ltd. v. Zillion Infraprojects (P) Ltd.* (2023) held that the contractor cannot deny payments to the sub-contractor merely on the ground that the contract was on a back-to-back basis and it has not received payments from the main employer, when the bills raised by the sub-contractor were not rejected by the employer.

2.3 Are the parties free 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 likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

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, 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. However, where 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 that can be awarded, and not the amount that 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 performed under the contract? Is there any limit on that right?

Variations in the works to be performed under a construction contract are typically ordered by an employer or an engineer under a "Change of Scope" clause. Variations must not be such as to alter the character of the contract and must be within the ability of the contractor to execute. The contract price will vary depending upon whether there has been an increase/decrease in the scope of works.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform 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. The employer cannot omit the work on non-*bona fide* grounds to deprive the contractor of its legitimate dues.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Yes, Indian law recognises both express and implied terms in construction contracts. Implied terms are read into a contract while examining the intent of the parties and must not offend the commercial purpose of the contract. While there is no prescribed set of terms which can be implied, certain obligations are recognised as impliedly binding on both the employer and the contractor. For instance, a contractor is expected to perform its tasks in accordance with industry standards and practices.

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

The Indian position on concurrent delay is not settled. However, Indian courts routinely refer to and rely on English cases. In situations where there are concurrent delays on part of the employer and contractor, an employer may rely upon delay to substitute an extension of time for payment of any monetary damages to a contractor, whereas a contractor may rely upon it to defend against the imposition of liquidated damages upon itself. Therefore, in cases of concurrent delays, a contractor would be entitled to an extension of time and not 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 have generally adhered to this position (see: *Bhagheeratha Engineering Ltd. v. National Highways Authority of India* (2019) SCC OnLine Del 7885; *National Highways Authority of India v. Patel* KNR (JV), FAO (OS) (COMM) 184/2018; and *Essar Projects (India) Ltd. & Ors. v. Gail* (India) Ltd. [2012] Arb P. No. 424).

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The Limitation Act governs the time period for filing a court action and a claim before the arbitral tribunal. The limitation period in relation to a breach of contract is three years from the date on which the breach occurs or the cause of action arises. The time period can be extended under certain circumstances, for instance, in the case of acknowledgment or part payment.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Section 28 of the Indian Contract Act provides that an agreement curtailing the period of limitation prescribed by law is void.

Indian courts, however, recognise a distinction between clauses curtailing the time period within which the claim can be referred to arbitration and prescribing the period to notify the claim. Any time period stipulated to notify the party's intention to make claims is valid, though it indirectly curtails limitation. However, there are also judgments wherein a stipulation to this effect has been held to be in violation of Section 28 of the Indian Contract Act.

Usually, no particular forms are prescribed for the notification of claims. The law recognises that the substance of a document is more important than the form (see: *Alok Kumar Lodha & Ors. v. Asian Hotels (North) Limited* (2020)).

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

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

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

Most large construction contracts contain change-in-law stipulations. Generally, an employer bears the risk arising out of a change in law, and any resultant delays can lead to granting of extension of time.

Section 64A of the Sale of Goods Act, 1930 provides that (subject to a contract to the contrary) in the event of an increase or decrease in tax or the 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 Which party usually owns the intellectual property in relation to the design and operation of the property?

Generally, a contract for service contains clauses that 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 the works concerned should normally 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, or in accordance with its statutory right to do so under the Indian Contract Act, 1872. Occasions when a contractor may suspend performance include: considerable delay by an employer; non-payment of dues for work performed; and *force majeure*, etc.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

The Indian Contract 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). See also question 3.13 (frustration). 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 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

No. Construction contracts usually specify events on the occurrence of which an employer can terminate the contract. In most cases, the contract provides for a cure-period notice to be given by the employer prior to termination. If termination is for the employer's convenience, the contractor is usually entitled to termination payment and compensation. If the contract has been wrongfully terminated, the contractor is entitled to compensation. See also questions 3.11 and 3.19.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected 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 acknowledged in Section 56 of the Indian Contract Act. A contract is considered 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* events as grounds for frustration.

However, an exception to Section 56 states that if the event 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 the promisor's obligations under the contract.

In addition, 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.

The Supreme Court, in *Energy Watchdog v. CERC* (2017) 14 SCC 80, held that *force majeure* clauses are to be narrowly

construed. Further, where the parties have a specific *force majeure* clause in the agreement, the provisions of the Indian Contract Act (Section 56) would not apply.

3.14 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction 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.

3.15 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Collateral warranties or direct agreements are not usual in construction and engineering projects in India.

3.16 Can one party (P1) to a construction contract, who 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. Should mutual negotiations fail, recourse can be taken to court and arbitration. In law, a set-off is different from a counterclaim. A counterclaim can exceed the sums claimed by the opposite party and be framed on a different cause of action but a set-off is limited by the sum claimed and pertaining to the same cause of action.

3.17 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

The doctrine of "duty of care" originates from tort law and extends to all persons who, on a reasonable contemplation, can be expected to be affected by the acts or omissions of a person. The doctrine of "duty of care" can also be invoked in construction works, and a liability for negligence may arise from any harm caused to persons who could foreseeably be seen to be affected.

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

Where the meaning of an agreement is not certain or capable of being made certain, that agreement is considered void.

It is necessary to attempt to resolve any ambiguity 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 the business efficacy of the contract (to be applied in that order). If the ambiguity is still not resolved, the parties may resort to the rule of *contra proferentem*.

3.19 Are there any terms which, if included in a construction contract, would be unenforceable?

Some terms which may be unenforceable in a construction contract are as follows:

(a) clauses empowering an employer to unilaterally terminate a contract without any remedy;
(b) unilateral and substantial alteration of the character of a contract by adding/omitting obligations of a contractor;
(c) clauses for payment of an unreasonable sum in the form of liquidated damages;
(d) clauses absolutely restricting a party from enforcing his rights under, or in respect of, any contract;
(e) clauses that limit the time within which a party may enforce his rights; and
(f) clauses which would defeat the provisions of any law, or which are opposed to public policy.

3.20 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?

The extent of a designer's liability in contract may be limited to the terms of the contract. Indian law does not recognise an "absolute liability" on the designer or the possibility to treat the designer as a guarantor. However, the designer's liability may extend to third parties in tort and may not be restricted to contractual limitation stipulations. The Indian law of tort and negligence is largely based on English common law. English cases are regularly referred to and relied upon.

3.21 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

No, the concept of decennial liability is not recognised in India. Defect liability clauses in construction contracts broadly cover such liability of the contractor. Liability under the defect liability clause is generally for a period of six or 12 months after completion of the project.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

There are multifarious ways of resolving disputes recognised in India. These include resolution through litigation, arbitration, mediation, conciliation, dispute resolution boards and judicial settlement. Arbitration is the most commonly used mechanism to resolve construction contract disputes. Mediation and conciliation hardly ever succeed when the Government is involved in high-stakes disputes.

Recently, on 29 May 2023, the Government of India introduced a dispute resolution scheme called the "Vivad Se Vishwas II", with the aim of settling contractual disputes involving Government Undertakings. It proposes a voluntary settlement scheme by offering graded settlement terms depending on the stage of the dispute. For instance, if an award is passed against the Government undertaking but it has not yet been challenged, then the settlement amount can be 60% of the awarded sum including interest till the date of payment. As per a survey published in December 2023, since the inception of this scheme, the Government has resolved disputes spanning across various sectors amounting to Rs. 2300 Crores (almost quarter billion USD). The Scheme is still at a nascent stage and its success remains to be seen.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

In the absence of a statutory enactment, the adjudication process is subject to the parties' agreement. The clause is hardly ever used. Dispute review boards, on the other hand, are common. In practice, however, either the disputes review board is not constituted in a timely manner, or its decision is not voluntarily accepted. The Government's mindset is to only accept an arbitral award as upheld by courts as the proper dispute resolution mechanism, especially in high-stakes disputes.

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

Construction contracts invariably provide for arbitration. The Arbitration and Conciliation Act, 1996 ("Arbitration Act") is the governing law. The Arbitration Act is largely based on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law, 1985, and UNCITRAL Model Arbitration Rules, 1976. The Act has two significant parts. Part I is an elaborate code providing for all arbitrations seated in India (domestic or international). Part II essentially provides 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.

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 (legal or practical) to enforcement.

Yes, India is a signatory to the New York Convention and the grounds on which the enforcement can be resisted are as specified in the NYC. The limitation period for enforcement of a foreign award is 12 years. Legal obstacles include judicial delays and issues concerning remittance in foreign currency. The losing party is usually directed to deposit the awarded sums in court pending resolution of the challenge grounds. This is to safeguard the interest of the successful party. The deposit is, however, in Indian Rupees. Several grey areas such as exchange rate issues and Indian tax issues on interest accrued have not been conclusively settled by the courts.

4.5 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 arrive at: (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 on the opposing parties to file their written statement (replies). Issues are thereafter framed by the court and the case is posted for trial. Evidence-in-chief is in the form of sworn affidavits, and cross-examination is conducted in front of court-appointed commissioners. The claimant's evidence is led first.

A claimant may request the court for a summary judgment in case of a certain debt or 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 or to a two-judge bench of the High Court. If parties are not satisfied with the judgment of a High Court, a Special Leave Petition 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.

Indian courts are burdened. The time taken can vary from jurisdiction to jurisdiction. Generally, a court case can take 10 to 15 years to progress through the various stages of appeal.

4.6 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? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

A foreign judgment may emanate from a "reciprocating" territory or a "non-reciprocating" territory. If it is from a reciprocating territory, the judgment is straightaway enforceable as a decree of the court, but subject to six defences that are available to the defending party. In the case of a non-reciprocating territory, the foreign judgment is not straightaway executable. A fresh suit would need to be instituted in India on the basis of the foreign judgment. Here too, the defendant can only use six specified grounds to defend itself. The six grounds available to the defendant (in either situation) are:

(a) that the judgment has not been pronounced by a court of competent jurisdiction;
(b) that it has not been given on merits, i.e., it is a default judgment;
(c) that it is founded on an incorrect view of international law or a refusal to recognise Indian law (if applicable);
(d) that the proceedings were opposed to natural justice;
(e) that it has been obtained by fraud; and
(f) that it sustains a claim founded on breach of law in force in India.

Major jurisdictions that have been notified as "reciprocating territories", include the United Kingdom, United Arab Emirates, Singapore and Hong Kong.

Sumeet Kachwaha has over 45 years' experience in the legal profession, mainly in dispute resolution, corporate and commercial law. Mr. Kachwaha has been recognised in Band One of the Arbitration section of *Chambers Asia-Pacific* since 2009. He 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 Legal 500 Asia Pacific*. He is also listed in GAR's *Who's Who Legal* Arbitration section and ranks in the India Business Law Journal's "A List" of "India Top 35 Lawyers". He has handled some of the leading and most landmark commercial litigations ever to come before Indian courts. Mr. Kachwaha has also been involved on the non-contentious side in several high-stakes projects in infrastructure, power, construction and telecoms.

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