Exclusionary Clauses in Construction Contracts – Development of Jurisprudence vis-à-vis Arbitration Law.

- **Gaurav Rai**[1]

I. Introduction

The most common commercial arbitrations today arise out of Construction contracts. These contracts have now also contributed certain terms and clauses which are unique only to such contracts. This is evident by the fact that there are special treatises and books on contract law and arbitration in the construction industry. One such clause is the exclusion clause. Although such exclusion clauses may not be specific to construction industry they are most widely used in construction contracts. This article will deal with exclusion clauses in which the clauses of a contract exclude the liability of employers in construction contracts for delays caused by the employers themselves. Such clauses will be referred to as exclusion clauses generally during the course of this paper.

Such a detailed discussion regarding the status of the law and the scope of such exclusion clauses is necessary because the suggestions of the 103rd Report of the Law Commission of India[2] have not been accepted. Titled "Unfair Contract Terms", this report dated 28th July 1984 took a harsh view of contracts of adhesion which were one sided and had unconscionable terms specifically those which excluded liability for faults of one of the parties to the contract. The Law Commission was of the view that the Contract Act in India, in its current form, would not be able to stop parties from inserting one sided clauses which extinguished the liability of one party even in cases of wilful breach. This report in chapter 6 made a single suggestion in the form of an insertion of Section 67A

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[2] 'Unfair Terms in Contract' (Law Commission of India 1984) 103 <http://lawcommissionofindia.nic.in/101-169/Report103.pdf>

to the Contract Act in the form of an amendment which would have read as follows:

> Section 67-A (1) Where the Court, in terms of the contract or on the basis of evidence adduced by the parties, comes to the conclusion that that the contract or any part of it is unconscionable, it may refuse to enforce the contract or the part that holds it unconscionable.
>
> (2) Without prejudice to the generality of the provisions of this section, **a contract or part of it is deemed to be unconscionable if it exempts any party thereto from – (a) liability for wilful breach of the contract,** or (b) the consequences of negligence."
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> **(Emphasis supplied)**

The author submits that such a clause would have definitely changed the landscape of contract law jurisprudence and would have made absolutely clear the status of the law which is being discussed in this paper. However, the author does not agree with the premise of the Report that parties can completely exclude the liability for their wilful default. This article is going to weave through a myriad of scenarios, Sections of the Indian Contract Act, 1872 and Judgments of the Courts of India to analyse the status of the law regarding exclusion clauses and show that such clauses in contracts when being dealt with in arbitration matters will not bind the arbitral Tribunal and it can disregard the same.

The author will, however, attempt to highlight and establish the most beneficial approach to either side i.e. the Contractor and the Employer, so as to safeguard their interest. This article will however limit its scope and not deal with supplemental agreements entered into between the parties when such issues of delays and compensation arise during the execution of the Contract which may or may not have such an exclusion clause.

II. Compensation for breach of Contract and delay in performance of Contract

The very basic universal rule of contract law is that when a party breaches

the terms of the Contract they are obligated to compensate the party who suffers from such breach for any loss caused which naturally arose in the usual course of business. The same is outlined under Section 73 of the Contract Act, 1872 and is extracted hereunder:

> **73. Compensation for loss or damage caused by breach of contract.**
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> When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
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> **Compensation for failure to discharge obligation resembling those created by contract.**
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> When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.
>
> **Explanation.**
>
> In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

In addition to the compensation provided for breach of Contract, Section 55 of the India Contract Act, 1872 also lays down how compensation may be available for the delay in the performance of the Contract. It centres around the nature of the contract in question. Different consequences are stipulated based on whether time is of the essence of the contract or not. This phrase is of utmost relevance to the discussion. Section 55 of the Indian Contract Act,1872 is extracted hereunder:

> **55. Effect of failure to perform at fixed time, in contract in which time is essential.**
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> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> **Effect of such failure when time is not essential.**
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> If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.
>
> **Effect of acceptance of performance at time other than that agreed upon.**
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> If, in case of a contract voidable on account of the promisors failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

As is well highlighted above, the second paragraph of Section 55 which deals with cases where time is not of the essence of the contract, does not contain conditions for claiming compensation from the employer for the delay that might have been caused unlike the third paragraph which states that notice must be given at the time of accepting an extension of time from the employer for the contractor to eventually seek compensation at a later date. In ***Hind Construction v. State of Maharashtra (1979) 2 SCC 70*** it was held by a three judge bench of the Supreme Court as follows:

> …….where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the

> inference that the completion of the work by a particular date was intended to be fundamental, for instance, if the contract were to include causes providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract.

Most construction contracts have such clauses that allow extension of time or imposition of penalty/ liquidated damages for delay in completion of works. Hence, on the basis of the principle laid down by the Supreme Court in the aforesaid case, all construction contracts which have such clauses will not be construed to have stipulated that time is of the essence of the Contract and consequently only the second paragraph of Section 55 of the Contract Act,1872 will be applicable for dealing with disputes regarding compensation for delay.

III. Exclusion clauses for delay caused by the Employer

Under this sub-head, the author will deal with how judgments in the Supreme Court of India have dealt with such exclusion clauses which state that Contractors are not entitled to receive damages for delay caused by the employers themselves in performing their obligations. In most construction contracts, according to the author, delays such as handing over of vacant possession of the land, approval or drawings etc is the responsibility of the Employer.

The Author, however, submits that most Indian Judgments, while dealing with the aspect of delays caused by the employers, have not truly discussed the difference between the rights of the parties in contracts where time is of the essence and where time is not of the essence. The Courts have either discussed Section 55 as a whole or have not discussed Section 55 or any other provision of the Contract Act altogether. The Courts while dealing with arbitral Awards under challenge have, on the basis of the principle of supremacy of the contract or the principle that the scope of the arbitral Tribunal is within the four corners of the contract, either set aside awards which granted compensation for delay of the

Employer even in the presence of exclusion clauses or have enforced/upheld the arbitral award which has dismissed the claims for compensation for delay caused by the Employer, solely on the basis of such exclusion clauses. Even the judgments which have upheld the award for allowing claims even in the presence of such clauses have given reasons which are difficult to justify. Through the discussion of these judgments, I shall follow up on my general position as put forth above and simultaneously lay out my specific criticism for each judgment.

In ***Ch. Ramalinga Reddy v. Superintending Engineer 1999 (9) SCC 610*** the Supreme Court affirmed the judgment of the High Court of Andhra Pradesh which had set aside the award of the arbitrator for payment of extra rates for work done beyond the agreed time. The High Court stated that Clause 59 of the A.P. Standard Specifications which applied to the contract between the parties stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined and it held that the claim fell outside the defined exceptions. It also distinguished the judgment of the Supreme Court in ***P.M. Paul v. Union of India 1989 Supp. (1) SCC 368*** and stated that the contract under consideration in P.M. Paul case did not have a clause which provided that the Employer would not be liable to pay compensation on account of delay in the work from any cause nor was it stipulated at the time of extension of the contract that no claim for compensation would lie on behalf of the contractor. Irrespective of all the points made above, it is pertinent to note that both these cases were based on the Arbitration Act, 1940 (Act,1940).

In ***General Manager, Northern Railway v. Sarvesh Chopra 2002 (1) Arb.L.R 506 (SC)*** the decision to not allow the reference to arbitration due to the claim being an excepted matter i.e. not arbitrable was based on (i) The Arbitration Act, 1940 and (ii) the expanded scope of judicial inquiry when an application is being made to appoint an arbitrator. The author argues that the consideration under the Act, 1940 for the appointment of arbitrator does not hold good any longer. The author admits that the Seven Judge Bench in ***SBP & Co.***

v. Patel Engineering (2005) 8 SCC 618 held that under the Arbitration and Conciliation Act, 1996 the power of the Chief Justice of the Supreme Court or High Court to appoint an arbitrator was a judicial power and was amenable to jurisdiction under Article 136 of the Constitution of India, 1950 which entailed a detailed examination of the disputes and the arbitration clause and also included the aspect of confirming whether the claims formed part of the excepted matter in which case the reference to arbitration could be disallowed at the appointment stage itself.

However, it was clarified by the Supreme Court in ***National Insurance Company v. Boghara Polyfab (2009) 1 SCC 267*** that there are three kinds of preliminary issues in an arbitration matter and the issue of whether the claims were within the scope of the arbitration clause formed part of the third kind i.e. to be left for the Arbitral Tribunal to decide. Further, in the case of ***Duro Felguera v. Gangavaram Port Ltd. (2017) 9 SCC 729*** it has become crystal clear that post the 2015 amendment and the inclusion of Section 11(6A), the only consideration for the courts while exercising power under Section 11 to appoint an arbitrator is to check the existence of the arbitration clause and all other considerations such as the claims being beyond the scope of the arbitration and forming part of the excepted matter is left to the Arbitral Tribunal to decide. Hence, upon a reading of the above two judgments along with the insertion of Section 11(6A) it becomes abundantly clear that the decision in ***General Manager Northern Railway v. Sarvesh Chopra(Supra)*** wherein the court set down principles to not allow arbitration in case of excepted matters also is no longer good law as the same is now the prerogative of the Arbitral Tribunal to decide in arbitration proceeding.

On merits, however, ***General Manager Northern Railway v. Sarvesh Chopra*** *(Supra)* judgment, makes a very pertinent observation regarding the contract law jurisprudence of India and highlights how the same is distinct from the American and Commonwealth jurisprudence on '*no damage clauses*' in the contract which finds favours in those jurisdictions. The Supreme Court

particularly referred to Section 55 of the Contract Act,1872 which provides for circumstances under which compensation will be available to the contractor even if the contract does not stipulates for damages to be payable for delays caused by the Employer. The relevant portion of the judgment is extracted hereunder:

> Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

Pertinently, what has been quoted above is correct, however it is imperative to note that Section 55 of the Contract Act, 1872 does not apply wholly to Construction Contracts. As was discussed above and outlined by the Supreme Court Judgement in ***Hind Construction v. State of Maharashtra (1979) 2 SCC 70***, Construction Contracts are generally in the nature of contract where time is 'not' of the essence because almost all construction contracts have clauses for extension of time or for liquidated damages for delay caused by the contractor. According to the apex Court, existence of such extension clauses indicates that time is never meant to be the essence of Construction Contracts.

Hence, as per the author, at best, only the second paragraph of Section 55 of the Contract Act, 1872 applies to construction contracts and the discussion of the entirety of Section 55 of the Contract Act seems unwarranted, as paragraphs 1 and 3 deal with situations where time is of the essence. Hence all the points laid down by the Supreme Court in ***General Manager Northern Railway v. Sarvesh Chopra*** *(Supra)* do not apply to construction contracts in general.

Even though ***General Manager Northern Railway v. Sarvesh Chopra*** *(Supra)* not being relevant in today's times, due to the outdated nature of the reasons for its conclusion, it remains the only judgment of the Supreme Court of India which actually deals with the concept of exclusion clauses in reference to the applicable provisions of the Contract Act,1872 and also makes a pointed mention to the fact that irrespective of clauses excluding the liability of the Employer for delay caused by the Employer itself, there are still circumstances as outlined by Section 55 that the Contractor will be able to get compensation for such delay.

The judgments discussed hereafter do not discuss any principles of contract law when discussing exclusion clauses. Their decision on whether the same will be applicable or not is established around the principles of arbitration law that the Arbitral Tribunal is a creature of the contract and cannot decide any dispute dehors the contract between the parties.

In ***Ramnath International Construction v. Union of India (2007) 2 SCC 453,*** the court looked into the award of an arbitrator which awarded amounts for delay caused by the Employer. It is pertinent to note that this judgment was under the Arbitration Act, 1940. The Court held that the contract provided that if there is any delay, attributable either to the contractor or the employer or to both, and the contractor seeks and obtains an extension of time for execution on that account, he will not be entitled to claim compensation of any nature, on the ground of such delay, in addition to the extension of time obtained by him. Based on this interpretation of the contract, the Court set aside the amounts awarded under the claims for compensation as a consequence of such delay. It was interesting to note that the court made a subsequent observation which will become quite significant when the author analyses the rationale or validity of such exclusion clauses in the backdrop of the Contract Act, 1872. The Court held that:

> As rightly held by the High Court, which decision we have affirmed while considering questions no. (i), clause 11 (C) of

> the General Conditions of Contract is a clear bar to any claim for compensation for delays, in respect of which extensions have been sought and obtained. **Clause 11(C) amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of his claims for delay and not claim any compensation.** In view of the clear bar against award of damages on account of delay, the arbitrator clearly exceeded his jurisdiction, in awarding damages, ignoring clause 11(C).

(Emphasis supplied)

In the opinion of the author, this reasoning by the Supreme Court is at best misguided. The extension of time being provided to the contractor is in no way a compensation for the delays caused by the Employer. It is more in the nature of the right that the contractor needs to complete the project because of the delays caused by the employer. For that matter, in case the extension is not provided, the contractor will not have a case for escalation prices or extra costs for the work done in the extended period of time but will definitely have a case for loss of profits for the work that could not be done by the contractor within the time, due to the delay caused by the Employer. Finally, just like the ***Sarvesh Chopra*** Judgment, the judgment in ***Ramnath International Construction v. Union of India (Supra)*** also states that the arbitrator is supposed to confine his decision to the limits of the contract and that the arbitrator has gone beyond the terms of the contract, more specifically Clause 11(C) and hence the award is liable to be interfered with.

In ***Asian Techs Ltd. v. Union of India - (2009) 10 SCC 354*** the Supreme Court of India dealt with an identical Clause 11(c), however, it arrived at a different conclusion regarding the validity of the arbitral Award which allowed the escalation of prices for work done during the extended period of time. In Asian Techs (Supra) the court outlined the various delays attributable solely to the Employer and upheld the award of the arbitral Tribunal which allowed the claim of the contractor towards increased costs. However, a keen eye will notice that this judgment had a different conclusion from Ramnath International (Supra)

only because the Employer, in this case, had verbally agreed for the increased costs to be determined later. The Contractor carried on work only on such assurance made by the Employer. The relevant text from the judgment is extracted hereunder:

> The letter dated 24.11.1988 makes it clear that the appellant was not ready to carry out the work beyond the contracted period otherwise than on separate work orders, and the subsequent correspondence like the letter dated 11.10.1989 makes it clear that it was on the specific assurance given by the respondent to the appellant to continue the work and that the rates would be decided across the table that the appellant went ahead with the work. Hence, in our opinion it is now not open to the respondent to contend that no claim for further amount can be made due to Clause 11(C) and that the arbitrator would have no jurisdiction to award the same.

Hence, the Court in the aforesaid case, without discussing whether time was of the essence of the contract or the applicability of the provisions of Section 55 of the Contract Act, 1872 or even a reference to the ***Sarvesh Chopra(Supra)*** judgment, came to a conclusion in line with the ***Sarvesh Chopra*** judgment and stated that the contractor had notified the employer for escalated rates and the same was agreed to by the Employer and hence the arbitrator was justified in granting the claims of the contractor for escalated rates for work done during the extended period of time for delays caused due to the employer.

Further, in ***Union of India v. Chandalavada Gopalakrishna Murthy (2010) 14 SCC 633*** the Supreme Court dealt with an award which allowed damages for delay by the Employer even though the contract between the parties contained Clause 17(3) which stated that if there is any delay by the Railways, the terms of the contract can be extended, however, the contractor shall not be entitled to damages or compensation. The Court directly applied the 'precedents' of ***Ch. Ramalinga Reddy v. Superintending Engineer (Supra) and General Manager***, ***Northern Railway v. Sarvesh Chopra (Supra)*** and set aside the award.

The non-binding nature of this Judgment of the Supreme Court in ***Union of India v. Chandalavada Gopalakrishna Murthy (2010) 14 SCC 633*** can be explained in more ways than one. First, this judgment stems from an arbitration under the Arbitration Act of 1940. Secondly, it does not discuss any of the principles of contract law and arbitration law. Thirdly, this judgment heavily relies on these precedents of ***Ch. Ramalinga Reddy v. Superintending Engineer (Supra) and General Manager, Northern Railway v. Sarvesh Chopra (Supra).*** Hence, in the opinion of the author, it is not advisable to associate heavy precedential value to this case as I have already dismantled the previous judgments that it relies on.

IV. The Judgments which set aside awards, not in consonance with the contract, are no longer good law.

The author is of the firm belief that the aforesaid judgments cannot be heavily faulted with as they were bound by the principles affirmed in the case of ***ONGC v. SAW Pipes [2003] 5 SCC 705*** which stated that any award not in consonance with the contract between the parties is liable to be set aside as being against public policy. The basis of this judgment was the provisions of Section 28(3) of the Arbitration and Conciliation Act, 1996 as it existed before its amendment in 2015. The unamended Section 28(3) is extracted as hereunder:

> 28. Rules applicable to substance of dispute
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> ….
>
> (3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

This particular section has been amended on the basis of the recommendation of the Law Commission 246th Report. The relevant portion of the report is extracted hereunder:

> The amendment to section 28(3) has similarly been proposed solely in order to remove the basis for the decision of the Supreme Court in ONGC vs. Saw Pipes Ltd, (2003) 5 SCC 705 – and in order that any contravention of a term of the contract by the tribunal should not ipso jure result in rendering the award becoming capable of being set aside. The Commission believes no similar amendment is necessary to section 28 (1) given the express restriction of the public policy ground (as set out below).
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> …
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> In sub-section (3), after the words "tribunal shall decide" delete the words "in accordance with" and add the words "having regard to"
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> [Note: This amendment is intended to overrule the effect of ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705, where the Hon'ble Supreme Court held that any contravention of the terms of the contract would result in the award falling foul of Section 28 and consequently being against public policy.]

The ruling of ***ONGC v. SAW*** Pipes regarding the supremacy of contract and limits of arbitrator jurisdiction to the four corners of the contract, was legislatively overruled by the amendment to Article 28(3) of the Arbitration and Conciliation Act, 1996. Hence, it is quite obvious that all the other judgments relying on ***ONGC v. SAW Pipes***, the unamended Section 28(3) of the Arbitration and Conciliation Act, 1996 or the principle that an arbitral award not in consonance of the contract is to be set aside, are no longer good law. By way of this amendment, the Arbitration and Conciliation Act, 1996 has given the power to the arbitrators to only 'take into account' the provisions of the contract between the parties and not be completely bound by the contract.

Specific reference also needs to be made to Section 28(1) of the Arbitration and Conciliation Act, 1996 which is extracted hereunder:

> "28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situate in India,—
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> (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law

> for the time being in force in India;
>
> (b) in international commercial arbitration,—
>
> (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
>
> (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
>
> (iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute."

Section 28(1)(a) mandates all domestic arbitral Tribunal in India to mandatorily follow the substantive law of India. This invariably includes the Contract Law of India governed by the Indian Contract Act, 1872 and a domestic arbitral Tribunal cannot decide a matter in derogation of the same[3]

Hence a summation of the of these two sections namely, Section 28(1) and the amended Section 28(3), is that all the provisions of the Contract which are diametrically opposite to the Contract Act, 1872 and more specifically, Section 55 and Section 73 of Contract Act, 1872 will not bind the arbitrators. This may also be applicable to International Commercial Arbitrations seated in India if the Contract between the parties in such cases states that the substantive law governing the Contract will be the Indian Law and hence the Contract Act, 1872 will be in play in the same manner and the exclusion clauses as discussed in this article will not bind the arbitrators at the time of dispute resolution.

The most detailed judgment which deals with the contractual as well as contract law aspect of such exclusion clauses is the Delhi High Court judgment in ***Simplex Concrete Piles v. Union of India (2010) ILR 2 Delhi 699.*** The

[3] Indu Malhotra, Commentary on the Law of Arbitration in India Vol. I (Wolter Kluwer, 4th Ed.) 738-740

operative portion of the judgment states that contractual clauses disentitling the aggrieved party to the benefits of Section 55 and Section 73 of the Contract Act, 1872 would be void being violative of Section 23 of the Contract Act,1872 as the said Sections are a matter of public policy & public interest to preserve the sanctity of the Contract. Due credit must be given to the Delhi High Court for pronouncing this judgment even before the 2015 amendment of the Arbitration and Conciliation Act, 1996 particularly the amendment to Section 28(3). **The author submits that today, post the amendment to Section 28(3), the simple fact that the provisions of the Contract Act,1872 are being violated by the provisions of a Contract would be enough for the Arbitral Tribunal to disregard such provisions of the contract.**

V. Saving for Employers in Construction Contracts

It is true that this entire article has been, in a way, a defence for contractors in construction contracts and to give them a way to not sustain losses for obligations not performed by the Employers. However, on a very practical note, what needs to be understood is that most employers will try their best to fulfil their obligations and as far as government employers are concerned they are limited in their budgets. They also take up obligations and responsibilities under the contract, such as handing over of peaceful possession of the land, which cannot be guaranteed many a time.

As I have already shown that exclusion clauses in contracts will not pass the muster of the Contract Act,1872 the only other solution for employers who are in breach of their obligations causing a delay in the overall performance of the contract by the contractor, is for them to provide limited liability towards the breaches they commit which will cause such delays. A limited damage clause is in consonance with Section 74 of the Contract Act,1872 and does not run foul of Section 55 and Section 73 of the Contract Act, 1872. Hence a clause in the contract providing reasonable damages and limiting the damages will be upheld by the Arbitral Tribunal as they are valid and damages beyond these limits cannot be provided even if the contractor has suffered losses greater than the limits. Such

a clause does not go into the distinction of whether time is of the essence of the contract or not hence does not complicate the matter with issues such as providing notice or parties getting into supplemental contracts for waiving their rights to claim damages.

The more recent National Highway Authority of India (NHAI) contracts have clauses that limit the compensation for delay in handing over of land to INR 1000 per month per 1000 Square metre or part thereof of land not handed over and in the opinion of the author are perfectly valid if the claim of the contractor for compensation is squarely covered under this clause for delay in handing over the land and no other delays have been caused wherein the liability is not limited. Further, if the clause limiting such liability has certain conditions which are not fulfilled or rather breached by the Employer, then the limited liability as provided for under the clause may not be applicable and the Arbitral Tribunal will be within it rights to deal with the claims of the contractor under Section 73 of the Contract Act, 1872 and grant compensation to the fullest extent based on evidence provided by the Contractor. For a clearer understanding of this position, reference may be made to National Highways Authority of India v. N.K. Toll Road Limited O.M.P. (COMM) 126/2017 High Court of Delhi.[4] ***In any case paragraphs 24-29 are extracted hereunder for the benefit of the readers:***

> 24. At the outset, it is necessary to observe that there is no dispute that NHAI had committed a default in handing over of land for the works to be executed. The Arbitral Tribunal had found that there was a delay of at least 206 days in handing over the site, which was wholly attributable to NHAI. The dissenting note entered by Mr Arun Kumar Sinha, which is heavily relied upon by Mr Nanda Kumar also accepts that NHAI had delayed handing over the land for at least a period of 206 days.
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> 25. It is also not disputed that NHAI is liable to compensate N K Toll for the damages on account of delay in handing over the site. The only question to be addressed is whether the Arbitral Tribunal had erred in assessing the damages in terms of Sub-

[4] Available at https://indiankanoon.org/doc/6516976/

clause 31.2 of the Agreement and in terms of Sections 55 and 73 of the Contract Act. It is, at this stage, also relevant to note that although Mr Nanda Kumar had contended that Sub-clause 31.2 of the Agreement was not applicable, he did not articulate any grievance with regard to the quantum of damages as assessed (assuming that Sub-clause 31.2 of the Agreement was applicable). Thus, the only question to be addressed is whether the Arbitral Tribunal (majority) had erred in holding that Sub-clause 31.2 of the Agreement was applicable for determining damages.

26. Mr Nanda Kumar's contention that Arbitral Tribunal had not taken into account the provisions of Sub-clauses 13.5.1 and 13.5.2 of the Agreement is ex facie incorrect. A plain reading of the impugned award indicates that the Arbitral Tribunal had discussed the issue whether the said sub-clauses were applicable and had rejected the same. The relevant extracts of the impugned award wherein the question of applicability of the provisions of Sub-Clause 13.5.2 are discussed are set out below:-

> "Now considering the effect on compensation of clause 13.5.2 of the contract agreement (page 41), it states, quote "Additional right of way for construction of main carriageway shall be made available to the concessionaire as per the handing over schedule mentioned herein free from all encumbrances and without the concessionaire being required to make any payment to NHAI on account of any costs, expenses and charges for the use of such additional right of way for the duration of the Concession Period. 50% (fifty percent) of additional right of way for construction of main carriageway on or before 6 (six) months from the appointed date, balance 50% (fifty percent) of the additional right of way for construction of main carriageway on or before 12 (twelve) months from the appointed date. Additional right of ways for service roads and other facilities shall be handed over to the concessionaire on or before 18 (eighteen) months from the appointed date. On or after the appointed date, the concessionaire shall commence, undertake and complete all construction works on the project highway in accordance with this agreement. Provided, however, that if NHAI does not enable such access to any part or parts of the additional right of way for any reason other than a force majeure Event or breach of this agreement

by the concessionaire as per the schedule mentioned herein, NHAI shall pay to the concessionaire damages at the rate of Rs. 1,000 (Rupees one thousand) per month per 1,000 (one thousand) sq. meters or part thereof if such area is required by the concessionaire for construction works. Such Damages shall be raised to Rs.2,000 (Rupees two thousand) per month after COD if such area is essential for smooth and efficient operation of the project highway. Provided further that the completion certificate or the provisional certificate, as the case may be, for the project highway shall not be affected or delayed as a consequence of such parts of the existing right of way remaining under construction after the scheduled project completion date".

It is evident that NHAI did not keep its obligations in providing additional right of way as scheduled in the above clause of the CA. The consequence of such failure are dealt with by two provisos to clause 13.5.2. The first proviso states, quote. "Provided, however, that if NHAI does not enable such access to any part or parts of the additional right of way for any reason other than a force majeure Event or breach of this agreement by the concessionaire as per the schedule mentioned herein, NHAI shall pay to the concessionaire damages at the rate of Rs.1,000 (Rupees one thousand) per month per 1,000 (one thousand) sq. meters or part thereof if such area is required by the concessionaire for construction works. Such Damages shall be raised to Rs, 2,000(Rupees two thousand) per month after COD if such area is essential for smooth and efficient operation of the project highway".

The second proviso puts a further condition, stating that, quote "Provided further that the completion certificate or the provisional certificate, as the case may be, for the project highway shall not be affected or delayed as a consequence of such parts of the existing right of way remaining under construction after the scheduled project completion date".

Thus considering clause 13.5.2 in its entirety, the stated sums mentioned as Damages against the failure of the Respondent to make available additional ROW can be applicable only if the provisional completion certificate was not delayed or affected as a consequence of delay/non-fulfillment of reciprocal promises by the Respondent."

27. The Arbitral Tribunal further examined the correspondence between the parties in relation to N K Toll's request for issue of provisional completion certificate and concluded that the same had been denied to N K Toll until it completed the entire four laning of the Project Highway, meeting all the requirements as per the specifications and standard. The Arbitral Tribunal concluded as under:-

> "The denial of PCC to the Claimant resulted in non-fulfillment of second provisio of clause 13.5.2 of the CA and breach of contract, thereby the pre-determined damages provided therein will no longer apply. The rate of damages payable by NHAI to the Concessionaire, if it does not enable access to any part or parts of the additional ROW to the Concessionaire as per the schedule mentioned in this clause are covered by two riders, and there can be no other interpretation that these damages will not be applicable, if the second rider is not complied with.
>
> Thus material breach has been committed by the Respondent and the damages on this account will have to be dealt with by clause 31.2 (page 74 of CA) read with section 55 and 73 of the Indian Contract Act 1872."

28. Sub-clause 31.2 of the Agreement (as quoted in the impugned award) reads as under:

> "31.2 In the event of NHAI being in material default of this Agreement and such default is cured before Termination, NHAI shall pay to the Concessionaire as compensation, all direct additional costs suffered or incurred by the Concessionaire arising out of such material default by NHAI, in one lumpsum within 30 (thirty) days of receiving the demand or at NHAI's option in 3 (three) equal installments with interest @ SBI PLR plus 2% (two per cent)".

29. As noticed above, there is no dispute that the damages awarded by the Arbitral Tribunal are in conformity with the aforesaid sub-clause."

The Court hence did not deem it proper to interfere with the award of the arbitral Tribunal due to reasons as is evident from the quote above. Hence the author believes that if the Employers take into account the following points, they will be able to adequately safeguard their interests in arbitration proceedings.

Conclusion

In conclusion, the author would like to state that the American principle of 'no damage clauses', which have been adopted by certain other commonwealth jurisdictions, have no place in Indian Contract Law jurisprudence. Hence, clauses excluding the liability of the Employer for delays committed by the Employer are not good consideration under Section 23 of the Indian Contract Act,1872 and cannot limit the power of the Arbitral Tribunal to grant compensation to the fullest extent to the Contractor in a construction contract under the Second paragraph of Section 55 and Section 73 of the Contract Act. Section 28(1) of the Arbitration and Conciliation Act makes it clear that the substantive laws of India will mandatorily apply to all domestic arbitrations and also to those International Commercial Arbitrations wherein the parties have chosen Indian Law as the substantive law to govern their relationship in which case it is further fortified that such exclusion clauses which exclude the liability of the employer for their breaches cannot bind the arbitral Tribunal as the same will be in violation of the substantive law of India, namely the Indian Contract Act, 1872. Further, the amendment to Section 28(3) also relieves the arbitral Tribunal from the four corners of the Contract between the parties as contracts between the parties is only to be taken into account and not circumscribe the scope of the arbitral Tribunal.

Such damages for breaches by the Employer can, however, be limited by inserting a carefully worded liquidated damages clause in line with Section 74 of the Indian Contract Act, 1872 which will then not be a violation of Section 55 and Section 73. Finally, on a personal note, the author firmly believes that with the necessary course correction provided by the amendment to Section 28(3) of the Arbitration and Conciliation Act, 1996, domestic arbitrations will form the source for the development of contract law jurisprudence in India.