DISPUTES DIALOGUE SERIES

Navigating practical realities of commercial dispute resolution

Discussion highlights from the inaugural session:
Delays in infrastructure projects-strategies for effective dispute avoidance, management and adjudication

A knowledge initiative by:

PSL Advocates & Solicitors

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ABOUT DISPUTES DIALOGUE SERIES

At PSL, our constant endeavour is to undertake innovative capacity-building and knowledge-sharing initiatives in commercial dispute resolution, which is our core domain expertise. These initiatives, in the form of advocacy workshops, empirical research papers, conferences, panel discussions, cross-talks, Oxford-style debates, webinars, etc., have helped shape the discourse around contemporary legal issues and garnered formidable participation from legal experts and industry leaders. This interactive engagement with key stakeholders has significantly bolstered our expertise and enabled us to create a dynamic knowledge repository to keep a finger on the pulse of best practices and emerging legal developments.

PSL Disputes Dialogue is designed to encourage meaningful deliberations and invite valuable insights on contemporary issues in commercial dispute resolution from industry leaders, general counsels and experts. We aim to brainstorm on niche topics of seminal importance, identify contentious issues, and analyze them threadbare to ideate a pathway to fruitful resolution. The formats utility lies in the collaborative symposium of functional knowledge by diverse stakeholders across various industries in the lifecycle of a commercial dispute to garner a holistic and nuanced response on contentious issues.

ABOUT OUR CONSTRUCTION AND INFRASTRUCTURE PRACTICE:

PSL has an extensive Construction and Infrastructure practice backed by a team of experienced lawyers with technical domain expertise who provide start-to-end legal, contractual, and practical advice on construction and engineering-related work. Our approach encompasses contentious and non-contentious aspects of construction and engineering projects, both domestic and international. Our client repertoire includes Developers/Concessionaries and Employers, Contractors and Subcontractors, Lenders/Financiers, Architects/Engineers, Contract Administrators, and Design Consultants. We advise on engineering and construction contracts across sectors such as Airports, Roads, Rail, and Power Plants, covering all aspects of engineering and construction contracts during the complete project life cycle. We also assist our clients in contract and claims management during the projects implementation. Our advice focuses on avoiding disputes and allowing the project to be implemented within budgeted costs and time. Whenever required, we work closely with domestic and international expert consultancies and law firms to provide comprehensive support to our clients.

The firm comprises a group of dynamic counsels adept at handling complex matters across various judicial forums and arbitrations conducted under premier institutional rules as well as ad hoc arbitrations. The firm also undertakes mandates related to representation in pre-arbitral contractual adjudication including Dispute Adjudication Boards. The firm services domestic and international clients in dispute avoidance, litigation strategy, and representation during the entire lifecycle of arbitration proceedings including securing interim measures of protection, navigating jurisdictional challenges. The firm is also active in handling annulment/setting aside challenges and enforcement proceedings before domestic and international courts. PSL's practice is highly appreciated by its clients and has been consistently recognised by coveted international publications.

PARTICIPANTS

Name	Designation	Organization
Mr. Ajit Kumar Mishra	Group General Manager, Contract Management	Dedicated Freight Corridor Corporation of India Limited
Mr. Mohit Dubey	Deputy Director, Military Engineer Services	Ministry of Defence, Government of India
Mr. Rajarshi Sen	Lead Counsel	Siemens Energy India
Col. Dr. Anand Mathialagan (Retd.)	Infrastructure Consultant & Member	Ministry of Defence, Government of India
Mr. Gaurav Gulati	Head – Disputes	PricewaterhouseCoopers India (PwC)
Mr. Arvind Arora	Former Director	General Military Engineer Services
Mr. Unmesh Kulkarni	Vice President, Contracts Administration	Shapoorji Pallonji & Company Private Limited
Mr. Ashish Gupta	Director	Nitya Nand & Sons Contractors Private Limited

Ms. Deepika Singh	Head	Legal, Roadis India
Mr. Sameer Jain	Founder and Managing Partner	PSL Advocates & Solicitors
Mr. Suvigya Awasthy	Partner	PSL Advocates & Solicitors
Ms. Anu Sura	Counsel	PSL Advocates & Solicitors
Ms. Jayashree Parihar	Counsel	PSL Advocates & Solicitors
Mr. Himesh Thakur	Counsel	PSL Advocates & Solicitors
Mr. Vivek Joshi	Senior Associate	PSL Advocates & Solicitors
Mr. Rohan Gulati	Associate	PSL Advocates & Solicitors

The inaugural Disputes Dialogue Series organized by PSL Advocates & Solicitors focused on issues related to delays in infrastructure projects- "Delays in Infrastructure Projects – Strategies for Effective Dispute Avoidance, Management, and Adjudication." The roundtable aimed to elicit insights from industry leaders regarding their experiences handling delay claims, identifying challenges, and discussing the best practices for minimizing delays and streamlining the adjudication of delay claims.

Instances of delay and disruption are unavoidable in infrastructure disputes and are commonly encountered in various projects globally. It's crucial to recognize that each delay event is distinct and arises from its own unique set of circumstances. When dealing with delay events, it's imperative to have an efficient adjudication process in place. Determining factors for categorizing delay claims is necessary to accurately attribute delay, determine the compensable or non-compensable nature of the delay event, and understand the contractual safeguards and consequences, which significantly affect the rights and obligations of the parties involved.

In order to prevent disputes, it's crucial to employ effective strategies to minimize delays. One way to achieve this is by using standard-form contracts with specific modifications. This can serve as an initial step towards preventing disputes. Furthermore, it's essential for contractors to carry out thorough due diligence and risk assessments during the bidding stage. These proactive measures are invaluable for addressing significant issues and ensuring the protection of the rights of all involved parties, particularly in large-scale infrastructure projects.

Risk assessment measures and safeguards

Prior to delving into the nature and types of delay claims, it is apposite to identify the pressing concerns related to safeguards and risk assessment measures that employers and contractors ought to undertake at the bidding stage to ensure delay avoidance.

We gathered vital insights from industry leaders who addressed issues such as monumental efforts towards devising unambiguous contract forms which outline the obligations and liabilities of all stakeholders involved in the performance of a contract. Unambiguous clauses and express allocation of risks and contractual safeguards are crucial for infrastructure projects. For instance, a road-highway project may be executed as an EPC contract where the design risk and responsibility are entirely transferred to the contractor –a method of risk allocation. Thus, an appropriate form of contract is a necessity in modern-day projects which is now viewed as a tool of dispute avoidance.

> *A chokepoint was identified from the employer's perspective by massacring the basic fabric of a standard form contract through particular conditions.*

Ordinarily, employers would start by adopting a standard form of contract. However, the introduction of various particular conditions results in the classic case of too many cooks spoiling the broth. The modifications by way of particular conditions will likely create an issue as the standard form contract loses its basic structure and practically turns into an entirely new contract, which has often not been tested before. Therefore, there is no experience in dealing with novel issues and in the absence of any precedence, dark clouds loom over the fate of the entire project.

An interesting facet towards analyzing dispute avoidance and management arrived in the form of setting the pre-qualification bid criteria of prospective contractors at the stage of bidding. The critical issue pertained to analyzing the nature of the project and setting out the pre-qualification criteria. In cases of new projects or a specific type of design to be executed by the contractor which may be a rarity otherwise, the pre-qualification criteria for selecting contractors needs to be relaxed.

> *Stringent pre-qualification criteria mean fewer bidders and lesser competition in the industry, which is likely to escalate disputes as contractors remain on their toes to notify and initiate disputes in cases where there is no guiding precedence.*

A plausible resolution for new projects with unique designs may be to invite requests for information prior to opening the bids. This assists prospective bidders in understanding the finer nuances of the project and avoids any potential delay events at the project's inception.

In addition to the insights contributed from the employers' perspective, it is also imperative to analyze the experience of the contractors qua risk assessment measures undertaken by contractors while bidding for new projects. In this regard, two critical takeaways were:
(i) the response to pre-bid queries and
(ii) the unambiguous allocation of roles, responsibilities and liabilities of the parties

The response to pre-bid queries plays a pivotal role in ascertaining the formulation of the bid and factoring in the uncertainties or, in other words, unforeseeable site

conditions that may lead to a dispute and inevitably delay the project.

> *Accurate pre-bid queries put by the bidders and proper disclosure of information by employers in response to the same largely prevent disputes as several issues can be settled at the stage of pre-bid responses itself.*

If the responses to pre-bid queries are not satisfactory, it creates an appropriate stage for a dispute to arise in the future.

In terms of proper risk and responsibility allocation, contractors often expect a crystal-clear outline of obligations from the employer. This mutual working relationship aids the contractors in understanding their obligations and liabilities under the contract and may also frame the net risk exposure for a specific project. While contractors remain alive to their rights, they expect reciprocity from the employer as well.

A leading general counsel from the logistics and energy division of an international conglomerate shared an experience about bidding for a project related to the Delhi metro. In the pre-bid query, the bidder stated that the technical specifications did not align with the basic laws of physics, and the response from the employer was an outright refusal as it cited the standard response 'as per tender'. Upon bidding, it was discovered that the energy efficiency stated by the bidder was lower than that of other bidders when viewed from the laws of physics.

We gathered from the experience of contractors that they often compare and opt to undertake the scope of work against the market competition. This assessment is indispensable for contractors as some may suit the risk profile; however, the market competition may be inferior. At the same time, inferior market competition negatively impacts the infrastructure industry as owing to the quantum/ profit involved, projects

are unlikely to be opted by key players and flooded with substandard bids, which, albeit factor in costs, are bound to disappoint at the stage of execution. Therefore, the significance of risk and cost analysis cannot be overstated at the pre-contractual stage.

Evaluating representations in detailed project reports

In our recent experience, we faced a peculiar situation where the representations and/ or information disclosed in the Detailed Project Report ('DPR') was inaccurate and contrary

to the prevailing ground conditions. At the same time, on account of the delay in the acquisition of encumbrance-free Right of Way **('ROW')** along with the nationwide lockdown due to COVID-19, there was hardly any scope or window of opportunity for any bidder to visit the site and verify the site conditions. After notifying the vastly altered scope of design to treat the ground conditions, the employer reneged from granting any Change of Scope **('CoS')** and sought to enforce the due diligence and disclaimer clauses which hold the contractor liable for verifying the site conditions. Upon sharing our experience, we gathered interesting insights from both employers and contractors.

From an employer's perspective, it was revealed that due diligence clauses are part and parcel of standard form contracts and have been continuing to be inserted as a customary practice. However, on several occasions, the feasibility reports are prepared based on an initial survey and preliminary geotechnical investigation, which are uploaded with the tender, but the same confines the contractor's time to verify them.

Some views also pertained to the fact that clauses which restrict the right of the contractor from claiming damages or which limit the employer's liability in respect of prevailing ground conditions, are inserted from the perspective of risk allocation. For instance, in design and build contracts, which are inspired by the FIDIC Yellow Book, the design obligation is transferred onto the shoulders of the contractor as the employer may feel handicapped in discharging that obligation. Thus, the contractor is naturally expected to discharge its routine obligation for the execution of the project.

The issue identified from an employer's perspective pertained to the importance of maintaining the *status quo qua* the balance of obligations. For instance, if the contractor raises a claim for the project being marred with uncertain soil conditions (commonly referred to as unforeseeable physical conditions) and failure of the employer to grant adequate time and opportunity for verifying the ground conditions, an employer will ideally analyze the time granted for conducting such due diligence. If the time is found be adequate and if extensions were granted for conducting such due diligence, then it would be evident that the contractor is leveraging the case to his advantage and disturbing the balance of obligations as mutually agreed under the contract.

From an employer's standpoint on risk allocation for design, the test of a reasonably experienced contractor is often cited on the issue of enforceability of such clauses. An experienced contractor is expected to gather adequate information beforehand and submit a technically and financially sound bid, which would factor in unforeseeable situations to a certain extent as well. Moreover, in defence projects, the risk assessment and initial survey by the employer are extremely meticulous and intense to ensure all

necessary safeguards are taken by the employer.

> *From a contractor's perspective, due diligence clauses are often viewed as roadblocks while raising claims related to uncertain site conditions. Although the enforceability of such clauses has been routinely questioned by the courts and tribunals as being non-applicable in cases of misrepresentation, the exercise for testing the enforceability is, by and large, fact-centric.*

For instance, the Hon'ble Delhi High Court in **Konkan Railway Corporation Ltd. v. Sms Infrastructure Ltd., 2022 SCC OnLine Del 1015,** categorically observed that merely inserting due diligence clauses would not absolve the employer from its obligations in relation to the ground conditions.

Similarly, the Hon'ble High Court of Meghalaya in **North Eastern Electric Power Corpn. Ltd. v. Patel Engineering Ltd., 2023 SCC OnLine Megh 247**, held that disclaimers in a commercial contract cannot be read to the point of absurdity. In essence, such disclaimers and/ or due diligence clauses are merely for guidance.

As the discussion gained momentum, an industry expert shared his experience of an arbitration proceeding where the tunnel was flooded with water from the river stream, which led to an enormous loss of livelihood. The contractor claimed damages on account of unforeseeable physical conditions, whereas the employer rejected the claim on the ground that, as an experienced contractor, such events ought to have been foreseen by the contractor. The arbitral tribunal concluded that the contractor will be entitled to the damages as the gushing of the water into the tunnel qualified as an unforeseeable physical condition. Thus, despite the existence of a feasibility report, such situations were never accounted for which led to the delay and dispute in the project.

An expert also highlighted that in a peculiar situation, it was revealed that the bidders were given hardly ten days' time to assess the conditions and submit their bids. Unfortunately, in such cases, the bidding process becomes speculative, where the prospective contractor is aware of the risks and begins raising disputes after the project is awarded.

Thus, it is evident that even after months have been spent in the execution of the contract, delay events are likely to be closely and inextricably linked with the DPR and the disclosures therein. However, at this stage, it is apposite to also understand that the DPR, along with the investigation report, may not necessarily form part of the contract

and cannot be read as part and parcel of the technical specifications. Thus, their relevance is limited to reference purposes only. This may change on a case-to-case basis. However, there ought not to be a situation where the employer is completely absolved of its liability with respect to the ground conditions, notwithstanding the contractor's responsibility for design.

Scope of negotiating standard form contracts to avoid disputes

Negotiating standard form contracts is a growing issue in the modern-day landscape. Although contractors welcome the idea of amicable resolution, in most cases, the government-owned undertaking is not willing to join hands and look for an amicable solution to issues.

The primary issue identified while negotiating standard form contracts pertains to the nature of contracts being 'standard'. At the same time, these contracts are not devised with the intent of a specific geographical location and to grapple with specific issues in such cities and villages which are prevalent only in a specific region. The standard form contracts represent a model or template of obligations between the employer and contractor and do not factor in the finer issues faced in specific geographic areas.
Consequently, as the scope for amicable resolution is considerably lesser, delay events often materialize into delay claims due to cost and time overruns.

Role of lawyers at the pre-bid stage

The importance of negotiating a well-balanced infrastructure contract can be hardly overstated. Lawyers specializing in contract management and acting as techno-legal experts can strengthen the bargaining skill of contracts from both perspectives, employer and contractor. The legal strategizing undertaken by well-reputed contractors is often concerned with their in-house legal team, which works jointly with the business and technical verticals. We gained an insight into the broad functioning of the logistics division of an international conglomerate and learnt that the three verticals work in tandem to achieve the necessary milestones in infrastructure projects and always have a well-structured risk analysis process. This ensures that not only the commercial and technical viability of a project is being monitored but also the legalities that creep in from time to time are being resolved within a prompt window.

Industry experts were firm in concluding that engaging a legal team is of great assistance

in terms of bifurcating the risks involved in the project.

> *Broadly, the risks may be classified into mitigable, non-mitigable and assumed risks.*

Insofar as mitigable risks are concerned, the same may be resolved by taking the aid and assistance of the contractual provisions where remedies for breach are compensable in monetary terms. To the contrary, non-mitigable risks are required to be factored in at the stage of bidding from both time and cost analysis. Lastly, assumed risks are the risks which are subsumed organically in the nature of work and are acquiesced by the contractor.

> *The engagement of lawyers since the pre-bid stage bolsters the confidence of the concerned party to make informed decisions without hesitation.*

Moreover, the familiarity with the facts and circumstances since the inception avoids any scope of ambiguity at a later point in time.

Compliance with procedural requirements and conditions precedent in notifying delay claims

To weed out ex-facie frivolous claims, it is common knowledge that majority of contracts provide for conditions precedent prior to notifying a claim pertaining to a delay event. For instance, Clause 4.12 of the FIDIC Yellow Book provides that notice for unforeseeable physical conditions must be notified to the engineer 'as soon as practicable'. The notice is required to describe the physical conditions and set out reasons why the contractor considers them unforeseeable, among other reasons.

The contractual stipulation necessitates formal written notice, in the absence of which the claim for unforeseeable physical conditions will not stand. Thus, strict procedural requirements and condition precedents prevent frivolous and duplicate claims.

At the same time, we must be aware of the crucial factor that merely stipulating a timeline for notification of a claim will not restrict the right of the contractor to claim it subsequently.

In National Highways Authority India v. Mecon - Gea Energy Systems India Ltd., 2013 SCC OnLine Del 1273, the Hon'ble Delhi High Court has expressly held that not only the curtailment of the period of limitation is void, but also the extinction of right if sought to be brought by the agreement within a specific period, which period is less than the period of limitation prescribed for the suit under the contract in question, is also rendered void.

In other words, after the amendment to Section 28 of the Indian Contract Act, 1872 ('Contract Act'), the distinction between curtailing the period of limitation and extinction of the right itself after the specified period no longer exists.

> *Clauses that prescribe stringent notice requirements within a specific time period violate the fundamental and statutory provisions of the Contract Act and have been read down by the courts in India.*

Despite the well-settled principle of law governing notification of claims in infrastructure disputes, it is imperative that the contractor(s) avoid unnecessary delays in notifying their claims. It is apt to advise that there ought not to be any delay in notifying a delay claim.

Compartmentalization of delay claims

Causes of delay claims remain common across different infrastructure projects and are primarily based on delays in handing over the encumbrance-free right of way, unforeseeable physical conditions, delay in approval/ rejection of variation requests, delay in approval/ rejection of designs/ drawings, suspension of works, force majeure, etc.

> *The industry experts agreed that delay may be compartmentalized into excusable and non-excusable events*

Under excusable events, the party is entitled to a time extension, which is commensurate with the period of delay, whereas, in non-excusable events, the party is restricted from claiming time and cost overruns. Interestingly, it is not always that only the contractor will be entitled to grant of extension of time due to a delay event. There may be cases where the delay event is beyond the reasonable control of the employer as well as the contractor. Such events are neutral in nature, for which no party can be

blamed. There may also be instances where the delay is attributable to both the contractor and employer, which results in concurrent delay.

Therefore, it is imperative to meticulously identify the delay event, liabilities, contractual compliance and entitlement, cause and effect, undertake a delay analysis and subsequently claim the actual loss or damage along with substantiation. In the absence of satisfying such fundamental elements for the grant of extension of time, the effective adjudication of such claims is directly hampered.

Significance of delay and quantum analysis by experts

> *Experts from the industry identified critical issues pertaining to delay and quantum analysis, such as*
> *(i) cherry-picking events and plotting the same on the initial plan to present a unilateral/ influenced delay analysis,*
> *(ii) re-kindling inflated claims with evidence, and*
> *(iii) perceiving experts as cost-center in arbitration proceedings.*

In terms of the first issue, it was revealed that merely picking up the initial plot and half-heartedly identifying certain events only presented a prejudiced delay analysis, which appeared to be solely attributable to the employer alone. This allowed the contractor to claim the entire sum as a loss of profit since the delay seemed attributable to the employer alone. However, upon noticing the events on the critical path of the project, it was discerned that the contractor heavily engaged in building the structures rather than the road highway which was not its prime obligation. Thus, there is an increasing need for presenting a neutral, independent and impartial delay and quantum analysis which reflects the accurate events of default. The second issue pertaining to the presentation of inflated claims has perhaps been the talk of the town. We observed multiple instances of claims that are unrealistic and inflated and cannot be substantiated beyond a reasonable sum.

The primary issue qua inflated claims is that quantum experts are rarely engaged during the pleadings phase of the arbitration. Therefore, their engagement at the belated stage of the proceedings presents them with an uphill task of reconciling the evidence to arrive at a realistic figure for proving the damages or claims.

The conventional mindset of perceiving experts as cost-center needs to undergo a substantial change. The nature of work undertaken by an expert with respect to preparing a delay and quantum analysis needs to be appreciated, as they present a realistic claim that is corroborated by the available evidence. There are several occasions when even the arbitral tribunals may not be satisfied with the claims solely because they are inflated. Realistic claims present a sense of genuineness and attach legitimacy even from the viewpoint of adjudication.

Experts also weighed in on the efforts made by the government towards setting up an in-house team of experts, commonly referred to as independent monitors. These are usually in the form of:
(i) employer,
(ii) user's project management team,
(iii) third-party technical inspector,
(iv) independent external monitor,
(v) in-house headquarters team, and
(vi) dispute avoidance team.

However, by setting up a slew of agencies to monitor a specific project, the bulk of correspondence increases, which eventually leads to conflicting reports.

Lastly, it was discerned that utilization of standard protocols such as the Delay and Disruption Protocol devised by the Society of Construction Law is a helpful tool for analyzing the planned versus as-built designs, which provides an insight into the critical path as well. Therefore, the effective utilization of such protocols is imperative for coming out with a comprehensive delay analysis. Prejudiced and half-hearted delay reports often question the credibility of an expert in presenting a tutored report which may not work in favour of either party.

Effective adjudication of delay claims

While unwrapping delay claims, the prime focus is the factual and evidentiary threshold for adjudicating such claims. For instance, a claim pertaining to delay in handing over the encumbrance-free right of way will subsume the damages or losses pertaining to idling manpower and machinery, additional expenditure incurred on overhead and administrative expenses, loss of profit and profitability, expenses on account of maintaining the bank guarantee until the conclusion of the contract, et al.

Therefore, a comprehensive delay analysis is imperative to prove the damages suffered in such instances.

> *Adjudication of a delay claim is heavily predicated on essential elements such as the nature of the event, type of delay, and attribution of delay to compartmentalize the delay claim effectively.*

It is also not necessary that the delay is squarely attributable to the employer alone on each occasion. There are instances where the delay is attributable to the contractor as well. In **Ircon International Ltd. v. GPT-Rahee JV, 2022 SCC OnLine Del 839**, the Hon'ble Delhi High Court applied the principle of apportionment of delay to test the findings returned by the arbitral tribunal. It affirmed the award which dealt with contributory/ concurrent delays in the project. Therefore, adjudication of delay claims is certainly not in a mechanical and straitjacket formula and must be assessed in each case's facts and circumstances.

From a legal standpoint, clauses which disentitle a person from claiming damages that a person is otherwise entitled to under the law have been read down by the courts in India time and again. The authoritative pronouncement in **Simplex Concrete Piles (India) Ltd. v. Union of India, 2010 SCC OnLine Del 821**, settled the convoluted position in law that a person who is guilty of breach of contract and is consequentially liable to pay damages cannot absolve itself by taking shelter of the contractual provisions. Provisions of the contract which exclude the liability of a party or, conversely, disentitle the aggrieved party to the benefits of Sections 55 and 73 of the Contract Act would be void, being violative of Section 23 of the Contract Act.

Contrary to the view taken in Simplex, the Hon'ble Delhi High Court in **Public Works Department v. Navayuga Engineering Co. Ltd., 2014 SCC OnLine Del 1343,** observed that while agreeing to the extension of the contract on the clear premise that the contractor shall not be entitled to claim compensation, it was not open for the contractor to renege from the same at a later point in time.

Therefore, while the issue of exclusionary clauses remains debatable, there is an imminent need for an authoritative judicial decision to settle this long-standing controversy to reduce the disputes on the said premise. Although a brief endeavour was made by the Hon'ble Delhi High Court recently in **MBL Infrastructures Ltd. v. DMRC 2023 SCC OnLine Del 8044,** wherein it was observed that clauses that are against the public policy then such consideration or object of an agreement is considered unlawful and void.

For adjudicating delay claims, the Hon'ble Supreme Court of India in **Unibros v. All India Radio, 2023 SCC OnLine SC 1366**, held that to support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that were available elsewhere, it becomes imperatives to substantiate the presence of a viable opportunity through compelling evidence. Compelling evidence may be in the form of contemporaneous evidence, such as other potential projects the contractor had in the pipeline that could have been undertaken if not for the delays, the total number of tendering opportunities the contractor received and rejected owing to prolongation, financial statements, etc.

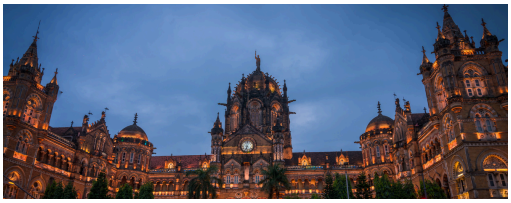
It was further held that for claims related to loss of profit, profitability or success opportunities, one would be required to establish the following conditions: first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability.

CONTACT US

PSL Advocates & Solicitors

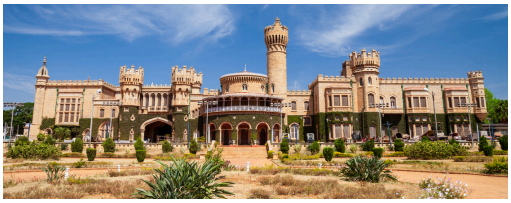
NEW DELHI

A-220, Block-A, Defence Colony,
New Delhi-110024, India
+91-11-4999-1250
delhi@pslchambers.com



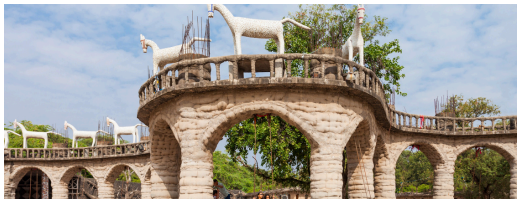
MUMBAI

10/A, 2nd Floor, Chamber No. 2,
59, Kala Ghoda Building-Bhadekaru
Cooperative Premises Society Ltd.
Mumbai-400023
+91-22-2282-2111
mumbai@pslchambers.com



BENGALURU

61, 65, 76, 79, 1st floor, Gold
Towers, #50, Residency Road,
Bengaluru 560025 (Land Mark:
Hotel Konark)
+91-80-4157-3199
bengaluru@pslchambers.com



CHANDIGARH

139-140, M.S. Enclave, Dhakoli,
Zirakpur - 160104
+91-17-6235-4096
chandigarh@pslchambers.com

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