

HKA-Trilegal Joint Publication

By: **Payel Chatterjee** (Partner), **Aman Singhania** (Senior Associate), and **Shuchita Choudhry** (Senior Associate), and **Anand Udayakumar** (Managing Consultant, HKA).

CRUX is HKA's integrated research program which provides unprecedented insight into the common claim and dispute causation factors for engineering and construction projects on a sectoral and regional basis.

At present, the CRUX database encompasses more than 1,600 projects in 100 countries (including India) representing a total capital expenditure of more than US\$2.13 trillion. An interactive [dashboard](#) has been developed which allows the user to search by region and sector.

This publication series focuses on the top claim and dispute causative factors, prevalent in the Indian project landscape.

Previously, we have discussed in Part I [Change in Scope](#), Part II [Access Issues](#), Part III [Unforeseen Physical Conditions](#), Part IV [Late Materials or Product Deliveries](#). In the remaining parts of the series, HKA together with renowned Indian law firms will present topics on design issues, poor subcontractor/supplier management, spurious claims, cashflow and payment issues, and contract management and/or administration failures.

This Part V of the ten-part series focuses on 'Late Approvals' as HKA's CRUX Report identifies this to be a main cause of claims and disputes on projects and covers potential triggers for Late Approvals, guidance on how to manage these challenges and legal stance/position under Indian law.

Potential Triggers

At a high-level, triggers for Late Approvals include:

- Design changes and revisions
- Weather and environmental considerations
- Stakeholder conflicts and objections
- Financial challenges, including sourcing funding or cash flow issues
- Inadequate planning and coordination
- Legal and regulatory disputes
- Infrastructure limitations
- Lack of guarantees or warranties for the duration required
- Non-inclusion of the employer's approved vendor or subcontractor list
- Employer unfamiliar with proposed material and requires greater documentation and testing data
- Late inspections and factory visits to view source materials, samples and facilities
- Project complexity and size
- Resource constraints

- Lack of experience/proper understanding of the applicable approval process
- Complications in procuring technically compliant samples and later ensuring product/material compliance
- Changing material specifications
- Improper scheduling/deviation from a functional schedule
- Subcontractor-related delays, including late and insufficient submission of required documents (not limited to technical ones)

For clarity, we have attempted to focus on Late Approvals for which the employer is responsible, including in situations where statutory/governmental approvals fall within the employer's domain. Though statutory/government approvals are highly integral in construction projects, for this article we do not delve into contractor's remedies (if any) in the event of Late Approvals caused by statutory/government authorities.

Managing Late Approvals

From the contractor's perspective, it is integral to consider the guidance provided below on the pre-execution and execution stages of the project while providing due consideration to the above triggers.

Pre-Execution Stage

The starting point for the contractor at the tendering stage and on a project-specific basis is to map out all approvals required to be obtained before, during and after execution and attribute party responsibility (which could include subcontractors/ suppliers). In addition, the contractor should understand the timing for initiating the approval process, the procedure to be complied with and the potential duration for obtaining the approval(s).

Lessons learnt from previous projects where complications were encountered during the approvals processes should be applied. Based on these, the contractor should be able to identify approvals which can impact the project's progress. In addition, proactive management of approvals will require the contract to detail a workable/practical process to prevent occurrences or prolonged continuance of Late Approvals.

In parallel, the contractor should lay importance on remedies available should Late Approvals occur. Remedies are to be approached from a time and cost perspective and could be encompassed in provisions relating to extension of time, non-imposition of liquidated damages, award of additional cost, and damages on account of breach of contract.

There may also be material sample and/or prototype requirements which may need to be sourced from the contractor's proposed supply chain, which will require proper identification of capable subcontractors/suppliers, including backup options.

This could also set the stage for suggesting an expedited or fast-track approval process where practical/possible, which could include reliance on a pre-approved list of subcontractors/vendors, plant, and materials.

Execution stage

To ensure proactive management at this stage, the contractor should maintain approvals register to track/prevent Late Approvals. Moreover, establishing clear lines of communication with all stakeholders (including the employer) and adherence to the contractually prescribed approval process and concerned timelines. This includes regular notifications, updates, and status reports of each approval process, including addressing difficulties encountered, and mitigation measures deployed.

Given further insight at this stage, the contractor could engage in pre-emptive identification of potential approval issues through a detailed assessment of project design, plans and documentation, to prevent Late Approvals. Particularly important are the direct consequences stemming from Late Approvals, including cascading effects on design coordination, delayed project schedule, increased costs, workflow disruption and productivity loss.

The contractor should ensure remedies are sought in a timely and contractually compliant manner while fully recording the collateral impact resulting from Late Approvals attributable to the employer.

The legal position in India

The Indian construction sector is highly regulated by numerous national and state laws, rules and regulations, codes, by-laws etc. Contractual approvals include approvals relating to designs, drawings, materials etc. Statutory obligations regarding approvals include obtaining approvals/ licenses/ permits such as environmental clearances, municipal approvals, fire safety clearances, traffic police clearances, approvals for utility connections, electric supply, etc. from different government authorities.

Late Approvals in Standard Form Contracts

The construction industry in India is driven by the Government authorities such as the National Highways Authority of India (“NHAI”), Central and State Public Works Departments (“CPWD/SPWD”) etc. as the Employer/Owner (directly or indirectly). Such Government authorities employ their standard form contracts, often influenced by FIDIC, ICE, IIA etc., as per their departmental requirements for various projects, especially roads, airports, railways, and ports^[1].

Specifically, in the Indian context and based on our experience, we note that approvals which the employer must provide are likely to relate to design, materials, change orders, payment, inspection, safety, subcontractor and completion. Any delay in granting such approvals by the employer is usually addressed by one or a combination of: (a) grant of extension of time, (b) compensation/ damages; and (c) right to termination, in favour of the contractor^[2].

Rights, remedies, and obligations of the contractor under Indian Law

In India, the rights, remedies and obligations of the contractor in a situation of Late Approvals are broadly governed under the Indian Contract Act, of 1872 (“Contract Act”)^[3].

Typically, the first remedy of extension of time is usually granted in favour of the contractor without major contentious disagreement^[4]. The contractor may also treat the prevention of performance as a repudiation of the contract on the part of the employer. In contracts where time is of the essence (i.e., where contractual duration is prescribed), failure of the employer to perform a mutual obligation would make the contract voidable at the contractor’s option^[5].

On the other hand, where time is not of the essence, the contractor would generally only be entitled to compensation for any losses incurred on account of the delay by the employer^[6]. However, in some cases, the contractor can still seek termination if the approval is not obtained by the employer within a reasonable time, despite advance notice to perform within such reasonable time^[7].

Please note that a contractor’s acceptance of belated performance by the employer would lead to waiver of the contractor’s right to void the contract and/or claim compensation,^[8] unless, at the time of such belated acceptance, the contractor gives due notice of his intention to claim compensation.^[9] Notably, under the Indian legal regime, while the contractor can choose to waive its right against Late Approval by the employer, it may not be legally permissible for the contractor to perform its obligations when statutory approval is required and pending^[10].

As a rule, these remedies in the event of default of an employer are subject to the terms of the contract entered between the parties. These contracts however need to be viewed through the lens of an Indian backdrop wherein government contracts are more favourable to the employer with less room for negotiation.

This leads to wide exclusionary clauses absolving the employer of any responsibility even if the delay is attributable to the employer. Private employers in India have also adopted such standard forms of government contracts which would allow no claim for damages by the contractor. Given the lack of a level-playing field and unequal bargaining power, Arbitral Tribunals and Courts in recent times have stepped in to carve out exceptions to such exclusionary clauses to avoid undue hardships for contractors.

Claim for damages despite exclusionary clauses?

In India, courts usually do not enforce, and strike down unfair, one-sided, and unreasonable contract/clauses entered between parties who are not equal in their bargaining power at the time of contract^[11]. Thus, an exclusionary clause which holds the employer unaccountable even for significant delays in approvals is likely to be disregarded while granting compensation to the contractor for the same^[12]. In cases of significant delay attributable solely to the employer, a contractor is held entitled to damages, notwithstanding an exclusionary clause^[13].

Proof of damages?

As regards a claim of compensation by the contractor for breach of contract or delay (including Late Approvals), the contractor claiming such compensation would have to prove the loss and damage sustained by it^[14] on account of such breach/delay^[15].

Approach of Indian Courts and Arbitral Tribunals on Late Approvals

Indian courts have recognized that Late Approvals by employers can have a significant impact on the implementation of construction projects. Indian courts and arbitration tribunals often weigh in the factors responsible towards the delay, carefully examine the provisions related to approvals, time extensions, liquidated damages, and *force majeure*, in the contractual documents as well as consider the intent of the parties and then allocate responsibility for the delays. These decisions are often based on the specific terms of the construction contract and the circumstances surrounding Late Approvals. The outcomes and judgments can vary depending on the specific facts and contractual provisions on a case-to-case basis.

In several cases where delay was attributable to an employer, courts have granted contractors extensions of time and awarded compensation^[16]; and even ordered refund of liquidated damages imposed while holding that imposition of liquidated damages by the employer is illegal^[17].

However, it may be noted that in several instances, where delay in statutory approvals occurs despite the employer's utmost diligence, timely completion of formalities, making of applications with third parties/ government authorities, etc, Courts take a liberal approach and do not impose liability on the employer for delay beyond the control of the employer^[18].

Conclusion

Timely approvals and clearances go to the root of the execution of any construction project. Late Approvals have the potential to derail contract schedules, smooth operations and relationships between parties.

The contractor needs to bear in mind that each instance of Late Approval could be linked to diverse causation factors, which may or may not run concurrently, and could be interlinked or independent of different issues between stakeholders. Given this, the contractor should adopt a proactive and systematic strategy to counter the adverse impact stemming from Late Approvals, ensure that suitable remedies are incorporated in the contract, along with seeking remedies promptly to secure any entitlement due. These remedies in India normally include one or more of the following:

- Extension of time for completion of the project;
- Change in milestones dates as well as payment milestones under the contract;
- Termination of the contract; and
- Liquidated as well as unliquidated damages upon proof of actual damage and loss.

Payel Chatterjee is a Partner in the Dispute Resolution and Disputes practice at [Trilegal](#), India's top-ranked full-service law firm. Aman Singhania is a Senior Associate and Shuchita Choudhry is a Senior Associate at Trilegal. Views expressed are personal.

This article was originally published [here](#), and co-authored with Anand Udayakumar (Managing Consultant, HKA)

ABOUT HKA

HKA is the world's leading consultancy of choice for multi-disciplinary experts and specialist services in risk mitigation and dispute resolution within the capital projects and infrastructure sector. We also have experience advising clients on the economic impact of commercial and investment treaty disputes, forensic accounting matters and privacy governance and compliance. In addition, HKA supports companies that conduct business with the US Federal Government, providing them with consulting services on complex government contracting matters.

As trusted independent consultants, experts and advisors, we deliver solutions amid uncertainty, dispute and overrun, and provide the insights that make the best possible outcomes a reality for public and private sector clients worldwide.

HKA has over 1,000 consultants, experts and advisors in more than 40 offices across 18 countries.

ABOUT TRILEGAL

Trilegal is a top-tier full-service law firm with offices in Bengaluru, Delhi, Gurugram and Mumbai. The Firm has been consistently recognised as [the best Indian law firm](#) for the quality of our services and client satisfaction.

With an expansive [portfolio of expertise](#) in domains including Corporate, Disputes, Projects and Capital Markets, the Firm has represented clients on many complex and high-value transactions in India.

Trilegal comprises over 800 lawyers, who are led by 104 partners. The Firm's combination of its culture, depth of transactional experience, range of expertise and the quality and energy of its lawyers allows it to offer a level of client service that is unique in the Indian legal market.

References

¹ See: [Construction & Engineering Laws and Regulations Report 2022-2023 India \(iclg.com\)](#); [Construction And Engineering 2021 – Construction & Planning – India \(mondaq.com\)](#)

² *Ibid*

³ Section 51 to Section 55 of the Indian Contract Act, 1872.

⁴ *Government of Madhya Pradesh v. Khusiram & Co.*, 1995(2) Arb LR 13 (DB) (MP)

⁵ *G.M. Northern Rly. Vs. Sarvesh Chopra*, (2002) 4 SCC 45; AIR 2002 SC 1272.

⁶ *Ibid*.

⁷ *M/S. Arosan Enterprises Ltd vs Union Of India & Anr.* [1999] 9 SCC 449.

-
- ⁸ *Kalparaj Dharamshi v. Kotak Investment Advisors Ltd*, 2021 SCC OnLine SC 204.
- ⁹ Chitty on Contracts (28th Edn., 1999, at p. 1106, para 22-015).
- ¹⁰ Section 15 of Environment Protection Act, 1986.
- ¹¹ *Central Inland Water Transport Corporation v. Brojo Nath Ganguly* , AIR 1986 SC 1571; *Hindustan Construction Company Limited v. Tamil Nadu Electricity Board*, 2005(1) Arb LR 41 (Mad) (DB); *R.B. Jodhamal v. State*, 2005(1) Arb LR 534 (J&K)
- ¹² *Asian Techs Ltd. v. Union of India*, (2009) 10 SCC 354 (SC); *N. Sathyapalan v. State of Kerala*, (2007) 13 SCC 43 (SC).
- ¹³ *N. Sathyapalan v. State of Kerala*, (2007) 13 SCC 43 (SC).
- ¹⁴ Section 73 of the Contract Act.
- ¹⁵ *Essar Procurement Service Ltd. v. Paramount Constructions* 2016 SCC Online Bom 9697; *Ajay Singh v. Suneel Darshan* 2015 SCC Online Bom 1412; *Maharashtra State Electricity Board v. Sterlite Industries (India) Ltd* 2000 SCC Online Bom 89.
- ¹⁶ *Union of India vs. Glove Civil Projects Pvt. Ltd.*, O.M.P. (COMM) 511/2022 – Decided on April 18, 2023 The Delhi High Court interestingly noted that the employer took an argument that the employer is not liable to pay any damages/ compensation as they have granted extension of time within which the works were completed, and the contractor has also issued a no claim certificate/ undertaking. In this respect, the arbitral tribunal observed that “*It is noteworthy that when the contract works get prolonged beyond the stipulated date of completion, inter-alia, due to Late Approvals and grant of extension of time by the employer, without levy of liquidated damages, such as in the present case, the demand of the employer has been that till such time a no claim certificate/ undertaking is tendered by the contractor, final bill shall not be paid, which is itself a circumstance to show that the contractor succumbed to the pressure of the employer. That is also the position when the Claimant tendered the other undertakings at the time when Respondent granted EOT.*”
- ¹⁷ *Dedicated Freight Corridor Corporation of India Ltd. vs. Soma Enterprises Ltd*, 2016 SCC OnLine Del 4262
- ¹⁸ *Bhopal Sanchi Highways Private Limited vs. National Highways Authority of India*, O.M.P. (COMM) 263/2019 – Decided on May 26, 2023