

The Public Utility Contract Exception in Indian Law: Awarding Damages without Proof of Actual Loss

This post analyses a new trend emerging from case laws in the Supreme Court of India allowing parties to claim damages without proof of actual loss in public utility Contracts on the basis that any delay in implementing them affects the public at large, a loss that can neither be computed nor proven. Jeet H. Shroff and Ibrah Shaikh argue that such decisions add an element of public interest to the law of damages in India, which falls firmly within the realm of private law. In doing so, the decisions re-draw the boundaries between public and private law, and are likely to affect larger issues of public policy in India.

Recently, the Supreme Court of India introduced an exception to the general rule that damages can only be awarded upon proof that at least some loss has been suffered (even if such loss may not always be capable of clear quantification) by the suing party. The ruling has wide-ranging implications for public works contracts and blurs the lines between 'public' and 'private' under Indian Contract law.

Contract Law in India

In India, the framework for granting damages is set out under Sections 73 and 74 of the [Indian Contract Act, 1872](#) (hereafter 'Contract Act'). Section 73 governs claims of unliquidated damages and lays down principles to evaluate a claim of damages — causation, remoteness, and mitigation. Section 74 deals with liquidated damages.

Damages under Section 73 have been interpreted to be of two types: (a) those that arise naturally in the usual course of things from a breach of Contract; and (b) those that are contemplated by the parties at the time of entering into the Contract to arise from the breach of Contract. When a Contract between parties has been breached, the non-defaulting party is entitled to receive compensation for any loss which naturally arose in the usual course of things from such breach. If, however, at the time of entering into the Contract, the parties contemplate a particular loss likely to arise from a breach of the Contract, they may stipulate an agreed sum in the Contract itself to be paid to the innocent party if and when such breach occurs (governed by Section 74).

Where a Contract containing a 'liquidated damages' clause has been breached, the party claiming damages must establish the factum of loss, i.e., the existence of loss or legal injury caused to the non-defaulting party as a result of the defaulting party's breach. Damage or loss caused is a *sine qua non* for the applicability of Section 74 (see [Kailash Nath Associates v. Delhi Development Authority \[2015 \(1\) SCJ 401\]](#), paragraph 43; hereafter 'Kailash Nath'). This is critical because while Section 74 enables a person to claim compensation despite not being able to prove the *extent* of loss or damage, it does not justify payment of compensation in a case where no loss or injury has in fact occurred as a result of the breach (see [Fateh Chand v. Balkishan Das \[AIR 1963 SC 1405\]](#), paragraph 15). If liquidated damages are awarded to a person claiming breach of Contract even when such person has not suffered any loss, it would amount to unjust enrichment, which is not permitted under Indian law (see [Indian Oil Corporation v. Lloyds Steel Industries Ltd \[2007 \(4\) ARBLR 84\]](#), paragraph 55). It is to be noted that while the courts have interpreted Section 74 with leniency on the issue of proof of quantum of damage or loss suffered, in cases where actual loss or damage can be proved however, such proof is not dispensed with (see [Kailash Nath](#), paragraph 43).

The difficulty of proving actual damage or loss is felt more acutely in certain classes of Contracts, such as public utility contracts, specifically where the state is the aggrieved party. The adequate performance of public utility contracts entails benefits for the public at large so that, as a corollary, any breach of performance of such contracts therefore is likely to cause public harm, a harm that is not easy to quantify or even prove. In the United States for instance, although different states follow different standards of assessing enforceability of 'liquidated damages' clauses, a presumption of intangible loss due to breach of public construction contracts has been recognised. In the case of [Melwood Construction Corp. v. State \[481 N.Y.S.2d\]](#), involving delay by a contractor to complete road construction in time, the Supreme Court of New York found that the inconvenience and injury suffered by drivers because of delayed roadwork constituted actual damages to the state, and that 'although a municipality, in its corporate capacity, may suffer no damage from delay ... it may validly contract for liquidated damages for delay in contemplation of the inconvenience and loss which will flow to its inhabitants.' The theory of 'municipality as trustee for the public' allows the government owner to collect under a 'liquidated damages' provision for an authentic and potentially serious injury.

The Supreme Court of India now seems to have read a similar doctrine into Section 74 of the Contract Act by its decision in the case of [Construction and Design Services v. Delhi Development Authority \[\(2015\) 14 SSC 263\]](#) (hereafter '*Construction and Design Services*'). The case involved a breach of a Contract to construct a sewerage pumping station at Delhi, entered into between the appellant contractor (Construction and Design Services (hereafter 'CDS')) and the respondent public authority (Delhi Development Authority (hereafter 'DDA')). CDS did not complete the construction within the time stipulated in the Contract. Consequently, DDA terminated the Contract and demanded compensation from CDS as per the Contract. On CDS' failure to pay the amount, DDA filed a suit for recovery before the Delhi High Court. The case travelled to the Supreme Court in appeal. The Supreme Court awarded DDA half the amount stipulated under the Contract as reasonable compensation, basing its relief entirely on the public utility argument for liquidated damages. The Court ruled that a breach of public utility contracts would certainly cause some loss to society at large for whose benefit the Contract was entered into, even though no specific evidence of the 'precise amount of loss' is presented by the aggrieved party (the state entity). In this case, since the clause in the Contract provided for an upper limit of compensation and did not provide a fixed sum, the Court held that in the absence of evidence of loss, part of it can be held as reasonable compensation while the remaining can be held as penalty. The burden to prove that no loss was suffered because of the delay was on the contractor. The decision in *Construction and Design Services* has been followed by High Courts in India (for instance see [NTPC Vidyut Vyapar Nigam Limited v. M/S Saisudhir Energy Limited \[\(2016\) 235 DLT \(CN\) 5\]](#)).

Conclusion

Under Indian law therefore, in case of breach of a public utility contract, the factum of loss is assumed as a consequence of breach and is deemed impossible, or at any rate, difficult to prove. As such, the state entity is guaranteed to be awarded compensation in case of a breach of a public utility contract, being either the entire stipulated amount in the Contract (if deemed to be a genuine pre-estimate of loss) or an amount considered reasonable by the court. The assumption of loss is nested in the idea of intangible harm believed to be caused to the public on account of breach of a public utility contract.

The decision in *Construction and Design Services* marks yet another instance of the interplay between 'public' and 'private' under Indian law. Chief Justice [Aharon Barak](#) has suggested that private law usually contains pockets of public law which serve as valves, ensuring that the content of private law does not conflict with the overarching commitments embodied in a country's public law systems. Similarly, [Mark Tushnet](#) has suggested that this may be an instance of the horizontal effect being given to public law by making it directly applicable to private parties. Whatever its jurisprudential significance, the decision in *Construction and Design Services* is certain to shape public policy in India for some time to come.

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