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India-CRUX Construction Dispute Causation Series Part II: 'Access Issues'

HKA-Nishith Desai Associates Joint Publication

CRUX is HKA's integrated research program which provides unprecedented insight in relation to common dispute causation factors for engineering and construction projects on a sectoral and regional basis. At present, the CRUX database encompasses more than 1,400 projects in 94 countries (including India) representing a total capital expenditure of more than US\$2 trillion. An interactive [dashboard](#) has been developed which allows the user to search by region and sector thus giving free-range and allowing searches relevant to any criteria.

The aim of this publication series is to focus on top dispute causative factors, prevalent in the Indian project landscape.

Previously, Part I discussed [Change in scope](#) as a causative factor. In the remaining parts of the series, HKA together with renown Indian law firms will present topics on unforeseen physical conditions, late delivery of materials and/or products, late approvals, design issues, poor subcontractor/supplier management, spurious claims, cashflow and payment issues, and contract management and/or administration failures.

This Part II of the ten-part series focuses on 'Access Issues' as CRUX identifies this to be a main cause of disputes on projects. The narrative below covers potential trigger points to late access and disrupted access issues, and further provides guidance on how to manage these issues and the legal position on the same under Indian law.

Potential triggers for access issues

- Unclear definition of 'site' or improper identification of access in tender drawings
- Changes to site boundaries
- Granting of partial access only
- No approval or consent by government authorities affecting access
- Land acquisition disputes by surrounding owners
- Environmental factors
- New political, governmental or legislative requirements affecting access
- Remoteness of location affecting transportation of material and equipment
- Interface issues with third parties limiting access/work areas
- Physical obstructions at site
- Unforeseen ground conditions
- Force majeure events leading to site closure (including pandemics)

Guidance on managing access issues

While taking into consideration the above triggers, it is important to consider the guidance below on the Pre-Execution and Execution stages of the project.

Pre-Execution stage

Tender documents may provide basic information upon which assumptions have to be made. Pre-conditionally, tenders stipulate confirmation of having examined the site and its surroundings, including access requirements¹, and by proceeding forward, the contracting party is deemed to have satisfied itself of the same. These tender documents subsequently form part of the contract documents.

To avoid pitfalls in access issues, at this stage, we recommend making reasonable and justified assumptions based on site investigations, proper review of technical specs and performing adequate risk assessment of the site area and access requirements. It is also integral to have an advanced understanding of involvement and impact of any third-party stakeholders, amongst others, including approvals, permits, land registry boundaries, regulatory requirements, land acquisition matters that are likely to affect access and execution of works.

Prior to each contract signing, it would be prudent to draw an exhaustive list of worst-case scenarios likely to result from access issues. It is important to put in place mitigation plans to counter contingencies associated with late access or partial access. At this stage, parties should also have an appreciation of potential unforeseen contingencies (e.g. force majeure events). The allocation of risk between parties for all these factors in the subsequent contract should be negotiated appropriately, including consequences of any corresponding additional cost, project schedule impact and resultant variations to works.

Execution stage

Standard form contracts normally oblige the owner/employer to provide sufficient access to the contractor. This however does not extend to the most economical means of access². The contractor must monitor the negative impact of hindered access issues and be prepared for alternative access options and/or contingencies, amongst others, revising work execution plans.

Site team's familiarity with site (example - obstructions, boundary concerns and interface requirements with other site users) through drawings and work programme will allow forward planning to mitigate interference with access. Intermittent working at certain work areas, although disruptive, does serve to mitigate delays. All of this should however be monitored through progress reporting tools.

Parties must be vigilant in issuing notices involving hindered or late access to ensure their recourse to additional time and costs is always secured. On rare occasions, prolonged access issues may result in suspension or even termination of works.

In summary, factors giving rise to access issues should be identified at the onset and addressed through contract provisions, and consistent monitoring upon commencement.

¹ FIDIC Clause 4 Red Book, Yellow Book, Multilateral Development Bank (MDB) Harmonized Edition and Gold Book.

² Neodox Ltd v Borough of Swinton & Pendlebury (1958) 5 BLR 34 at 50–51, per Diplock J.

Legal position in India

The following section summarises certain key considerations from the Indian legal standpoint relating to access issues:

- Access to the site forms the basis of any construction project as without peaceful possession of the site, the contractor will not be able to perform the works under the agreement. Accordingly, the construction contract should clearly have provisions relating to access to the site, time of possession, consequences of any delays, reliance on any pre-contractual site inspection or any land survey reports. It is also prudent to specify whether the site is being fully or partially handed over to the contractor.
- Generally, construction contracts expressly cast an obligation on the employer to provide site possession to enable the contractor to carry out works. However, in the absence of this express obligation, the employer is under an implied duty to hand over the site insofar as necessary for the execution of the work.³ In case no particular date of handing over the site is specified, it would be implied that the contractor is to be provided access to the site almost immediately and in any case within a reasonable time.⁴
- In India, an employer's delay in handing over the site in all likelihood can entitle the contractor to stop work and rescind the contract. Alternatively, the contractor may decide to continue with the contract but claim compensation due to prolongation of time and escalation of costs.⁵
- Standard form contracts:
 - In India, standard form contracts used by ministries such as the Ministry of Ports, the Ministry of Road Transport and Highways, Shipping and Waterways, and the Ministry of Railways provide that the government will pay damages calculated at the rate of 0.1% of the value of the performance security per day for any delay by the government in procuring access for the contractor to the site, unless the delay was a result of *force majeure*.⁶ In some cases, the aggregate damages on this account are capped at 1% of the contract price.⁷ Most of these forms also provide for deemed termination of the contract in the event of the government's failure to provide access to the site beyond the extended time agreed by the parties.⁸
 - FIDIC: Under this type of contract, the employer is under an express obligation to provide the contractor access and possession of the site in a timely manner to enable the contractor to undertake works in compliance with

³ *Freeman v Hensler*, (1900) 64 J.P. 260.

⁴ Markanda: *Building & Engineering Contracts*, 5th ed, Ch. 8; Also see, *Shiv Dayal Kapur v UOI*, AIR 1963 P&H. 538 at p. 477 and 478

⁵ *State of Gujarat v. Kothari & Associates*, (2016) 14 SCC 761, at 11; *Salwan Construction Co v. Union of India*, ILR (1977) 2 Del 748, at 21-23.

⁶ Art. 4.2, Model Concession Agreement for PPP in National Highways; Art 3.4, Model Concession Agreement 2021 for Public-Private Partnerships in Major Ports; Art. 4.2, Model Agreement for Construction, Operation and Maintenance of Rail System on a Design, Build, Finance, Operate and Transfer Basis.

⁷ See for example, Clause 3.1(v) of the standard EPC Agreement for National Highways, March 2019 issued by Ministry of Road Transport and Highways.

⁸ Art 3.6, Model Concession Agreement 2021 for Public-Private Partnerships in Major Ports; Art 4.5, Model Concession Agreement for Public Private Partnership in National Highways.

the programme.⁹ The contractor is provided an express entitlement to additional time and cost including reasonable profit in the event of the employer's failure to provide site access and possession.¹⁰

- ICE Conditions of Contract: Under this contract type as well, in the event the contractor suffers delay and/or incurs extra cost on account of employer's failure to give access and/or possession of the site, the contractor is likely to receive an extension of time¹¹ and, subject to notice,¹² may also claim any cost to which the contractor may be entitled with profit in respect of any additional or temporary work resulting from the delay in accessing the site.
- In India, certain standard government contracts are one-sided and include terms excluding the liability of the government even if the delay is attributable to the government. Therefore, the courts and arbitrators are often faced with the question of whether to enforce such widely worded exclusionary clauses. The courts/arbitrators have taken such clauses with a pinch of salt and carved out exceptions to such broad exclusionary clauses.¹³ The courts have held that the contractor can claim damages despite any exclusionary clauses in the contract in cases where the delay is solely attributable to the employer, and adequate notice about the claim is provided to the employer. The courts have also held that contractual provisions extinguishing the right of the contractor to claim damages are contrary to the rule of law and public policy in India, and therefore, are regarded as being void.¹⁴ Generally, construction contracts with detailed extension of time clauses are viewed as contracts in which time is not of the essence.¹⁵ Accordingly, in such a contract, a party has entitlement to claim compensation for loss suffered on account of delay caused by the other party in accordance with Section 55 of the Indian Contract Act, 1872. However, there are a few isolated instances where the courts have disallowed the contractor to recover damages based on the exclusion of liability clause¹⁶ and recent trend suggests that the courts are more and more disinclined to enforce such clauses. Further, it is a settled principle under Indian law that no party can derive a benefit from its own wrong.¹⁷ Hence, it will be difficult for the employer to avoid liability if the delay in providing access to the site was solely attributable to it.
- The courts in India have allowed the contractors to recover losses for employer's delay in handing over of the site in

⁹ See Clause 2.1 of FIDIC (Silver Book, Red Book, Yellow Book)

¹⁰ See Clause 2.1 and 8.4 of FIDIC (Silver Book, Red Book) and Clause 8.5 (Yellow Book, 2017 Edn.)

¹¹ See Clause 44 of the ICE Conditions of Contract (7th Edn)

¹² See Clause 53 of the ICE Conditions of Contract (7th Edn)

¹³ *Asian Techs Limited v. UOI* (2009) 10 SCC 354, at 21; *Simplex Concrete Piles v. UOI* ILR (2010) 2 Del 699, at 15-19; *K.N. Sathyapalan v. State of Kerala* (2007) 13 SCC 43 at 32-34.

¹⁴ *Simplex Concrete Piles v. Union of India*, ILR (2010) 2 Del 699, at 15-19.

¹⁵ *Anand Construction Works v. State of Bihar*, AIR 1973 Cal 550 at 27.

¹⁶ See for example *Ramnath International Construction (P) Ltd. v. Union of India*, (2007) 2 SCC 453, at 12; *Steel Authority v. JC Budharaja*, (1999) 8 SCC 122, at 22; *Ch. Ramalinga Reddy v. Superintending Engineer*, (1999) 9 SCC 610, at 15.

¹⁷ *Kusheshwar Prasad Singh v. State of Bihar*, (2007) 11 SCC 447 at 14-16.

instances where the contractor had given notice of such claim.¹⁸ Once the employer's breach of its obligation to provide timely access is established, the contractor is empowered under Section 73 of the Indian Contract Act, 1872 to claim losses/damages arising from the natural course, which may include costs incurred in relation to idle machinery, equipment and labour, site overheads, head office overheads etc.

Conclusion

Access issues and their potential impact are generally overlooked, which can have significant consequences during project execution, and can serve as a catalyst for multi-layered complicated disputes, including with other stakeholders (such as subcontractors).

Engaging a proactive approach right from the tendering stage through execution is integral. The contractor's site and contract teams should work in tandem to address potential access issues should they arise. This coupled with serving contractually and timely compliant notices can help strengthen the contractor's position in its pursuing of suitable time and cost remedies.

If you require any further information, please contact shamilaneelakandan@hka.com or anandudayakumar@hka.com from HKA, and ashish.kabra@nishithdesai.com or mohammad.kamran@nishithdesai.com from Nishith Desai Associates.

¹⁸ See for example *ICM Airport Technics v IAAI*, (2006) 1 RAJ 189 (Del).

ABOUT HKA

HKA is the world's leading consultancy of choice for multi-disciplinary expert and specialist services in risk mitigation and dispute resolution within the capital projects and infrastructure sector. We also have particular experience advising clients on the economic impact of commercial and investment treaty disputes, forensic accounting matters and in cybersecurity 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 in excess of 1,000 consultants, experts and advisors in more than 40 offices across 18 countries.

ABOUT NISHITH DESAI ASSOCIATES

Nishith Desai Associates has earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium Aligunjan, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bangalore, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

As an active participant in shaping India's regulatory environment, we at NDA, have the expertise and more importantly – the VISION – to navigate its complexities. Our ongoing endeavours in conducting and facilitating original research in emerging areas of law has helped us develop unparalleled proficiency to anticipate legal obstacles, mitigate potential risks and identify new opportunities for our clients on a global scale. Simply put, for conglomerates looking to conduct business in the subcontinent, NDA takes the uncertainty out of new frontiers.

The firm has been consistently ranked as one of the Most Innovative Law Firms, across the globe. In fact, NDA has been the proud recipient of the Financial Times – RSG award 4 times in a row, (2014-2017) as the Most Innovative Indian Law Firm.

We are a trust based, non-hierarchical, democratic organization that leverages research and knowledge to deliver extraordinary value to our clients. Datum, our unique employer proposition has been developed into a global case study, aptly titled 'Management by Trust in a Democratic Enterprise,' published by John Wiley & Sons, USA.