

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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PUBLIC ACCOUNTABILITY MEETS PROCEDURAL INTEGRITY: A CASE COMMENTARY ON JKERA V. SIMPLEX PROJECTS LTD.

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1. INTRODUCTION

The Matter¹ in the nature of Commercial Arbitration first came before the Arbitral Tribunal on 28 Jan 2023. The Arbitral Award was issued on 13 July 2024. The case was finally decided by the Hon'ble Delhi High Court on 19 May 2025.

The Delhi High Court bench of Justice Manoj Kumar Ohri has held that even though there is a Liquidated Damages (LD) clause, the law does not provide automatic recovery of the entire LD sum upon breach; rather, actual loss proof is required. As a result, the Petitioner's unilateral adjustment without seeking adjudication was wrong. Such a unilateral settlement does not rule out the necessity for a fair evaluation of the LD claim, as the AT correctly determined. After the Respondent raised an objection to the unilateral adjustment, the Petitioner was forced to seek a declaration endorsing it.

2. FACTUAL BACKGROUND

- Under Section 34 of the Arbitration & Conciliation Act, 1996 ²the petition sought partial setting aside of the 13.07.2024 Arbitral Award.
- Contract Agreement No. JKUSDIP Srinagar/UT/02 dated 02.04.2013 between the Petitioner (Jammu & Kashmir ERA) and Respondent (Simplex Projects Ltd.) for building a multi-storied mechanised parking facility in Srinagar caused the conflict.
- Along with the operation and maintenance (O&M) of the multi-level vehicle parking for three years from the date of the Defect Liability Period ending, the scope of work under the subject contract includes
- The Petitioner submitted—disputed by the Respondent—who asserts that the date of completion of the aforementioned project was 24.02.2015—the initial completion timetable was 549 days beginning from 06.05.2013 to 05.11.2014.

¹ *Jammu & Kashmir Economic Reconstruction Agency v. M/s Simplex Projects Limited*, 2025/DHC/4076

² Arbitration and Conciliation Act, 1996, § 34

- Unquestionably, the actual completion happened on April 30, 2017, after eight EoT extensions of time.
- The Respondent submitted nine allegations in its Statement of Claim; the Petitioner raised three counterclaims and also unilaterally changed ₹2,75,14,796 as liquidated damages (LD) from payments payable to the Respondent.

3. CONTENTIONS RAISED

The Petitioner claimed that the project was delayed 1003 days from 06.05.2013 to 05.11.2014 because construction began on 24.08.2013 and ended on 30.04.2017. 326 days were not attributed to the respondent, whereas 677 were.

The petitioner granted 8 EoTs due to Kashmiri circumstances and issued non-compliance letters under Clause 15.1 of the GCC, which were ignored. Based on the TAC's 03.08.2017 ruling, the petitioner imposed LD at 10% of the contract value under Clause 8.7, which allows 0.05% each day of delay, maximum at 10%.

The AT failed to adjudicate which party caused the delay, and without doing so, it could not have fairly dealt with the question of LD, so it lacked mind in Issue Nos. 1 and 2.

In contrast, the Respondent argued that the AT correctly ruled that no liquidated damages counter claim was ever pleaded and that the petitioner unilaterally adjusted it against the respondent's undisputed claims without consent.

For argument, Clause 8.7 damages should be regarded penalties rather than liquidated damages if Issue Nos. 1 and 2 are revisited. Clause 8.7 of the GCC and Section 8 of the PCC (Part A – Contract Data) provide delay damages of 0.05% of the final contract price per day.

Finally, the term “penalty” in this context—especially where continued fines apply for unachieved milestones—supports the conclusion that these are penal, contrary to the petitioner's allegation of pre-estimated true losses.

4. ISSUES BEFORE THE FORUM

4.1 Before the Arbitral Tribunal

1. Whether the petitioner (JKERA) was entitled to liquidated damages (LD) on account of delay in performance by the respondent (Simplex).
2. Whether the respondent was entitled to Claim Nos. 3, 5, and 7 as raised in the Statement of Claims.

3. Whether the petitioner was entitled to idling charges as claimed in its Counter Claim No. 2.
4. Whether either party was entitled to interest and costs of arbitration proceedings.

4.1 Issues Before the Delhi High Court Under Section 34

The Arbitral Tribunal had first formulated four issues. But as no Section 34 challenge was brought against those portions, the Court specifically said it was only reviewing issues connected to LD and delay attribution. The Court thus just addressed two of them:

- I. Whether the delay in completion of the project was attributable to the Simplex Projects Ltd. (hereinafter referred to as the Respondent) or not.

This is important as under Clause 8.7 liquidated damages could only be justified if the delay was attributable to the contractor.

- II. Whether the petitioner (JKERA) was legally entitled to levy and recover liquidated damages (LD) under Clause 8.7 of the General Conditions of Contract (GCC), including by way of unilateral adjustment from sums payable.

This included whether provision 8.7 fit as a legitimate LD provision under Section 74 of the Indian Contract Act; also, it addressed whether the petitioner could modify LD unilaterally without arbitral adjudication.

5. JUDGMENT SUMMARY AND ANALYSIS

5.1 ISSUE I: ATTRIBUTION OF DELAY

5.1.1 Court's Finding

The AT was not bound to adjudicate attribution of delay once it rejected the LD claim on legal grounds (i.e., that Clause 8.7 was unenforceable as LD).

5.1.2 Analysis

The petitioner argued that the AT skipped deciding attribution of delay—crucial for LD claims. However, the court clarified that since the LD clause itself was invalid, attributing delay became redundant. This is a pragmatic approach reflecting that procedural questions do not arise if the substantive legal foundation (validity of LD clause) is absent.

5.1.3 Contextual References to Unadjudicated Claims

- **Claim Nos. 3, 5, and 7 raised by the respondent**

These issues were not independently challenged under Section 34 and hence not examined by the Court. The court made it clear it would not review unchallenged claims. It adopted a narrow Section 34 scope, only examining arbitral findings that were specifically assailed. This shows judicial deference to arbitral procedure.

- **Idling charges as claimed in the petitioner’s Counter Claim No. 2**

Rejected by the AT; not specifically discussed in High Court. The AT likely found insufficient evidence or merit. The court did not interfere—suggesting the rejection did not violate Section 34 standards.

- **Respondent’s Claim No. 7 – Loss due to unrest in Kashmir Valley**

- Rejected for lack of evidence. Despite the real socio-political unrest, the claim failed evidentiary thresholds. The AT was consistent with the principle that claims for compensation must be quantified and proved. This reinforces the evidentiary rigor required in arbitration.

5.2 ISSUE II: ENTITLEMENT TO LEVY LIQUIDATED DAMAGES UNDER CLAUSE 8.7

5.2.1 WHETHER CLAUSE 8.7 OF GCC IS A VALID LD CLAUSE

5.2.1.1 Court’s Finding

Rejecting the LD claim, the Arbitral Tribunal was justified, holding that Clause 8.7 did not constitute a genuine pre-estimate of damages, and instead appeared as a standard penalty clause lacking mutual negotiation.

5.2.1.2 Analysis

The court concurred with the AT’s observation that Clause 8.7, being a subset of standard form contract, was not shown to be mutually pre-estimated and hence could not automatically entitle the petitioner to LD. Under Section 74 of the Indian Contract Act³, the court underlined LD must show a real pre-estimate of loss—not a penal clause. In the lack of precise data proving such pre-estimation, the AT had not considered Clause 8.7 as enforceable.

5.2.1.3 Judgments Relied Upon

The Hon’ble Court placed reliance upon the stance taken by the court in *Fateh Chand vs. Balkishan Dass*⁴; *Kailash Nath Associates vs. DDA*⁵; *Sudershan Kumar Bhayana Thr LRs vs. Vinod Seth Thr LRs* to establish that **mere stipulation of a sum as LD does not justify**

³ Indian Contract Act, 1872, § 74

⁴ *Fateh Chand v. Balkishan Dass*, 1963 INSC 164 (Also reported as MANU/SC/0258/1963)

⁵ *Kailash Nath Associates v. Delhi Development Authority*, 2015 INSC 19 (Also reported as MANU/SC/0019/2015)

recovery without pro-p. of of actual loss. LD cannot be enforced ipso facto upon breach without loss being proven or clause showing genuine estimation. Reference is drawn to the precedent laid in *BSNL v. Reliance Communication Ltd.*⁶; *ONGC Ltd. v. Saw Pipes Ltd.*⁷ and *Pawan Hans Helicopters Ltd. v. Maritime Energy Heli Air Services Pvt. Ltd.*⁸: Division Bench was referred to on standard for enforceability of LD for defining the **distinction between LD and penalty clauses** and reaffirming that **even contractually agreed LD must meet Section 74 tests** placing reliance upon the decisions in *Kailash Nath Associates (Supra)* and *Vivek Khanna (Supra)*.

5.2.2 VALIDITY OF CLAUSE 8.7 OF THE GCC

5.2.2.1 Court's Finding:

The clause was held to be a penalty and not enforceable as LD under Indian law.

5.2.2.2 Analysis:

The AT's interpretation of Clause 8.7, as not reflecting mutual negotiation or tailored estimation of losses, was accepted. The court reiterated Indian jurisprudence (*Fateh Chand, Kailash Nath, BSNL v. Reliance*) that labels like "LD" are not determinative—the test is substance, not form. Since no evidence was adduced to show actual pre-estimation, the clause failed.

5.2.2.3 Judgments Relied Upon:

1. ***BSNL v. Reliance Communication Ltd.***⁹. – Detailed discussion on the **construction of clauses** (Chitty on Contracts¹⁰ & Treitel¹¹ quoted at *Para 33*)
2. ***Fateh Chand, Kailash Nath*** – Applied to **disqualify the clause as LD.**

⁶ *Bharat Sanchar Nigam Ltd. v. Reliance Communication Ltd.*, 2010 INSC 723 (Also reported as MANU/SC/1000/2010)

⁷ *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, 2003 INSC 241 (Also reported as MANU/SC/0314/2003; (2003) 5 SCC 705)

⁸ *Pawan Hans Helicopters Ltd. v. Maritime Energy Heli Air Services Pvt. Ltd.*, 2017/DHC/3051 (DB) (Also reported as MANU/DE/1614/2017)

⁹ *BSNL v. Reliance Communication Ltd.*, 2010 INSC 827, MANU/SC/1000/2010, (2011) 1 SCC 394

¹⁰ As observed in Chitty on Contracts, "whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. The question to be always asked is whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss."—quoted in *BSNL v. Reliance Communication Ltd.*, 2010 INSC 827, MANU/SC/1000/2010, (2011) 1 SCC 394, ¶ 47 (Supreme Court of India, 29 Nov. 2010), citing Chitty on Contracts, 30th edn., ¶¶ 26–126.

¹¹ According to G.H. Treitel, *Law of Contract* (10th edn), "a clause is penal if it provides for 'a payment stipulated as in *terrorem* of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract.'"—quoted in *BSNL v. Reliance Communication Ltd.*, 2010 INSC 827, MANU/SC/1000/2010, (2011) 1 SCC 394, ¶ 48 (Supreme Court of India, 29 Nov. 2010).

5.2.3 WHETHER UNILATERAL ADJUSTMENT WITHOUT ADJUDICATION IS PERMISSIBLE

5.2.3.1 Court's Finding:

Unilateral recovery of LD was impermissible. The petitioner should have raised a formal counter-claim for LD before the AT.

5.2.3.2 Analysis:

The court upheld that arbitral adjudication is mandatory before any LD recovery. The adjustment of ₹2.75 crores without an award in petitioner's favour was ultra vires the contractual process. This reinforces the jurisdictional discipline of arbitration—unilateral actions cannot bypass arbitral scrutiny.

5.2.3.3 Judgments Relied Upon:

Indirectly supported by reasoning in Fateh Chand, Kailash Nath, and Saw Pipes on procedural fairness and enforceability.

5.2.4 PROOF OF LOSS IN PUBLIC CONTRACTS

5.2.4.1 Court's Findings:

No. Even for public entities, proof of loss or genuine estimate is legally mandated.

5.2.4.2 Analysis:

The court squarely rejected the petitioner's assertion that government bodies can skip loss proof. Indian law maintains equal standard across private and public contracts. The court also declined to presume that delays in public works always lead to loss.

5.2.4.3 Judgments Relied Upon: Fateh Chand, Kailash Nath, BSNL, Pawan Hans

5.2.5 CLAIM OF LOSS OF PARKING REVENUE

5.2.5.1 Court's Finding:

Rejected - no evidence produced to prove revenue loss or causation.

5.2.5.2 Analysis:

The AT and Court both highlighted that bald assertions and assumptions of revenue loss are insufficient. It was also noted that the petitioner, being a society (not the State), failed to show legal entitlement to claim for loss to the public exchequer.

5.2.6 TREATMENT OF INTEREST AND COSTS

5.2.6.1 Court's Finding:

Interest awarded on admitted and proven claims; no challenge by petitioner.

5.2.6.2 Analysis:

The AT's discretion in awarding pendente lite and future interest is standard under arbitration law. The petitioner did not contest this separately, implying tacit acceptance.

6. BROADER JURISPRUDENTIAL IMPLICATIONS

According to Section 34 of the Arbitration and Conciliation Act of 1996, this case initially seems to be a technical arbitration challenge. But at its heart, it struggles with a very practical question: Can the government automatically recover damages when public works are delayed, or does it have to follow the same rules of evidence as everyone else?

Citing delays in finishing a mechanised parking facility in Srinagar, the petitioner, JKERA, an implementing agency for public infrastructure, attempted to impose liquidated damages (LD) of nearly ₹2.75 crore on Simplex, a private contractor. Additionally, it attempted to unilaterally deduct this sum without the consent of an arbitrator and concurrently filed a counterclaim for additional losses, all the while the original contract clause (Clause 8.7 of the GCC) was a boilerplate.

The Delhi High Court sent a very clear message when it dismissed JKERA's claims: government agencies are not given a free pass. The court emphasised that, in accordance with Section 74 of the Indian Contract Act, liquidated damages must still satisfy the basic legal threshold. In other words, they must represent an accurate pre-estimate of loss rather than a capricious or punitive number taken from a template.

Some would contend that because the court ruled the LD clause to be invalid, it adopted a formalistic stance, declining to even determine who was to blame for the delay. However, this was intentional. When the legal basis was already tenuous, the court decided not to get bogged down in the details. It made a clear statement: courts won't correct contractual laziness.

In a standard contract, clause 8.7 remains a generic line that is never discussed or changed. It was appropriately handled by the court as a penalty rather than a pre-estimate. This is in line with established Indian precedent that separates true LD from punitive clauses masquerading as such (Fateh Chand, Kailash Nath, Saw Pipes).

The court's decision to refute the notion that a public delay inevitably equates to a public loss was a noteworthy one. According to JKERA, delays in public infrastructure inevitably hurt the public coffers or the populace. However, the court rejected such sweeping presumptions,

as did the Arbitral Tribunal before it.

It searched for proof: How many vehicles would have been parked? How much money was lost? To whom did that money belong? None of this was displayed. The court pointed out that JKERA was not even the custodian of the state treasury, despite being a registered society. How, then, could it assert public loss?

Regardless of whether the claimant is a public or private stalwart, this illustrates the rule that claims must be supported by evidence.

Also a subtle theme running through the judgment is judicial respect for arbitral reasoning. The court did not attempt to re-decide the case. The same has been referenced through *P.R. Shah, Shares and Stock Brokers Pvt. Ltd. vs. BHH Securities Pvt. Ltd. & Ors*¹²; *Anglo American Metallurgical Coal Pty. Ltd. v. MMTC Ltd*¹³; *Associate Builders v. DDA*¹⁴; *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd*¹⁵. It explicitly noted that the AT had:

- Taken a plausible, legally tenable view;
- Demanded proper evidence;
- Made no egregious legal or factual error.

This is admirable restraint. In a time when arbitration is supposed to minimise judicial involvement, the High Court upheld this principle by avoiding the temptation to get involved just because it might have disagreed.

In the end, this case serves as a reminder to contractors and public authorities alike:

- To claim LD, you need real, project-specific evidence; standard clauses won't help.
- Being a public figure does not give you an advantage; even organisations with ties to the government must provide evidence.
- Unilateral deductions or assumptions of loss will not stand up to scrutiny; due process is a requirement of arbitral fairness.
- Unless there is an obvious illegality, courts will not micromanage arbitral awards.

¹² *P.R. Shah, Shares and Stock Brokers Pvt. Ltd. v. BHH Securities Pvt. Ltd. & Ors.*, 2011 INSC 1248, MANU/SC/1248/2011, (2012) 1 SCC 594

¹³ *Anglo American Metallurgical Coal Pty. Ltd. v. MMTC Ltd.*, 2020 INSC 705, MANU/SC/0953/2020, (2021) 3 SCC 308

¹⁴ *Associate Builders v. Delhi Development Authority*, 2014 INSC 809, MANU/SC/1076/2014, (2015) 3 SCC 49

¹⁵ *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, 2019 INSC 1395, MANU/SC/1765/2019, (2019) 20 SCC 1

The ruling straddles the line between legal idealism and business realism. While it acknowledges the significance of public projects, it maintains that public accountability and procedural integrity must coexist with public importance.

At first glance, this case appears to be a technical arbitration challenge under Section 34 of the Arbitration and Conciliation Act of 1996. Fundamentally, though, it faces a very practical dilemma: Does the government have to adhere to the same standards of proof as everyone else, or can it automatically recover damages when public works are delayed?

The petitioner, JKERA, an implementing agency for public infrastructure, sought to impose liquidated damages (LD) of almost ₹2.75 crore on Simplex, a private contractor, citing delays in the installation of a mechanised parking facility in Srinagar. In addition to being a typical boilerplate clause, the original contract clause (Clause 8.7 of the GCC) attempted to unilaterally deduct this sum without arbitral approval and simultaneously sought a counterclaim for further losses.

When the Delhi High Court rejected JKERA's arguments, it made it very evident that government organisations are not allowed to get away with anything. The court emphasised that liquidated damages still need to meet the fundamental legal requirements under Section 74 of the Indian Contract Act. In other words, they must not be an arbitrary or punitive number derived from a template, but rather an accurate pre-estimate of loss.

Some would argue that the court took a formalistic approach, refusing to even identify the cause of the delay, because it declared the LD clause to be invalid. But this was deliberate. The court chose not to get caught up in the specifics when the legal foundation was already shaky. It stated unequivocally that courts will not correct contractual laziness.

Clause 8.7 is a generic line that is never discussed or altered in a typical contract. The court handled it properly as a penalty instead of a pre-estimate. This is consistent with long-standing Indian precedent that distinguishes between punitive clauses that pass as LD and actual LD (*Fateh Chand, Kailash Nath, Saw Pipes*).

It was significant that the court rejected the idea that a public delay invariably results in a public loss. JKERA asserts that public infrastructure delays invariably have a negative impact on the public coffers or the general public. But like the Arbitral Tribunal before it, the court rejected

such broad assumptions.

It looked for evidence: What was the expected number of cars parked there? What was the amount of money lost? Who was the rightful owner of that money? None of this was shown. Despite being a registered society, the court noted that JKERA was not even the custodian of the state treasury. So how could it claim loss to the public?

This exemplifies the requirement that claims be backed up by evidence, regardless of whether the claimant is a public or private stalwart.

Another underlying theme that permeates the decision is the judiciary's respect for arbitral reasoning. The court did not re-decide the case. It clearly stated that the AT had:

- Adopted a reasonable, legally sound stance;
- Requested appropriate proof; and
- Made no egregious legal or factual errors.

This restraint is commendable. By resisting the urge to intervene merely because it might have disagreed, the High Court upheld the principle that arbitration should minimise judicial involvement in this era.

7. CONCLUSION

This case ultimately serves as a reminder to both public authorities and contractors- unilateral deductions or assumptions of loss won't stand up to scrutiny; public status doesn't exempt you; even government-affiliated entities must provide proof; arbitral fairness requires due process; standard clauses won't save you—you need real, project-specific evidence to claim LD. Courts will not micromanage arbitral awards unless there is a clear violation of the law. The decision falls somewhere between business realism and legal idealism. It maintains that public accountability and procedural integrity must coexist with public importance, even though it recognizes the importance of public projects.