

Loss of Profit or Loss of Profitability: Admissibility of Contractual Remedies in India

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ABSTRACT

In the landscape of contemporary commercial contractual disputes, the terms “loss of profit” and “loss of profitability” have not only become prevalent particularly in relation to claims for damages but are also one of the most contentious. Though seemingly interchangeable and often confused, it is crucial to understand that they not only connote to two different concepts but also carry distinct legal and financial implications for the parties. The authors in this paper analyse the evolving jurisprudence in India regarding these two types of claims, and the evidentiary burdens involved to substantiate them through the interpretation provided by Delhi High Court in the recent case M/s Plus91 Security Solutions v. NEC Corporation India Pvt Ltd, a decision that navigates the complex interplay of contract law, arbitration law, and judicial review in India. At its core, the case revolves around enforceability of a limitation of liability clause, that excluded consequential damages, including loss of profits, in a dispute arising from a Memorandum of Understanding (MOU). The case offers valuable insights regarding the court's interpretation of these two concepts, and the treatment of clauses limiting liability. This case also highlights the balanced approach taken by courts in the conflict between the court's duty to guarantee that arbitral awards are not unlawful and the principle of minimal judicial intervention in arbitration awards, particularly when those decisions conflict with the explicit provisions of the underlying contract. The Delhi High Court's Single Judge and Division Bench, both found the Arbitral Tribunal's decision to award loss of profit despite an express contractual clause limiting the same to be blatantly unlawful. The entire dispute that has traversed through arbitration and multiple levels of the Indian judicial system, and is now pending before the Supreme Court of India, not only emphasises the need for businesses to exercise due diligence and foresight but also the relevance and significance of preparatory agreements, like MOUs, in establishing the limits of liability between businesses, even early on in their partnership.

Keywords: *Loss of Profit, Loss of Profitability, Arbitration, Judicial Review, Limitation of Liability, Memorandum of Understanding.*

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1. Introduction

In the landscape of contemporary commercial disputes, claims for loss of profit and loss of profitability have become increasingly prevalent,¹ particularly in arbitral proceedings where contractual breakdowns are examined in detail.² These claims often emerge from complex commercial engagements, where one party claims consequential damages due to the other's breach of contract. While both of these terms are frequently used interchangeably, they differ significantly in meaning, scope, and evidentiary requirements. Their conflation not only creates ambiguity but also affects the manner in which arbitral tribunals and courts assess liability and damages under Indian law. Hence, it is imperative to understand and underscore that the distinction between “loss of profit” and “loss of profitability” is not merely semantic, but rather carries significant legal and financial implications.

A recent illustration of this evolving jurisprudence is found in the decision of the Delhi High Court in *M/s Plus91 Security Solutions v. NEC Corporation India Pvt. Ltd.*³ The Delhi High Court reversed an arbitral verdict that had given M/s Plus91 Security Solutions ₹8,43,07,904 (i.e. 10% of the total value of works of Rs. 84,30,79,040) as damages for lost profits against NEC Corporation India Pvt Ltd. A limitation of liability clause contained in the Memorandum of Understanding (MOU), signed by both parties, which expressly excluded any liability for loss of profit, formed the basis for the High Court's ruling. The arbitral tribunal's decision to award such damages, notwithstanding the exclusion, was subjected to judicial scrutiny. The High Court's involvement underscores the importance of precise wording in business contracts, particularly with regard to liability-limiting provisions, and demonstrates the balanced approach adopted by the judiciary between respecting arbitral autonomy and upholding the contractual intent of the parties and integrity of contractual agreements. Currently, the Supreme Court of India is hearing an appeal filed by M/s Plus91 Security Solutions against this decision.⁴

¹ See Kenneth M Kolaski & Mark Kuga, “Measuring Commercial Damages via Lost Profits or Loss of Business Value: Are These Measures Redundant or Distinguishable?” 18 *Journal of Law & Commerce* 1 (1998-99).

² See e.g. Gyanvi Khanna, “Awarding Claim for Loss of Profit Without Substantial Evidence is in Conflict with Public Policy of India: Supreme Court” *Live Law* (Oct. 23, 2023), available at: <https://www.livelaw.in/supreme-court/supreme-court-judgment-claim-for-damages-substantial-evidence-arbitral-award-240832> (last visited on June 10, 2025); Raghav Bhatia, “Supreme Court on Grant of Loss of Profits Sans Evidence” *India Corp Law* (Apr. 24, 2024), available at: <https://indiacorplaw.in/2024/04/supreme-court-on-grant-of-loss-of-profits-sans-evidence.html> (last visited on June 10, 2025); Susshil Daga, *et al.*, “Claim for Loss of Profit vis-à-vis Railway Contracts and Public Works Department Contracts” *Live Law* (Jan. 07, 2025), available at: <https://www.livelaw.in/law-firms/law-firm-articles/-claim-for-loss-of-profit-vis-vis-railway-contracts-and-public-works-department-contracts-280177> (last visited on June 10, 2025); Rituparna Chand, “Unraveling the Complexities of Loss of Profit Versus Loss of Profitability in Construction Disputes” *Live Law* (May 21, 2025), available at: <https://www.sconline.com/blog/post/2025/05/21/unravelling-the-complexities-of-loss-of-profit-versus-loss-of-profitability-in-construction-disputes/> (last visited on June 10, 2025).

³ *M/s Plus91 Security Solutions v. NEC Corporation India Pvt Ltd*, 2024 LiveLaw (Del) 869.

⁴ *M/s Plus91 Security Solutions v. NEC Corporation India Pvt Ltd.*, Civil Appeal No. 14131/2024 (before the Supreme Court).

The authors in this paper aim to analyse the legal nuances of this case, highlighting key aspects such as the principles governing claim of damages, the role of limitation of liability clauses, and the extent of judicial intervention in arbitration awards. Understanding these elements is essential for refining contract drafting practices and ensuring fair dispute resolution mechanisms. The paper is structured as follows: The next section provides the necessary background and an abridged procedural history of the *Plus91 case*. The third section explores the conceptual and legal differences between loss of profit and loss of profitability. The fourth section again delves into the *Plus91 case*, analysing the key elements that led to the judgement. The fifth section, contextualised the *Plus91 case* in the existing legal and jurisprudential discourse on loss of profits, evaluating the broader implications for contractual drafting, enforcement, and also on claiming interests. The last section of the paper concludes with a brief summary and key takeaways from the discussion.

2. Background and Procedural History of the Case

The genesis of the dispute can be traced back to an earlier collaboration between NEC Corporation India Pvt Ltd and M/s Plus91 Security Solutions in 2014, where NEC, a company renowned for its IT and biometric solutions, approached Plus91, a firm specializing in security-oriented IT solutions, for potential collaboration on projects involving Facial Recognition System (FRS) technology, leading to the signing of an initial Memorandum of Understanding (MOU). The specific MOU that triggered the current legal battle was signed on May 16, 2019, and pertained to an E-Boarding-Biometric Boarding System (BBS) project for the Airport Authority of India (AAI). Plus91 contended that NEC utilised their industry expertise and contacts to successfully secure the AAI project, with assurances of receiving purchase orders amounting to approximately ₹84 crores for their contribution. In contrast, NEC maintained that the MOU's sole purpose was to enable Plus91 to obtain vendor quotations. It did not establish any binding obligation on NEC to issue purchase orders to Plus91.⁵

Clause 1 of the 2019 MOU, stipulated that the parties would collaborate in the field of BBS, explore potential opportunities together, and subsequently enter into specific project-based agreements that would clearly define their respective roles and responsibilities. This clause was pivotal in the Delhi High Court's interpretation that the MOU was a preliminary agreement outlining the intent for future collaboration rather than a definitive contract for the execution of work. Furthermore, Annexure-A of the MOU, which detailed the scope of work for both parties and indicated a tentative value for Plus91's

⁵ *Supra* note 3.



portion, remained unsigned by either party. This lack of a formal signature on a document, outlining key aspects of the proposed work, further bolstered NEC's argument that the MOU did not constitute a binding commitment for the award of work. NEC was eventually awarded the AAI contract on August 23, 2019.⁶ Following this, Plus91 requested a project-specific agreement to formalise their role, but NEC did not enter into such an agreement. This led Plus91 to issue a legal notice in May 2020, alleging a breach of the MOU by NEC. NEC refuted these allegations, asserting that the MOU did not impose any obligation on them to issue purchase orders to Plus91. Consequently, Plus91 invoked the arbitration clause embedded within the MOU, initiating arbitration proceedings to resolve the dispute. The differing interpretations of the MOU by Plus91 and NEC underscore the inherent ambiguity that can arise from preliminary agreements, particularly concerning the crucial matter of do they create a binding obligation to enter into subsequent, more detailed contracts. The absence of a signed Annexure-A further suggests a lack of conclusive commitment regarding the specific terms and conditions of the work intended for Plus91.

The dispute resolution process began with Plus91 invoking the Arbitration Agreement embodied in clause 14 of the MOU. The Arbitral Tribunal comprised of three arbitrators, one arbitrator nominated by Plus91 and NEC each, and the presiding arbitrator chosen by the two arbitrators. The tribunal gave its award on March 17, 2023, in favour of Plus91 Security Solutions. The Tribunal awarded a significant sum of ₹8,43,07,904 as compensation for loss of profits, along with ₹1,27,30,625 for costs. This award was based on the Tribunal's finding that NEC had breached the MOU by failing to assign works valued at ₹84,30,79,040 to Plus91, estimating the loss of profits at 10% of this amount. Despite Clause 10 in the MOU, which seemingly excluded liability for loss of profit, the Arbitral Tribunal determined that Plus91 was entitled to damages. Subsequently, NEC Corporation India Pvt. Ltd. challenged this arbitral award by filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996, before the Single Judge of the Delhi High Court. On December 18, 2023, the Single Judge issued a judgment that set aside the arbitral award. The primary reasoning behind this decision was the Single Judge's conclusion that the *Simplex Concrete Piles (India) Ltd. v. Union of India*,⁷ precedent, relied upon by the Arbitral Tribunal, was inapplicable to the specific context of the Plus91-NEC MOU. The Single Judge further held that the Arbitral Tribunal's conclusions were patently illegal, considering the MOU as a mere statement of intent rather than a binding commitment for NEC to award work to

⁶ Arunima, "Delhi High Court: Arbitral Tribunal Cannot Award Certain Types of Damages if They Are Specifically Excluded by Contractual Clauses" *SCC Online Web Edition* (Aug. 5, 2024), available at: <https://www.sconline.com/blog/post/2024/08/05/delhi-high-court-arbitral-tribunal-cannot-award-certain-types-of-damages-if-they-are-specifically-excluded-by-contractual-clauses/> (last visited on June 10, 2025).

⁷ *Simplex Concrete Piles (India) Ltd v Union of India*, 2010 SCC OnLine Del 821.

Plus91. Aggrieved by this decision, Plus91 Security Solutions filed an appeal before the Division Bench of the Delhi High Court under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996.⁸ However, the Division Bench, in its judgment dated July 29, 2024, upheld the decision of the Single Judge and dismissed Plus91's appeal. The Division Bench explicitly concurred that the award of damages for loss of profit was contrary to the express terms of Clause 10 of the MOU and was therefore vitiated by patent illegality. Undeterred by these setbacks, M/s Plus91 Security Solutions has now approached the Supreme Court of India by filing a Civil Appeal (No. 14131 of 2024) against the Delhi High Court's judgment. As of May 7 2025, the Supreme Court proceedings indicate that NEC has entered an appearance in the matter and has been directed to file a counter-affidavit. The journey of this case, through multiple tiers of the judicial system, underscores the intricate legal and financial considerations at play.

3. Distinguishing "Loss of Profit" and "Loss of Profitability"

In the assessment of economic damages arising from breaches of contract, tortious conduct, or other forms of misconduct, the terms "loss of profit" and "loss of profitability" frequently emerge within the realm of business disputes. Although the terms may seem synonymous and are often used interchangeably in informal business discussions, it is essential to distinguish their precise legal meanings. Clear differentiation between "loss of profit" and "loss of profitability" is crucial for accurately assessing and recovering damages. A thorough legal analysis should explore their definitions, contextual applications, and the legal standards used to determine each.

3.1 Loss of Profit

This refers to the specific profit a party would have earned from a particular transaction but for the breach. It is usually a direct consequence of the breach and can be substantiated with financial projections and past performance records. To understand "loss of profit," it is first necessary to define "profit" within a business and legal context. Profit is fundamentally the residual income remaining after all expenses—including the cost of goods sold, operating expenses, taxes, and interest—have been deducted from the total revenue generated by a business. In essence, it represents the net financial gain from a business activity.

"Loss of profit," as a legal concept, refers to the financial detriment suffered by a business or individual due to an inability to earn the expected revenue or income. This inability is often a direct consequence of a breach of contract, a tortious act, such as negligence that disrupts

⁸ The Arbitration and Conciliation Act, 1996, s. 37 (1)(c).



business operations, or other forms of wrongful conduct.⁹ Several key elements are integral to the legal understanding and recovery of loss of profit.

Firstly, causation is paramount. The plaintiff must demonstrate that the loss of profit was directly caused by the defendant's specific actions or omissions.¹⁰ Without establishing this direct link, a claim for loss of profit will likely fail. Secondly, in the context of contract law, foreseeability plays a significant role. The loss of profit must have been reasonably foreseeable to the breaching party at the time the contract was entered into as a probable result of the breach.¹¹ This principle, stemming from the landmark case of *Hadley v. Baxendale*,¹² ensures that parties are only liable for losses they could have reasonably anticipated. Thirdly, the amount of the loss must be proven with reasonable certainty. Courts are reluctant to award damages based on speculation or conjecture; the plaintiff must provide sufficient evidence, such as financial statements, past performance, and expert testimony, to establish a reasonable estimate of the lost profits. Furthermore, "loss of profit" often refers to reduced income for a finite period. The damages are typically measured for the period until the business can reasonably be expected to recover the position it would have been in had the damaging act not occurred. In contrast to the well-defined legal concept of "loss of profit", and "profitability" from a business perspective is a measure of a business's efficiency in generating profits relative to its revenue, assets, or equity.¹³ It is an indicator of how well a company utilises its resources to produce profit and is often expressed as a ratio or percentage, such as profit margin or return on investment.

3.2 Loss of Profitability

It refers to a decline in these profitability metrics over a period. This could manifest as a decrease in profit margin (profit as a percentage of revenue), a lower return on assets, or a reduced return on equity. However, a decrease in profitability can have significant legal implications. It can serve as crucial evidence in substantiating a claim for "loss of profit." If a defendant's actions cause a business to become less efficient in generating profit, this reduced

⁹ Founder Shield, "Loss of Profit" *Insurance Terms & Definitions* (2024), available at: <https://foundersshield.com/insurance-terms/definition/loss-of-profit/> (last visited on June 10, 2025).

¹⁰ The Knowles Group, "Calculating Lost Profits" *The Knowles Group Blog* (2025), available at: <https://www.theknowlesgroup.org/blog/calculating-lost-profits/> (last visited on June 10, 2025).

¹¹ Freiburger Haber LLP, "Lost Profit Damages: It Makes a Difference in Proof Whether the Damages Alleged Are General or Special" *Freiberger Haber LLP* (2025), available at: <https://fhnylaw.com/lost-profit-damages-it-makes-a-difference-in-proof-whether-the-damages-alleged-are-general-or-special/> (last visited on June 10, 2025).

¹² *Hadley v. Baxendale*, (1854) 9 Exch 341.

¹³ Rachel Blakely-Gray, "The Difference Between Profit and Profitability," *Patriot Software Blog* (2025), available at: <https://www.patriotsoftware.com/blog/accounting/difference-between-profit-profitability> (last visited on June 10, 2025).

efficiency will likely result in a lower net income than expected. For example, increased costs or operational inefficiencies caused by a breach of contract or a tortious act could lead to a decline in profit margins, directly impacting the bottom line and resulting in a "loss of profit."

Furthermore, a significant and sustained "loss of profitability" might indicate a longer-term decline in the business's financial health, potentially leading to a claim for "loss of business value", if the business is severely impaired or ultimately destroyed.¹⁴ In such cases, the reduced profitability might be a key factor in the valuation of the business before and after the damaging event, helping to determine the extent of the loss in its overall worth. Therefore, while "loss of profitability" itself may not be a direct legal claim, it is a vital economic indicator that can significantly influence the assessment of damages under recognised legal principles like "loss of profit" and "loss of business value". This distinction is crucial because it affects how damages are calculated and awarded. Loss of profit is often more readily quantifiable, while loss of profitability can be more complex and speculative.

From a legal standing perspective, "loss of profit" is a well-established and recognised basis for claiming damages in legal proceedings, particularly in cases of breach of contract and tortious interference with business operations. Claims for "loss of profit" are subject to stringent legal tests of causation, foreseeability (in contract), and reasonable certainty. "Loss of profitability", on its own, does not appear to be a direct legal claim for damages. Instead, it functions more as a condition or evidence that can support claims for "loss of profit", or in more severe cases, "loss of business value".

The measurement of these two concepts also differs. "Loss of profit" is usually calculated by comparing the actual net profits earned during the period affected by the damaging event with the net profits that would have been reasonably expected had the event not occurred. This often involves analysing historical financial data, market trends, and expert projections. "Loss of profitability," on the other hand, is assessed by analysing changes in key profitability ratios and metrics, such as gross profit margin, net profit margin, operating profit margin, and return on investment.¹⁵ A decline in these ratios indicates a decrease in the business's efficiency in generating profit.

Finally, regarding duration, "loss of profit" is often associated with a finite period during which the business suffers reduced earnings. While it can be temporary or, in cases of

¹⁴ Kathryn Solomon, Differentiating between Lost Profits and Lost Business Value, *Berkowitz Pollack Brant Advisors*, available at: <https://www.bpbcpa.com/differentiating-between-lost-profits-and-lost-business-value-by-kathryn-solomon-cpa/> (last visited on June 10, 2025).

¹⁵ *Supra* note 13.



permanent business destruction, indefinite, the focus is usually on a specific timeframe. A significant and sustained "loss of profitability", over time, however, can be an indicator of a more fundamental problem that might lead to a permanent impairment of the business's value.¹⁶

4. Analysis of the Delhi High Court's Judgment

The Delhi High Court's ruling emphasises the need for clear distinctions between these two categories when assessing damages, as their evidentiary standards and legal treatment differ significantly. The Delhi High Court, in its deliberations, grappled with several key legal issues. A central point of contention was the interpretation of the Memorandum of Understanding (MOU) itself, with specific focus on Clause 1, which outlined the proposed collaboration, and Clause 10, which contained the exclusion of liability. The court had to determine whether the MOU constituted a binding contract that legally obligated NEC to issue purchase orders to Plus91 for the AAI project. Furthermore, the High Court needed to interpret the scope and applicability of Clause 10, particularly whether it effectively precluded Plus91's claim for loss of profit arising from the alleged breach of the MOU. Another significant legal issue considered by the High Court was the relevance and applicability of the *Simplex Concrete Piles (India) Ltd. v. Union of India*,¹⁷ precedent. The court examined whether this case provided a valid legal basis for the Arbitral Tribunal to award damages for loss of profit to Plus91, notwithstanding the explicit exclusion clause present in the MOU. Ultimately, the overarching legal issue before the High Court was whether the arbitral award, in granting damages for loss of profit, was so fundamentally flawed that it amounted to patent illegality on the face of the record. This required the court to assess whether the Arbitral Tribunal's decision contravened the express terms of the contract agreed upon by the parties. The primary legal challenge, therefore, centred on the correct interpretation of the contractual language and the extent to which an arbitral tribunal could deviate from those agreed-upon terms when rendering its award.

In its judgment, the Single Judge of the Delhi High Court explicitly found the *Simplex Concrete Piles* case to be inapplicable to the facts of the Plus91-NEC dispute, reasoning that it was decided within a different factual and contractual context. The Single Judge concluded that the MOU between Plus91 and NEC should be interpreted as a preliminary statement of intent, outlining the parties' desire to collaborate and potentially

¹⁶ *Supra* note 14.

¹⁷ *Supra* note 7.

enter into definitive agreements on a project-by-project basis, rather than a binding commitment on NEC's part to award work to Plus91. Subsequently, the Division Bench of the Delhi High Court affirmed this view, placing strong emphasis on the express terms of Clause 10 of the MOU. The Division Bench concurred that Clause 10 clearly stated that neither party would be held liable for any loss of profit arising from or in connection with the MOU. Both the Single Judge and the Division Bench underscored the fundamental principle of upholding the contractual bargain freely entered into by the parties, including clauses that explicitly limit liability for certain types of damages, such as loss of profit. The High Court also noted that Clause 10 did not entirely preclude Plus91 from seeking any form of compensation, as it did not bar claims for direct expenditure or costs that might have been incurred by Plus91 in furtherance of the MOU. To support its stance, the High Court referred to several precedents set by the Supreme Court of India, including cases like *Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd.*,¹⁸ and *Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Private Limited*,¹⁹ which affirm the binding nature and enforceability of contractual clauses that limit liability. The High Court's judgment strongly reinforces the legal principle that exclusion clauses in commercial contracts are generally considered valid and will be upheld by the courts unless they are found to be against public policy or were procured through fraudulent means or coercion. Furthermore, the distinction made by the High Court between the MOU as a preliminary agreement and a definitive, project-specific contract is crucial, as it clarifies that MOUs, while serving an important purpose in outlining the initial intentions of parties, do not automatically translate into binding obligations for the execution of future work, especially when the language suggests the need for further specific agreements.

The central point of contention in this case, particularly concerning the arbitral award, was the compensation granted to Plus91 Security Solutions for "loss of profits", amounting to ₹8,43,07,904. This amount, calculated by the Arbitral Tribunal as 10% of the value of the works that were allegedly not awarded to Plus91, was awarded despite the clear language of Clause 10 of the MOU. Clause 10 explicitly stated that neither party would be liable for "any loss or damage due to loss of goodwill or loss of revenue or profit arising from or in connection with this MOU". The Delhi High Court, in both its Single Judge and Division Bench decisions, specifically overturned this award of loss of profit, directly citing Clause 10 as the primary reason. The High Court firmly held that awarding damages for loss of profit was in direct contravention of the explicitly agreed-upon terms of the MOU. This

¹⁸ *Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd.*, AIR 1996 SC 2508.

¹⁹ *Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Private Limited*, (2010) 13 SCC 377.



judicial stance underscores the fundamental legal principle that parties to a contract have the autonomy to exclude liability for certain types of damages, including loss of profit, through unambiguous contractual provisions. Legal definitions of "loss of profit" consistently refer to the financial detriment a business experiences when it is unable to generate expected revenue due to a breach of contract or other disruptive events. In this context, Plus91's claim for loss of profit was based on the premise that NEC's failure to award them the project work constituted a breach of the MOU, leading to a loss of anticipated earnings. While "profit" refers to a specific financial gain, "profitability" is a broader measure of a business's efficiency in generating profit relative to its resources. The MOU in this case specifically used the term "loss of profit", and the High Court's judgment focused on the direct exclusion of this type of damage. This case serves as a significant reminder for businesses to meticulously negotiate and thoroughly understand clauses within their contracts that limit or exclude liability for specific types of losses, including loss of profit, as these clauses are highly likely to be upheld by the courts, particularly in arbitration proceedings. The Arbitral Tribunal's attempt to rely on the *Simplex Concrete Piles*,²⁰ precedent to circumvent the exclusion clause was rejected by the High Court, emphasizing the crucial need for arbitrators to strictly adhere to the specific contractual terms agreed upon by the parties and to avoid overriding them based on general legal principles or seemingly analogous cases without a careful consideration of the distinct context of the contract in question.

5. Contextualizing the Plus91-NEC Judgement in Broader Jurisprudential Discourse

The legal distinction between "loss of profit" and "loss of profitability" in Indian contract and arbitration law is substantial both in theory and actual application, going beyond mere semantic differentiation. The form of claims, the high standards of proof that must be met, and the range of damages that can be awarded are all governed by this distinction, which has been meticulously described in several important court decisions. In this case, the expected revenue sources are directly and quantitatively disrupted, resulting in a discernible decline in net income. In *Bharat Coking Coal Ltd. v. L.K. Ahuja*,²¹ the Supreme Court set a high standard for such claims, requiring verifiable evidence of a causal connection between the alleged losses and the violation. The court in Ahuja unequivocally dismissed allegations that were based just on assumptions or conjectural predictions, requiring the presentation of thorough documentation and proof of missed opportunities. The need for claimants to carefully demonstrate a direct and proximate causal relationship

²⁰ *Supra* note 7.

²¹ *Bharat Coking Coal Ltd v. LK Ahuja*, (2004) 5 SCC 109.

between the breach and the alleged pecuniary harm is highlighted by the court's emphasis on concrete evidence.

On the contrary, claims regarding "loss of profitability" are inherently linked to the idea of delays and strive to compensate for missed opportunities. These assertions explore the systematic decline in a company's profitability-generating efficiency, which is frequently assessed using complex financial measures and measurements. This type of loss affects a company's long-term financial stability and viability by reflecting a significant deterioration of its core ability to turn revenue into profit. In *M/S UNIBROS v. All India Radio*,²² the Supreme Court recognised the particular difficulties in calculating losses resulting from delays. According to the *UNIBROS* ruling, claimants must carefully record the precise effects of delays on the profitability of their company. This requires in-depth financial analyses, expert testimony, and comparative data that shows the company's performance both before and after the delay. The judiciary's acknowledgement of the intricate and frequently speculative character of opportunity cost arguments is demonstrated by this increased burden of proof.

Furthermore, the necessity of establishing a clear and unambiguous nexus between the alleged breach and the claimed losses, regardless of whether they relate to loss of profit or profitability, has been repeatedly emphasised by seminal cases such as *Dwaraka Das v. State of Madhya Pradesh*²³ and *A.T. Brij Paul Singh v. State of Gujarat*.²⁴ In order to prevent damages from being granted based solely on guesswork or unsupported supposition, the courts have continuously required a high bar of proof. The recovery of remote or indirect losses is prohibited under the reasonable certainty criterion, which is stated in *Dwaraka Das* and requires that damages be precisely calculable. This rule protects against speculative claims and guarantees that damages are supported by verifiable facts and prudent financial analysis.

Cases involving large-scale infrastructure projects, where calculating damages due to delays requires complex financial models and estimates, make these claims even more complicated. The courts in *National Highways Authority of India v. Hindustan Construction Co. Ltd.*,²⁵ and *MSK Projects India (JV) Limited v. State of Rajasthan*,²⁶ struggled with the particular difficulties of determining opportunity costs in such intricate situations. Given the

²² *M/s Unibros v. All India Radio*, 2023 SCC OnLine SC 1366.

²³ *Dwaraka Das v. State of Madhya Pradesh and Ors.*, (1999) 3 SCC 500.

²⁴ *A T Brij Paul Singh v. State of Gujarat*, (1984) 4 SCC 59.

²⁵ *National Highways Authority of India v. Hindustan Construction Co Ltd*, Civil Appeal No. 4702 of 2023.

²⁶ *MSK Projects India (JV) Limited v. State of Rajasthan*, (2011) 10 SCC 573.



inherent challenges in estimating the financial impact of project delays, these instances demonstrated the need for expert testimony and thorough financial research to support claims for loss of profitability. Given the distinct financial dynamics of major infrastructure projects, the courts recognised the necessity for a nuanced and context-specific approach to damage assessment.

The boundaries of judicial review in arbitration cases involving loss of profit and profitability have also been clarified by the Supreme Court's rulings in *McDermott International Ltd. v. Burn Standard Co. Ltd.*,²⁷ and *Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corporation Ltd.*²⁸ These decisions have emphasised how crucial it is to enforce the terms of contracts and make sure arbitral awards are supported by reliable legal precedents and factual data. The courts have repeatedly reaffirmed that arbitrators cannot ignore clear contractual restrictions or grant damages based on conjecture or unsupported allegations. In addition to ensuring that awards are in line with accepted legal norms and commercial agreements, this judicial review helps to preserve the integrity of the arbitration process.

The need to establish a direct and unambiguous causal link between the alleged loss of profit and the contract violation was further illustrated by the case of *Mohd. Salamatullah v. Government of Andhra Pradesh*.²⁹ The court stressed that rather than being a distant or indirect result, the loss must be a natural and likely consequence of the breach. The judiciary's dedication to guaranteeing that damages are only granted for losses that can be closely linked to the defendant's wrongdoing is emphasised by the proximate causation principle.

The Indian judiciary has meticulously established a distinctive legal framework for addressing claims related to "loss of profit" and "loss of profitability", recognizing their unique characteristics and the differing levels of evidentiary requirements they entail. Claims for "loss of profitability" necessitate a thorough examination of opportunity costs and the broader financial implications, whereas "loss of profit" claims demand concrete evidence of a reduction in direct revenue. Collectively, these judicial determinations underscore the importance of precise contract drafting, comprehensive evidence gathering, and an advanced understanding of financial metrics in effectively navigating the complex landscape of damages claims within the context of Indian contract law. The courts' unwavering commitment to upholding contractual terms and ensuring just and equitable compensation reinforces the principles of legal predictability and commercial certainty, thereby fostering a stable and reliable legal framework for commercial transactions.

²⁷ *McDermott International Ltd v. Burn Standard Co Ltd*, (2006) 11 SCC 181.

²⁸ *Batliboi Environmental Engineers Ltd v. Hindustan Petroleum Corporation Ltd*, 2023 SCC OnLine SC 1208.

²⁹ *Mohd Salamatullah v. Government of Andhra Pradesh*, (1977) 3 SCC 590.

5.1 The Test for Loss of Profit and Evidentiary Requirements

Substantiating a claim for loss of profit under Section 73 of the Indian Contract Act, 1872, (“ICA”) requires proof that the loss arose naturally from the breach. In *AT Brij Paul v. State of Gujarat*,³⁰ the Supreme Court confirmed that a contractor is entitled to claim damages for the expected profits from a work contract when the contract is breached. The Court emphasised that while the exact measure of profit and the proof required are distinct issues, the claim itself is valid. Similarly, in *Dwarka Das v. State of Madhya Pradesh*,³¹ where a contract was rescinded after only 10% of the work was completed, the Court upheld that a contractor could claim damages for lost profits. It also ruled that a broad evaluation of damages should be applied rather than focusing on minute details, acknowledging that expected profit is a legally admissible claim when a breach occurs.

In *NHAI v. IJM Gayatri Joint Venture*,³² the Delhi High Court clarified that to claim damages for lost profitability, the claimant must prove an existing opportunity that was missed due to contract delays, resulting in quantifiable loss. Once a contractor demonstrates that they lost an opportunity, quantifying the damage becomes critical. In *McDermott International Inc. vs Burn Standard Ltd.*, the Supreme Court clarified that Sections 55³³ and 73 of the ICA do not prescribe a specific mode for calculating damages. The arbitrator has discretion to choose the appropriate formula. The *Hudson Formula*, *Emden Formula*, and *Eichleay Formula* are commonly employed depending on the case specifics. However, disputes often arise over both the calculation and the method chosen by the arbitral tribunal.

In *Batliboi Environmental Engineers Limited v. Hindustan Petroleum Corporation Limited*,³⁴ the complexities of quantifying the loss of profit were highlighted. In this case, BEEL sought compensation for loss of profit due to delays in a sewage water reclamation project. The arbitrator awarded 10% of the contract value for overheads and 10% for lost profits. HPCL contested the method and computation, underscoring the challenges in assessing loss of profitability in commercial disputes.

The complexities surrounding the quantification of loss of profit and profitability often lead to disputes, as highlighted in the case of *Batliboi Environmental Engineers*

³⁰ *A T Brij Paul Singh v. State of Gujarat*, (1984) 4 SCC 59.

³¹ *Dwaraka Das v. State of Madhya Pradesh and Ors.*, (1999) 3 SCC 500.

³² *NHAI v. IJM Gayatri Joint Venture*, AIR 2021 (NOC) 27 (Del).

³³ The Indian Contract Act, 1872, s. 55.

³⁴ *Batliboi Environmental Engineers Limited v. Hindustan Petroleum Corporation Limited*, Civil Appeal No. 1968 of 2012, decided on Sept. 21, 2023 (SC).



Limited vs Hindustan Petroleum Corporation Limited. In this case, HPCL challenged the arbitrator's method and computation in awarding the claim for loss of profit and profitability.

The case involved an agreement between HPCL and Batliboi Environmental Engineers Limited (BEEL) for the construction of a sewage water reclamation plant. The project, initially slated for completion within 18 months, faced significant delays, with multiple time extensions granted at BEEL's request. Eventually, BEEL abandoned the project after completing only 80%, attributing the delays to HPCL. BEEL then sought compensation through arbitration, claiming "loss of profit and profitability" due to the delay. The arbitrator partially allowed BEEL's claim, awarding 10% of the contract value for overheads and another 10% for lost profits.

HPCL challenged the award on several grounds, particularly criticising the lack of clarity in the arbitrator's method for computing the awarded amounts for overheads and profits. In response, BEEL justified the computation by referencing *Hudson's formula*. This prompted the Supreme Court to examine the circumstances under which the Hudson formula could be applied by an arbitral tribunal.

The Court reaffirmed that the arbitrator has the authority to determine damages but cautioned that the computation must not be arbitrary or result in a disproportionate award. The Court stressed that damages should be commensurate with the actual loss sustained, with money acting as compensation for the loss caused by the breach. The Supreme Court also discussed the arbitral tribunal's discretion in choosing a method for calculating damages, noting that formulas like the *Hudson*, *Emden*, and *Eichleay* formulas are based on assumptions that could lead to different results. Therefore, the Court emphasized that the assumptions underlying any formula must be carefully examined and validated against the facts of the case.

In relation to the Hudson formula, the Court outlined three assumptions: (1) the contractor did not habitually underestimate costs when pricing; (2) the profit element was realistic; and (3) there were no market fluctuations, and work of comparable profitability would have been available once the contract was completed. The Court further clarified that the burden of proof lies with the contractor to provide evidence that these assumptions were met, and they must also prove that alternative opportunities were missed due to the delay.³⁵

In this case, the Court found that the arbitral award lacked justification or a detailed computation of the loss. It held that the award was based solely on the authority of the

³⁵ *Ibid.*

arbitrator without any explanation for the figures used. As a result, the Supreme Court upheld the High Court's decision and set aside the arbitral award. The ruling in *Batliboi* is a significant directive for arbitral tribunals, advising them to exercise caution when using formulas to calculate loss of profit or profitability. The judgment highlights the need for careful computation and the provision of a well-reasoned justification for such awards. It also solidifies the contractor's responsibility to present substantial evidence to support their claim, emphasizing that mere demonstration of an alternative opportunity is insufficient. Concrete proof of the quantification of the alleged loss is essential.

5.2 The Interest Act, 1978 and its Implications for Loss of Profit Claims

India's increasingly globalised economy has made disputes over loss of profit more prominent, especially with the interplay of Section 73 of the Indian Contract Act, 1872,³⁶ and the Interest Act, 1978. The latter refines financial justice by outlining when interest can be levied on compensatory amounts for contractual breaches. As a more modern response to the outdated 1839 legislation, the Interest Act expanded the definition of "court" to include tribunals and arbitrators, reflecting the rise of arbitration in commercial disputes.

The Act's key feature is its definition of "current rate of interest", tied to the Reserve Bank of India's policies, ensuring rates remain relevant to economic realities. It also broadens the scope of "debt" to include obligations beyond monetary liabilities, making the Act applicable across a range of commercial dealings. Section 3³⁷ grants courts discretion to award interest on debts and damages, including lost profits, based on clear conditions, either from the due date or from the date of notice. However, it prevents interest on amounts already repaid or settled and bans the compounding of interest, ensuring a fair balance in compensation.

Section 4 of the Interest Act, 1978³⁸ ensures clarity in its application by prioritising its provisions under Section 3, except where interest is already mandated by other laws or consistent contractual practices. This prevents conflicts and guarantees uniformity across legal domains. The section also mandates interest for breaches of fiduciary duty or fraudulent retention of property, unless compelling reasons suggest otherwise, reflecting the Act's commitment to addressing financial misconduct.

Section 5³⁹ establishes a clear relationship between the Interest Act and Section 34 of the Code of Civil Procedure, 1908,⁴⁰ ensuring a logical progression of interest

³⁶ The Indian Contract Act, 1872, s. 73.

³⁷ The Interest Act, 1978, s. 3.

³⁸ *Id.*, s. 4.

³⁹ *Id.*, s. 5.

⁴⁰ Code of Civil Procedure, 1908, s. 34.



calculation—pre-suit interest is governed by the Interest Act, while post-suit interest falls under Section 34. This division ensures a coherent framework for interest throughout a dispute's lifecycle.

The Commercial Courts Act doesn't specifically or explicitly define the loss of profit or profitability. However, the Act does provide for resolving commercial disputes, including those related to contracts, which can include claims for loss of profit. Section 73 of the Indian Contract Act, 1872, makes lost profits compensable if they arise directly from a breach or were foreseeable at the time of contract formation, following the *Hadley v. Baxendale* principle. Indian courts are cautious about speculative losses and require claimants to mitigate damages.

While the Interest Act doesn't specifically define "loss of profit" for interest awards, the judiciary has interpreted "damages" to include economic losses like profit loss. Interest can be awarded on substantiated loss-of-profit claims, provided the loss is clear and notice has been served. Courts distinguish between interest on the amount of damages and interest as part of the damages themselves, ensuring it compensates for delay and loss of the time value of money, not as unjust enrichment.

Payment of Interests under the MSMED Act, 2006: The Micro, Small and Medium Enterprise Development (MSMED) Act, 2006 contains provisions on Delayed Payment to Micro and Small Enterprise (MSEs).⁴¹ As per the provisions of the Act, the buyer shall be liable to pay “compound interest with the monthly rests” to the supplier on the amount at three times the bank rate notified by RBI in such circumstances where he does not make payment to the supplier for his supplies of goods or services within 45 days of the acceptance of the goods/service rendered.⁴² The Finance Act, 2023 included the MSME 45-day payment rule under the Section 43B(h) which is in effect from April 1, 2024.

Ultimately, judicial discretion to award interest depends on the contract's terms, timely notice of the claim, and principles of reasonableness and equity. The Interest Act, in conjunction with Section 73 of the Indian Contract Act, provides a nuanced framework that ensures legitimate economic losses are fairly compensated without unjust enrichment.

5.3 When is Interest Due from and Entitlement to Interest on Delayed Payments

When a breach of contract results in a loss of profit or profitability, determining when interest on these losses becomes due is a significant legal issue. The prevailing principle dictates that interest generally starts to accrue from the date the breach occurred, rather than

⁴¹ The Micro, Small and Medium Enterprises Development Act, 2006, s. 15- 24.

⁴² *Id.*, s. 16.

from the date the lawsuit is filed. This approach is in line with the primary objective of awarding damages, which is to compensate the injured party and place them in the same position they would have been in had the contract been properly performed. As a result, the claimant is deprived of prospective profits from the moment the breach happens, and any interest paid on these lost earnings compensates for the period of denial.

Section 73 of the Indian Contract Act, 1872, authorises courts to award compensation for losses directly resulting from a breach, including lost profits calculated from the date of the breach. While Section 34 of the Civil Procedure Code, 1908, governs the award of interest from the date of the suit, the authority to grant pre-suit interest on damages lies within the substantive law, particularly the principles of compensation established in the Contract Act and related statutes. Moreover, the Explanation to Section 74 of the Indian Contract Act,⁴³ which addresses stipulated penalties, implicitly connects the date of default (often coinciding with the breach) to the imposition of interest. Judicial interpretations consistently support this view, affirming that interest on damages for lost profit is typically calculated from the date the loss was incurred, which is directly tied to the breach date. Thus, while procedural law covers interest during litigation, the substantive entitlement to interest on profit loss begins from the breach itself.

In addition to the Indian Contract Act and the Civil Procedure Code, other statutes, such as the Interest Act, 1978, also influence pre-suit interest on profit loss damages. Specifically, Section 3(1)(a)⁴⁴ of this Act allows courts to award interest at a reasonable rate (not exceeding the prevailing current rate) on debts or damages payable under a written agreement, calculated from the date specified in the agreement until the payment date. Section 3(1)(b)⁴⁵ further extends this to other forms of debt or damages, permitting interest from the date a formal written demand for payment is made until actual payment.

Various commercial legislations may also provide relevant provisions regarding interest in the case of a breach. For example, the Sale of Goods Act, 1930, while not explicitly mandating pre-suit interest, can be used in conjunction with the Interest Act's provisions to support an award of interest. Similarly, the Negotiable Instruments Act, 1881, which governs financial instruments like promissory notes, bills of exchange, and cheques, includes stipulations regarding interest payable on these instruments, potentially applicable in breach of contract cases involving these financial tools. Additionally, sector-specific laws in industries like banking, insurance, or infrastructure may contain provisions dealing with

⁴³ The Indian Contract Act, 1872, s. 74.

⁴⁴ The Interest Act, 1978, s. 3(1)(a).

⁴⁵ *Id.*, s. 3(1)(b).



interest on delayed payments or losses, reinforcing the view that interest accrues from the moment of breach or default.

6. Conclusion

The *Plus91-NEC* case presents a valuable illustration for understanding the intersection of contract law, arbitration law, and judicial review in India. At the heart of the dispute lies the distinction between "loss of profit" and "loss of profitability", two terms that, while seemingly synonymous, but as discussed in the paper, carry distinct legal and financial implications. The Delhi High Court's interpretation of these concepts, its stance on contractual clauses limiting liability, and its approach to reviewing arbitral awards offer invaluable insights for legal professionals and businesses alike.

The decision of the Supreme Court in the pending appeal will be of paramount importance as it will ultimately determine the outcome of this protracted dispute. Furthermore, the judgment delivered by the apex court is expected to provide significant clarity on the crucial issue of the enforceability of exclusion clauses, particularly those about loss of profit, within the context of arbitral awards in India. The very fact that the Supreme Court has admitted this appeal for hearing suggests that the court perceives the presence of substantial questions of law or public interest that warrant a more detailed and authoritative consideration at the highest judicial level. The legal and business communities will be keenly observing the proceedings and the eventual judgment, as it is likely to have far-reaching implications for the interpretation and enforcement of commercial contracts, and the scope of judicial review over arbitral awards in India.

This case is a powerful reminder of the crucial significance of clearly drafting all contractual clauses, particularly those meant to limit or exclude liability for particular types of losses, for companies entering into business partnerships and choosing arbitration as a dispute resolution procedure. The readiness of the judge to enforce such provisions serves as further evidence that careful attention to detail is necessary when negotiating and drafting contracts in order to control potential risks and liabilities. Whether the Court awards Loss of Profit or Profitability depends upon the proof of loss with credible evidence. Arbitrators must also be aware of the specific provisions of the parties' agreement and use caution when granting damages that are expressly prohibited by those provisions. A difficult balance between arbitral autonomy and respect for the law is highlighted by the possibility of court intervention in arbitral judgements that are shown to be blatantly unlawful by violating specific contractual obligations. The Supreme Court's ultimate ruling in this case will surely offer further important direction on these intricate matters, influencing business dealings and conflict settlement in India for some time to come.