

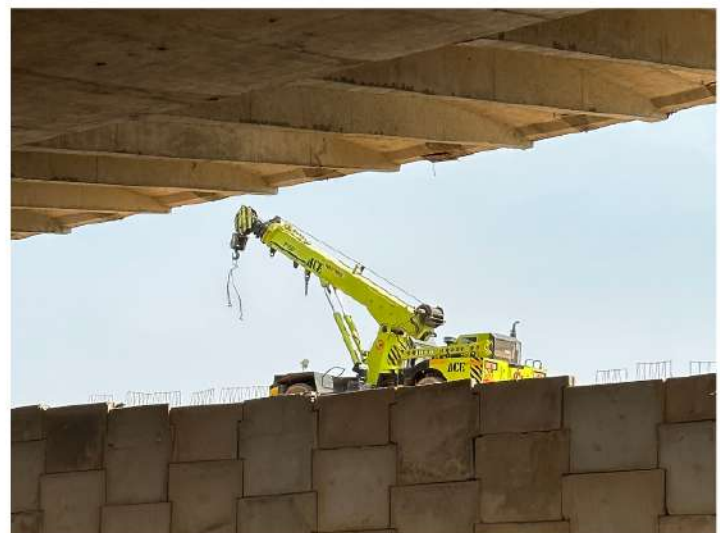
Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Liquidated damages - proof of loss or legal injury - delay in completion of project by the Contractor - extension of time (EOT) sought by the Contractor - Employer levied and recovered liquidated damages only at the time of processing the bills whilst allowing the Contractor to continue the work even after contractual completion date, without terminating the contract - Employer failed to prove the loss sustained and the loss incurred due to the delay in completion of the project work, by leading evidence - in order to avail the benefit of liquidated damages, the loss or legal injury must be proved, in a manner known to law - if there is a breach of contract which did not result in any loss or 'legal injury', compensation would not be payable.**
- **Authority of the Engineer to revise the Interim Payment Certificate ('IPC') once the final bill has been issued - under Clause 60.11 of Conditions of Particular Application ('COPA'), it is the Engineer and the Contractor who have to agree on the Draft Final Statement submitted by the Contractor and a Final Statement is to be issued which represents the value of work done in accordance with the contract - Engineer cannot make corrections and modifications in Final Statement agreed to between the Engineer and the Contractor under Sub-clause 60.11 since Sub-clause 60.9 of COPA is limited to IPCs alone - if the Employer has not challenged the Final Payment Certificate under Clause 2.6 of General Conditions of Contract ('GCC'), which could only be challenged in terms of Clause 67 of COPA, the certificate becomes absolute and final - Employer could have carried out verification of quantities executed at the stages when the IPCs were issued by the Engineer or even thereafter till they reached a finality through the acceptance of Final Statement, by both the Engineer and the Contractor.**

*[Chennai Port Authority v. Srishila-GDCL JV -
Madras High Court - Decided on 8.4.2024]*



- Steps necessary to be taken by the parties for raising the bills and for releasing the payments in accordance with the contract - Certification done by the Engineer in its monthly IPCs for all the items of Work executed by the Contractor was in accordance with the drawings approved by the Engineer and was quantified on the basis of actual measurements of the various components of works carried out at site - averment of the Employer that the Engineer was issuing Interim Payment Certificates on tentative basis based on quantities in the BOQ and that the Certification in the IPCs was done after simply deducting the amounts withheld under the Contract and there is no certification relating to work executed, is wrong.
- Application of 'Linking Factor' at the time of calculating Price Adjustment - indices used in Sub-Clause 70.3 of the GCC cannot be unilaterally modified and no linking factor can be applied - Policy Circular issued by the Employer with a new formula for determining indices by applying a 'linking factor', cannot be implemented since it is outside the agreed contractual terms.
- Final Payment Certificate - amount due under the Contract to be stated by the Engineer is only an 'opinion' of the Engineer - in the absence of the written discharge given by the Contractor, the Final Payment Certificate issued by the Engineer acquires no value - it is always open for the Engineer to revisit the same to find out any discrepancies or irregularities in the calculations leading to payments claimed by Contractor.
- Counter Claim barred by limitation - Engineer unilaterally sought to revise the Final Payment Certificate after a lapse of three years - starting point of limitation would be the date when the mistake is discovered - Employer failed to invoke provisions of Clause 67 of COPA in relation to Final Payment Certificate issued by the Engineer within limitation period under law - no right available to the Engineer or to the Employer to revise its Final Payment Certification upon the completion of the Contract, unilaterally.

*[National Highways Authority of India v. Ssangyong Engineering & Construction Co. Ltd.
- Delhi High Court - Decided on 8.4.2024]*



**Chennai Port Authority v. Srishila-GDCL JV - Madras High Court -
Decided on 8.4.2024**

The Employer awarded the contract to the Contractor for construction of coastal berth at Chennai Port. There was delay in completion of the work and the Contractor had sought extension of time for completing the project work, on various occasions. The Employer had granted EOT only up to a certain period. The Employer at the time of processing the bills, levied liquidated damages and recovered the same. The arbitral tribunal concluded that the Employer was not justified in levying the liquidated damages. The arbitral tribunal also took the view that the Contractor was not entitled to claim loss incurred due to delay in completion of the work since it failed to bring into operation the project, even after a period of three years. The arbitral tribunal concluded that the Employer failed to prove the loss sustained and the loss incurred due to the delay in completion of the project work, by leading evidence. The Court held that the Employer failed to lead evidence and had not proved that the delays were attributable to the Contractor. The Employer also failed to prove that it incurred loss or suffered legal injury due to the delay in completion of the work.

National Highways Authority of India v. Ssangyong Engineering & Construction Co. Ltd.
- Delhi High Court - Decided on 8.4.2024

The Contractor was awarded the work for construction of Sagar By-Pass between 211 kms to 255 kms of National Highway-26 in the State of Madhya Pradesh on EPC basis. After completion of the work by the Contractor, a Defect Liability Certificate was issued by the Engineer recommending payment against the Statement of Completion submitted by the Contractor. As per the agreement, the Contractor was required to submit a Draft Final Statement showing value of all the work done in accordance with the contract along with the amount which the Contractor considers is due to it, within a period of 56 days. Several disputes arose between the parties regarding the completion of work and payments, which were referred to arbitration. The Employer raised various grievances regarding completion of work subsequent to the issuance of the Defect Liability Certificate ('DLC'). The arbitral tribunal allowed the claim of the Contractor for balance payment under Engineer's certification based on agreed Final Statement and the counter claim of the Employer was rejected as being barred by limitation. The arbitral tribunal concluded that the certification issued by the Engineer was a Final Statement agreed between the Contractor and the Engineer under Sub-clause 60.11 of the Conditions of Particular Application ('COPA'). The arbitral tribunal rejected the Employer's contention that under Sub-clause 60.9 of COPA, the Engineer could make corrections and modifications in the Final Statement agreed to between the Engineer and the Contractor under Sub-clause 60.11. It concluded that Sub-clause 60.9 of COPA is limited to IPCs alone. In terms of Clause 60.11 of COPA, it is the Engineer and the Contractor who have to agree on the Draft Final Statement submitted by the Contractor and a Final Statement is to be issued which represents the value of work done in accordance with the contract. The arbitral tribunal also rejected the contention of the Contractor that since disputes existed between the parties, Final Statement could not be issued. The Court upheld the challenge to the award on the ground that the arbitral tribunal directed payment to the Contractor despite holding that the certificate was not a final payment certificate.



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