

# Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Claim for overheads on the basis of formula - Contractor is not entitled to claim overhead losses on the basis of Hudson's formula in the absence of evidence - Contractor should produce evidence to support its claim and for application of the Hudson's formula.**
- **Claim for loss of profit - mark up on account of overheads, profit and establishment expenses in item rates cannot form the basis of awarding compensation for loss of profit that would have been earned by execution of the contract - analysis of rates of an extra item is not akin to execution of the contract of the works as a whole - value of the contract is determined on the basis of the offer made by the Contractor and there is no requirement for the Contractor to align its estimated profit on the basis of analysis of rates of extra items - there can be no assumption that the loss of profits is 15% of the remaining value of the work.**
- **Levy of liquidated damages - whether an 'excepted matter' falling in the exclusive jurisdiction of the Superintendent Engineer, in terms of the contract - non-arbitrability - an 'excepted matter', if the parties have agreed, does not require any further adjudication since the contract itself provides for a named adjudicator - concurrence to the same is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties - for imposition of liquidated damages, there has to be a condition precedent and a finding that there has been a delay - the question whether there was delay entitling imposition of liquidated damages, even if calculated by the Superintendent Engineer, is arbitrable.**

*[Nandi Infratech Pvt. Ltd. v. R.K. Baria - Delhi High Court - Decided on 31.5.2024]*





- Completion of the work of construction of elevated road - contract providing that the work is treated to be completed only when the final certificate of completion is issued to the Contractor - once the road was opened to traffic and the minor defects did not prevent the road from being used by the traffic, the project stood completed - issuance of a formal completion certificate on a later date will not postpone the completion date.

*[Govt. of NCT of Delhi v. DSC Ltd. - Delhi High Court - Decided on 29.5.2024]*

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**Nandi Infratech Pvt. Ltd. v. R.K. Baria - Delhi High Court -  
Decided on 31.5.2024**

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The Contractor was awarded the work of construction of structures for 8 towers of a residential project. Subsequently, it was given another work order of vacuum dewatering flooring. The said work could not be completed by the Contractor within the stipulated time period. The Employer terminated the contract. The disputes between the parties were referred to arbitration. The arbitral tribunal, among others, allowed the Contractor's claim for loss of profit on unexecuted works and overheads. The Court set aside the arbitral award and concluded that the arbitral tribunal proceeded on the misconceived premise that Hudson's formula is invariably adopted for quantification of claims for overhead losses in India. The award of the arbitral tribunal with respect to the claim for overhead losses, in the absence of evidence, on the basis of Hudson's formula was not sustainable. Further, the Court set aside the award to the extent it allowed compensation at the rate of 15% of the value of unexecuted works without any evidence or material.



The Contractor was awarded the contract of construction of 'Elevated Road over Barapulla Nalla starting from Sarai Kale Khan to Mathura Road, Delhi'. The arbitral tribunal, on the issue whether the work on the elevated road stood completed once it was opened to traffic notwithstanding the pending completion of few minor finishing work, concluded that once the road had been opened to traffic there was no question of the project not being completed. Even if there were minor defects noted in the project, the same were not of the nature which prevented the road from being used by the traffic and were of the kind which could have and were in fact, rectified during the intervening period. The Court observed that while the quantification of the liquidated damages as stipulated in the contract was not arbitrable and was an excepted matter, that clause can be invoked only after it is determined that there is delay on the part of the Contractor. Only after it is found that the delay was indeed on the part of the Contractor, the question of getting the work completed from a third party and also the issue of imposition of liquidated damages would arise. The question determining whether indeed there was a delay is not an excepted matter, and it is only the quantum of damages that is non-arbitrable. The Court upheld the arbitral award.



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Successfully handled construction arbitrations relating to DBFOT projects, EPC Contracts and FIDIC based contracts in infrastructure projects.