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Construction Arbitration

Newsletter

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Construction Arbitration Law Firm

- **Claim for liquidated damages - price adjustment for delay in completion - Clause in the contract provided that the provision for price adjustment and/or fixation is not to be understood or construed as a provision for liquidated damages or penalty under section 74 of the Indian Contract Act - arbitral tribunal cannot award damages in favour of the Employer without there being any averment to the effect that it had suffered losses or damages.**

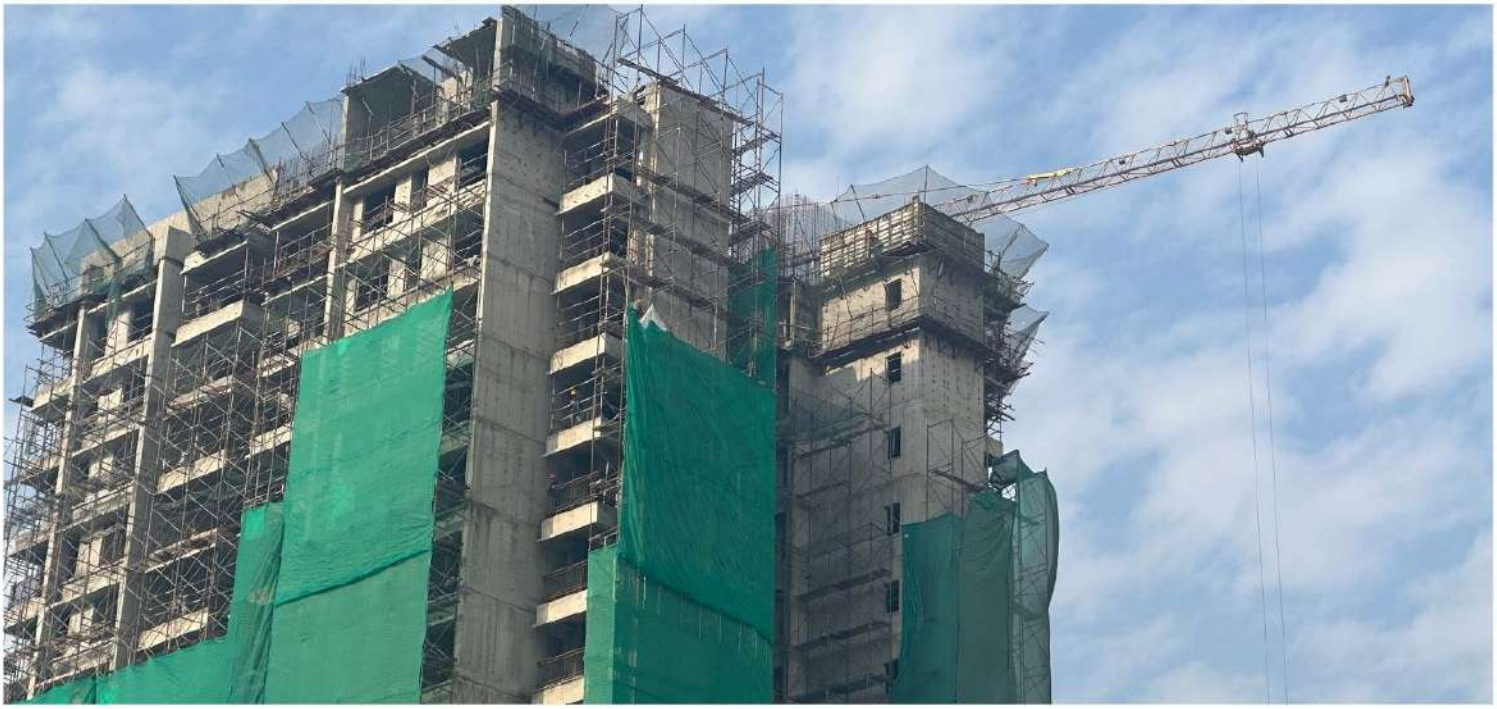
- **Meaning of expression "whether or not actual damage or loss is proved to have been caused thereby" - where it is possible to prove actual damage or loss, such proof is not dispensed with - it is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.**

- **Price adjustment clause for delay in completion - where contractual terms provide for a variable consideration depending on the performance of the agreement, the said term is required to be enforced - it is not necessary that in all cases where the parties have agreed to reduction in consideration on the basis of performance, that the contractual term to that effect is to be construed as the clause for damages - in such cases, the contractual clause must be read as an integral part of the rights and obligations of the parties, which are required to be performed.**

[Indian Oil Corporation Ltd. v. Fiberfill Engineers - Delhi High Court - Decided on 20.11.2024]

- **Claim on account of price variation due to increase in the cost of cement - dispute as to which index applies, whether the price index as per the memorandum issued by the Director General, CPWD as applicable to Delhi, Faridabad, Gurugram, Ghaziabad and Noida or the price as mentioned by the Zonal Chief Engineer, CPWD, South Zone or the All India Wholesale Index issued by the Economic Advisor to the Government of India, Ministry of Commerce and Industry, was applicable - the calculation of price variation in terms of the formula under the contract should be by using the price index as declared by the Director General, CPWD.**

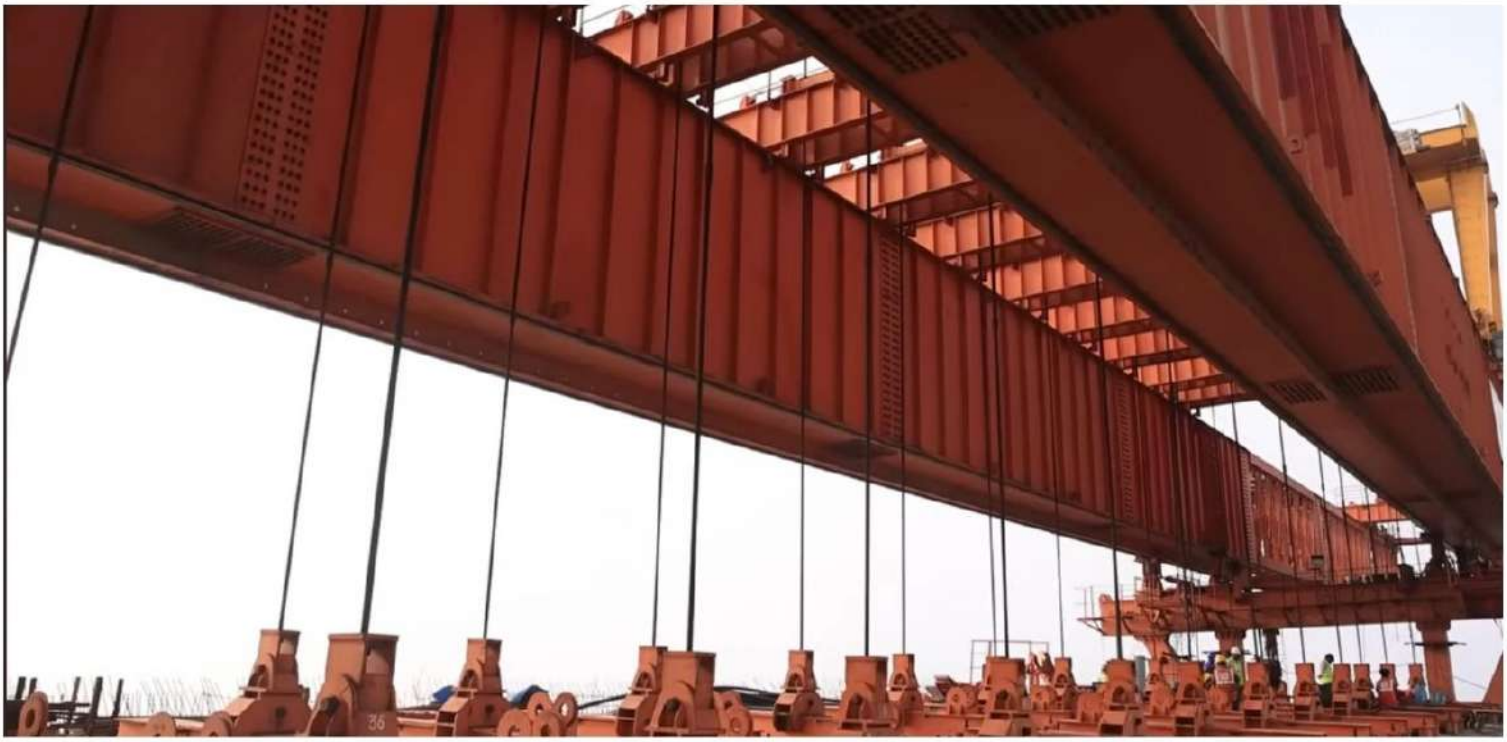
[PCC Infrastructure Pvt. Ltd. v. Airports Authority of India - Delhi High Court - Decided on 1.4.2024]



Indian Oil Corporation Ltd. v. Fiberfill Engineers - Delhi High Court - Decided on 20.11.2024

The Employer awarded the contract for designing, supplying, installation, testing and commissioning of high mast signage systems of various heights and types at various Employer's retail outlets in the State of Tamil Nadu. The execution of the work order was inordinately delayed. The disputes between the parties were referred to arbitration. The single judge took the view that the arbitral tribunal had wrongly accepted the Employer's claim for compensation on account of delay in execution of the works, without returning a finding that the Employer had suffered damages on account of delay or that the amount withheld was a reasonable compensation for the delay in execution of the work on the part of the Contractor. Further, the arbitral tribunal had ignored the relevant material and also awarded liquidated damages by way of price adjustment without recording a finding as to whether the Employer had suffered any loss or injury. Clause in the contract provided that the provision for price adjustment and/or fixation is not to be understood or construed as a provision for liquidated damages or penalty under section 74 of the Indian Contract Act. The contract also provided that the amount as contemplated under the General Conditions of Contract (GCC) would be payable "by way of compensation". The arbitral tribunal rejected Contractor's contention that the amount deducted was by way of penalty as the Employer had not made any claim for loss or injury. Whilst the Employer claimed that it was entitled to compensation and liquidated damages, the Contractor claimed that Clause 4.2.2.2 of the GCC contains the provision for levy of penalty, which was impermissible.

The Court concluded that in a given case where contractual terms provide for a variable consideration depending on the performance of the agreement, the said term is required to be enforced. It is not necessary that in all cases where the parties have agreed to reduction in consideration on the basis of performance, that the contractual term to that effect is to be construed as a clause for damages. In such cases, the contractual clause must be read as an integral part of the rights and obligations of the parties, which are required to be performed. The award was set aside since the arbitral tribunal awarded liquidated damages or compensation by way of price adjustment, in the absence of an averment by the Employer that it had suffered loss.



PCC Infrastructure Pvt. Ltd. v. Airports Authority of India - Delhi High Court - Decided on 1.4.2024

The Employer awarded to the Contractor the work for "Construction of part parallel taxi track for new Runway 06/24 at both sides and Provision of RESA of 240m × 90m for 06 Runway at Mangalore International Airport". The work was to be completed within a period of twenty months to be reckoned from the 15th day after the issuance of Letter of Acceptance.The work could not be completed within the stipulated period and was extended by about nine months. The delay in execution of the work was not due to the Contractor. The time for completing the work was extended without levy of penalty or compensation. The Contractor did not agree with the Dispute Redressal Committee decision and invoked arbitration. The arbitral tribunal rejected the claim of the Contractor and also the counter claims of the Employer. The Contractor claimed that the price variation clause was required to be calculated on the basis of the base rate of cement as declared by the Chief Engineer, Central Public Works Department (CPWD), South Zone as on the date of submission of the tender. The increase or decrease in price was required to be determined in reference to the said base rate either as per the cost indices / prices of cement as notified by the Chief Engineer, CPWD, South Zone from time to time or prices / indices of cement covered under the All India Wholesale Price Index of materials published by the Economic Advisory to the Government of India, Ministry of Commerce and Industry. It claimed that the price indices issued by Director General, CPWD for Delhi NCR region was not applicable for calculating the price variation in terms of clause 10CA of the GCC as the Work was to be executed in the South Zone. According to the Employer, the All India Wholesale Price Index was not relevant for calculating the price variation in respect of cement. Additionally, it claimed that the All India Wholesale Price Index referred to by the Contractor, were of series 2004-2005 and were no longer relevant. It claimed that the All India Wholesale Price Index data for series 2011-2012 in respect of Ordinary Portland Cement also reflected a downward trend in 17 months out of 24 months. The price variation in respect of the cement was required to be determined on the basis of All India Price Index published by Director General, CPWD.

The arbitral tribunal concluded that there was no ambiguity in the description for determination of the price indices (Cl and Clo) to be used for calculating the price variation as per the formula provided in the contract. It further held that there was no material, which reflected that the Contractor has raised any query in regard to the said formula or had protested that the price variation was required to be based on the base price and index notified by the Zonal Chief Engineer, CPWD in respect of the said zone. The dispute was confined only to the question as to which index applies, whether the price index as per the memorandum issued by the Director General, CPWD as applicable to Delhi, Faridabad, Gurugram, Ghaziabad and Noida or the price as mentioned by the Zonal Chief Engineer, CPWD, South Zone or the All India Wholesale Index issued by the Economic Advisor to the Government of India, Ministry of Commerce and Industry, was applicable. The Court concluded that there was no dispute that the base price of cement would be the price "at the time of the last stipulated date for receipt of tender". Thus, the base price of cement as in March 2014 would be the relevant base price. The increase and decrease in the price of cement is required to be determined "by the price indices issued by Director General (Works), CPWD". The clause also specified that the same "shall be determined by All India Wholesale Price Indices of materials as published by Economic Advisor to the Government of India, Ministry of Commerce and Industry". The Court concluded that the calculation of price variation in terms of the formula under the contract, by using the price index as declared by the Director General, CPWD, cannot be faulted with.

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- "Recommended for Construction arbitration work." Asia Pacific Legal 500.
- "Leading Individual" in Dispute Resolution - Asia Pacific Legal 500 – 2022, 2023 & 2024.

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