

## Construction Arbitration Newsletter

- Reasonableness of the extension of time in construction contracts – Analysis of grounds of delay entitling the contractor to extension of time cannot be interfered with by the Court.
- Quantum of Damages with respect to idle charges – Reasonableness of the reasons assigned by the Arbitral Tribunal in awarding such damages is beyond the domain of the Court.
- Formula used by the Contractor for arriving at idling charges – can be accepted by the Arbitral Tribunal.
- Court must exercise restraint and not proceed to re-appreciate evidence.
- Whether a particular amount is payable is a decision within the competency of the Arbitral Tribunal.

*[Atlanta Limited vs. Union of India - Supreme Court - Decided on 18.1.2022]*



- Delay in execution of works – The Arbitral Tribunal's decision based on correspondence filed on record and the inter-departmental communications disclosing admission of delays by the Railways cannot be interfered with.
- Delay in completion - execution of extra works - is a finding of fact and cannot be interfered with by the Court in a section 34 proceedings.

## Atlanta Limited vs. Union of India - Supreme Court - Decided on 18.1.2022

- Award of Pendent Lite Interest - Clause of the Railway Contract prohibiting the Arbitral Tribunal to award interest till the date of award - award of pendete lite interest by the Arbitral Tribunal in view of specific bar in the contract is not maintainable.

- Costs of Arbitration - Clause of the Contract stating that parties would bear their own arbitration costs, cannot override the provisions of Section 31A of the 1996 Act, and such clause is not valid.

*[Union of India vs. Om Vajrakaya Construction Company - Delhi High Court - Decided on 20.12.2021]*

Appellant - Contractor entered into a contract with the Respondent-Union of India for construction of a runway and allied works at the Naval Air Station, Arakonam. The work was to be completed within a period of 21 months from the date of the commencement. Appellant raised claim against the Respondent Union of India on account site being water logged. Appellant - Contractor sought extension of time which was granted by the Respondent thrice. However, the Respondent terminated the contract subsequently and declined to extend the time any further for completion of the work. Aggrieved by the illegal termination the Appellant - Contractor invoked arbitration and raised several claims.

The Arbitral Tribunal rendered an award in favour of the Appellant. The Single Judge of the High Court upheld the award. The Division Bench of the High Court set aside the amount awarded in favour of the Appellant-claimant towards idle hire charges and the value of the tools and machineries. Further, the findings returned in the Award in respect of the extension of time and illegal termination of the contract on the part of the Respondent-Union of India, were also set aside. The Supreme Court, in appeal, set aside the judgment of the Division Bench of the High Court and held that the "Sole Arbitrator had interpreted the clauses of the contract by taking a particular view and had gone to great length to analyse several reasons offered by the Appellant-claimant to justify its plea that it was entitled for extension of time to execute the contract, the Division Bench of the High Court ought not to have sat over the said decision as an Appellate Court and seek to substitute its view for that of the learned Arbitrator". The Court found that the "Arbitrator was lucid in his reasoning for taking a particular view on the interpretation of the terms and conditions of the contract between the parties". The principle that the Arbitrator is the final arbiter of the disputes between the parties was reiterated and the Supreme Court held that "and it is not open to a party to challenge the Award on the ground that he has drawn his own conclusions or has failed to appreciate certain facts. It is beyond the jurisdiction of the Appellate Court to assign to itself, the task of construing the terms and conditions of the contract and its provisions and take a view on certain amounts awarded in favour of a party".

The Supreme Court upheld the award based on the formula adopted by the Appellant – Contractor for arriving at the loss suffered by it on account of idling charges of plants and machineries. The Court held that “[I]t was beyond the domain of the Appellate Court to have examined the reasonableness of the said reasons by reappreciating the evidence to arrive at a different conclusion”. Significantly, the Supreme Court observed that the Division Bench failed to show restraint and proceeded to re-appreciate the terms and conditions of the contract as also the evidence adduced by the parties.

## Union of India vs. Om Vajrakaya Construction Company - Delhi High Court - Decided on 20.12.2021

Tenders were issued by the Ministry of Railways/Union of India(Petitioner) for construction of works, letter of acceptance was issued to Om Vajrakaya Construction Company (Respondent/OVC). A dispute arose pertaining to the said works. The matter was referred to an arbitral tribunal, the award was in favour of the Respondent. The Petitioner filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 questioning the validity of the arbitral award. The Single Judge held that “the award of pendente lite interest runs contrary to Clause 64.5 of the GCC which expressly provides that 'no interest shall be payable on whole or any part of the money for any period till the date on which the award is made". Further, the Single Judge held that “Arbitral Tribunal and the Courts would have the power to award costs at their discretion, in terms of Section 31A of the A & C Act despite any repugnancy with the regime of costs under the CPC” and that “[T]he discretion of the Court or the Arbitral Tribunal to award costs is not subject to the agreement between the parties unless that agreement is entered after the disputes have arisen”. The Arbitral Tribunal in its award had noted that with respect to the question of delay in execution of works, that the Contractor had deployed required labour staff, machinery and had also made arrangements for raw material but its resources could not be deployed in entirety due to several reasons including non-availability of drawings, non-availability of free site for execution, non-sanctioning of ESP, cutting of trees, etc. and there was extensive correspondence on record to establish delay in approval of drawings, inter departmental communications wherein, the delays, and hindrances as pointed out by Contractor had been admitted, was a finding of fact and could not be interfered with in a challenge to the award under section 34 of the 1996 Act.



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