

Construction Arbitration Newsletter

Construction Arbitration Law Firm

- Evidence to prove loss of overheads – audited balance sheets tendered in evidence, is sufficient.
- Proof of loss of overheads - actual loss of overheads could be proved by producing accounts and leading other evidence – Contractor can place materials to show, on what basis the estimate was made.
- Hudson Formula for quantification of loss of overheads in the extended period - evidence in shape of Contractor's audited balance sheets of previous years and by applying the Hudson formula, the arbitrator calculated damages to be awarded taking 12.5% of the contract value over a period of 45 months extension to complete it.
- Sections 55 and 73 of the Contract Act, 1872 - do not lay down mode or manner as to how or in what manner computation of damages or compensation has to be made - nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law.
- "No interest shall be payable", clause in the contract - if there is a specific contract between the parties that prohibits award of interest, award of pre-reference interest by the arbitral tribunal would be impermissible.
- "Cost of arbitration shall be borne by the respective parties" - clause that a party has to pay whole, or part of the costs would be valid, only if such an agreement is made after the disputes have arisen.

[Union of India v. Om Vijay Construction Company - Delhi High Court - Decided on 20.12.2021]

[State of Odisha v. Rani Construction Private Ltd. - Orissa High Court - Decided on 27.9.2022]





State of Odisha v. Rani Construction Private Ltd.
- Orissa High Court - Decided on 27.9.2022

The Contractor raised a claim for loss of overheads for the extended construction period. The Employer challenged the award on the ground that no evidence was led for claiming the general damages on account of loss of overheads. The Contractor had adduced evidence in shape of its audited balance sheets of previous years, to base its claim for loss of overheads by applying the Hudson formula. The arbitral tribunal awarded the claim for loss of damages for a delay of 45 months in completing the project and the delay was not due to reasons attributable to the Contractor. The arbitrator took 12.5% in calculating loss of overheads per Hudson formula instead of 25% of the contract value as claimed by the Contractor. The Court held that the Contractor can certainly place materials to show, on what basis the estimate was made and that the evidence may be in the shape of account books and calculation made in the office before submitting tender. Furthermore, it was held that sections 55 and 73 of the Indian Contract Act, 1872 do not lay down mode or manner as to how or in what manner computation of damages or compensation has to be made and there is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law.



Union of India v. Om Vijay Construction Company
- Delhi High Court - Decided on 20.12.2021

The Employer invited tenders for work pertaining to 'Earth work in filling for embankment with contractor's own earth and cutting to the required profile, Blanketing materials including compaction by vibratory roller, construction/extension of minor bridges less than 6.00 m, retaining wall and other allied works from Ch. 0.00 km to Ch. 22.71 kms between Ambala Cantt-Dhappar railway Stations'. The period of completion of the works was stipulated to be eighteen months. The Contractor claimed that after the award of the works, the Railway advised it to deploy its machinery, staff, labour and construct the site offices as per the tender stipulations for expeditious execution of the works within the stipulated time. However, the arrangements made by the Contractor at the site remained un-utilized due to non-availability of drawings, site for execution, tree cutting, non-sanctioning of Engineering Scale Plan (ESP) etc. Due to addition in the scope of work and the various hindrances in executing the works, the Employer/ Railway extended the date of completion of the works. The Contractor claimed that it was directed to accept the Final Bill prepared by the Railway without any protest and, to tender its 'No Claim Certificate' failing which the admitted amounts due would not be released. The arbitral tribunal, amongst other claims, awarded pendente lite interest and the arbitration cost equivalent to the arbitration fees and the actual counsel fees paid by the Contractor. The Court held that the awarding of pendente lite interest by the arbitral tribunal contrary to the express provisions of the General Conditions of Contract, was bad in law. Further, the contractual provision stipulating that each party would bear its own costs, was not valid since it was not entered into 'after' the disputes had arisen between the parties, in view section 31A(5) of the Arbitration and Conciliation Act, 1996.



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