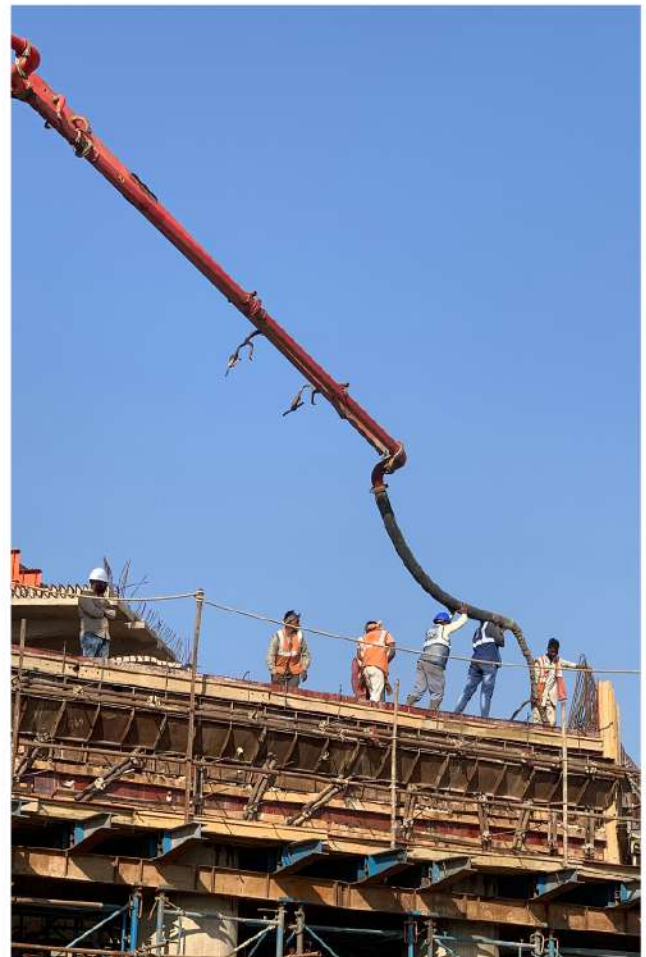
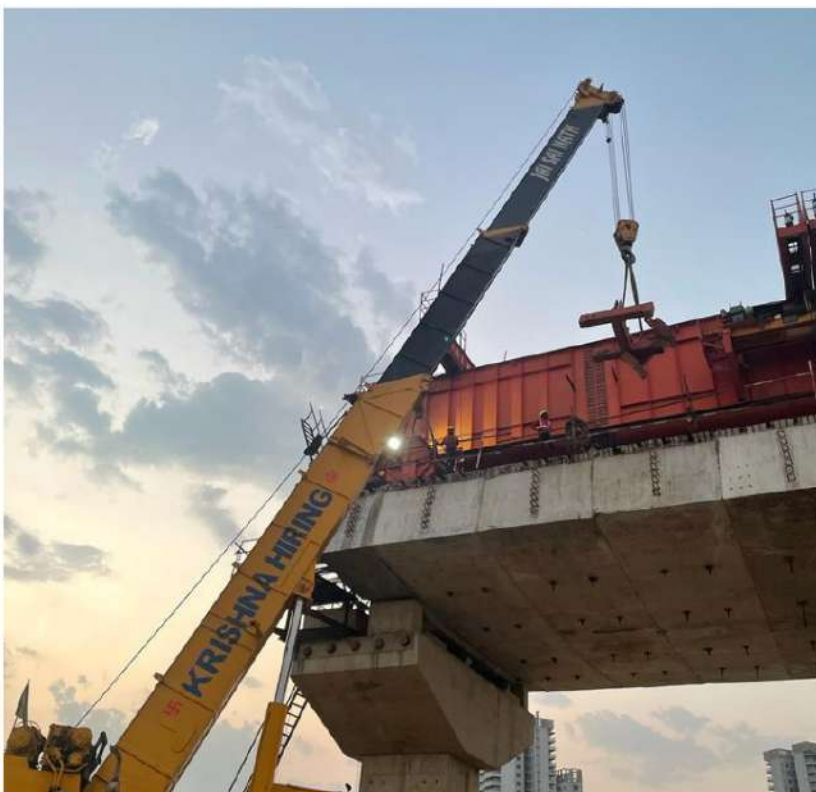


# Construction Arbitration Newsletter

## Construction Arbitration Law Firm

- **Levy of Liquidated Damages – meaning of expression "whether or not actual damage or loss is proved to have been caused thereby" in section 74 of the Indian Contract Act - 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.**
- **Finding of the arbitral tribunal on the cause of delay in completion of works – Court cannot re-evaluate the evidence and look into the materials placed before the arbitral tribunal.**
- **Power of Engineer to fix new rates – quantity of work exceeding the estimated contract quantity by more than 25% - variation in the quantity beyond the stipulated limit - once a rate has been found to be inappropriate or inapplicable on account of variation in the quantity beyond the stipulated limit, then the new rate would be applicable to the entire item of the work executed and not only to the quantities executed in excess of 125% – the Contractor is entitled to new rate for the BOQ Item executed after the original period of completion of work.**

*[Delhi Development Authority v. M/s Eros Resorts and Hotels Limited - Delhi High Court - Decided on 7.4.2022]*



- **Old rates inappropriate or inapplicable – if the actual quantities were executed over a period of several months beyond the period stipulated in the contract – if the instructions to execute the works has been changed by the Employer or the Engineer – if there is change in the market price of the materials.**

*[National Highways Authority of India v. Afcons Infrastructure Ltd. -  
Delhi High Court - Decided on 23.3.2021]*

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**Delhi Development Authority v. M/s Eros Resorts and Hotels Limited -  
Delhi High Court - Decided on 7.4.2022**

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The Contractor was awarded the contract to construct a hotel for the Commonwealth Games held in New Delhi. The work was required to be completed on 5.6.2010 i.e. within 42 months of the delivery of possession of plots. However, it was completed on 20.12.2010. The Contractor submitted five set of drawings of its hotel project. The Employer carried out certain corrections in the drawings and approved the plans. The Contractor informed the Employer that the changes made by them were not acceptable. Subsequently, the Contractor submitted the revised building plans. The Employer, thereafter, stated that the performance security to the extent of 5% of the bid amount, shall be encashed since the completion period would expire on 5.6.2010. Dispute between the parties was referred to arbitration. The award of the arbitral tribunal was upheld by the Single Judge. In appeal, the Employer stated that it had not caused any delay and, therefore, it was justified in invoking the bank guarantee. The Employer also contended that the Single Judge had failed to consider that even a small period of delay would entitle the Employer to claim the proportionate amount and invoke the bank guarantee. The Division Bench held that the arbitral tribunal had minutely examined the delay in completion of the hotel project and reached a finding that the delay was attributable to the Employer. The Court cannot re-evaluate the evidence and supplant its opinion over that of the arbitral tribunal.

**National Highways Authority of India v. Afcons Infrastructure Ltd. -  
Delhi High Court - Decided on 23.3.2021**

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Disputes arose between the parties in relation to a contract for execution of the project involving "Widening to 4-lanes and Rehabilitation of Existing 2 lane Carriageway of Poonamalle-Kanchipuram Road (NH-4), Package 1, from km 13.80 to km 70.20". Disputes arose between the Employer / NHAI and the Contractor due to a disagreement on the rate of Item Wet Mix Macadam (WMM) mentioned in the Bill of Quantity (BOQ). The BOQ indicated an estimated quantity of 1,91,212 cum. The quantity of the said BOQ Item i.e WMM, exceeded the estimated quantity beyond the limits as envisaged. The Contractor submitted its analysis of the rates for determining a new rate for WMM which was based on the Ministry of Road Transport and Highways (MoRTH) norms. The Engineer accepted that there was a change in the quantity that had triggered Clause 52.2 of Conditions of Particular Application (COPA). However, the Engineer did not accept the rates submitted by the Contractor and fixed a lower rate per cum. The reduced rate was not accepted by the Employer / NHAI. The arbitral tribunal held that in view of the increase in quantities of WMM, the BOQ rate contained in the contract had been rendered inappropriate and the Contractor was entitled to a new rate for the said item. However, the arbitral tribunal restricted the new rates to the quantities of WMM executed beyond the stipulated period of the contract. The Employer contended that Clause 52.2 of COPA only made the Contractor eligible for seeking a revised rate, but did not automatically entitle it to a new rate and that a new rate would have to be determined only if it was found that the contracted rate was rendered "inappropriate or inapplicable". The Contractor on the other hand claimed that the rate quoted under the contract had become inapplicable and inappropriate for several reasons, including the period during which the said quantities were executed. The market price of the materials had also changed. The Court held that the Contractor was entitled to the new rates only for WMM works executed beyond the initial period of thirty months. The Court rejected the Employer's contention that the new rates were only applicable to quantities executed in excess of 125% of the original estimated quantities.



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Author of the book "Principles of Law of Arbitration in India"

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