

Construction Arbitration Newsletter

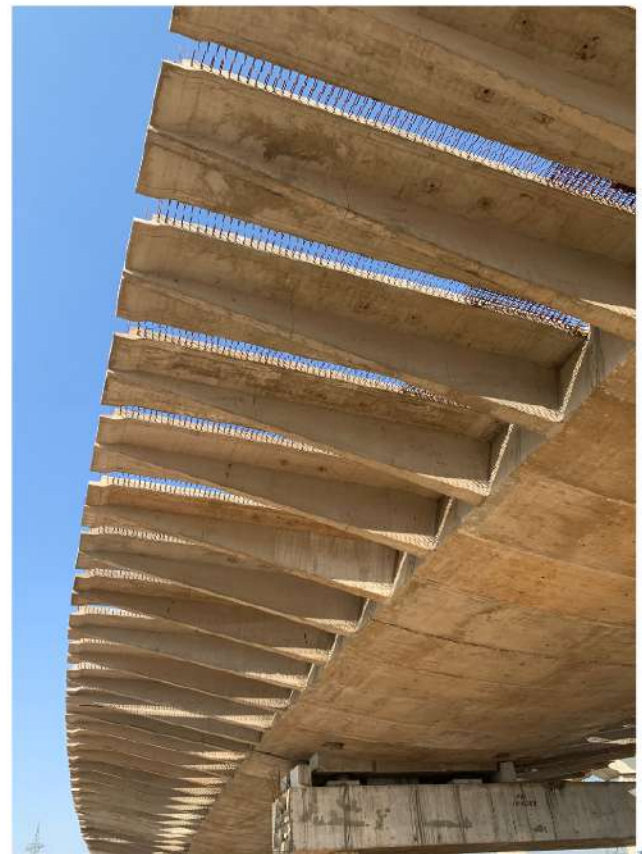
Construction Arbitration Law Firm

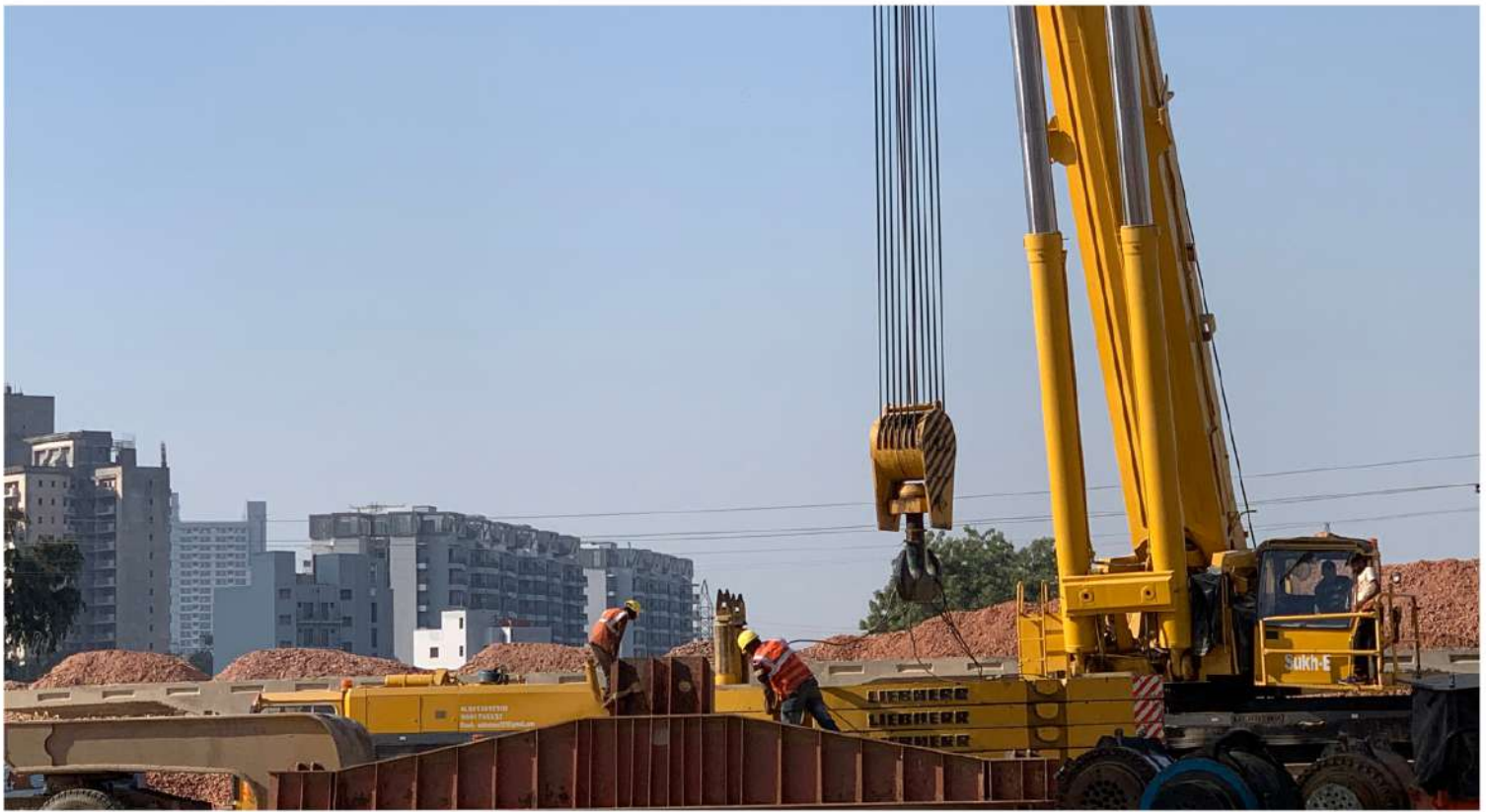
- **Defect Liability Period (DLP) can be extended for a period during which the work could not be used by reason of any defect or damage.**
- **As per Clause 49.5 of (Conditions of Particular Application (COPA) if only part of the works cannot be used, then the DLP shall be extended for that part alone.**
- **Extension of DLP by the Employer not permissible if the work alleged to be defective is being used by the Employer.**
- **Employer cannot take the plea that it was not capable of performing the contract and to get the defective works rectified through other agency at the risk and cost of the Contractor, because it is time consuming and tedious.**
- **Meaning of 'excepted matters' - when parties have agreed to not have any further adjudication since the agreement itself provides a named adjudicator - the right to levy damages for delay if exclusively conferred upon the Superintending Engineer, it being a complete mechanism for determination of liability, and when such damages are levied by the Superintending Engineer, the same is final and binding and cannot be referred to arbitration.**

[Mitra Guha Builders (India) Company v. Oil and Natural Gas Corporation Limited - Supreme Court of India - Decided on 8.11.2019]

[National Highways Authority of India v. Ssangyong Engineering & Construction Co. Ltd. - Delhi High Court - Decided on 23.1.2023]

- **Levy of Liquidated Damages whether an 'excepted matter' and therefore not arbitrable - once the parties have decided that certain matters are to be decided by the Superintending Engineer and his decision would be final, the same cannot be the subject matter of arbitration.**
- **Pre-condition to imposing Liquidated Damages - parties may agree to quantification of Liquidated Damages as an excepted matter but whether there has been a delay in the first place, can be referred to arbitration.**





National Highways Authority of India v. Ssangyong Engineering & Construction Co. Ltd. - Delhi High Court - Decided on 23.1.2023

The Employer awarded the Contractor a contract for construction of a four-lane Highway at the Jhansi-Lakhanadon section between km 351 to km 405.77, National Highway-26 in the State of Madhya Pradesh. During the construction period, the Engineer refused to determine the new rates for additional works instructed by the Employer. Upon completion, the Contractor raised various claims including bank guarantee charges incurred by the Contractor on account of failure of the Employer to issue the Defect Liability Certificate (DLC). The Employer argued that the DLC was not issued due to large number of defects in the work carried out by the Contractor which required rectification and execution of the balance work. Consequently, the Employer had to extend the Defect Liability Period (DLP). The arbitral tribunal concluded that the DLP could be extended for a period during which the work cannot be used by reasons of any defect or damage. However, in the present case the entire stretch of highway was being used even before the DLP expired. The arbitral tribunal allowed the claims of the Contractor. The Court upheld the award in favour of the Contractor.



**Mitra Guha Builders (India) Company v. Oil and Natural Gas Corporation
Limited – Supreme Court of India - Decided on 8.11.2019**

The Contractor was given two contracts to construct multistoried residential flats, guest house, multipurpose hall, service block, underground water tank etc. and other works for the Employer / ONGC. The Contractor raised certain claims and the dispute between the parties was referred to arbitration. The arbitral tribunal disallowed the claim of the Employer for Liquidated Damages in both the arbitration proceedings. The arbitral tribunal recorded a finding that the Employer was responsible to an extent for the prolongation of the contract and the Contractor was also to some extent responsible which resulted in slow progress of the work. The arbitral tribunal observed that there was delay and both the Employer and the Contractor were responsible for the delay. The Employer was responsible for 160 days of delay and the Contractor for the balance 371 days. The Court held that in terms of the agreement, the Superintending Engineer had to assess and quantify the compensation. By the terms of the agreement, the parties had agreed that in case the contractor failed to comply with the conditions and complete the work with due diligence, the Superintending Engineer may decide the compensation. The Superintending Engineer had been conferred with not only a right to levy compensation, but the contract also provided a mechanism for determination of the liability / quantum of compensation. The finality clause in the contract made the intention of the parties clear that there cannot be any further dispute on the said issue between the parties. The entire contract between the parties, and the terms, had to be read as a whole to decide the rights and liabilities of the parties arising out of the contract. The finality clause in the contract cannot therefore be frustrated by calling upon the arbitrator to decide on the correctness of levy of compensation by the Superintending Engineer.



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- “Recommended for Construction arbitration work.” Asia Pacific Legal 500.
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Successfully handled construction arbitrations relating to DBFOT projects, EPC Contracts and FIDIC based contracts in infrastructure projects.