

# Construction Arbitration Newsletter

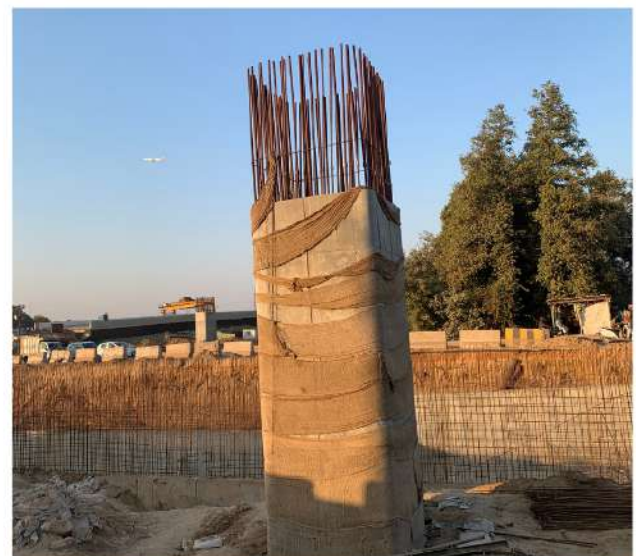
## Construction Arbitration Law Firm

- **Disclaimer Clause cannot be used to prevent the Contractor / Concessionaire from claiming compensation for material breach committed by the Employer - it cannot be used as a bar to a claim for compensation when the alignment including the levels were not properly given and the representation found to be wrong at a later point of time.**
- **Claim for increase in quantities of earth required for work - maintainability in DBFOT project - mining of earth is within the control of the State Government - getting permission from State Government authorities is not within the control of the Concessionaire - writing of letters alone by the Employer requesting performance by the Government is not sufficient and cannot discharge the Employer from its representation made to the Concessionaire to cooperate, especially when the matter is beyond the control of the Concessionaire.**
- **Commencement of limitation period - rejection by the Independent Engineer of various issues does not result in commencement of the limitation period - Independent Engineer not authorised to deal with monetary claims.**
- **Undertakings submitted by the Contractor and acceptance of the final bill towards full and final settlement of claims - Contractor succumbed to the pressure of the Employer since the Contractor was desirous of continuing the work to keep the labour and machinery engaged and get the work done to receive the payment on time - Employer cannot take the plea that the Contractor has waived his claim, by way of undertakings - even the final bill did not contain the wordings "full and final settlement of claim".**
- **Revision of rates justified since execution of work prolonged beyond the original completion date.**

*[The Executive Director, The Godawari Marathawada Irrigation, Development Corporation v. Shinde & Sons - Bombay High Court - Decided on 6.12.2022]*

*[The Governor of Tamil Nadu v. GMR Chennai Outer Ring Road Pvt. Ltd. - Madras High Court - Decided on 11.8.2022]*

- **Claim of the Contractor to refer disputes to arbitration cannot be rejected solely on the ground that the settlement agreement or discharge voucher has been executed by the Contractor, if its validity is disputed by the Contractor.**

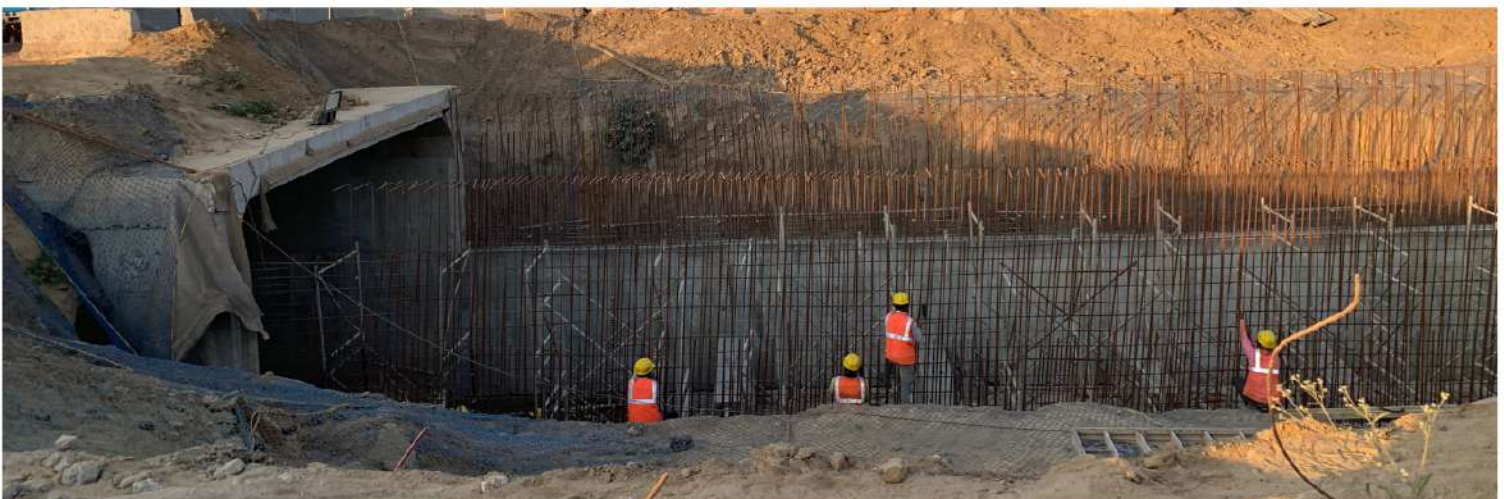




**The Governor of Tamil Nadu v. GMR Chennai Outer Ring Road Pvt. Ltd. -  
Madras High Court - Decided on 11.8.2022**

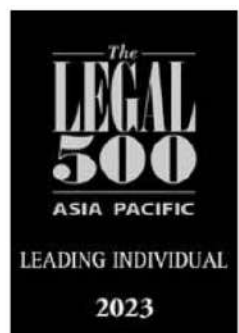
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The Concessionaire was awarded the work for the development of Chennai Outer Ring Road to a total length of 29.5 Kms and a Concession Agreement (CA) was entered between the parties on Design, Build, Finance, Operate and Transfer (DBFOT) basis. The Concessionaire was to be paid annuities half yearly post the construction period. The construction period as per the Concession Agreement was 913 days, with the planned completion period of 20 months from the Appointed Date. There were number of delays and breaches attributable to the Employer. The Concessionaire raised several claims including claim for additional cost of plant and machinery, overheads, interest on term loan, material escalation etc. The arbitral tribunal concluded that the rejection of request by the Independent Engineer did not result in the commencement of the limitation period. The decision of the Independent Engineer if disputed, must be resolved through the dispute resolution mechanism provided in the Concession Agreement and since the Engineer did not have the power to deal with monetary claims, his decision cannot be construed as giving rise to a cause of action to claim monetary claims or compensation. The Court upheld the arbitral tribunal's finding that the disclaimer clause cannot prevent the Concessionaire from claiming compensation for material breaches committed by the Employer, especially when the Concession Agreement provides for payment of compensation for such material breaches.



**The Executive Director, The Godawari Marathawada Irrigation, Development Corporation v. Shinde & Sons - Bombay High Court - Decided on 6.12.2022**

The contract for construction of earth work, structures, lining of Kothala Branch Canal was awarded to the Contractor. Since, the work was not completed within the time stipulated in the contract, extension was granted by the Employer. The Contractor after accepting the final bill issued notice and raised a dispute. The Executive Engineer replied to the Contractor's notice and rejected all the claims of the Contractor. The Contractor, thereafter, approached the Superintending Engineer and requested to settle the dispute. The Superintending Engineer rejected the claims of the Contractor stating that the claims are time barred and the Contractor has accepted final bill amount without protest and undertakings were given by the Contractor. The second appeal filed by the Contractor before the Chief Engineer was also rejected. Thereafter, the matter was referred to arbitration. The Employer argued that in view of the provisions of Clause 52 of the contract, the Contractor could not have raised arbitration dispute after receipt of final payment. Further, it was argued that the Contractor had, from time to time, filed undertakings that it would not claim any enhanced amount and is ready to complete the work as per the earlier contract. The arbitral tribunal arrived at a finding that the undertakings were submitted by the Contractor due to insistence and coercion of the officers of the Employer Department. The Court upheld the award and the arbitral tribunal's finding on revision of rates since the execution of work was prolonged for more than 10 years. Further, it was mandatory under the contract for the Contractor to observe all labour laws, which included the Minimum Wages Act, the arbitral tribunal was justified in revising the rates since the regional schedule of rates of the Employer failed to take note of the rates prescribed under the Minimum Wages Act.



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- “Recommended for Construction arbitration work.” Asia Pacific Legal 500.
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Author of the book “Principles of Law of Arbitration in India”

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