

# Construction Arbitration Newsletter

## Construction Arbitration Law Firm

- **Extra and substituted item rates - applicability of Delhi Schedule Rate (DSR) - unilateral reduction of rates by the Employer - not permissible for the Employer to drastically reduce the rate shown as full rate in previous running account bills in the final bill, after completion of the work - Employer is estopped from doing so if the Contractor has proceeded with the work based upon acceptance of a higher rate.**
- **Alternative formulas for determining the price escalation - Applicability of Clause 10CC of the General Conditions of Contract (GCC) which provides that no compensation shall be payable for a work for which stipulated period for completion is equal to or less than the time as specified in the schedule - reliance on the Building Cost Index to determine the escalation in prices - arbitral tribunal determined damages by relying on the formula given in Clause 10CC - merely because one method may be better than the other, it cannot be a ground for setting aside the arbitral award - Court cannot interfere with the arbitral award merely because it preferred another method of calculating damages.**
- **Prolongation costs - overheads claim - determination based on estimate of cost engagement of required technical personnel and plants and other expenditure - limiting of overheads claim to 7.5% as provided in the agreement - no proof of actual deployment and expenditure incurred on overheads - in the absence of a plea by the Employer that there was no engagement of required technical persons at site, the arbitral tribunal can presume that they were engaged till completion of the contract.**

*[Union of India v. Multi Tech Construction Co. - Delhi High Court - Decided on 2.5.2023]*

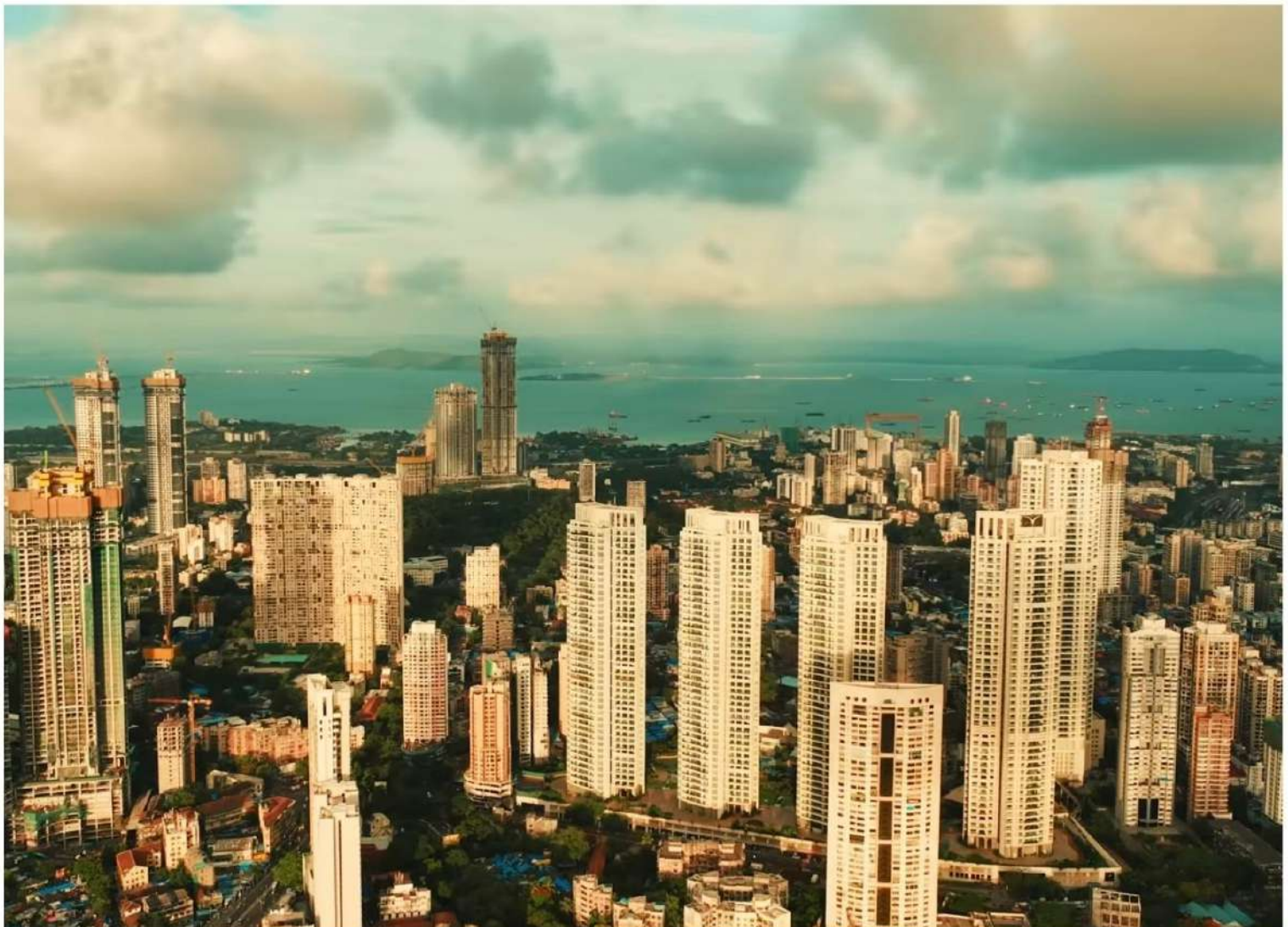




- **Payment against deviation items - Employer failed to approve or refute the rates proposed by the Contractor within the time period specified in the General Conditions of Contract (GCC) - Contractor would be entitled to payment of the deviated items - while deriving market rate there is a scope of estimation and minor variation of about 10% can be ignored.**
- **Claim for payment of boring cast-in-situ piles - standard rate analysis not applicable in special circumstances - additional Direct Mud Circulation (DMC) mobilised by the Contractor - comparison of any standard rate analysis like DSR, MORT&H Data Book etc. not applicable in special circumstances such as obstruction of height restriction at site - sanction of deduction by the Employer for carrying out piling work using DMC method, not permissible.**
- **Claim for refund of the amount deducted towards the extra item for conducting the High Strain Dynamic Load Test in lieu of Vertical Static Load Test on the working pile - Employer made cost adjustment and recovery - recovery made by Employer unjustified if weightage to the benefit of doing Dynamic Load Test is not given - Employer must prove the cost benefit to the Contractor.**
- **Possession of site handed over by the Employer in piecemeal manner - Employer responsible for the delay in completion of work.**

*[Government of NCT of Delhi v. Afcons Infrastructure Ltd. - Delhi High Court - Decided on 26.4.2023]*

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**Union of India v. Multi Tech Construction Co. - Delhi High Court -  
Decided on 2.5.2023**

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The Contractor was awarded the contract for construction of a building within the hospital premises. The arbitral tribunal allowed some of the claims raised by the Contractor on account of prolongation of the contract period including overheads, escalation of prices and rates for extra items of work. The Court upheld the award and concluded that the Employer was not entitled to reduce the rates of items of work in the final bill after the completion of works, having accepted and paid the full rates in the running bills. The Employer is estopped from reducing the rates since the Contractor had proceeded with the work based on the acceptance of higher rates by the Employer. The arbitral tribunal was correct in accepting the DSR 2013 and DSR 2014 rates in the absence of documentary evidence of the market rates. The Court cannot interfere with an arbitral award by substituting its opinion on what could have been more fair or appropriate method of awarding the claim. The determination of damages by the arbitral tribunal by applying one particular method of calculation cannot be questioned even though an alternative method may be better. The Court upheld the award on the claim for overheads during the prolongation period which was based on the presumption that the Employer had made no recovery for non-engagement of technical personnel in the running bills and the final bill. The arbitral tribunal had concluded that since there was no recovery made by the Employer, the technical personnel can be presumed to have remained engaged up to the date of completion of the contract.

**Government of NCT of Delhi v. Afcons Infrastructure Ltd. - Delhi High  
Court - Decided on 26.4.2023**

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The Employer awarded work for the construction of elevated road to the Contractor. During the course of the work, disputes arose between the parties due to the delay caused in completion of the project. The arbitral tribunal allowed some of the claims of the Contractor. The award was challenged by the Employer. The Court upheld the findings of the arbitral tribunal. The minor variation in the rates can be ignored when computing the compensation. The Court concluded that the damages during extended stay on account of uncovered price escalation of reinforcement bars, labour, construction materials etc. were payable and the contract clauses which barred compensation for breach were unenforceable being contrary to the provisions of the Indian Contract Act, especially when the Employer was responsible for the delay. The arbitral tribunal arrived at the finding that the circumstances of the case constituted an exception to the “no damage clause” and the said clause was not enforceable in view of the judgment of the Delhi High Court in Simplex Concrete Piles v. Union of India, (2010) SCC OnLine Del 821. The Court upheld the award of 10% pendente lite interest and 12% per annum future interest on the awarded amount.



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