

# Construction Arbitration Newsletter

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Construction Arbitration Law Firm

- **Claim for reimbursement for increase in price of material or tax by the Contractor - express provision in the contract stating that the Contractor shall bear the burden of sales tax or turnover tax on works contract or other tax on the amount billed, levied or increased during the execution of the work - contract did not provide for reimbursement of increase in taxes which may indirectly be a component of the price or rate quoted and which is governed only by the price variation clause - when a Contractor quotes a rate for an item of work, such rate will have various components like material cost, labour cost, fuel cost, overheads and profits - Contractor not entitled to claim reimbursement.**
- **Reimbursement of indirect cost and taxes incurred during the execution of work - contract contemplates the Contractor quoting a price for executing a work would take all circumstances into account and all increase that may take place - contract provided that the rates / prices shall include all taxes and the rates quoted shall hold good till the completion of the work and no individual claim shall be entertained on account of increase in tax or other levies - Contractor entitled only to the price quoted and only variation in price as permitted by the price variation clause.**

*[Konkan Railway Corporation Ltd. v. Chenab Bridge Project Undertaking - Supreme Court -  
Decided on 17.8.2023]*





- **Claim for loss of profit – claim based on delays attributed to the Employer - evidence in support to be furnished by the Contractor - reliance only on the Hudson’s Formula and the passage from the book not sufficient evidence to claim loss of profit – Contractor should demonstrate that had the contract been executed in time, the Contractor could have secured supplementary profits utilizing its existing resources elsewhere.**
- **Nature and quality of evidence for claim of loss of profit - may generally include independent contemporaneous evidence such as (a) other potential projects that the Contractor had in the pipeline that could have been undertaken if not for the delays, (b) the total number of tendering opportunities that the Contractor received and declined owing to the prolongation of the contract, (c) financial statements, or (d) any clauses in the contract related to delays, extensions of time, and compensation for loss of profit.**
- **Claim of loss of profit based on Formulae - formulae can be helpful in assessing the losses but it alone cannot prove the Contractor's loss of profit.**

*[Unibros v. All India Radio - Supreme Court - Decided on 19.10.2023]*



**Unibros v. All India Radio - Supreme Court - Decided on 19.10.2023**

The Contractor was awarded a work contract by the Employer to carry out construction of Delhi Doordarshan Bhawan, New Delhi. The work suffered delay of roughly 42 ½ months. Disputes between the parties were referred to arbitration. The arbitral award was set aside by the Division Bench of the High Court. The Supreme Court observed that a Contractor’s claim for loss of profit should establish that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. Further, the Court observed that the Hudson's formula, as well as other methods used to calculate claims for loss of off-site overheads and profit, do not directly measure the Contractor's exact costs. Instead, they provide an estimate of the losses the Contractor may have suffered. While these formulae are helpful when needed, they alone cannot prove the Contractor's loss of profit. They are useful in assessing losses, but only if the Contractor has shown with evidence the loss of profits and opportunities it suffered owing to the prolongation.



## Konkan Railway Corporation Ltd. v. Chenab Bridge Project Undertaking - Supreme Court - Decided on 17.8.2023

The Employer issued tender for construction of a bridge at KM 50/800, on the Katra-Laole section of Udhampur-Srinagar-Baramulla rail link. While the contract was in execution, disputes arose between the parties. Disputes between the Employer and the Contractor arose with respect to withdrawal of the exemption on entry tax by the State Government and the reimbursement of toll tax on machinery and materials. At that time, the Notification of the Government of Jammu and Kashmir exempted Entry Tax on earth-moving instruments. However, during the execution of the contract, the Government of Jammu and Kashmir withdrew the exemption notification. Consequently, the Contractor raised claims for reimbursement of payment of Entry Tax. As per the extant policy in Jammu and Kashmir the Toll Tax, as applicable on the date of the submission of tender, tax was Rs. 400 per MT. However, through four subsequent notifications issued under Jammu and Kashmir Levy of Toll Tax Act, 1998, the taxes were progressively increased to Rs. 650 per MT. Consequently, the Contractor raised a claim for reimbursement of sums paid on account of increase in toll tax during the subsistence of the contract. The arbitral tribunal rejected all the claims raised by the Contractor. The arbitral tribunal concluded that Entry Taxes on earth-moving equipment formed part of the cost of the works quoted in the Bill of Quantities. Interpreting the Price Variation clauses, the arbitral tribunal noted that the contract only provided for generic price variation based on a standardised formula. Accordingly, the arbitral tribunal held that the claim for reimbursement of increased tax liability for individual or specific items i.e. the imposition of entry tax, cannot be reimbursed. The arbitral tribunal was of the view that the Contractor was aware of these conditions at the time when the prices were quoted, and therefore, the claim could not succeed under Price Variation clause. With respect to the claim for toll tax, the arbitral tribunal rejected the claim for reimbursement on interpretation of the contractual clauses. The Court in appeal held that the arbitral tribunal failed to interpret the contractual clauses harmoniously and holistically and set aside the award and allowed the claims of the Contractor. Accepting the Employer's appeal, the Supreme Court concluded that interpretation of the arbitral tribunal of the contractual provisions cannot be interfered with by the court and upheld the award.



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