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## **Delhi High Court: Arbitrators can calculate liquidated damages on the basis of “honest guesswork” and “rough methods” in case of insufficient evidence**

By a recent judgment, the Division Bench of the High Court of Delhi (“**Delhi HC**”) in the case of *Cobra Instalaciones Y Servicios v. Haryana Vidyut Prasaran Nigam Ltd.*<sup>1</sup> upheld the Arbitral Tribunal’s quantification of liquidated damages on the basis of “honest estimations” and “rough methods” to arrive at a fair assessment of damages in a case where the quantification was complex and there was insufficient evidence on record.

### **Brief Facts**

Haryana Vidyut Prasaran Nigam Ltd (“**Respondent**”) awarded a contract to Cobra Instalaciones Y Servicios (“**Appellant**”) to design, supply, and install sub-stations for the Haryana Power System Improvement Project (“**Project**”). The contract stipulated a 450 (four hundred and fifty) day deadline and included a clause for liquidated damages (“**LD**”) in case of any delays.

While the project commenced on time, there were delays in the contract which triggered the LD. The Respondent initially deferred the LDs. However, later imposed the same at the maximum permissible limit under the contract.

Aggrieved, the Appellant invoked arbitration under the contract. The central question for determination in the arbitration was the quantification of losses.

Upon assessment, the Arbitral Tribunal concluded that some delays were caused by the Appellant’s actions, while others resulted from issues with third-party vendors. Accordingly, the Arbitral Tribunal awarded the Respondent 50% of the imposed LDs based on the “rough and ready” methodology established by the Supreme Court in the case of *Construction and Design Services v. Delhi Development Authority*<sup>2</sup>.

Both parties filed an appeal challenging the award by preferring respective appeals under Section 34 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”). The Ld. Single Judge, set aside the award and remanded the matter back to the Arbitral Tribunal for fresh consideration. Aggrieved, the Appellant appealed under Section 37 of the Arbitration Act.

### **Issues**

Whether time was of the essence of the contract and if so, what percentage of liquidated damages is the Appellant entitled to?

<sup>1</sup> *Cobra Instalaciones Y Servicios v. Haryana Vidyut Prasaran Nigam Ltd.*, 2022: DHC: 1479

<sup>2</sup> (2015) 14 SCC 263

## Findings and Analysis

1. On the issue of whether time was of the essence, the Delhi HC observed that although *stricto sensu* time was not of the essence, the Respondent's repeated reminders of timely completion of works under the contract established that delays had consequences in the contract, and it could not be assumed that the Respondent had not suffered a loss.
2. It was further held that the burden of the resultant loss cannot be mulcted solely on the Appellant as more than 1 (one) contractor was involved in executing the project.
3. With respect to the apportionment of the LDs, the Delhi HC concluded that the LD clause did not represent a genuine pre-estimate of damages and the exact contribution of loss attributable to each contractor was not possible.
4. Upholding the award, the Delhi HC affirmed that arbitrators have the authority to use "rough and ready" or "honest guesswork" methods while quantifying damages when the exact loss cannot be ascertained.
5. The Delhi HC recognized that such computation method was a tool available to the arbitrator which has received the *imprimatur* not only of the Supreme Court of India but also of other courts, even before the case of Construction and Design Services (*supra*).
6. The Delhi HC explained that the rationale behind this approach is that even when the evidence of loss exists, the absence of precise details shouldn't prevent an award on damages and the arbitrators can use reasonable estimations to arrive at a fair assessment.

## Conclusion

The "honest guesswork" approach offers a practical solution for arbitrators when precise damage calculations are difficult, particularly in public projects with non-monetary benefits. It further saves time and resources by eliminating the need for extensive evidence gathering. However, this flexibility comes with potential drawbacks as estimates can be inaccurate, or biased, leading to unfair outcomes for one party or the other. Furthermore, a lack of transparency may even undermine the legitimacy of the arbitration process.

In view of the above, clear guidelines from the Supreme Court of India can standardize the use of estimates, which should be used as a last resort only when determining damages is truly impossible, and not simply when it is improbable. This will achieve a balance between efficiency and fairness in the assessment of damages during arbitration and strengthen the legitimacy of the arbitration process.

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