

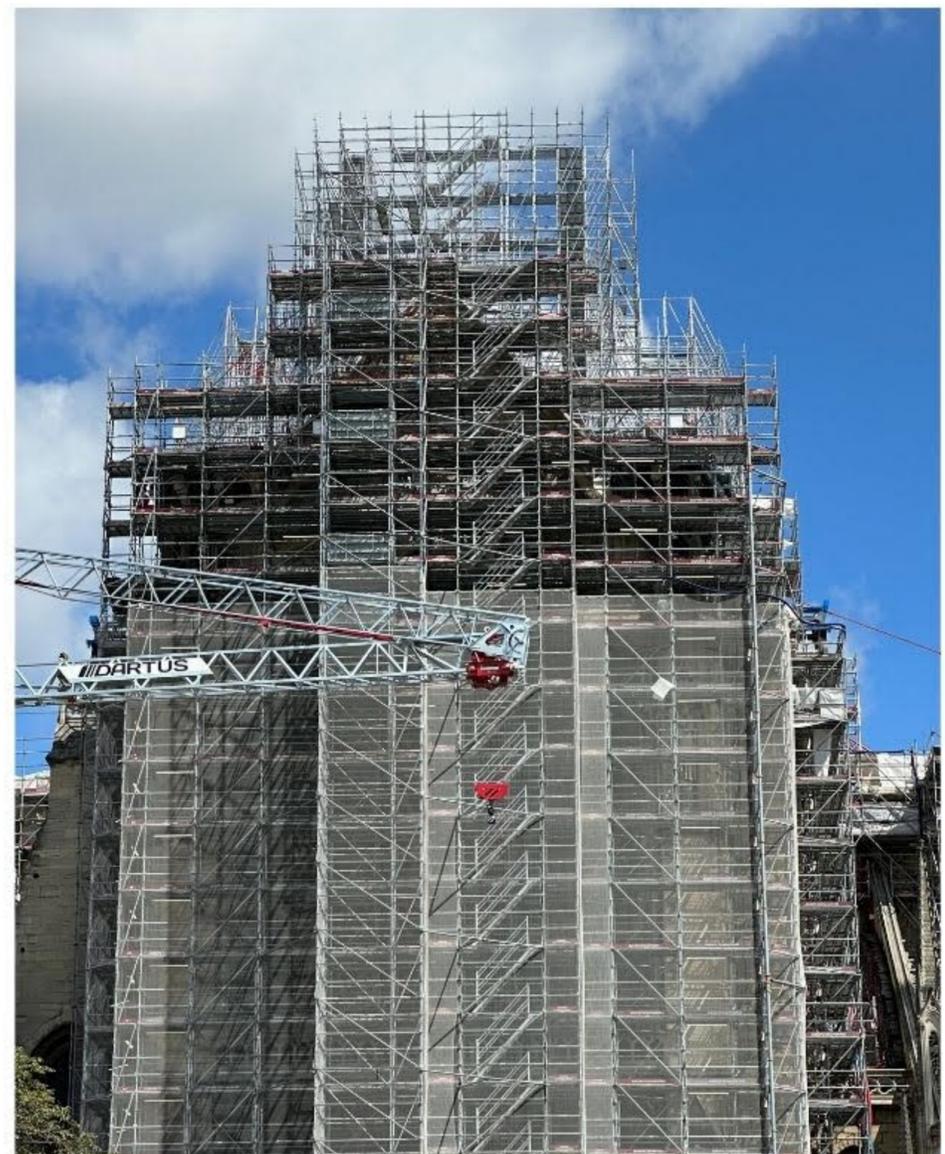
# Construction Arbitration Newsletter

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Construction Arbitration Law Firm

- **Discarding of expert report of one party - violation of principles of equality - expert reports produced by the Employer were prepared subsequent to the commencement of the arbitration proceeding, much after the fateful incident, for the purpose of preparing the defence of the Employer - experts who authored the reports waited for the retrieval of the concerned TBM, which had to be cut into pieces over a long period of time spanning almost three years and recovered from underground, along with soil samples - delay in filing report, not a valid or rational ground for discarding the post-retrieval reports filed by the Employer.**
- **Meaning of the contractual term 'unforeseen physical condition' - the presumption is, as per the contract between the parties, that the Contractor was duly satisfied of the soil condition before entering into the Contract - contract casts full responsibility and risk on the Contractor for the adequacy, stability, safety of site operations, works, irrespective of approval or consent of the Engineer - Contractor took a commercial risk upon assessing and taking into account the soil conditions and other aspects involved and cannot resile from such position.**

*[Kolkata Metro Rail Corporation Limited v. ITD-ITD Cem Joint Venture - Calcutta High Court - Decided on 31.10.2025]*



- **Claim for Head Office overheads - evidence to prove costs - only Chartered Accountant certificate produced in support of the claim - the accountant was not examined as witness - no plausible evidence on record or material to show that the said expenses as such was incurred on account of any fault of the Employer - Head Office expenditure calculated on the basis of certain percentage ranging between 3.11% and going up to 5.42% of the total expenditure of the Head Office during the said financial years by relating it to the turn-over of the said project and the overload as such - further supported by a certificate of the Chartered Accountant - witness produced by the Contractor denied having any personal knowledge and stated that the information had been gathered from the Head Office and he had not personally seen the relevant record - mere production of the certificate in the absence of corroboration of the certificate from the Chartered Accountant, is not sufficient.**

*[Himachal Pradesh Road Infrastructure Development Corp. Ltd. v. C&C Construction Ltd.  
- Himachal Pradesh High Court - Decided on 31.10.2025]*



The Employer awarded a contract to the Contractor for construction of an underground metro segment between Central Station and Subhash Sarobar, using two TBMs. During operation of the west-bound TBM, severe water ingress and ground settlement occurred, causing surface damage and public litigation. The Contractor initiated arbitration blaming unforeseeable sub-soil conditions. The Employer denied liability, asserting contractor misoperation, inadequate greasing, misalignment, and contractual allocation of risk. Both parties submitted expert reports. The Contractor relied largely on pre-retrieval reports; but the Employer relied predominantly on post-retrieval technical analyses conducted after the TBM was cut out and examined. The arbitral tribunal accepted the Contractor's case and discarded the Employer's expert evidence and awarded monetary claims to the Contractor. The Court concluded that the delay in furnishing the reports corresponded with the delay in retrieval of the TBM and those were filed at the earliest thereafter. It could not have been a valid or rational ground for discarding the post-retrieval reports filed by the Employer altogether while accepting the pre-retrieval reports produced by the Contractor. The obvious reason for the delay in issuance of the said reports, about nine hundred days after the incident, was that the experts who authored those waited for the retrieval of the concerned TBM, which had to be cut into pieces over a long period of time spanning almost three years and recovered from underground, along with soil samples. The Contractor was to carry out soil investigation and it would be deemed that it was satisfied of the same, before putting in the tender. Thus, the presumption would be, as per the contract between the parties, that the Contractor was duly satisfied of the soil condition before entering into the contract. Clause 4.1 of the GCC, casts full responsibility and risk on the Contractor for the adequacy, stability, safety of site operations, works, irrespective of approval or consent of the Engineer. The Contractor had the contractual obligation to bear the liabilities for any damage caused to third parties during the project, irrespective of approval or consent of the Engineer. The nature of the transaction itself shows that the Contractor took a commercial risk upon assessing and taking into account the soil conditions and other aspects involved and cannot resile from such position. The Court set aside the arbitral award.



**Himachal Pradesh Road Infrastructure Development Corp. Ltd. v. C&C Construction Ltd.  
- Himachal Pradesh High Court - Decided on 31.10.2025**

The Employer awarded to the Contractor the contract for widening and strengthening of the Una-Nerchowk Road, section from Km 45+000 to up to Km 90+800. The project was to be completed within thirty-three months, but substantial delays occurred due to hindrances at site, including non-availability of land, acquisition issues, utilities shifting, permissions, and other constraints attributable largely to the Employer. The Employer eventually granted nine extensions of time, and the project was completed. Though contractual payments were released, the Contractor claimed it incurred huge additional costs due to prolongation. The disputes between the parties were referred to arbitration wherein the Contractor raised the claim for prolongation costs, additional overheads, and interest. The arbitral tribunal allowed the claims of the Contractor. The arbitral tribunal allowed the head office overhead costs by holding that, since the head office is not an earning unit, it recovers its costs from the revenue/turnover generated by the projects executed by the Contractor. Such costs incurred during the extended period are covered within the definition of "cost"; therefore, the Contractor is entitled to recover its head office overhead costs incurred during the extended period of the contract. The single judge did not interfere with the award of the arbitral tribunal. The Division Bench partly set aside the award holding that computation of Head Office overhead on the basis of percentage of the cost being incurred maintained by Head Office and as per the certificate furnished by the Chartered Accountant, without producing the Chartered Accountant as witness to prove the expenses, goes to the root of the matter and the arbitral award was patent illegal. The Contractor has to prove from the books of account to demonstrate additional costs incurred by it.



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