

CONSTRUCTION CONTRACTS AND ARBITRATION

Responsible Faculty Instructor: Ruby Panchal
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Assistant Professor

Credits: 4

Credits Type: Law/ Elective

Cross-registration: NA

Pre-requisites: Alternate Dispute Resolution (Core Subject)

COURSE DESCRIPTION (COURSE VISION):

The construction industry is one of the major contributors to India's GDP and foreign direct investment (FDI) inflow. The backbone of any construction project is its underlying construction contract.

If the Government of India (GoI) intends to build an eight-lane non-stop express highway from Sonipat to Delhi, it will most likely delegate the job to a private contractor through a bidding process. This project will then be formalised through a construction contract between the Employer (GoI) and the Contractor. In this case, the contract would most likely be based on a turnkey model or design, build and operate model. Now, suppose the Contractor is unable to complete the project within the scheduled time, or there are variations in the designs, or fluctuation in prices of the raw materials, or force majeure conditions such as COVID-related lockdowns, or there are defaults in payments, or issues between the contractor and subcontractor. In all these instances, the contractual disputes are bound to arise between the parties. According to the Construction Industry Arbitration Council, a substantial sum of the economy is locked up in contractual construction disputes.

In India, there is no single standard form contract that is uniformly followed as a template in the construction industry. In public construction projects, the State Employer generally relies on its own bespoke standard form contracts. It has also become a common practice to adopt construction contract templates stipulated by engineering organisations such as the International Federation of Consulting Engineers, the UK Institution of Civil Engineers, and the Indian Institute of Architects, etc. Out of these, FIDIC contracts are widely used, both internationally and domestically. This course will focus on the following FIDIC suite contracts: Red Book, Yellow Book, Silver Book, and Gold Book.

This course is divided into two broad parts: a) substantive and b) procedural provisions under the construction contracts. The first part focuses on substantive rights and obligations of the Employer and the Contractor, commencement and completion of the Works, handling of the delays, breach and termination of the contract. It further addresses common claims and defences in construction disputes and the principles applicable to damages. The second part of the course focuses on the structure and form of multi-tier dispute resolution clauses in construction contracts. It further focuses on key arbitration-related issues arising in construction disputes, including jurisdictional challenges, the appointment and challenge of arbitrators, interim reliefs, and the enforcement of arbitral awards.

TEACHING METHODOLOGY:

The primary method of delivering the course will be through weekly lectures. This course adopts a blended and student-centric teaching methodology combining doctrinal instruction with interactive and practice-oriented learning. Core legal principles relating to construction contracts and arbitration are taught through structured lectures, followed by case law analysis using the Socratic method, where students are encouraged to critically engage with the legal issues.

INTENDED LEARNING OUTCOMES:

1. To understand the form and substance of standard construction contracts.
2. To have a sound understanding of both substantive and procedural clauses in standard construction contracts. To interpret such clauses in accordance with the Indian Contract Act, 1872.
3. To understand the rights and obligations of parties under the construction contract, i.e., the Employer and the Contractor. To develop a critical understanding of risk allocation between these parties under different standard forms of construction contracts.
4. To gain an understanding of various arbitration-related issues arising in construction disputes, such as jurisdictional challenges, appointment and challenge of arbitrators, interim reliefs and enforcement of awards.
5. To learn to identify key issues in construction disputes and to analyse, research, and draft claims and defences.

READING LIST (up to 10 select readings):

1. Taxmann's Construction Arbitration – Delays, Disputes, Resolution, Dr. SB Saraswat (2020)
2. FIDIC Contracts: Law and Practice, Elis Baker et al. (2013)
3. BS Patil's Building and Engineering Contracts, 7th edn., BS Patil (2019)
4. The Guide to Construction Arbitration, Stavros Brekoulakis and David Brynmor Thomas QC (5th ed., 2023)]
5. Delay and Disruption in Construction Contracts, Andrew Burr (5th ed., 2025)
6. Badrinath Srinivasan, Case Note: Time as Essence and Liquidated Damages Clauses: A Critique of Welspun Specialty v. ONGC, Australian Journal of Asian Law (2023)
7. Shivprasad Swaminathan, De-inventing the Wheel: Liquidated Damages, Penalties and the Indian Contract Act, 1872, The Chinese Journal of Comparative Law 6 (2018)
8. Pallavi Shroff, Drafting Arbitration Clauses for India-Centric Approach in Arbitration in India, Dushyant Dave et al. (eds.) (2021)
9. Dr. Donald Charret, Lex Constructionis – or My Country's Rules? International Construction Law Review (2021)
10. Concurrent Delays, Luigi Di Paola, The International Construction Law Review (2006)

WEEKLY READING PLAN (WEEKLY OUTLINE):

A weekly plan is provided below:

MODULES	WEEK(S)
<p>MODULE 1: INTRODUCTION TO CONSTRUCTION CONTRACTS</p> <ul style="list-style-type: none"> a) Introduction to Construction Contracts b) Standards of Construction Contracts c) Types of FIDIC Suite of Contracts d) Formation of Construction Contracts (Tender Process and Acceptance) 	1
<p>MODULE 2: STRUCTURE AND RISK ALLOCATION IN CONSTRUCTION CONTRACTS</p> <ul style="list-style-type: none"> a) Documents Forming Construction Contract b) Definitions in Construction Contracts c) Pricing Models in Construction Contracts d) Allocation of Risk in Construction Contracts 	2
<p style="text-align: center;">MODULE 3: PARTIES UNDER CONSTRUCTION CONTRACTS:</p> <p style="text-align: center;">THE ENGINEER</p> <ul style="list-style-type: none"> a) Engineer’s Appointment and Duties b) Engineer Determination <p style="text-align: center;">THE EMPLOYER</p> <ul style="list-style-type: none"> c) Employer’s Rights and Obligations d) Employer’s Risks Allocation <p style="text-align: center;">THE CONTRACTOR</p> <ul style="list-style-type: none"> a) Contractor’s Rights and Obligations b) Contractor’s Risks Allocation 	3-5
<p>MODULE 4: THE WORKS UNDER CONSTRUCTION CONTRACTS</p> <ul style="list-style-type: none"> a) Commencement and Variations of Works b) Completion and Taking Over of Works c) Defect Liability Period d) Delay Attribution, Extension of Time and Delay Damages 	6-7
<p>MODULE 5: BREACH, TERMINATION AND DAMAGES UNDER CONSTRUCTION CONTRACTS</p> <ul style="list-style-type: none"> a) Material Breach of Construction Contracts b) Termination of Construction Contracts c) Claims and Defences in Contraction Disputes d) Reliefs in Construction Disputes 	8

<p align="center">MODULE 6: DISPUTE RESOLUTION CLAUSE IN CONSTRUCTION CONTRACTS</p> <p>a) Multi-Tier Dispute Clauses in Construction Contracts b) Dispute Boards, Mediation and Conciliation in Construction Disputes c) Seat of Arbitration and Applicable Laws in Arbitration</p>	<p align="center">9</p>
<p align="center">MODULE 7: JURISDICTIONAL CHALLENGES IN CONSTRUCTION ARBITRATIONS</p> <p>a) Premature Invocation of Arbitration Clauses b) Time Barred Claims c) ‘Excepted Matters’ and Full and Final Settlement of Claims d) Existence and Validity of Arbitration Agreement</p>	<p align="center">10-11</p>
<p align="center">MODULE 8: MULTI-PARTY ARBITRATIONS IN CONSTRUCTION DISPUTES</p> <p>a) Multi-Parties in Construction Contracts – Subcontractors and Separate Contractors b) Back-to-Back Arbitration Clauses c) Non-Signatories as Parties to Main Construction Contracts d) Composite Transactions and Group of Companies Doctrine</p>	<p align="center">11</p>
<p align="center">MODULE 9: APPOINTMENT AND CHALLENGE OF ARBITRATORS IN CONSTRUCTION DISPUTES</p> <p>a) Unilateral Appointment and Unilateral Lists/Panels Clauses b) Challenge to Arbitrators: Independence and Impartiality</p>	<p align="center">12</p>
<p align="center">MODULE 10: INTERIM AND FINAL AWARDS IN CONSTRUCTION DISPUTES</p> <p>a) Interim Relief in Construction Disputes: Bank Guarantees and Security Deposit of Money b) Enforcement of Interim Reliefs c) Challenge and Enforcement of Domestic Awards d) Enforcement of Foreign Awards</p>	<p align="center">13-14</p>
<p align="center">REVISION WEEK</p>	<p align="center">Week 15</p>