

Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Change in law - exclusion of government notification increasing the minimum wages under the General Conditions of Contract (GCC) - notification increasing the minimum wage amounts to a change in law - notification issued under the Minimum Wages Act, 1948 by the Central Government, by virtue of the authority conferred upon it under the provisions of the 1948 Act, is a part of the 1948 Act and modification to the minimum wages brought about by a notification would amount to modification of the 1948 Act constituting a change in law.**
- **Term 'Law' defined - includes all applicable rules, regulations, orders, notifications issued by a government instrumentality and also includes all rules, regulations, and decisions - it encompasses enactment of any new Act or Statute and rules made thereunder.**
- **Price Adjustment clause - expenditure incurred due to reasons of delay and expenditure already compensated under the Price Adjustment clause whether excluded under the GCC - whether Contractor is being compensated twice for the same increase - Variable Dearness Allowance (VDA) is factored in the formula for the variation in the Contract Price but not the increase in the basic minimum wage rate apparent in the formula, since the price for labour component was linked to the All India Consumer Price Index for Industrial Workers as published by Labour Bureau.**

*[NTPC Limited v. Larsen and Toubro Limited -
Delhi High Court - Decided on 5.1.2024]*



- 'Baseline Schedule' to be read as part of the contract - delays under the contract required to be determined on Critical Path Method (CPM) - post-contract conduct is inadmissible.
- Liquidated damages - proof of actual loss - Employer unable to fulfil its obligations prior to the Scheduled Completion Date and therefore there was no possibility to complete the work within the scheduled time - delay caused by the Contractor prior to the pre-commissioning stage whether relevant - as per the arbitral award, works could have been completed after seven to eight months after uninterrupted provision of utilities or two months after uninterrupted provision of feedstocks - therefore, delay by the Contractor prior to the pre-commissioning stage would have made no real difference - even if the Contractor had achieved the stage for pre-commissioning as per the contract schedule, it could not have proceeded further, for want of utilities and feedstocks - Employer could not have been denied claim for liquidated damages for delays caused by the Contractor before the pre-commissioning stage.

[ONGC Petro Additions Limited v. Technimont S.P.A - Delhi High Court - Decided on 22.12.2023]



**NTPC Limited v. Larsen and Toubro Limited - Delhi High Court -
Decided on 5.1.2024**

The Contractor was awarded the work for setting up of 2 × 800 MW Darlipali Super Thermal Power Project, Stage I in the Sundargarh District of Odisha, by the Employer. The Ministry of Labour and Employment, Government of India issued notification under the Minimum Wages Act, 1948, increasing the daily rates of minimum wages payable to workmen with effect from 19 January 2017. The Contractor raised a claim for additional cost of construction on account of the above Notification. The disputes between the parties were referred to arbitration. The arbitral tribunal allowed the claim of the Contractor. The Employer contended that the Notification dated 19.1.2017 did not amount to a 'change in law' under clause 10.4.3 of the General Conditions of Contract (GCC). The 2017 notification was issued under the provisions of the Minimum Wages Act, 1948 which enactment existed 7 (seven) days prior to the opening of the bids and when the parties entered into the contract. Further, the Price Adjustment clause in the SCC considered the increase in the rate of minimum wages and compensated the Contractor for the variation or increase in the rate of labour costs. The Court relied on the decision of a co-ordinate bench which observed that the notification on minimum wages for labour were in two parts. The first being the basic minimum wage rate and the second, being a Variable Dearness Allowance (VDA). The second component of VDA was revised from time to time to commensurate with the increase in the cost of living. The VDA was factored in the formula for the variation in the Contract Price, as stipulated in Appendix-2 of the Contract Agreement but not the increase in the basic minimum wage rate. Appendix-2 only factored in the variable cost of living allowance as published by the Labour Commissioner periodically and did not factor any rise in the basic minimum rate of wages. The Court upheld the interpretation of the arbitral tribunal and allowed the claim of the Contractor holding that the notification increasing the minimum wage amounted to a change in law.

[Comment: The Court failed to take note of clause 6.15.0 of the SCC which precluded compensation to the Contractor for other expenditure incurred due to the increase in benefits to the workers / labourers and also the fact that in case of a conflict between the clause 10.4.3 of GCC and clause 6.15.0 of SCC, the latter would prevail.]

The Employer awarded to the Contractor, Lumpsum Turnkey contracts to erect petrochemical plants. The works under the Project were divided into three stages namely construction, pre-commissioning and commissioning. At the pre-commissioning stage, the Employer was required to supply to the Contractor certain utilities in order to facilitate the pre-commissioning. The performance of the Contracts was delayed. The Contractor alleged that the Employer was responsible for the delay in performance of the contracts as it failed to provide utilities at the pre-commissioning stage. According to the Employer, majority of the delays by the Contractor had already occurred prior to the “mechanical completion”. The claims and counter claims of the parties were referred to arbitration. The Contractor claimed for compensation for payments to sub-contractors, both initially and after extension of construction, extended site supervision, running costs, head office support and overheads, extension of bank guarantees, and claims on warranty obligations amongst other claims. The Employer claimed liquidated damages due to delays caused by the Contractor, amongst other claims. The arbitral tribunal concluded that the delays before pre-commissioning have not delayed completion because, even in the absence of such delays, completion would not have been achieved earlier. The delays attributable to the Contractor before pre-commissioning did not cause any actual delay and therefore, did not even constitute a “cause of delay”. The unavailability of utilities and feedstock was the sole effective cause of critical delay attributable to the Employer. The arbitral tribunal refused to apportion the delays. The arbitral tribunal accepted the contention of the Contractor that the delays before pre-commissioning had not delayed the completion because, even in the absence of such delays, completion could not have been achieved earlier. The Court observed that the Employer’s claim for liquidated damages was not without merit on the admitted delay in completing the work by the Contractor. Interestingly, however, the Court concluded that the decision of the arbitral tribunal to deny liquidated damages to the Employer, on the ground that the delay in completing the works was not critical since the Employer was not prepared for the next stage, did not offend the most basic notions of justice or morality and did not shock the conscience of the Court. The Court upheld the majority award refusing to allow the claim of the Employer for liquidated damages .

[Comment: The refusal by the Court to set aside the Majority Award for rejecting the Employer’s claim for liquidated damages on the ground that the delay in completing the works by the Contractor before the pre-commissioning would not be critical since the Employer was not prepared for the next stage, is erroneous. Upholding of the Majority Award and the claims raised by the Contractor on account of delay by the Employer seems erroneous, especially when the Court took the view that there was merit in the Employer’s claim for liquidated damages on the admitted delay caused by the Contractor prior to the pre-commissioning stage.]



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