

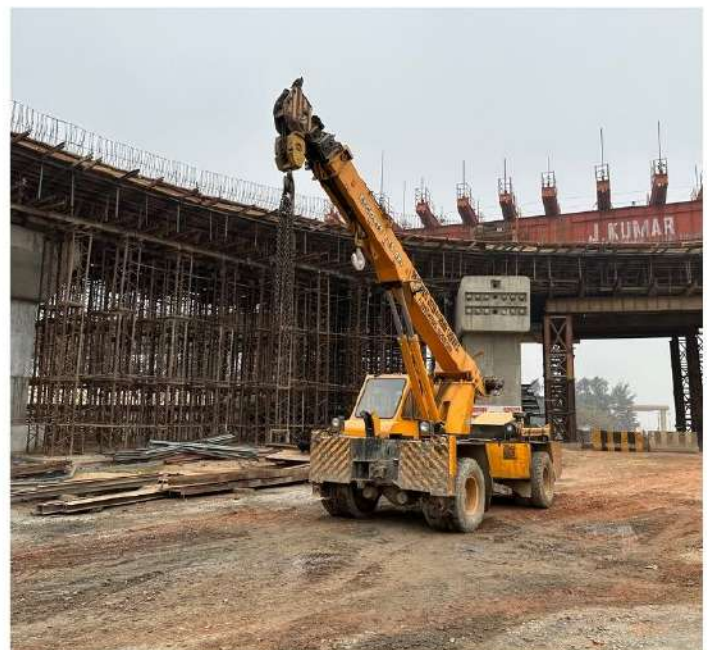
Construction Arbitration Newsletter

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Construction Arbitration Law Firm

- **Concession Agreement - computation of loss of revenue - Financial Model submitted by the Concessionaire to the Employer at the beginning of the project is a relevant material for quantifying the claim for loss of revenue.**
- **Loss of Opportunity - Concessionaire entitled to compensation for loss of opportunity and profits due to prolongation of the construction period - Concessionaire is required to produce sufficient proof for establishing the quantum - in the absence of sufficient proof Concessionaire is entitled to nominal damages.**
- **Limitation of liability clause - predetermined compensation @ Rs. 1000 per month for 1000 sqm or part thereof in case of failure of the Employer in making available the existing Right of Way - clause not applicable to the cases where the Provisional Completion Certificate and the Commercial Operation Date was adversely affected and delayed.**
- **Prolongation cost - additional expenses incurred for plant and equipment at site on account of the extended construction period - Concessionaire produced a list of plant and machinery that was required to be maintained and had computed the compensation on the basis of the rates for such plant and machinery as stipulated in the Standard Data Book of the Ministry of Road Transport and Highways and had further reduced the said rate by 40% to arrive at an hourly dry rate - the arbitral tribunal reduced the compensation by restricting the cost of plant and equipment to 20% of the cost of project and computing the per day cost of the plant and equipment in proportion to the period of delay - the reduction was justified, since the Concessionaire was required to maintain the plant and machinery on site for a period of thirty months, the proportionate cost (on the basis that plant and machinery was 20% of the cost of Project) for a period of eight months along with further reduction by 15% as an allowance for possible mitigation for such losses.**

[National Highways Authority of India v. D.S. Toll Road Private Ltd. - Delhi High Court - Decided on 9.1.2024]



- **Claim for reimbursement of Countervailing Duty (CVD) - whether reimbursement of CVD valid for imported line pipes is not valid for reimbursement of excise duty not directly paid by the Contractor to the tax authorities - Contractor's CVD reimbursement concession was a singular exception applicable solely to line pipe imports, disentitling the Contractor to any excise duty reimbursement.**
- **Interpretation of contract - construction of a document - not permissible for the arbitral tribunal to infer an ambiguity in a contractual provision based on background correspondence, and then resort to an interpretative exercise to resolve an ambiguity even though the contractual provision is unambiguous.**

*[JSIW Infrastructure Pvt. Ltd. v. ONGC Ltd. - Delhi High Court -
Decided on 20.12.2023]*



**National Highways Authority of India v. D.S. Toll Road Private Ltd. - Delhi High Court
- Decided on 9.1.2024**

The Concessionaire was awarded the work for 'Design, Construction, Development, Finance, Operation and Management of Km. 375.275 (start of proposed flyover at Dindigul Bypass) to Km. 426.6 (Samayanallore) on NH-7 in the State of Tamil Nadu on build, operate and transfer (BOT) basis'. The Concessionaire was required to complete the work within a period of thirty months from the date of the Notice to Proceed and the concession period was agreed as twenty years from the Appointed Date. The project got delayed and the Provisional Completion Certificate was issued after a delay of almost eight months. According to the Concessionaire, the delay was on account of failure of the Employer to provide the site free from encumbrances or hindrances within the time stipulated under the Concession Agreement. The disputes between the parties were referred to arbitration. The arbitral tribunal upheld the claims of the Concessionaire for the delay in handing over of existing Right of Way (ROW), handing over of additional ROW for four laning, handing over of additional ROW for service road construction, trees and utilities in the additional land required for four laning etc. The arbitral tribunal held that the compensation payable to the Concessionaire could not be limited to the amounts stipulated in the concession agreement providing for compensation at the rate of Rs. 1000 per month per thousand square meters for failure on the part of the Employer to make available the existing ROW. The Court concluded that the compensation payable to the Concessionaire for inordinate delay was not confined to stipulated amounts in the concession agreement. The stipulated compensation of Rs. 1000 per month per thousand square meters was not applicable in cases where the provisional Completion Certificate and the Commercial Operation Date was affected or delayed for want of completion of the work on the affected land. The Court upheld the arbitral award in favour of the Concessionaire. 2

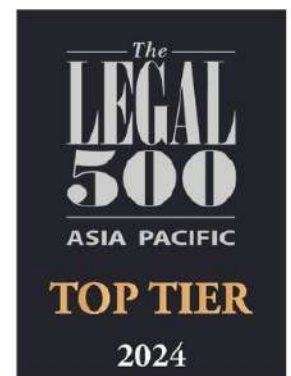
The Employer awarded to the Contractor the contract for 'two pipeline replacement project for Ankleshwar Asset'. Disputes between the parties arose with respect to Contractor's claim for reimbursement of excise duty in terms of clause 3.4.1.5 of the General Conditions of Contract (GCC). The Contractor had highlighted the difficulty in procuring line pipes domestically, and informed the Employer that it would probably have to import line pipes required for the project instead of purchasing them from domestic supplier. The Contractor also highlighted that on import of materials, Countervailing Duty (CVD) will be imposed in lieu of excise duty at the same rate of excise duty. The Contractor requested the Employer that for import of line pipes, the CVD, as would be payable by the Contractor should be reimbursed to it instead of excise duty. The Employer rejected the Contractor's request initially but subsequently accepted it resulting in amendments to the contract. The amended contract in clause 3.4.1.5 of the GCC provided that "only for line pipes, company shall reimburse the Excise Duty paid by the manufacturer to the Tax Authorities and invoiced to the Contractor, at actual, in Indian rupees against documentary evidence subject to the maximum of the amount of Excise Duty indicated in the Contract Price Schedule". The Contractor, however, procured the line pipes domestically and submitted the tax invoices claiming reimbursement of excise duty. The Employer returned the invoices endorsing "to submit proof of excise duty paid" by the Contractor. The Contractor took the plea that the requirement to pay excise duty directly to the tax authorities by the Contractor is not applicable in case of line pipes and the claim for reimbursement of excise duty on line pipes ought to be allowed. The Employer's stand was that clause 3.4.1.5 of the GCC was only valid for imported line pipes for the purpose of reimbursement of CVD and was not valid for reimbursement of excise duty not directly paid by the Contractor to the tax authorities. The dispute between the parties were referred to the arbitral tribunal. The arbitral tribunal concluded that the Contractor's CVD reimbursement concession was a singular exception applicable solely to line pipe imports, disentitling the Contractor to any excise duty reimbursement. The Court set aside the award and observed that it was not permissible to infer an ambiguity in a contractual provision based on background correspondence, and then resort to an interpretative exercise to resolve an ambiguity even though the contractual provision is unambiguous.



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