

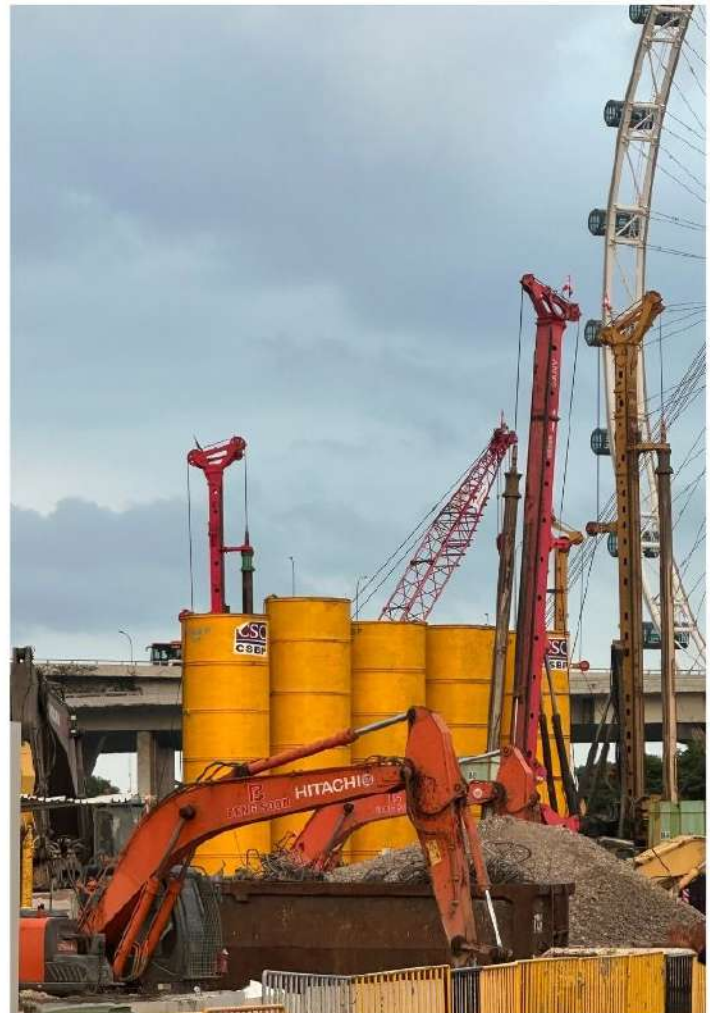
Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Early completion bonus and annuity - Concession Agreement provided for payment of first annuity in case the completion is prior to the scheduled completion date - where the terms of a contract are capable of more than one interpretation, the Court cannot interfere with the award simply because the Court is of the opinion that another interpretation would have been a better one.**
- **Claim for additional annuity of 260 days - computations based on the Commercial Operation Date (COD) and first annuity payment date which was six months after scheduled project completion date - conjoint reading of clauses of the Concession Agreement showed that the obligation of the Employer to pay annuity would arise subject to and only upon occurrence of COD and that the first annuity payment will be the product of average daily annuity and the number of days between the COD and the first annuity payment date.**
- **Loss due to demonetisation - suspension of collection of tolls - change in law - expression 'change in law' denotes such change in law can be occasioned by a notification having the force of law.**
- **Calculation of revenue loss - historical figures could be used as a basis for estimating ad hoc payments - Monthly Fee Statement can be relied upon - arbitral tribunal is entitled to adopt a reasonable method of computation - the adoption and application of a formula by an arbitrator is a pure question of fact.**

[Reengus Sikar Expressway Ltd. v. National Highways Authority of India - Delhi High Court - Decided on 20.12.2023]



- “Material adverse effect” - meaning - material adverse effect of any act or event on the ability of either party to perform any of its obligations in accordance with the Concession Agreement - Concessionaire was prevented from collecting toll / user fee on account of circumstances beyond its control - suspension of collection of toll fee, put in place as a consequence of the directives issued by the Employer, amounted to a breach of Employer's obligations as envisaged in the Concession Agreement - resulted in “material adverse effects” on the ability of the Concessionaire to avail its exclusive right and privilege to collect toll fee, guaranteed and secured by the contract.

*[National Highways Authority of India v. GVK Expressway Pvt. Ltd. - Delhi High Court -
Decided on 11.12.2023]*



**Reengus Sikar Expressway Ltd. v. National Highways Authority of India -
Delhi High Court - Decided on 20.12.2023**

The parties entered into a Concession Agreement for construction, laning, design, built, finance, operate and transfer of Reengus Sikar Highway. Disputes arose between the parties including a claim for bonus which were referred to arbitration. The arbitral tribunal held that the Concessionaire was entitled to payment of annuity. The arbitral tribunal concluded that there was delay on the part of the Employer including delay in fixing the appointed date; delay in receipt of Stage-II forest clearance for tree cutting resulting in delay in handing over hindrance free work site in existing Right of Way; delay in handing over hindrance free work site for bypass; and delay in issuance and deliberate deferment of effective date of provisional certificate. According to the arbitral tribunal the Concessionaire was entitled to full bonus amount of one annuity since it had completed the work six months prior to the date of scheduled completion. The Concessionaire contended that while bonus was the incentive for achieving early completion of the project, annuity was the consideration in lieu of the construction and operation and maintenance of the Project. Article 27.2.2 of the Agreement contemplated a proportionate increase in the first annuity payment to compensate for the increase in the maintenance obligation, not to disincentivise the Concessionaire from obtaining early completion. The Division Bench of the High Court set aside the judgment of the single Judge and concluded that the Concessionaire was entitled to payment of annuity for a period of 260 days from the Commercial Operation Date to the date of scheduled completion and such annuity is to be treated as first annuity payment.

**National Highways Authority of India v. GVK Expressway Pvt. Ltd. - Delhi
High Court - Decided on 11.12.2023**

The parties entered into a Concession Agreement for execution of the work of widening of the Project Highway on build, operate and transfer (BOT) basis. The Concessionaire commenced levying and collecting toll fee from users of the Project Highway. The Department of Economic Affairs in the Ministry of Finance issued notification declaring that bank notes of denomination of Rs. 500 and Rs. 1000 would cease to be legal tender. The Ministry of Road Transport and Highways (MoRTH) wrote to the Employer, conveying the decision that toll collectors at toll plazas and highways would be permitted to accept notes of Rs. 500 and Rs. 1000 denominations. This was immediately followed by a second communication from the MoRTH to the Employer, conveying the decision of the Government to completely suspend collection of toll fee at toll booths. The Employer informed the Concessionaire that ad hoc payment of compensation to the Concessionaire as a result of the said decision was being worked out. Suspension of collection of tolls was, thereafter, successively extended by the MoRTH. The Concessionaire claimed compensation for the loss suffered owing to suspension of collection of toll. The disputes between the parties were referred to arbitration. The arbitral tribunal concluded that the expression "change in law" denoted that such change in law could be occasioned, inter alia, by a notification having the force of law. The existing law with respect to the said bank notes constituting the legal tender, therefore, stood modified to that extent by the notification. The Concessionaire was entitled to compensation for loss incurred due to suspension of toll collection along with interest. The Court upheld the award and observed that the arbitral tribunal is entitled to adopt a reasonable method of computation. The adoption and application of a formula by an arbitrator is a pure question of fact. The computation of the compensation on the basis of the traffic figures and the toll collected during a given month could not be faulted, as there was no other way to estimate the traffic flow during the period for which toll collection remained suspended.



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Successfully handled construction arbitrations relating to DBFOT projects, EPC Contracts and FIDIC based contracts in infrastructure projects.