C.A.N

Construction Arbitration

Newsletter

ANNUAL PUBLICATION

2024 - 2025

RAUTRAY

ADVOCATES & SOLICITORS

New Delhi . India mail@rautray.com



Ginny Jetley Rautray
Managing Partner
Rautray & Co.
Law Firm

Dear Readers,

Rautray & Company (Law Firm) is delighted to bring to you the latest news and updates in the construction industry through this Annual Publication of the Construction Arbitration Newsletter (C.A.N). The bi-monthly publication of C.A.N has been compiled into an extremely convenient and user friendly publication for the benefit of our readers and clients and for those who have keen interest in understanding contractual rights, principles of construction law, infrastructure disputes and law of arbitration relating to construction disputes.

Construction arbitration plays a crucial role in resolving disputes in the construction industry. It provides an alternative to litigation, which can be lengthy and costly. Arbitration allows parties to resolve their disputes efficiently and effectively with the help of a neutral third party.

The construction industry is constantly evolving, and staying up-to-date with the latest legal trends and developments is crucial to succeed in this field. In this publication, we aim to provide you with relevant and timely information that can help you make informed decisions and stay ahead of the curve. Whether you are a construction professional, a project manager, construction arbitration lawyer, or someone with an interest in the industry, there is something for everyone in this publication.

As you read through the newsletters published bi-monthly, I urge you to keep an open mind and consider the different perspectives and experiences presented by the author(s).

I hope that the information and insights presented in this publication will enhance your understanding of construction arbitration and its role in the construction industry.

We value your feedback and suggestions, and we encourage you to share your thoughts with us. Our goal is to provide you with a newsletter that is informative, engaging, and relevant to your needs.

Thank you for your continued support, and we look forward to bringing you more updates and insights in the future.



Ginny Jetley Rautray
Managing Partner

ABOUT RAUTRAY & COMPANY

Rautray & Co. is a full-service law firm having its offices in New Delhi, Gurgaon and Bhubaneswar. The firm specialises in international commercial arbitration, construction and infrastructure arbitration, commercial litigation, international trade, employment law, taxation, and administrative law. It is ranked as Tier-1 law firm in Dispute Resolution by Asia Pacific Legal 500.

The partners of the firm are senior professionals with years of experience in their respective specialised areas of practice. We often advise international law firms on Indian laws and jurisdictional issues in matters before foreign courts and arbitral tribunals.

The firm is dedicated to provide clients with sound legal advice and strategize matters to protect their interest. The firm has a strong reputation in successfully handling construction and infrastructure dispute arbitrations and international commercial arbitrations and litigation.

We bring the highest level of professional service to our clients along with the traditions of the profession, integrity and sound ethical practices. The partners are also conversant with international practice and law. Partners of the firm are accessible and highly responsive to clients' urgency and are available to provide advice whenever the need arises.

At our law firm, the partners personally take the time to understand clients' need and objectives and provide personalised attention at all times from start till the end of the engagement. We are proud to be recognised as a law firm which provides sound strategy and trusted advisor to our clients.

Members of the firm are active in myriad international law forums including the International Bar Association, Inter-Pacific Bar Association, ICCA and the UIA.

RECENT HIGH VALUE ARBITRATION AWARDS WON

- Acted on behalf of Indo-Canadian JV and succeeded in getting an arbitration award for US$ 450 million / INR 3,600 crores. The dispute related to construction of National Highwayproject on DBFOT basis.
- Acted on behalf of an Indian Company and succeeded in getting an arbitration award for US$ 110 million / INR 918 crores. The dispute related to construction of National Highway project on DBFOT basis.
- Successfully represented an Indian Company in enforcement of an arbitral award for INR 120 crores against Dedicated Freight Corridor Corporation Limited for construction of 54 Railway bridges.
- Acted as lead counsel and succeeded in getting an arbitration award for a Malaysian company in excess of US$ 135 million. The dispute related to construction of four laning of National Highway under DBFOT basis.
- Acted as lead counsel and succeeded in getting an arbitration award for US$ 45 million / INR 360 crores. The dispute related to an EPC contract for construction of Chambal Bridge.
- Acted as lead counsel and succeeded in getting an arbitration award for US$ 150 million for a Korean company in an arbitration under SIAC Rules in Singapore in relation to construction of a National Highway.
- Acted as lead counsel and succeeded in getting an arbitration award for US$ 90 million / INR 600 crores. The dispute related to construction of four laning of a State Highway under DBFOT basis.

TESTIMONIALS

- **Tier – 1, Law Firm Rautray & Co. in Dispute Resolution in NCR Delhi.**

[Asia Pacific Legal 500 – 2023, 2024 & 2025]

- **Dharmendra Rautray "Leading Individual" in Dispute Resolution.**

[Asia Pacific Legal 500 – 2022, 2023 & 2024]

- **"[Rautray] has a vast knowledge of Indian law, studies the documentation in detail and is well placed to give sound advice. His strategy in approaching a dispute is one of his strengths."**

[Chambers Asia 2018]

- **Dharmendra Rautray, ranked in Chambers Asia – Pacific (2022) for Dispute Resolution.**

[Chambers Asia 2022]

- **"They are very professional in their dealings and more importantly, very efficient. Satish K. Gupta and Ms. Ginny Rautray are extremely sharp, intuitive and highly competent professionals."**

[CEO, Neo BioMed Services]

- **"[Dharmendra Rautray] Recommended for Construction arbitration work."**

[Asia Pacific Legal 500]

- **"My personal experience with Rautray & Co. (Law Firm) is that the entire team including Ms. Ginny Rautray & Satish Gupta, Advocates handled my matter in the Delhi High Court with utmost dedication, sincerity and efficiency...I express my sincere appreciation for the hard work they had put in the matter."**

[Corporate Advisor (Regulatory Affairs) Abbott India Ltd.]

- **"The 'organised and very responsive' Dharmendra Rautray has 'extensive experience in handling international commercial arbitrations'."**

[Asia Pacific Legal 500 - 2013]

- **"Dharmendra Rautray wins plaudits for his 'thorough knowledge of contractual disputes'."**

[Chambers Asia-Pacific (2017) – Dispute Resolution Section]

- **"Dharmendra Rautray listed as "Experts" by Expert Guides in the category of Commercial Arbitration.**

[Guide to the World Leading Experts in Commercial Arbitration – 2016]

- **Dharmendra Rautray is 'very experienced, bright and commercial,' in addition to being 'great fun to work with.'…."**

[Asia Pacific Legal 500 – 2015]

- **"Mr Rautray argued before the Constitutional Bench of the Supreme Court in Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services Inc. [arbitration law]. He was the only law firm partner to make oral submissions before the Constitution Bench."**

[Asia Pacific Legal 500]

AUTHORS

GINNY JETLEY RAUTRAY

LL.B., Campus Law Centre, University of Delhi
BSc. (Chemistry), Hindu College, University of Delhi
Year of Enrolment: 1995

- Successfully handled and acted as lead counsel for a Swiss Construction and Engineering Company in an arbitration proceeding relating to construction of Metro Rail Project including disputes pertaining to Central Sales Tax and Excise duty.
- Representing a Government Institution in an arbitration proceeding with respect disputes arising out of civil work for the Kolkata campus building.
- Represented an Indian construction company in an arbitration proceeding relating to construction of District Court Building Complex, New Delhi.
- Represented a Government Construction Corporation in an arbitration proceeding relating to disputes arising from a contract for construction of the NDMC City Centre, Parliament Street, New Delhi.
- Successfully handled and acted as lead counsel in an arbitration proceeding relating to dispute arising out of a Concession Agreement for construction, operation and maintenance of a four lane National Highway in the State of Gujarat.
- Successfully handled and acted as lead counsel for an Indian Company in an arbitration proceeding relating to disputes arising out of a contract for construction of Terminal Building and allied works for the Bhubaneswar Airport.
- Represented an Indian Company in an LCIA arbitration proceeding relating to disputes arising out of a contract for shipment of iron ore from Hong Kong.
- Represented an Indian construction company in a dispute arising of a contract for construction of the Vashi Railway Station in Mumbai.
- Represented a US based company in a proceeding before the New York City Court for recording of evidence from an Indian witness pursuant to the execution of a Letter of Rogatory issued under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents and Taking of Evidence Abroad in Civil or Commercial matters.
- Represented an Indian construction company in a dispute arising out of a contract for construction of the Vidhan Sabha building in the State of Uttarakhand.
- Represented a Swiss Construction and Engineering Company in a dispute before an Adjudicator relating to construction of a power plant.
- Advised an Indian construction company during the construction period on disputes and matters arising out of construction of the Mohali Cricket Stadium.
- Representing a Hong Kong based multinational company in enforcement and execution of arbitral award before the Delhi High Court.
- Advised a Chinese EPC Contractor involved in the construction of a Captive Power Plant (CPP) project in a dispute relating to the levy of Entry Tax by the State Government before the Supreme Court of India.
- Representing an Indian construction company in a proceeding challenging the arbitral award pertaining to installation and construction of RE wall panels in a road construction project.
- Advised an Indian construction company in proceeding arising out of collapse of a bridge in the Union Territory of Daman and its reconstruction.
- Represented an EPC Contractor in proceedings arising out of disputes relating to construction of residential building for the accommodation of military personnel.
- Represented a Government Undertaking in an enforcement proceeding of an arbitral award relating to construction of the Salarjung Museum, Hyderabad.
- Representing an EPC Contractor in two arbitration proceedings relating to dispute arising from contracts for mechanical works for ECU in a Government owned Petrochemical company.
- Represented a Swiss Engineering Company in a dispute against a Government owned Oil company with respect to SCADA works in the drilling rigs and oil exploration sites across the country.
- Represented an EPC Contractor in several disputes relating to construction of multiple housing societies in New Delhi.

DHARMENDRA RAUTRAY

Barrister-at-Law, Lincoln's Inn (London)
LL.M, London School of Economics
Author: "Principles of law of Arbitration in India" published by Wolters Kluwer (2018)
Year of Enrolment: 1995

- Handling and acting as lead Counsel for a Canadian JV – Indian Joint Venture Company in three arbitrations proceedings relating to construction of National Highway on DBFOT basis with claims over US$ 2 Billion and US$ 150 million. Succeeded in getting an award for Rs. 3,600 crores and Rs. 918 crores.
- Successfully represented a major Turkish construction company in an adjudication proceedings in Singapore, relating to construction of a Metro Rail Project.
- Represented a major Korean Construction and Engineering company in a dispute relating to construction of National Highway. The arbitration proceeding was in Singapore governed by SIAC Rules with the claim amount exceeding US$ 150 million.
- Advised two major Indian construction and engineering companies in tunneling, four laning of road and bridge construction Projects in the states of Bihar, Karnataka and the State of Jammu and Kashmir.
- Successfully handled and acted as the lead Counsel for an Indian Company in an arbitration proceeding relating to construction of a State Highway in Uttar Pradesh before a three member arbitral tribunal comprising of retired Supreme Court Judges and a High Court judge.
- Presently handling and acting as lead Counsel for an Indian Company in an arbitration proceeding before a three member arbitral tribunal comprising of former Chief Justice of India relating to construction of National Highway in the State of Karnataka with a claim over US$ 500 million.
- Successfully handled and acted as lead counsel in two arbitrations on behalf of an Indian JV Company relating to the construction of four laning of National Highway in the State of Gujarat. Amount awarded in one of the matters was in excess of US$ 134 Million along with future interest.
- Successfully handled and acted as lead counsel in a National Highway construction dispute arbitration where over US$ 45 Million plus interest was awarded in favour of the client. The disputes arose out of an EPC contract for construction of Chambal Bridge in the State of Rajasthan / Madhya Pradesh.
- Successfully handled and acted as lead counsel for an Indian company against National Highways Authority of India in the construction of National Highway (on BOT annuity basis) in the State of Andhra Pradesh.
- Represented an Indian Company in a London seated arbitration under the UNCITRAL Rules in a commercial shipping dispute between the Indian company and a Hong Kong based company.
- Lead counsel before the Constitution Bench of the Supreme Court in Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Service Inc. (2012) 9 SCC 552.
- Successfully handled arbitration proceedings on behalf of an Indian Company against NTPC (a Public Sector Undertaking) in the construction of raw water reservoir and its lining package with a claim exceeding US$ 14 million.
- Represented a subsidiary of a Malaysian Company in the construction of four laning of Ghaziabad - Aligarh section in the State of Uttar Pradesh in a BOT project tendered by the National Highway Authority of India.
- Represented a Malaysian Company, in an arbitration against an Indian company for construction of road in the State of Uttar Pradesh on BOQ basis. The claim amount exceeded US$ 40 Million.
- Represented a Malaysian company in an ad hoc arbitration proceeding against the State Government undertaking in relation to construction of district roads.
- Successfully represented an Indian Company in enforcement of an arbitral award for US$ 18 Million against Dedicated Freight Corridor Corporation Limited (DFCC) for construction of 54 bridges in the State of Gujarat. The arbitral Award was upheld by the Supreme Court of India.
- Successfully represented an Indian company in arbitration proceedings under the ICA Rules against Indian Oil Corporation for construction of Diesel Hydro Treatment Plant (DHDT).
- Successfully represented a US Company in the enforcement of a foreign award rendered under the AAA Rules against an Indian company.
- Successfully handled arbitration on behalf of the Hong Kong based multinational company before a three member arbitral tribunal in relation to disputes arising from contracts awarded for the Commonwealth Games, 2010 Delhi.
- Represented an Indian construction company in several arbitration proceedings relating to disputes arising out of construction of irrigation dams in the State of Odisha.

CONTENTS

Page

Issue 49 C.A.N April 2024
Construction Arbitration
Newsletter 1

Issue 50 C.A.N April 2024
Construction Arbitration
Newsletter 5

Issue 51 C.A.N May 2024
Construction Arbitration
Newsletter 8

Issue 52 C.A.N May 2024
Construction Arbitration
Newsletter 11

Issue 53 C.A.N June 2024
Construction Arbitration
Newsletter 14

Issue 54 C.A.N June 2024
Construction Arbitration
Newsletter 17

Page

Issue 55 C.A.N July 2024
Construction Arbitration
Newsletter 20

Issue 56 C.A.N July 2024
Construction Arbitration
Newsletter 23

Issue 57 C.A.N August 2024
Construction Arbitration
Newsletter 27

Issue 58 C.A.N August 2024
Construction Arbitration
Newsletter 30

Issue 59 C.A.N September 2024
Construction Arbitration
Newsletter 34

Issue 60 C.A.N September 2024
Construction Arbitration
Newsletter 38

Issue 61 C.A.N October 2024
Construction Arbitration
Newsletter 42

Page

Issue 62 C.A.N October 2024
Construction Arbitration
Newsletter 45

Issue 63 C.A.N November 2024
Construction Arbitration
Newsletter 49

Issue 64 C.A.N November 2024
Construction Arbitration
Newsletter 52

Issue 65 C.A.N December 2024
Construction Arbitration
Newsletter 56

Issue 66 C.A.N December 2024
Construction Arbitration
Newsletter 59

Issue 67 C.A.N January 2025
Construction Arbitration
Newsletter 62

Issue 68 C.A.N January 2025
Construction Arbitration
Newsletter 65

Page

Issue 69 C.A.N February 2025
Construction Arbitration
Newsletter 68

Issue 70 C.A.N February 2025
Construction Arbitration
Newsletter 71

Issue 71 C.A.N March 2025
Construction Arbitration
Newsletter 74

Issue 72 C.A.N March 2025
Construction Arbitration
Newsletter 77

Issue 49

C.A.N

April 2024

Construction Arbitration

Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Failure to handover hindrance free site for construction - fundamental or repudiatory breach of contract - reciprocal obligations - Contractor was obliged to commence the pre-construction activities including the survey of the work site, investigation, soil testing etc. before the commencement of the construction works - Employer was obliged to deliver and handover hindrance-free land at the proposed work site to the Contractor to enable smooth progress of construction activities and completion of the same within the period stipulated in the agreement - to determine a fundamental breach of contract or repudiatory breach of contract, one has to look at the situation as to whether the party in breach has produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made and the scope of inquiry would be to ask not only what had already happened but also what was likely to happen in future and the fact that the breach was deliberate may be of great importance.**



- **No damage clause - contract providing no claim for delay in giving the possession of the work site to the Contractor for execution of the work or delay in obtaining necessary permissions - contract provided that no claim for compensation for loss suffered by the Contractor inter alia, on account of delay by or on behalf of the Government in the possession of the worksite will be allowed where such failure is due to legal formalities or circumstances beyond the control of the State Government - award of damages by the arbitral tribunal on account of delay is not tenable in law - arbitral tribunal cannot act contrary to the stipulation in the contract.**

- **Claim for loss of profit - there can be no material application of Hudson's formula in the matter of award on account of loss of profit without the aggrieved party leading any evidence as a condition precedent for application of the said formula.**

[Executive Engineer, Water Ways Division v. Modi Project Ltd. - Jharkhand High Court - Decided on 8.1.2024]



- **Claim for escalation due to prolongation of work - Extension of Time (EOT) approved with a condition that extension was without price escalation and without compensation - post facto EOT granted by the Employer i.e. after the completion of work - Contractor was not aware of the condition that he would not be entitled to price escalation before completion of work, which included execution of extra and additional work - all conditions of EOT ought to have been brought to the notice of the Contractor before the completion of the work so as to afford to him an opportunity to choose as to whether he would avail any benefit out of the contract.**

- **Price Adjustment - increase and decrease in the rate of labour and materials except those materials supplied by the Employer - clause in the contract provided that price adjustment clause shall be applicable only for the work that is carried out within the stipulated time or extension thereof as are not attributable to the Contractor and that no claims for price adjustment other than those provided shall be entertained - extra time of three months for blasting of rocks occurred due to non-supply of stock materials - Contractor entitled to price escalation.**

[Dhiren Kumar Singh v. State of Odisha - Orissa High Court - Decided on 10.11.2023]



Executive Engineer, Water Ways Division v. Modi Project Ltd. - Jharkhand High Court - Decided on 8.1.2024

The Contractor was awarded the work for the construction of the Jharjhara Reservoir Project in the district of West Singhbhum on turnkey basis. The work awarded to the Contractor comprised of three main components namely, construction of an Earthen Dam effecting creation of a Reservoir, construction of two new canal systems, namely the left Main Canal system and the Link Canal system and renovation of the old Brahmani Canal system. The Contractor contended that the land that was required for the execution of the work was either not acquired or not possessed by the Employer. It could not construct its site office at the head work site, nor could do a separate survey of its work (Dam and appurtenant works of the main canal) on account of heavy public objections and resistance by the land owners/occupiers in the reservoir area. The Contractor could not execute more than 10% of the work in the next six months period. The Employer asked the Contractor to return the total amount of mobilization advance. The Employer took the stand that the tender was invited after acquiring more than two-third of land required for the work and as per the Notice Inviting Tender (NIT), the tenderers were advised to visit the work site of the scheme to study the details and conditions of work, examine the project details etc. The Contractor was aware that some portion of the project work was under acquisition and therefore,, the Contractor was not justified in demanding the entire work site. The Contractor referred the disputes to arbitration. The arbitral tribunal held that Employer was responsible for handing over hindrance free land at the sites as a condition precedent, which it failed to. The Court observed that the finding of the arbitral tribunal that the Employer had committed a fundamental breach of contract is perverse on account of non-consideration of material clauses of the contract. The arbitral tribunal while allowing the claims of the Contractor had ignored the clauses of the Notice Inviting Tender (NIT) which expressly provided that survey / investigation was to be made by the tenderer; no claim for idle labour, men and machinery would be entertained for any reason whatsoever; required facilities were to be established at the work site before execution of work and the tenderer was to plan his construction work programme in accordance with the departmental programme for the transfer of land through acquisition or inter departmental land transfer. Accordingly, the Court set aside the arbitral award.



Dhiren Kumar Singh v. State of Odisha - Orissa High Court - Decided on 10.11.2023

The Contractor was awarded the work for "Restoration and completion of balance work of T.M.C. from RD 68.040 km to 79.815 km under Potteru Irrigation Project, Package No-6". But, due to certain hindrances and departmental laches, the work could not be completed within the stipulated time. The completion of work took 46 months instead of 10 months. The final deviation was approved on the basis of measurement against the works executed by the Contractor after 8 years. The disputes between the parties were referred to arbitration. Both parties challenged the arbitral award since both were aggrieved. The arbitral tribunal held that due to requirement of execution of extra and additional work, excess deviation of more than 71% was approved. Extension of time as well as approval of final deviation was both after completion of the work. No penalty or damages was imposed. Therefore, the Contractor was entitled to price escalation. The Court upheld the Contractor's claim for price escalation.



Issue 50

C.A.N

April 2024

Construction Arbitration

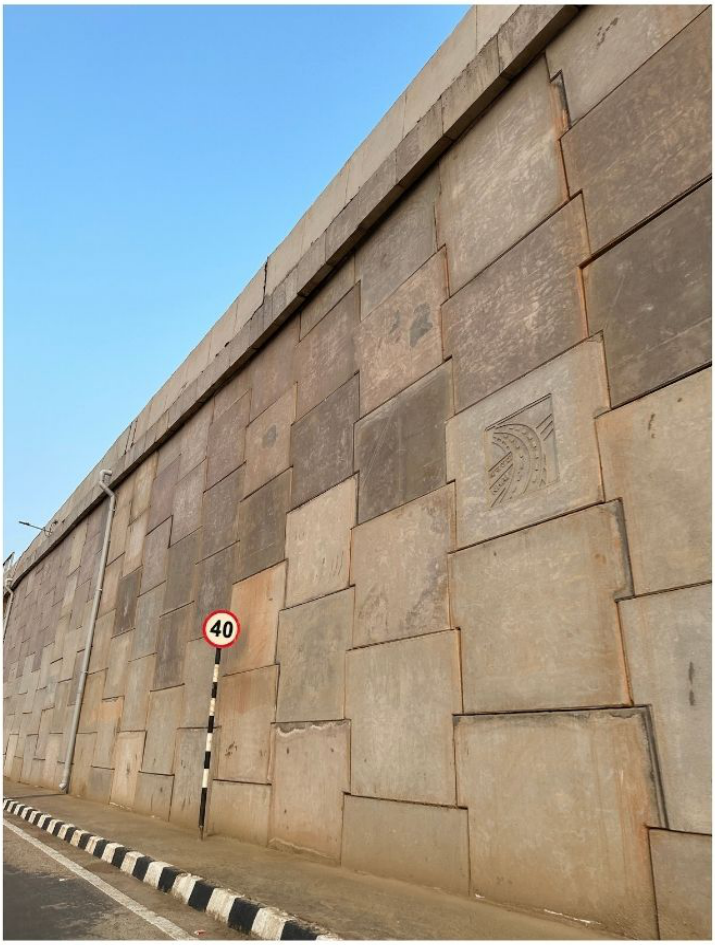
Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

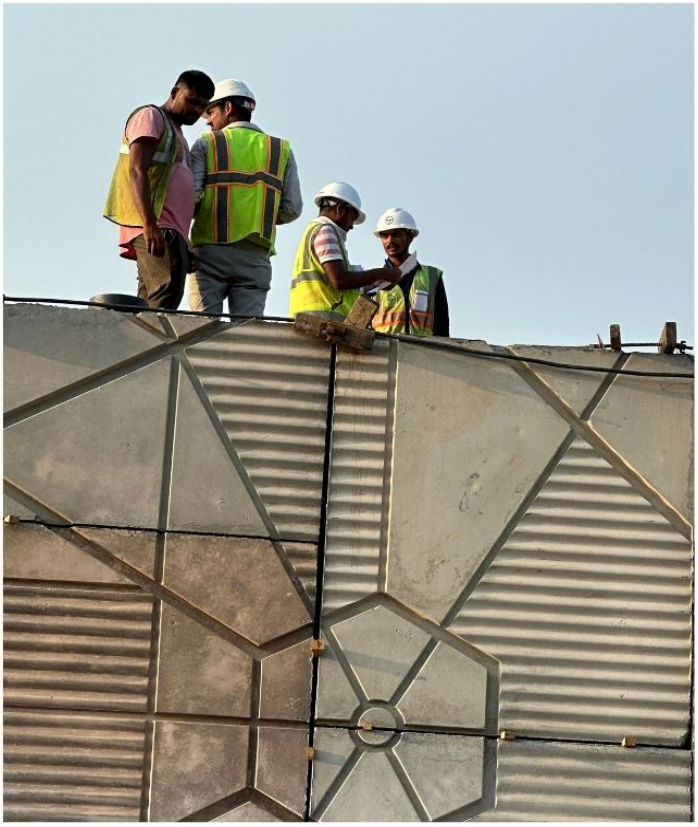
- **Grant of Provisional Extension of Time (EOT) - permissibility under the contract - Engineer-in-Charge empowered to determine a fair and reasonable extension even if the Contractor does not apply for EOT within a period of 14 days and to declare that the Contractor is not eligible for consideration for EOT, after ensuring that such declaration would be fair and reasonable - EOT on provisional basis could not have been granted under the terms of the agreement.**

[Municipal Corporation of Delhi v. IJM Corporation Berhad - Delhi High Court - Decided on 8.5.2024]



- **Foreclosure of contract - claim for compensation for expenditure incurred towards 'mobilization etc.' - whether the inclusion of financial costs i.e. maintenance of bank guarantees, maintenance of insurance policies and interest liability on advances and portion of the corporate expenses, could be included as expenditure towards 'mobilization etc.' - expenditure towards mobilization would include all expenditure incurred for raising resources for execution of work at the site - it is not confined to expenditure incurred on manpower and equipment, and for the preparation of the site.**

[Jaiprakash Associates Limited v. Ircon International Limited - Delhi High Court - Decided on 1.5.2024]





Municipal Corporation of Delhi v. IJM Corporation Berhad - Delhi High Court - Decided on 8.5.2024

The Contractor was awarded the work for construction of a Civic Centre at New Delhi. The execution of the project was delayed and the Employer granted several extensions of time to complete the project terming the same as "provisional" while reserving the right to impose liquidated damages. The Employer, upon completion, claimed liquidated damages on account of delay in the execution of the work. The disputes between the parties were referred to arbitration. One of the disputes between the parties involved the question whether the grant of provisional extension of time for completion of the contract was in conformity with the terms of the agreement between the parties. The arbitral tribunal held that in terms of the agreement, the Employer did not have an option to issue "provisional" extension of time to complete the work. It could either give a fair and reasonable extension of time to complete the works or declare that the Contractor would not be eligible for consideration for EOT in terms of Clause 5.3 of the Agreement. The Court upheld the partial award of the arbitral tribunal and concluded that the arbitral tribunal's interpretation of terms of the agreement cannot be made a subject matter of judicial review.



Jaiprakash Associates Limited v. Ircon International Limited - Delhi High Court - Decided on 1.5.2024

The Employer awarded to the Contractor, the work for "construction of civil works including tunnels, bridges, earthwork etc. in Zone III (KM 134 to KM 142) of Laole Qazigund Section of Udhampur-Srinagar-Baramulla New B.G. Railway Line Project". The contract was an Item Rate Contract entailing execution of different items of work required for completing the project at the agreed rates. The contract value as on the base date was Rs. 168.46 crores. The Employer granted mobilization advance to the Contractor in terms of the General Conditions of Contract ('GCC'). There was considerable delay in the progress of the works. The Contractor could only execute work worth Rs. 26.44 crores till the stipulated date of completion. The Employer issued a seven days prior notice under Clause 89 of the GCC, which entitled the Employer to terminate the agreement owing to the default of the Contractor. The Contractor set out detailed reasons for the slow progress and claimed that the execution of the project was planned on the basis of round-the-clock operation but neither the site nor the construction drawings were made available to match the Construction Programme. Further, the escalation formula provided in the agreement did not neutralize the increase in costs due to increase in price of various inputs such as cement, steel, High Speed Diesel oil and labour. The Employer proposed extension of time of twenty months on the existing terms and without levy of liquidated damages. The Contractor rejected the proposal of the Employer. The Employer terminated the contract on account of defaults on the part of the Contractor. Disputes between the parties were referred to arbitration. The arbitral tribunal concluded that the foreclosure of the contract was by mutual consent of the parties. The arbitral tribunal constituted a Joint Committee comprising of two members of the Contractor and two representatives of the Employer. The Joint Committee was required to verify the details of expenditure submitted by the Contractor and scrutinize the vouchers in support of the expenditure incurred by the Contractor. The report of Joint Committee was signed by all four members including the two representatives of the Employer. The arbitral tribunal determined the unrealized amount of expenditure by reducing the verified expenditure by a figure of amount realized, which also factored in the amount that the Contractor could have realized. The realized amount of expenditure was determined by increasing expenditure chargeable to the project by a factor of the work already done, over work which ought to have been done. The arbitral tribunal accepted the Contractor's claim for an additional 2.5% on account of corporate expenses. The arbitral tribunal included expenditure on account of maintenance of bank guarantees, maintenance of insurance policies and interest liability on advances as payable under the foreclosure / supplementary agreement. The Court concluded that expenditure towards mobilization would include all expenditure incurred for raising resources for execution of work at the site. It is not confined to expenditure incurred on manpower and equipment, and for preparation of the site alone. Further, the amount included on account of 10% profit was rightly rejected by the arbitral tribunal.

Issue 51 C.A.N May 2024
Construction Arbitration
Newsletter

RAUTRAY & CO.
Construction Arbitration Law Firm

- **Claim for idling of plants and machineries - invoices of purchase of plant & machinery should be produced - no evidence to show that the plant and machinery was available on site, which is a pre-requisite for any claim of idling - delay in execution of the work due to delay in giving possession of work sites and borrow area sites due to geological reasons and slope failures - contract clause providing that "price adjustment shall apply only for work carried out within the stipulated time or extension granted by the corporation and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor" - withholding of or freezing the indices is against the provision of the contract and the Employer committed a breach in freezing the indices.**

- **Validity of rates quoted at the time of bidding for any length of delay - grant of extension of time by the Employer - original contract period of 45 months extended due to delay of 63 months - Contractor entitled to revised rates and the rates quoted by the Contractor at the time of bidding is not valid for any length of time - Employer liable to compensate the Contractor.**

- **Revised rates in respect of quantities of work that were executed beyond the contract period - price escalation that has taken place thereafter by revising the base date to the date of the revised rates being made applicable after the contract period, also to be added - cost of materials, labour, etc., should be worked out on an accepted principle of rate analysis considering the input rates that were prevalent on the date which is the end of the contract period in respect of works carried out beyond the original contract period - rates based on the price indices prevailing as on the date which is the end of the contract period and the execution of the works will be subject to the price variations - same price variation formula would apply even in the extended period with the necessary change in the base date for the revised rates beyond the contract period - base prices and indices shall be as prevalent on the date which is the end of the contract period and not prior to the date of submission of the bid.**

[THDC India Ltd. v. PCL-Intertech Lenhydro Consortium JV - Delhi High Court - Decided on 24.4.2024]



- **Claim for refund of the unadjusted mobilisation advance by the Sub-Contractor - Principal Employer terminated the contract with the Contractor - the contract for executing balance works was awarded by the Principal Employer to the Sub-Contractor - mobilization advance is in the nature of an advance and is required to be repaid - resources raised by utilization of the mobilization advance were used by the Sub-Contractor in executing the works relating to the project - termination of the contract between the Contractor and the Sub-Contractor, even if wrongful by the Contractor, does not mean that the Sub-Contractor would not be liable to repay the mobilization advance to the Contractor.**

[NBCC (India) Limited v. Nangia Construction (I) Pvt. Ltd. - Delhi High Court - Decided on 16.4.2024]



THDC India Ltd. v. PCL-Intertech Lenhydro Consortium JV - Delhi High Court - Decided on 24.4.2024

The Contractor was awarded the contract for construction of "Civil Works of Dam, Spillway and Power House of 400 MW Koteshwar Hydro Electric Project at Koteshwar, Uttarakhand". The work envisaged under the contract could not be completed in the original contract period of 45 months. The completion period was extended twice by the Employer on the request of the Contractor. The Contractor was made to furnish two "no claim certificates" during the course of the contract. According to the Contractor the delay was caused by the Employer in approving constructions drawings and their frequent revisions; adverse geological conditions; slope failure and execution of increased quantities of excavation and slope stabilization works; conveying decisions and changes in concrete placement methodology; treatment of cracks in the foundation blocks of dam; obstruction by villagers, including strikes etc. The Contractor raised claim for losses suffered due to non-handing over of land; extra rates for slope stabilization; construction of diversion structure (upstream dyke); idling of plant and machinery, overheads; escalation; extra costs due to mobilization advance towards interests and bank guarantees etc. The Employer raised several counter claims against the Contractor. The Court upheld the arbitral award and the claims of the Contractor and concluded that the furnishing of the "No Claim Certificate" was a pre-condition imposed by the Employer for grant of EOT which was not contemplated under the contract. Further, the Court upheld the award of claim for revised rates of inputs materials and the rates for extra works based on actual rates analysis as on the date of execution of extra work. The claim for price escalation in the rates of cement and other materials by way of revision of rates for work executed after the expiration of original stipulated completion time was upheld since the rates quoted at the time of bidding cannot remain valid for any length of time. The price variation formula would apply even in the extended period with the necessary change in the base date for the revised rates beyond the contract period.

NBCC (India) Limited v. Nangia Construction (I) Pvt. Ltd. - Delhi High Court - Decided on 16.4.2024

The Contractor was awarded the work of 'widening of four lanes including strengthening of existing pavement of National Highway No. 1 from 50 km to 74.80 km (Murthal to Smalkha) in Haryana' by the Employer. The Contractor entered into a separate contract with the Sub-Contractor on a back-to-back basis with its agreement with the Principal Employer in the Principal Agreement. In terms of the contract, the entire work under the Principal Agreement was subcontracted to the Sub-Contractor at the value of the contract less 5%. Clause 3 of the Sub-Contract stated that "All the accepted tender terms and conditions of the Agreement as finally signed by the "Corporation" with the "Clients" are annexed herewith as Annexure-I and hereinafter called the "Agreement" shall form a part of this agreement and shall be binding on the Associate Contractor". The execution of the project was delayed for various reasons. In the arbitration between the Contractor and the Sub-Contractor, the Contractor's case was that the Sub-Contractor delayed the project due to the failure on the part of Sub-Contractor to maintain sufficient progress in execution of the project. The stand of the Contractor was in variance with the Contractor's stand in the arbitration between the Principal Employer and Contractor. The Contractor terminated the contract with the Sub-Contractor. The Principal Employer terminated the contract with the Contractor. The arbitral award in the arbitration between the Principal Employer and Contractor held that the progress of the work was slow, the Contractor had mis-utilized the mobilization advance; and thirdly, the Contractor had sublet the work to the Sub-Contractor in violation of Clauses 3 and 4 of the General Conditions of Contract as applicable to the Principal Agreement. In the arbitration between the Contractor and the Sub-Contractor, the Contractor sought to justify termination of the contract by claiming that the Sub-Contractor had failed to maintain sufficient progress in the execution of the project. The arbitral tribunal found that the Contractor was entitled to recover the balance mobilisation advance as it was in the nature of a loan and rejected the Sub-Contractor's claim that it was entitled to refund of the unadjusted mobilisation advance, on the ground that the Sub-Contractor had utilised the resources at site subsequently for execution of the balance project after the same was awarded by the Principal Employer. The Sub-Contractor took the stand that since the contract was terminated illegally, it was absolved of its liability to pay back the mobilization advance, which was admittedly fully utilized for raising resources at site. The Court upheld the conclusion in the arbitral award that the mobilization advance was in the nature of an advance and was thus, required to be repaid. Moreover, the resources raised by utilization of the mobilization advance were used by the Sub-Contractor in executing the works relating to the project.

Issue 52 C.A.N May 2024
Construction Arbitration
Newsletter

RAUTRAY & CO.
Construction Arbitration Law Firm

- **Liquidated damages - proof of loss or legal injury - delay in completion of project by the Contractor - extension of time (EOT) sought by the Contractor - Employer levied and recovered liquidated damages only at the time of processing the bills whilst allowing the Contractor to continue the work even after contractual completion date, without terminating the contract - Employer failed to prove the loss sustained and the loss incurred due to the delay in completion of the project work, by leading evidence - in order to avail the benefit of liquidated damages, the loss or legal injury must be proved, in a manner known to law - if there is a breach of contract which did not result in any loss or 'legal injury', compensation would not be payable.**

[Chennai Port Authority v. Srishila-GDCL JV - Madras High Court - Decided on 8.4.2024]



- **Authority of the Engineer to revise the Interim Payment Certificate ('IPC') once the final bill has been issued - under Clause 60.11 of Conditions of Particular Application ('COPA'), it is the Engineer and the Contractor who have to agree on the Draft Final Statement submitted by the Contractor and a Final Statement is to be issued which represents the value of work done in accordance with the contract - Engineer cannot make corrections and modifications in Final Statement agreed to between the Engineer and the Contractor under Sub-clause 60.11 since Sub-clause 60.9 of COPA is limited to IPCs alone - if the Employer has not challenged the Final Payment Certificate under Clause 2.6 of General Conditions of Contract ('GCC'), which could only be challenged in terms of Clause 67 of COPA, the certificate becomes absolute and final - Employer could have carried out verification of quantities executed at the stages when the IPCs were issued by the Engineer or even thereafter till they reached a finality through the acceptance of Final Statement, by both the Engineer and the Contractor.**



- **Steps necessary to be taken by the parties for raising the bills and for releasing the payments in accordance with the contract - Certification done by the Engineer in its monthly IPCs for all the items of Work executed by the Contractor was in accordance with the drawings approved by the Engineer and was quantified on the basis of actual measurements of the various components of works carried out at site - averment of the Employer that the Engineer was issuing Interim Payment Certificates on tentative basis based on quantities in the BOQ and that the Certification in the IPCs was done after simply deducting the amounts withheld under the Contract and there is no certification relating to work executed, is wrong.**

- **Application of 'Linking Factor' at the time of calculating Price Adjustment - indices used in Sub-Clause 70.3 of the GCC cannot be unilaterally modified and no linking factor can be applied - Policy Circular issued by the Employer with a new formula for determining indices by applying a 'linking factor', cannot be implemented since it is outside the agreed contractual terms.**

- **Final Payment Certificate - amount due under the Contract to be stated by the Engineer is only an 'opinion' of the Engineer - in the absence of the written discharge given by the Contractor, the Final Payment Certificate issued by the Engineer acquires no value - it is always open for the Engineer to revisit the same to find out any discrepancies or irregularities in the calculations leading to payments claimed by Contractor.**

- **Counter Claim barred by limitation - Engineer unilaterally sought to revise the Final Payment Certificate after a lapse of three years - starting point of limitation would be the date when the mistake is discovered - Employer failed to invoke provisions of Clause 67 of COPA in relation to Final Payment Certificate issued by the Engineer within limitation period under law - no right available to the Engineer or to the Employer to revise its Final Payment Certification upon the completion of the Contract, unilaterally.**

[National Highways Authority of India v. Ssangyong Engineering & Construction Co. Ltd. - Delhi High Court - Decided on 8.4.2024]



Chennai Port Authority v. Srishila-GDCL JV - Madras High Court - Decided on 8.4.2024

The Employer awarded the contract to the Contractor for construction of coastal berth at Chennai Port. There was delay in completion of the work and the Contractor had sought extension of time for completing the project work, on various occasions. The Employer had granted EOT only up to a certain period. The Employer at the time of processing the bills, levied liquidated damages and recovered the same. The arbitral tribunal concluded that the Employer was not justified in levying the liquidated damages. The arbitral tribunal also took the view that the Contractor was not entitled to claim loss incurred due to delay in completion of the work since it failed to bring into operation the project, even after a period of three years. The arbitral tribunal concluded that the Employer failed to prove the loss sustained and the loss incurred due to the delay in completion of the project work, by leading evidence. The Court held that the Employer failed to lead evidence and had not proved that the delays were attributable to the Contractor. The Employer also failed to prove that it incurred loss or suffered legal injury due to the delay in completion of the work.

National Highways Authority of India v. Ssangyong Engineering & Construction Co. Ltd. - Delhi High Court - Decided on 8.4.2024

The Contractor was awarded the work for construction of Sagar By-Pass between 211 kms to 255 kms of National Highway-26 in the State of Madhya Pradesh on EPC basis. After completion of the work by the Contractor, a Defect Liability Certificate was issued by the Engineer recommending payment against the Statement of Completion submitted by the Contractor. As per the agreement, the Contractor was required to submit a Draft Final Statement showing value of all the work done in accordance with the contract along with the amount which the Contractor considers is due to it, within a period of 56 days. Several disputes arose between the parties regarding the completion of work and payments, which were referred to arbitration. The Employer raised various grievances regarding completion of work subsequent to the issuance of the Defect Liability Certificate ('DLC'). The arbitral tribunal allowed the claim of the Contractor for balance payment under Engineer's certification based on agreed Final Statement and the counter claim of the Employer was rejected as being barred by limitation. The arbitral tribunal concluded that the certification issued by the Engineer was a Final Statement agreed between the Contractor and the Engineer under Sub-clause 60.11 of the Conditions of Particular Application ('COPA'). The arbitral tribunal rejected the Employer's contention that under Sub-clause 60.9 of COPA, the Engineer could make corrections and modifications in the Final Statement agreed to between the Engineer and the Contractor under Sub-clause 60.11. It concluded that Sub-clause 60.9 of COPA is limited to IPCs alone. In terms of Clause 60.11 of COPA, it is the Engineer and the Contractor who have to agree on the Draft Final Statement submitted by the Contractor and a Final Statement is to be issued which represents the value of work done in accordance with the contract. The arbitral tribunal also rejected the contention of the Contractor that since disputes existed between the parties, Final Statement could not be issued. The Court upheld the challenge to the award on the ground that the arbitral tribunal directed payment to the Contractor despite holding that the certificate was not a final payment certificate.



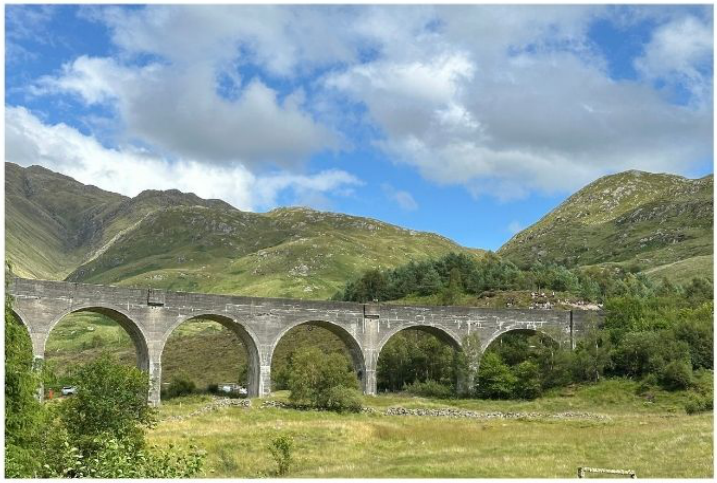
Issue 53 C.A.N June 2024
Construction Arbitration
Newsletter

RAUTRAY & CO.
Construction Arbitration Law Firm

- **Claim for overheads on the basis of formula - Contractor is not entitled to claim overhead losses on the basis of Hudson's formula in the absence of evidence - Contractor should produce evidence to support its claim and for application of the Hudson's formula.**

- **Claim for loss of profit - mark up on account of overheads, profit and establishment expenses in item rates cannot form the basis of awarding compensation for loss of profit that would have been earned by execution of the contract - analysis of rates of an extra item is not akin to execution of the contract of the works as a whole - value of the contract is determined on the basis of the offer made by the Contractor and there is no requirement for the Contractor to align its estimated profit on the basis of analysis of rates of extra items - there can be no assumption that the loss of profits is 15% of the remaining value of the work.**

[Nandi Infratech Pvt. Ltd. v. R.K. Baria - Delhi High Court - Decided on 31.5.2024]



- **Levy of liquidated damages - whether an 'excepted matter' falling in the exclusive jurisdiction of the Superintendent Engineer, in terms of the contract - non-arbitrability - an 'excepted matter', if the parties have agreed, does not require any further adjudication since the contract itself provides for a named adjudicator - concurrence to the same is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties - for imposition of liquidated damages, there has to be a condition precedent and a finding that there has been a delay - the question whether there was delay entitling imposition of liquidated damages, even if calculated by the Superintendent Engineer, is arbitrable.**



- **Completion of the work of construction of elevated road - contract providing that the work is treated to be completed only when the final certificate of completion is issued to the Contractor - once the road was opened to traffic and the minor defects did not prevent the road from being used by the traffic, the project stood completed - issuance of a formal completion certificate on a later date will not postpone the completion date.**

[Govt. of NCT of Delhi v. DSC Ltd. - Delhi High Court - Decided on 29.5.2024]



Nandi Infratech Pvt. Ltd. v. R.K. Baria - Delhi High Court - Decided on 31.5.2024

The Contractor was awarded the work of construction of structures for 8 towers of a residential project. Subsequently, it was given another work order of vacuum dewatering flooring. The said work could not be completed by the Contractor within the stipulated time period. The Employer terminated the contract. The disputes between the parties were referred to arbitration. The arbitral tribunal, among others, allowed the Contractor's claim for loss of profit on unexecuted works and overheads. The Court set aside the arbitral award and concluded that the arbitral tribunal proceeded on the misconceived premise that Hudson's formula is invariably adopted for quantification of claims for overhead losses in India. The award of the arbitral tribunal with respect to the claim for overhead losses, in the absence of evidence, on the basis of Hudson's formula was not sustainable. Further, the Court set aside the award to the extent it allowed compensation at the rate of 15% of the value of unexecuted works without any evidence or material.

Govt. of NCT of Delhi v. DSC Ltd. - Delhi High Court - Decided on 29.5.2024

The Contractor was awarded the contract of construction of 'Elevated Road over Barapulla Nalla starting from Sarai Kale Khan to Mathura Road, Delhi'. The arbitral tribunal, on the issue whether the work on the elevated road stood completed once it was opened to traffic notwithstanding the pending completion of few minor finishing work, concluded that once the road had been opened to traffic there was no question of the project not being completed. Even if there were minor defects noted in the project, the same were not of the nature which prevented the road from being used by the traffic and were of the kind which could have and were in fact, rectified during the intervening period. The Court observed that while the quantification of the liquidated damages as stipulated in the contract was not arbitrable and was an excepted matter, that clause can be invoked only after it is determined that there is delay on the part of the Contractor. Only after it is found that the delay was indeed on the part of the Contractor, the question of getting the work completed from a third party and also the issue of imposition of liquidated damages would arise. The question determining whether indeed there was a delay is not an excepted matter, and it is only the quantum of damages that is non-arbitrable. The Court upheld the arbitral award.

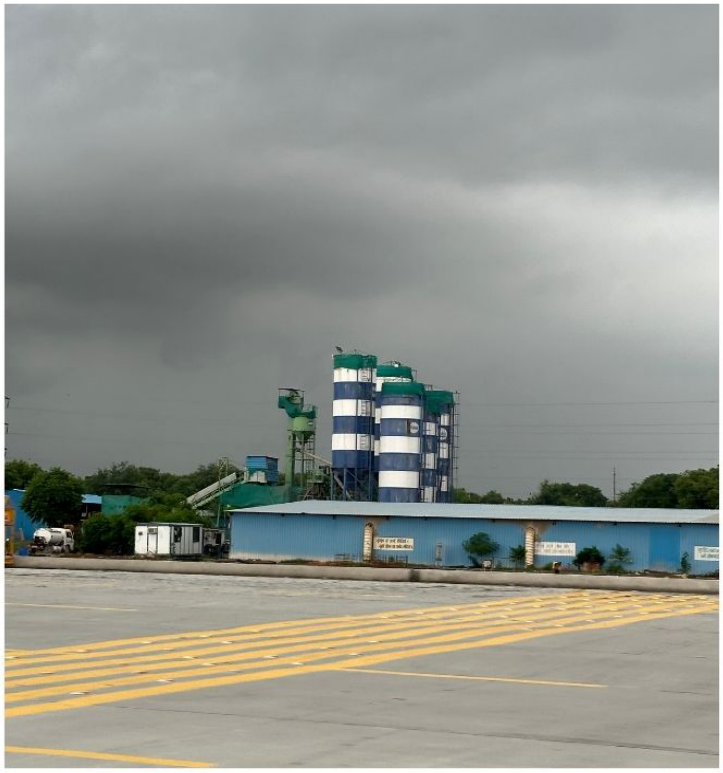


Issue 54 C.A.N June 2024
Construction Arbitration
Newsletter

R A U T R A Y & C O.
Construction Arbitration Law Firm

- **Claim for compensation for idling of resources - onus of proof on the Contractor to prove by some evidence about there being losses or extra charges suffered by the Contractor on account of prolongation of the contract - if there is no evidence of the loss suffered by the Contractor, then the Contractor is not entitled to compensation in terms of sections 73 and 74 of the Indian Contract Act - compensation cannot be awarded by the arbitral tribunal based on the element of overheads and Contractor's profit widely accepted under contracts.**

- **Setting aside of the arbitral award in part - Court can segregate the arbitral award on issues that do not suffer from any infirmity and uphold the award to that extent.**



- **Claim for idling of resources - calculation of the loss - exclusion of the days during which the workforce was not available - delay in providing the structural drawings having a cascading effect, leading to a further delay in commencement of work on account of rains - delay during the monsoon period also attributable to the Employer because of the initial delay in providing structural drawings - within the knowledge of both the parties that the latter part of the contract fell during the monsoon period - structural drawings ought to have been supplied by the Employer in time for structural work to be completed before the onset of the rains.**

[Union of India v. ANS Construction Ltd. - Delhi High Court - Decided on 28.6.2024]



- **Termination of contract without issuing a notice fixing reasonable time for completion - Employer and the Contractor continued with the contract, without the Employer fixing any new or fresh stipulated date of completion - time for completion of the work set at large - time not the essence of the contract.**
- **Delay by the Employer to provide drawings - structure drawings were not completed and shop drawings were not provided - the approval with regard to the shop drawings was pending - unless and until the structure work is completed, no finishing work could have been executed.**
- **Claim for prolonged retention of plants, machineries, shuttering, staging materials etc. - Contractor not allowed to remove the materials from the site even after termination of the contract - Contractor entitled to depreciated cost of the materials unjustly taken over by the Employer.**
- **Maintainability of counter claim of the Employer - Employer having the right to terminate under the contract for delay - counter claim of the Employer not maintainable if the termination of the contract by the Employer is unlawful.**

[J.G. Engineers Private Limited v. National Building Construction Corporation Ltd. - Delhi High Court - Decided on 1.7.2024]



Union of India v. ANS Construction Ltd. - Delhi High Court - Decided on 28.6.2024

The Employer was awarded the work for construction of women Barrack, including internal electrical installation to be constructed for army personnel accommodation deployed along Indo-Nepal Border. Disputes arose inter se the parties after completion of work. The Employer contended that there was 660 days of delay in completion of the work. The arbitral tribunal attributed 106 days of delay on the Contractor and upheld the levy of penalty. However, for the balance 554 days the arbitral tribunal held the Employer responsible for 396 days of delay while the remaining balance days of 158 was attributed to the rain and the work site being inundated with water.

The arbitral tribunal calculated overhead expenses on account of idling of resources by reducing them to the extent of 50% on the ground that the workforce must have been deployed by the Contractor to do other work that he had in the work site. Further, the arbitral tribunal arrived at the finding that the Employer delayed the issuance of good for construction structural drawings for a period of 4.5 months out of the total contract period of 9 months. The delay in supply of structural drawings had a cascading effect as the work could not be started on account of rains. The Court upheld the finding of the arbitral tribunal that the delay in providing the structural drawings had a cascading effect, which led to a further delay in commencement of work on account of rains leading to a delay of total period of 554 days, attributable solely to the Employer. The Court observed that it was well within the knowledge of the parties that the latter part of the contract fell within the rainy season and the structural drawings ought to have been supplied in time for structural work to be completed before the onset of rains and the work ought to be completed before the rains while the other completion work would not have been hampered by rains. However, the Court set aside the award in part since there was no evidence furnished by the Contractor to prove the losses on account of idling of resources.

J.G. Engineers Private Limited v. National Building Construction Corporation Ltd. - Delhi High Court - Decided on 1.7.2024

The Project Management Consultant ('PMC') engaged the Contractor to execute the work relating to the airport at Bhubaneshwar, Odisha. The work was not completed within the stipulated date of time, and the Employer granted extension of time without levy liquidated damages from time to time. Subsequently, the PMC terminated the contract. The Contractor referred the disputes to arbitration. The arbitral tribunal held that the termination of the contract by the Employer was unlawful while allowing some of the counterclaims of the PMC. The arbitral tribunal arrived at the finding that both the parties were responsible for the delay. Before the Court, the Contractor contended that the arbitral tribunal had erred in holding that the Contractor was responsible for the delay overlooking the fact that the essential correct drawings good for construction were not given by the PMC. The PMC also challenged the award on the ground, amongst others, that the arbitral tribunal erred in holding that the PMC could not terminate the contract without issuing a notice fixing reasonable time for completion of the balance work, making such time the essence of contract. The Court set aside the finding of the arbitral tribunal that beyond a certain date the Contractor was responsible for the delay. The Court concluded that without the Employer providing the structure drawings and shop drawings the said works could not have been completed by the Contractor. The finding of the arbitral tribunal that the Contractor was responsible for the delay beyond a certain date, was set aside. Further, the Court concluded that the PMC was not justified in taking over the materials of the Contractor to execute the balance works after the termination of the contract and the Contractor was entitled to claim the depreciated cost of the materials.



Issue 55

C.A.N

July 2024

Construction Arbitration

Newsletter

RAUTRAY & CO.

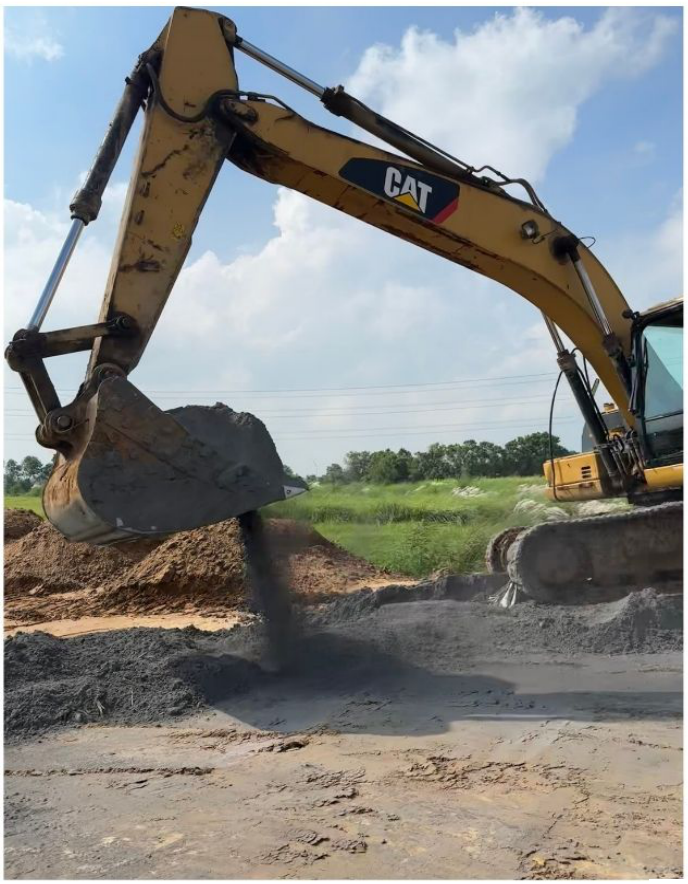
Construction Arbitration Law Firm

- **Final Bill showing handwritten / manual adjustment - proof of correctness of entries - a party relying on the said document should examine its officer who had carried out the handwritten / manual adjustments in the final bill or prove the correctness of the alterations / corrections made.**

[Union of India v. RCCIVL-LITL JV - Delhi High Court - Decided on 8.7.2024]



- **Claim towards idling of establishment and equipment - basis for the figures, or even the methodology and the assumptions, adopted by the arbitral tribunal should be reflected in the award - "generally acceptable norms" of inputs towards employment of labour, machinery, overheads should be either reproduced, or referred to by the arbitral tribunal in the award - arbitral tribunal is entitled to apply well recognised standards in the making of an award - however, the arbitral tribunal cannot surprise the parties by referring, for the first time in the award, to standards which find no place in the arbitral proceedings.**



- **Use of personal / expert knowledge of the arbitrator - an award which is predicated on personal knowledge of the arbitrator, the basis of which is not disclosed in the award or in the arbitral proceedings which led up to the award, is contrary to fundamental policy of Indian law.**

- **Failure to produce the measurement book to show quantity of work done - drawing of adverse inference against the Employer - original measurement book not produced by the Employer despite an opportunity - letters addressed by the Contractor setting out the work done never rebutted or replied to by the Employer - arbitral tribunal's reliance on the Contractor's letters and drawing an adverse inference is justifiable.**

[North Delhi Municipal Corporation v. R&T Enterprises - Delhi High Court - Decided on 5.8.2024]



Union of India v. RCCIVL-LITL JV - Delhi High Court - Decided on 8.7.2024

The Contractor was awarded the work for "Completion of Balance Work for Construction of Residential Accommodation for Army at Amritsar and Tibri". The Project was to be completed in four Phases within a period of 27 months from the date of handing over of site. There was delay in the completion of the project and extensions of time were granted to the Contractor without imposition of liquidated damages. The arbitral tribunal rejected bulk of the claims but allowed some of the claims. The Court upheld the award and observed that the Employer should have proved the correctness of the handwritten / manual adjustments in the final bill by examining the officer who had carried out the alterations / corrections.

North Delhi Municipal Corporation v. R&T Enterprises - Delhi High Court - Decided on 5.8.2024

The Employer awarded to the Contractor the contract for widening and improvement of the carriageway of roads passing between Blocks 8, 9 and 10, Phase-II, Kirti Nagar Industrial Area. A sole arbitrator was appointed to adjudicate upon the claims of the Contractor and the counter claims of the Employer. The arbitral tribunal allowed the claim towards idling of establishment and equipment since the equipment was incapable of being employed elsewhere during the idling period. The Court concluded that the arbitral tribunal was justified in drawing an adverse inference against the Employer for not producing the measurement book despite being given an opportunity. The finding of the arbitral tribunal for refund or release of earnest money deposit by the Employer on the basis that the clearance certificate from the Labour Officer should be deemed to have been received by the Employer for eligibility seeking release of the security deposit, was erroneous. There was no evidence of the Employer even having applied to the Labour Officer for the clearance certificate, which was under Clause 45, the Employer's primary obligation. The arbitral tribunal could not have awarded any amount in contravention of the contractual clause, which was a mandatory requirement of the contract. With respect to the claim towards idling of establishment and equipment, the Court observed that the “generally acceptable norms of inputs towards employment of labour/machinery/overheads” have neither been reproduced, nor referred at any stage of the proceedings. The respondent, too, did not place reliance on any such “generally acceptable norms”. The basis for adopting the store/material element of work at 60% labour, machinery and site overheads as 25% and profit-cum-overheads as 15% was not corroborated. An award which is predicated on personal knowledge of the arbitrator, the basis of which is not disclosed in the award or in the arbitral proceedings which led up to the award, is contrary to fundamental policy of Indian law. The Court set aside the award of the said claim by the arbitral tribunal in favour of the Contractor.



Issue 56 C.A.N July 2024

Construction Arbitration

Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Claim for escalation - rates for execution of the work - absence of escalation clause in the contract - no escalation provision in the tender or the contract - jurisdiction of the arbitral tribunal to award escalation - after the expiry of stipulated period of contract, the provisions and conditions of the contract become inapplicable to both the parties - the rates for execution of the work are also not applicable after the contract period is over.**



- **Contract stipulating Contractor not to make any claim for delay in performance - still a claim would be maintainable in one of the following situations (i) if the Contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the Employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the Contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the Employer and the Employer accepts performance by the Contractor in spite of the delay and such notice by the Contractor putting the Employer on terms.**

[State of West Bengal v. PAM Developments Pvt. Ltd. - Calcutta High Court - Decided on 14.6.2024]



- **Claim for reimbursement of payments for escalation due to abnormal increase in steel, cement, aggregate, sands and bricks - prohibition in the contract that no escalation is permissible - actual increase for cement more than 100% and that of steel about 80% - Contractor was required to complete the work in the stipulated period, however this did not happen - Contractor duly notified his intention to claim escalation and damages and loss in the extended period of contract - unprecedented increase can no way be considered by a bidder while quoting his tender.**

- **No Claim Certificate (NCC) - undue influence and coercion - coercion and undue influence is to be inferred from facts and circumstances in each case - Contractor requesting time and again for release of its dues - Contractor's final bill was pending for more than 2 ½ years - immediately on issuance of the NCC, the undisputed amounts were released by the Employer to the Contractor - there was undue influence and coercion.**

- **Claim after submission of Final Bill - clause of the General Conditions of Contract (GCC) stating that "No further claims shall be made by the Contractor after submission of the Final Bill and these shall be deemed to have been waived and extinguished" - the Contractor had reserved its right to add and supplement additional claims - clause 55 of GCC not a bar to the arbitrability of claims if the payments were received by the Contractor under protest.**

- **Site conditions - provision of the contract providing that the Contractor should be fully acquainted of the site condition - claim for additional work in clearing the jungle and filling - clauses of the contract did not prohibit payment to be made for the additional work - Contractor entitled to claim for the additional work.**

- **Claim for change in site condition - during site visit only soil was encountered and no rock strata was found - Contractor entitled to claim for change in site condition.**

- **Contract clause providing that no claim for compensation shall be admitted if extension of the contract period is granted by the Employer - clause cannot be interpreted to mean that if extensions are granted due to the fault of the Employer, the Contractor would be deemed to have waived off its right to claim damages.**

[Union of India v. Vishva Shanti Builders (India) Pvt. Ltd. - Delhi High Court - Decided on 24.7.2024]



State of West Bengal v. PAM Developments Pvt. Ltd. - Calcutta High Court - Decided on 14.6.2024

The Employer awarded to the Contractor the work for "Construction of Reinforcement Concrete Viaduct Structures with bored piles foundation and the retaining wall on the eastern side of the proposed road over bridge over the Howrah-Bandel Railway line of the Eastern Railway on replacement of the existing level crossing No. 1/1A at Liluah Howrah under the Howrah Highway Division". As per Clause 2 of the conditions of contract, the Contractor was bound to execute 1/4th of the total work in 1/4th time, 1/2 of the work in ½ of the time, 3/4th of the work before 3/4th of the time and the total work within the total stipulated time. The said clause provided that in the event, the Contractor failed to execute the work in terms of the General Conditions of Contract ('GCC') the Superintending Engineer concerned shall penalize the Contractor for the remaining work still to be completed during the contract period to the extent of 1% or such smaller amount as he thinks fit. The Contractor, during the execution stage wrote to the Employer stating that it had already executed work, including extra work, which was above the contract amount and if the Contractor is requested to carry out the balance work, it would not be possible to complete the work without approval and assurance of the competent authority and therefore, it would be proper to terminate the contract amicably. On receipt of the request of the Contractor, the Superintending Engineer amicably terminated the contract. The claims of the Contractor were referred to arbitration. The arbitral tribunal awarded escalation in favour of the Contractor even though the contract provided no further additional claim is maintainable. The Court concluded that in spite of there being a contract between the parties where under the Contractor had undertaken not to make any claim for delay in performance of the contract occasioned by an act of the Employer, still a claim would be maintainable in one of the following situations: (i) if the Contractor repudiates the contract exercising his right to do so under section 55 of the Contract Act, (ii) the Employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the Contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the Employer and the Employer accepts performance by the Contractor in spite of the delay and such notice by the Contractor putting the Employer on terms. The Court upheld the finding of the arbitral tribunal that after the expiry of stipulated period of contract, the provisions and conditions of the contract became inapplicable to both the parties and thus, rates for execution of the work was also not applicable after the contract period was over. The Contractor executed additional works after the stipulated period of contract and therefore, section 70 of the Indian Contract Act was held to be applicable.



Union of India v. Vishva Shanti Builders (India) Pvt. Ltd. - Delhi High Court - Decided on 24.7.2024

The Contractor was awarded the contract for the work of "Provision of Married Accommodation for ORs (525 DUs) including allied External Services at Mahipalpur (Package - II) Delhi Cantonment". The work was completed within the extended period of completion. During the pendency of the project, extension was granted by the Employer for completion of the work without levy of liquidated damages. The Contractor reserved its right to seek compensation for escalation, overhead loss and other losses due to delay caused by the Employer. The disputes between the parties were referred to arbitration. The arbitral tribunal allowed some of the claims of the Contractor. The arbitral tribunal held that the prohibitory clause in the General Conditions of Contract ('GCC') became redundant and the claim of escalation can be allowed provided extension was granted without levy of compensation, and where the Contractor had notified its claim. Further, clause 55 of GCC would not bar the arbitrability of claims given the fact that the payments were received under protest. The Contractor had reserved its right to add and supplement additional claims. The Court upheld the finding of the arbitral tribunal and observed that the prohibitory clause, did not indicate that the parties intended that no escalations could be claimed in the event the contract was extended. Clause 13 of the GCC provided that if the works are delayed "no claim in respect of compensation or otherwise, however arising, as a result of extensions granted under condition mentioned above shall be admitted". The Court observed that the said clause of the GCC cannot be interpreted to mean that if extensions are granted due to the fault of the Employer, the Contractor would be deemed to have waived off its right to claim damages.



Issue 57

C.A.N

August 2024

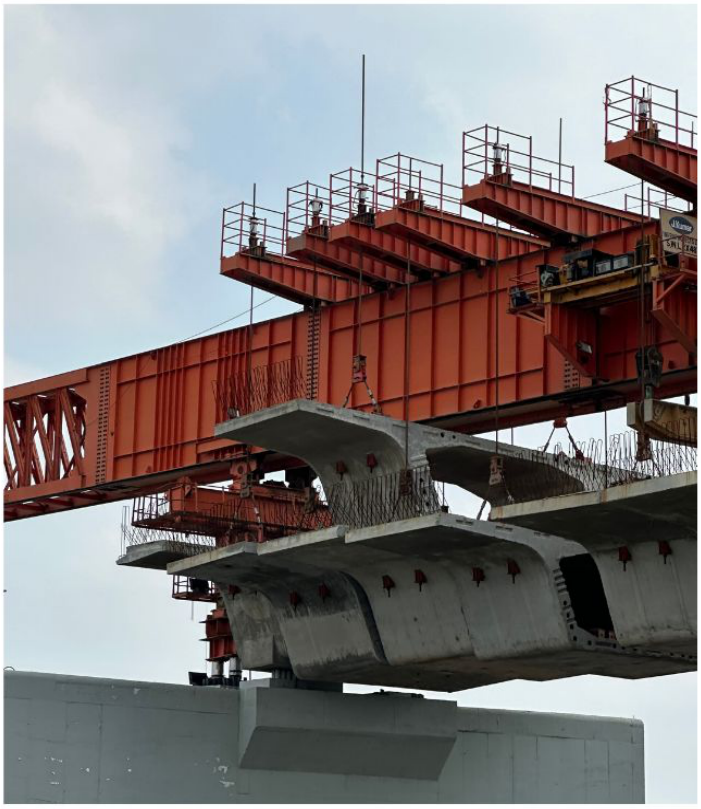
Construction Arbitration

Newsletter

R A U T R A Y & C O.

Construction Arbitration Law Firm

- **Meaning of expression "dispute is" - Courts (and arbitrators) should not adopt an over legalistic analysis of what the dispute between the parties is - no need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is - cannot be concluded that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration - ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration.**



- **Power of adjudicator to decide a case upon a factual or legal basis which had not been argued or put forward by either side - an adjudicator can reach a decision on a point of importance on the material before on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator.**

[Bell Building Limited v. TClarke Contracting Limited - King's Bench Division (TCC) - Decided on 12.7.2024]



- **Unenforceability of liquidated damages - early possession of section of the completed works - whether the liquidated damages provision is void and/or unenforceable - liquidated damages provisions did not contain a mechanism for reducing the level of liquidated damages to reflect early possession - necessary to construe the relevant provisions of the contract in question - there was one completion date for the whole of the works and liquidated damages were payable at the rate set out in the contract particulars for failure to complete the whole of the works by the completion date - if there is no reduction in the rate of liquidated damages where partial completion is achieved or the Employer takes over part of the works prior to practical completion the provisions are capable of being operated.**

[Eco World – Ballymore Embassy Gardens Company Ltd v. Dobler UK Ltd. - Queen's Bench Division (TCC) - Decided on 3.8.2021]



Bell Building Limited v. TClarke Contracting Limited - King's Bench Division (TCC) - Decided on 12.7.2024

The parties entered into a sub-contract incorporating the JCT Design and Build Sub-contract Conditions 2016. Pursuant to the sub-contract the Contractor was to carry out sub-contract corks for the construction of a Data Centre at LCY-Ten (Echelon), Greenwich Point, London. The sub-contract works consisted of the supply and installation of the new substructure and superstructure consisting of the frame including enhancements, floor, roof, stairs, external walls, windows and external doors, internal walls and partitions, internal doors, internal finishes, walls, floors and ceilings, all builder's work in connection to the lifts installation and all builder's works including demolition and fire-stopping, all as further described within the sub-contract document. The disputes between the parties were referred to the adjudicator. It was contended by the Employer that the adjudicator purported to award more than the sum claimed. He considered the "calculation" of the claim which was outside his jurisdiction. He carried out a valuation exercise which was likewise outside his jurisdiction and purported to award more than the sum claimed. There was no prior suggestion from the Adjudicator that he was minded to award more than the sum claimed in the Notice / Referral. The Court held that the decision of the adjudicator was enforceable. The Contractor's claim included the common caveat giving adjudicator license to grant "such other relief as is necessary, just and equitable to resolve the dispute". Further, the Court observed that an adjudicator can reach a decision on a point of importance on the material before on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator.

Eco World – Ballymore Embassy Gardens Company Ltd v. Dobler UK Ltd. - Queen's Bench Division (TCC) - Decided on 3.8.2021

The Employer engaged the Contractor to carry out the design, supply and installation of the façade and glazing works for Building A04, part of a development of apartments known as Embassy Gardens Phase 2, Nine Elms, London. The clause in the contract provided that the Employer may "at any time or times prior to the date of issue by the Construction Manager of the certificate of practical completion for the Works or such works in a Section that the Employer wishes to take over any part or parts of the Works or such works in a Section" the Employer may take over such part or parts. The parties agreed to extend the original contractual completion date and agreed to a new completion date. The Deed of Variation provided that the liquidated damages at the rates stated in the Contract Particulars may only be levied by the Employer from the new completion date onwards where applicable. The Contractor contended that where an Employer under a construction contract has (and exercises) a contractual right to take early possession, but the liquidated damages provisions do not contain a mechanism for reducing the level of liquidated damages to reflect such early possession, the liquidated damages provisions are void and/or unenforceable. Where liquidated damages provisions are void and/or unenforceable, the Employer is entitled to recover general damages for delay in completion, and the void and/or unenforceable liquidated damages do not cap the damages recoverable. The Court observed that both parties benefitted from early take-over of part of the works. The Contractor was not entitled to any relief from liquidated damages to reflect such take-over. The full rate of liquidated damages continued to be applicable to the reduced scope of the outstanding works. The Court took note of passage from Hudson's Building and Engineering Contracts (14th Edition) (2020) at paragraph 6-024 which states "… in the absence of a properly completed contractual mechanism for sectional completion and accompanying liquidated damages, it has been held the liquidated damages clauses are liable to be rendered inoperable or invalidated through the Employer taking possession of a section of the works. Unless there are effective provisions for dividing the single sum between the sections or reducing it in proportion to the part taken into possession, a claim for liquidated damages will fail". The Court concluded that the said extract did not state that liquidated damages provisions will never be enforceable where sectional completion or partial possession is used without any related reduction in the liquidated damages payable; they identify the potential danger of failing to draft effective provisions to respond in such circumstances. In each case, it is necessary to construe the relevant provisions of the contract in question, adopting the established rules of contractual interpretation, to determine whether they give rise to a liquidated damages regime that is certain and enforceable. The liquidated damages clause would be inoperable where the contract provided for sectional completion and a pro-rata adjustment of liquidated damages to take account of partial possession, if the adjustment could not be calculated because the scope of works falling within each section was not adequately defined or capable of ascertainment from the contract documents.

Issue 58 C.A.N August 2024
Construction Arbitration
Newsletter

R A U T R A Y & C O.
Construction Arbitration Law Firm

- **Consequence of failure to provide possession of site - contract provided that "on the date for possession stated in the appendix to these conditions possession of the site shall be given to the Contractor who shall thereupon begin the works and regularly and diligently proceed with the same and who shall complete the same on or before the date for completion stated in the appendix subject nevertheless to the provisions for extension of time..." - contract required the Employer to give possession of at least 18 houses at any given time and the Contractor's obligation to complete the works by the scheduled completion date is conditional on the Employer giving the Contractor possession of not less than 18 houses at any one time.**



- **Acceptance of payment in full and final satisfaction of all and any claims by the Contractor - bar to raise further claims - by agreeing to the final account and accepting the sum paid as the result of an agreement, the Contractor had accepted the sum in full discharge of all sums due to it under the contract and could not claim any more under the contract.**

[Whittal Builders Co. Ltd v. Chester-le-Street District Council - Queen's Bench Division - 11 Con LR 40]



- **Entitlement to terminate the contract - FIDIC Silver Book - Contractor claimed entitlement to terminate the contract upon failure of the Employer to determine the Contractor's claim for Extension of Time (EOT) and additional payment and to pay the amount due at Milestone 5 under the contract - whether principal Contractor's rejection of its claims for extension of time was a "material breach" - the rejection of the EOT claims by the principal Contractor was not final and binding and not a "material breach" - the law provides parties to construction contracts with a right to refer any dispute to adjudication at any time.**

- **Abandonment of work - party alleging must prove that other party had no intention to perform the contract by its purported termination, failed to progress the detailed design of the civil works and abandoned the physical works - locking of the site by the sub-Contractor, and refusal to give access to working area until further notice is sufficient to prove the intention to abandon.**

- **Site conditions - 'Unforeseeable difficulties' - contract clause provided "condition of the Site (including Sub-Surface Conditions) shall be the sole responsibility of the Contractor and the Contractor is deemed to have obtained for itself all necessary information as to risks, contingencies and all other circumstances which may affect the Works, the remedying of Defects and the selection of technology and (save where otherwise set out in this Contract) the Contractor accepts entire responsibility for investigating and ascertaining the conditions of the Site including, without limitation, ground, load-bearing and other structural parts, suitability of the utilities and incoming services, hydrological climatic, access, environmental, weather and other general conditions and the form and nature of the Site including both natural and man-made conditions" - event of Unforeseeable difficulties in the contract provided that by signing the contract, the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the works - principal Contractor informed the Sub-Contractor in the kick-off meeting and subsequently of the final results from the soil analyses, including recordings of asbestos from the draft Geotechnics report, the Utilities Search, the Drainage Statement and the Geotechnics draft Ground Investigation Report - Sub-Contractor had no valid claim for an Extension of Time.**

- **Award of damages under Liquidated Damages clause - clause providing that "Delay Liquidated Damages shall...be the Employer's sole and exclusive remedy and the Contractor's sole and exclusive liability for such Contractor's delays...other than in the event of termination...prior to completion of the works" - payment of 10% of the contract sum under liquidated damages clause did not deal with the costs of delay i.e. principal Contractor's internal costs of delay, which did not form part of the contract sum.**

[PBS Energo A.S v. Bester Generacion UK Ltd. - Queen's Bench Division (TCC) - Decided on 7.2.2020]



Whittal Builders Co. Ltd v. Chester-le-Street District Council - Queen's Bench Division - 11 Con LR 40

The Contractor was awarded the work for modernisation of 108 dwellings for the Employer. It was agreed that the Contractor would complete the works in 18 months provided the Employer gave them possession of at least 18 houses at any one time. The major part of the work was the building extension at the rear of the houses and in all but six cases the extension was a single building extending out to the rear two houses with an internal party wall, designed to be only building only and to be built as one. The appendix stipulated the date for possession of the site and the date for completion, but after that it was added that the Employer should give 18 dwellings to the Contractor to work in at any given time. The Court held that the obligations of the Employer, both express and implied, were to give the Contractor possession of at least 18 houses at any one time and that save in the case of the six singles possession of the houses was to be given in pairs. The Court observed that the quantity surveyor of the Contractor had agreed to the final account with the representative of the Employer. The Contractor's quantity surveyor had agreed to the amount due to it but subject to audit. Therefore, the Contractor's acceptance followed by payment of the agreed sum resulted in a concluded agreement, an accord and satisfaction, resolving all differences between the parties.



PBS Energo A.S v. Bester Generacion UK Ltd. - Queen's Bench Division (TCC) - Decided on 7.2.2020

The principal Contractor and the Sub-Contractor entered into a contract for setting up a biomass energy plant at Kingmoor Park, Bryn Lane, Wrexham Industrial Estate, in North Wales. The plant was never built. Each party claimed to terminate the contract between them. The principal Contractor claimed to be entitled to terminate on the basis firstly of a failure to pay the fifth milestone payment instalment by the due date, and secondly on the basis of substantial failures by the main Contractor to fulfil its contractual obligations. The principal Contractor in turn claimed to be entitled to terminate the contract firstly by reason of a failure to comply with a Notice to Correct as regards delay to the project, caused by delay in the detailed design and suspensions of works and by reason of failure to provide necessary permits and assistance. Secondly the principal Contractor relied on abandonment of the works or an intention not to perform. The Employer in turn issued a notice of intention to terminate the contract with the principal Contractor. The question before the Court was which of the parties is correct that they were entitled to, and did, terminate the contract. Clause 20.1 of the Contract provided that "...if the Contractor fails to give notice of a claim within such period of twenty-eight (28) days, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim". The Court observed that the rejection of those claims by the principal Contractor was not final and binding and hence, was not a "material breach" because the law provides parties to construction contracts with a right to refer any dispute to adjudication at any time. The Sub-Contractor had no valid claim for an Extension of Time based on the event of "unforeseeable difficulty" in the site conditions. The first discovery of asbestos was not due to any error or incompleteness in the reports, which had only been intended as preliminary reports. Further, as noted no delay was caused to the critical path. The Sub-Contractor was not entitled to claim "unforeseen circumstances" since it failed to establish that it fell within the definition of "any and all difficulties and cost, which the Contractor acting with Good Industry Practice could not reasonably foresee, especially events of Force Majeure, occurrence of Employer's Risks and any other unforeseeable difficulties as expressly stated in the Contract." The Court was of the view that sub-Contractor struggled to actually identify any error in the Geotechnics report or any contamination on the site which was not broadly speaking to be expected in the light of what the report did say.



Issue 59 C.A.N September 2024
Construction Arbitration
Newsletter

RAUTRAY & CO.
Construction Arbitration Law Firm

- **Limitation period for raising of claim - indivisible contract for supply of goods and work done - full payment under the supply / erection purchase order were dependent on certificates relating to completion, commissioning, guaranteed performance etc. - Contractor waited till successful completion, commissioning, guaranteed performance of the project to file a composite claim for the balance amount payable under the purchase orders - Contractor is entitled to make a composite claim for the goods supplied and the work done after the project was successfully completed i.e. when the unit was commissioned followed by guaranteed performance - it is only then, when the outstanding amount, as per the bills / invoices raised, became due and payable to the Contractor in terms of the contract - Article 18 of the Limitation Act, 1963 would not be applicable since it is where the suit is for the price of the work done and where no time has been fixed for payment.**



- **Time not the essence of the contract - contract contained a clause for liquidated damages for delay in completion - time not of essence if the aggrieved party has not terminated the contract for non-completion of the project by the date stipulated and has continued to engage with each other and accepted performance of contractual obligations even beyond the stipulated date.**



- **Article 55 of the Limitation Act - applicable where the claim is for compensation (in as much as the term 'compensation' includes a specified amount payable under a contract) in respect of the goods supplied and the work done under a contract - claim is based on a breach of the contractual obligation, if the Employer had failed to fulfil their obligation(s) of making payment of the outstanding principal amount payable under the contract despite raising of bills / invoices by the Contractor - Contractor's claim not in respect of non-payment of any specific bill or invoice during execution of the contract - it was for the outstanding principal amount due to the Contractor on discharge of his obligations under the contract - list of unpaid bills / invoices was placed on record of the arbitral proceedings to demonstrate that bills / invoices were raised / issued, but the same was by way of evidence to support the claim which was for the entire outstanding principal amount payable to the Contractor on discharge of its obligations under the contract - cause of action for the claim in question is Employer's failure to make payment of the outstanding principal amount to the Contractor despite discharge of contractual obligations by it - starting point of limitation would be the date when the Contractor had fulfilled all its obligations under the contract and was entitled for release of the outstanding amount payable under the contract - starting point of limitation for the claim would be the date by which the Contractor met the performance guarantee requirement under the contract.**

- **Counter claim barred by limitation - claims and counter claims are independent and distinct proceedings - counter claims are independent claims which could have been raised in separate proceedings but are permitted to be raised in the same proceeding as a claim to avoid multiplicity of proceedings - for the purpose of limitation, date of reckoning is the date when the counter claim is filed and not when the claim is filed - exception is where the counter claimant has also made a claim and sought arbitration by serving a notice but subsequently raises that claim as a counter claim in the arbitration proceedings initiated by the claimant - limitation for such counter claim would be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counter claim.**

- **Acknowledgment of liability - admission need not be in respect of any precise amount nor by expressed words but must be made in circumstances and in words from which the court or tribunal can reasonably infer that the person making the admission intended to refer to a subsisting liability as on the date of the statement - minutes of meeting incorporating a table giving specific description of the items and their corresponding value on which parties, purportedly, admitted their respective liabilities - balance amount payable to the Contractor mentioned in the minutes - minutes did not state that parties acknowledge, or are willing to settle, any other, or all their rights / obligations, arising from, or under, the contract - acknowledgment is specific and in respect of certain items only.**

- **Extension of limitation period by acknowledgement - limitation period of three years would extend if there is acknowledgement of liability in respect of such right has been made in writing signed by the party against whom such right is claimed - must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability - a writing, to be treated as an acknowledgement of liability should consciously admit his liability to pay or admit his intention to pay the debt.**

[OPG Power Generation Pvt. Ltd. v. Enexio Power Cooling Solutions India Pvt. Ltd. - Supreme Court of India - Decided on 20.9.2024]

- **Claim for additional works - lump sum contract - changes or revisions to the Piping and Instrumentation Drawings ('P&IDs') - Contractor was under an obligation to comply with the written instructions of the Employer - Employer agreed that for any major change in the work or variations or modifications beyond the scope of the work, the Employer would be liable to pay to the Contractor the extra amounts at a mutually agreed price - P&IDs formed the basis of the contract, and any additional work / variation / modification entailed additional payment - additional work had been done as per the requirement of the project.**

[Trans Engineers India Private Limited v. Otsuka Chemicals (India) Private Limited - Delhi High Court - Decided on 22.7.2024]



OPG Power Generation Pvt. Ltd. v. Enexio Power Cooling Solutions India Pvt. Ltd. - Supreme Court of India - Decided on 20.9.2024

The Employer awarded to the Contractor the work for designing, manufacturing, supply, erection and commissioning of air-cooled condenser unit (ACC Unit) with auxiliaries for 160 MW Coal Based Thermal Power Plant (Project) at Gummidipoondi in the State of Tamil Nadu. There was delay in completion and the commissioning of the plant. The Contractor raised a claim for outstanding principal amount due under the purchase order and reimbursement of amount deducted towards liquidated damages by the Employer. The Employer also raised counter claim with respect of liquidated damages, customs duties and cost of erection of horizontal and vertical exhaust through external agency. The arbitral tribunal allowed the Contractor's claim towards outstanding principal amount and arbitration costs. The arbitral tribunal arrived at a finding that the counter claims were raised beyond the limitation period of three years from the date of request for arbitration. Further, the Contractor's claims were not barred by limitation because meaningful negotiations were ongoing between the parties as evidenced by the minutes of meeting. The Court observed that the Employer had failed to undertake the performance guarantee test, despite request of the Contractor, within the period specified.

The final payment of the bills / invoices was dependent on issuance of certificate(s) including one relating to successful completion of the performance guarantee test. The cause of action for the claim made by the Contractor, matured on expiry of the stipulated period of 180 days within which, despite request, the Employer failed to undertake the performance guarantee test. The Court concluded that where an acknowledgement is in respect of a specified sum of money or a specific right only, and not in general terms, it would extend the period of limitation only in respect thereof, and not of other claims which, though may have arisen out of same jural relationship, are not specified therein. The acknowledgement of liability did not extend the limitation of the entire claim of the Contractor but only in respect of to the portion of the claim which has been specified. The minutes of meeting could not be treated as an acknowledgment for the purpose of extending limitation of counter claims, which were not specified therein. In consequence, when counter claims were otherwise barred by limitation on the date of filing of counter claim, the arbitral tribunal was justified in rejecting them as barred by limitation.

Trans Engineers India Private Limited v. Otsuka Chemicals (India) Private Limited - Delhi High Court - Decided on 22.7.2024

The Employer engaged the Contractor for expansion of its plant at the project site located at RIICO Industrial Area, Keshwana Rajpoot, Tehsil-Kotputli, District Jaipur, Rajasthan. The Contractor was required to supply, erect, manufacture and commission equipment, piping systems, instrumentation material and electrical material for the project. Disputes arose between the parties with respect to the Contractor's claim for price of additional works. The additional works were given by the Employer in writing, in the form of modifications, changes and/or revisions to the Piping and Instrumentation Drawings (P&IDs). The arbitral tribunal concluded that the revised P&IDs were not a part of the contract between the parties and that the revision resulted in additional work. The Court concluded that the revision to the P&IDs was necessary due to changed requirement for equipment etc., which had to be incorporated in connection with the work. The P&IDs served as the base drawings. Any variation or additional work entailed extra payment. The parties consciously chose to make the P&ID drawings, as the basis of the purchase orders issued to the Contractor. Necessarily, any increase of scope of work on account of these revisions, entailed entitlement for additional payment, which was required to be assessed based on the comparison with the earlier P&ID drawings viz-a-viz the final P&ID drawings.



Issue 60

C.A.N

September 2024

Construction Arbitration

Newsletter

R A U T R A Y & C O.

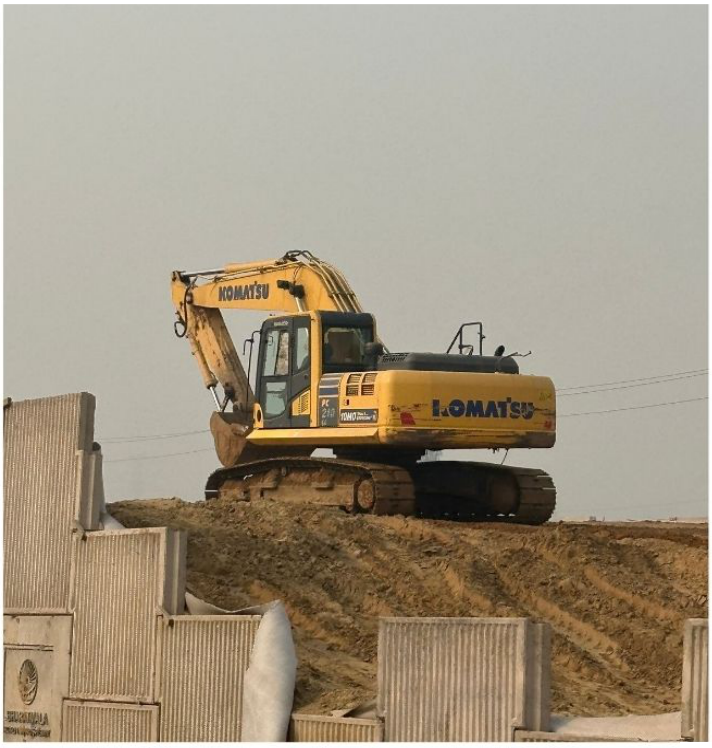
Construction Arbitration Law Firm

- **'Back-to-back' contract - claims of sub-Contractor against the principal Contractor - contradictory stand of the principal Contractor in the arbitration against the Employer - coextensive liability of the principal Contractor and the Employer - tenability of sub-Contractor's claims against the principal Contractor whether dependent upon acceptability and tenability of those claims before the Employer under the main contract - in the two arbitration proceedings, the very same claim, which the sub-Contractor made against the principal Contractor had been made by the principal Contractor against the Employer and on that basis, an award had been passed in favour of the principal Contractor - no provision in the main contract between the Employer and the principal Contractor for "back to back" sub-contracts whereby the Employer would be directly liable for the payment claims raised by sub-Contractors notwithstanding that the subletting was provided for by the main contract - there was no transfer of liability from the principal Contractor to the Employer.**



- **'Back-to-back' contract - meaning of - depending on the wording of the sub-contract, the terms and conditions relating to technical specifications, and quality, quantum, manner and method of work to be done by the principal Contractor in the main contract, stood transposed into the sub-contracts - in the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract will mean that the jural relationship between the Employer and the principal Contractor on the one hand and between the sub-Contractor and the principal Contractor on the other will be quite distinct and separate.**

[Zonal General Manager, M/s Ircon International Ltd. v. M/s Vinay Heavy Equipments - Supreme Court - Decided on 6.5.2015]



- **'No Claim Certificate' - contract clause provided that "Contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of arising out of this contract, nor shall the Railway entertain or consider any such claim, if made by the Contractor, after he shall have signed a 'No claim' certificate in favour of the Railway" - clause in the contract would not be an absolute bar to a Contractor raising claims which are genuine, even after the submission of such 'No Claim Certificate' - if the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud / coercion / undue influence practised by the other party and is able to establish the same, then the discharge of the contract by such agreement / voucher is rendered void and cannot be acted upon.**

- **Proof of coercion or undue influence - Contractor must prove that the certificate had been given under duress or coercion - mere allegation that 'No Claim Certificate' was obtained under financial duress and coercion, without there being anything more to suggest, would not lead to an arbitrable dispute - a rebuttable presumption can be drawn when a no claim has been furnished in the prescribed format at the time of submission of the final bill with unilateral deductions made, and even that acceptable amount is not released, unless no claim certificate is being attached to the final bill.**

- **No interest payment clause - jurisdiction of the arbitral tribunal to grant interest to the Contractor - contract clause provided "No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the Contract, but Government Securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon" - the arbitral tribunal cannot grant interest in view of the prohibition in the contract.**

- **Principle 'necessitas non habet legem' - necessity knows no law - a person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.**

[Union of India v. B.S Sangwan - Delhi High Court - Decided on 24.9.2024]



Zonal General Manager, M/s Ircon International Ltd. v. M/s Vinay Heavy Equipments - Supreme Court - 6.5.2015

The principal Contractor entered into two sub-contract agreements in respect of two packages for laying of roads. The sub-Contractor completed substantial portion of work under the two sub-contracts but thereafter ceased work on both. The principal Contractor terminated the sub-contracts and engaged other agencies to complete the balance work. The sub-Contractor claimed amounts due to it and referred the disputes to arbitration. The principal Contractor also took recourse to arbitration against the Employer in respect of the pending payments pertaining to the two packages. The arbitral tribunal adjudicated the claims made by the sub-Contractor against the principal Contractor in the first arbitration and claims made in turn by the principal Contractor against the Employer in the second arbitration. The arbitral tribunal made a common award and allowed the claims of the sub-Contractor against the principal Contractor for works on both packages. The sub-Contractor contended that the principal Contractor had rejected the sub-Contractor's claims for payment arrears under the two sub-contracts, it had, at the same time and contradictorily, claimed in the second arbitration against the Employer that its dues to sub-Contractor were in turn payable to it by the Employer. The arbitral tribunal found that the primary liability of the principal Contractor did not transfer onto the Employer despite the "back-to-back" contract between the principal Contractor and sub-Contractor. Further, the principal Contractor had reiterated the "back-to-back" nature of the sub-contract and agreed that the sub-Contractor would be entitled to payment of dues as and when the principal Contractor received the payment for these from the Employer. The principal Contractor had agreed to a direction passed against it to make payment upon realization of the sum from the Employer. In the two arbitration proceedings, the very same claim, which the sub-Contractor made against the principal Contractor had been made by the principal Contractor against the Employer and on that basis, an award had been passed in favour of the principal Contractor. The Court observed that in the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract will mean that the jural relationship between the Employer and the principal Contractor on the one hand and between the sub-Contractor and the principal Contractor on the other will be quite distinct and separate. There was no such clause to the contrary, existent in the main contract between principal Contractor and the Employer. There was no transfer of liability from the principal Contractor to the Employer. There was nothing in the main contract between the Employer and the principal Contactor for "back to back" sub-contracts whereby the Employer would be directly liable for the payment claims raised by sub-Contractors notwithstanding that the subletting was provided for by the main contract. The principal Contractor having admitted an unconditional contractual liability on its part to pay to the sub-Contractor depending on a favourable outcome in the second arbitration, is liable to make the payment to the sub-Contractor.



Union of India v. B.S Sangwan - Delhi High Court - Decided on 24.9.2024

The Employer awarded the contract to the Contractor for carrying out work on the Jalandhar-Firozpur section of the Northern Railway. The Contractor claimed payments under the contract which was not paid by the Employer. During the execution of the work, the Contractor was forced to execute certain extra items as they were essential for completing the scheduled items in the contract. The Contractor raised disputes regarding these extra items. The extra work was not recorded in the measurements books. The Contractor was told that the extra items would be included in the addendum / corrigendum to be prepared later and included in the final bills. The 'No Objection' signed in the measurement books pertained to measurements recorded till then and not disputed. The items claimed as extra work was not recorded. The disputes between the parties were referred to arbitration. The Court observed that there was no scope for interference with the decision of the arbitral tribunal on the plea of accord and satisfaction. The arbitral tribunal held that the measurements recorded in the measurement books did not include the items for which the claims were raised during execution of the contract. The 'No Claim Certificate' was undated and on a routine pre-printed form. Most importantly, the final bill, regarding which the 'No Claim Certificate' had been issued, was itself raised only after the 'No Claim Certificate' was submitted. The Court held that the General Conditions of Contract specifically prohibits payment of interest on earnest money or security deposit or any amounts payable to the contractor under the contract. The clause barring interest is very widely worded. Therefore, the award of interest by the arbitral tribunal is unsustainable.



Issue 61 C.A.N October 2024

Construction Arbitration

Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Undertaking by the Contractor as a pre-condition for getting approval of Extension of Time (EOT) from the Employer - Undertaking stated that the Contractor has not suffered any loss and damages on account of delay at the time of grant of extension - Undertaking can be said to have been given under duress since EOT was sanctioned without levy of liquidated damages on the Contractor, immediately upon submission of the Undertaking by the Contractor.**

- **Notice under section 55 of the Indian Contract Act - prolongation claims - essential conditions for claiming loss of profit require proof of definite breach of contract by the Employer, actually loss suffered with evidence, institution of claim at appropriate time, proof of efforts to avoid such losses and notice under section 55.**

[Union of India v. Satish Builders - Delhi High Court - Decided on 30.9.2024]





- **Compensation for competing roads - reduction in toll collection - liability to pay premium to the authority - linking payment of revised premium to toll collected - since toll collected had reduced because of the competing road, the Concessionaire's liability to pay revised premium would be affected too - there cannot be an omnibus declaration that revenue generation had nothing to do with the premium payable by the Concessionaire.**

- **Interim relief sought after the making of the arbitral award - section 9 petition seeking interim remedy - Court cannot re-write the arbitral award, or second guess the reasons for the award - Court is required to proceed exactly on the basis of what the arbitral award has directed - standard required to be met by a post-award section 9 applicant, seeking securing of the awarded amount before proceeding to execution, is higher than the standard which has to be met by a pre-award section 9 applicant.**

[National Highways Authority of India v. IRB Ahmedabad Vadodara Super Express Tollways Pvt. Ltd. - Delhi High Court - Decided on 18.10.2024]



Union of India v. Satish Builders - Delhi High Court - Decided on 30.9.2024

The Contractor was awarded the contract for construction of 100 bed Hospital at Pooth Khurd, Delhi. There was delay in completion of the work. The Employer alleged that the Contractor was unable to execute the work within the stipulated time schedule because of slow progress. The Employer contended that in terms of the contract measurements of all items having financial value which were required to be taken jointly by the authorised representatives of both the parties and duly signed in acceptance of its correctness, had to be entered into the measurement book. Unless the items were entered into the measurement book as per the contract between the parties, no payment could be made to the Contractor. No objection ever was taken by the Contractor to the measurement recorded in the measurement book at any stage. No objection was raised by the Contractor at that stage about the running bills either in regard to quantity or the rate at which the payment for each item were disbursed. The Contractor had given an Undertaking stating that it has not suffered any loss or damages on account of delay at the time of grant of extension of time by the Employer. The arbitral tribunal concluded that the Undertaking given by the Contractor that it has not suffered any loss and would not go for arbitration, was under duress which was evident from the fact that the Superintendent Engineer sanctioned extension of time without levy of compensation immediately upon submission of the Undertaking by the Contractor. The method adopted for calculating escalation cost during the extended period was by calculating averages on the basis of the sanctioned cost index by CPWD on the stipulated date of completion and on the actual date of completion. The Court upheld the findings of the arbitral tribunal and the award of claim for escalation due to prolongation of the construction period.

National Highways Authority of India v. IRB Ahmedabad Vadodara Super Express Tollways Pvt. Ltd. - Delhi High Court - Decided on 18.10.2024

The Employer awarded the Concessionaire the work for six laning of the Ahmedabad to Vadodara section of NH 8 and for improvement of the Ahmedabad Vadodara Expressway covering a length of 93.302 km in the state of Gujarat. The Concession Agreement was on design, build, finance, operate and transfer basis. The Concessionaire had the exclusive right, licence and authority to operate and maintain the project highway for 25 years from the appointed date. The Concessionaire was obligated to bear all costs and expenses in respect of the project highway and was entitled to demand, collect and appropriate toll from vehicles plying on the project highway. The Concession Agreement required the Concessionaire to pay a premium, in the form of an additional concession fee to the Employer. The payment mechanism was provided in the Concession Agreement commonly known as the 'waterfall mechanism'. The Concessionaire applied for Premium Deferment Scheme (PDS) which was intended to assist Concessionaires in stressed projects experiencing revenue shortfall. The PDS envisaged reduction/revision of the annual Premium payable by the Concessionaire and deferment of the payment of the remainder subject to payment of interest @2% above bank rate per annum. The Concessionaire's request for premium deferment was approved resulting in execution of a Supplementary Agreement. The disputes between the parties culminated in making an arbitral award. Simultaneously, the Concessionaire raised the dispute regarding the revenue collection being affected due to construction of a competing road. The arbitral tribunal rejected the Concessionaire's claim for compensation on the ground of existence of a competing road. The Concessionaire contended that since it was entitled to compensation on account of a competing road having come into existence it was not liable to pay the revised premium under the scheme. The arbitral tribunal concluded that the Concessionaire was liable to pay the revised premium. The Court observed that the findings of the arbitral tribunal cannot be read as an omnibus declaration that revenue generation had nothing to do with the premium payable. Such a declaration would be contrary to clause 31.3.1 of the Concession Agreement. It would also be contrary to Rule 7 of the National Highway Fee (Determination of Rates & Collection) Rules, 2008 which had been incorporated by reference in Article 27 of the Concession Agreement, and which stipulated that the "fee collected" shall be appropriated by the Concessionaire in accordance with the provisions of, and for performance of its obligations under the agreement entered into by such Concessionaire. Therefore, there can be no absolute severance of relationship between the fee collected and the obligation to pay revised premium. The Court also concluded that the standard required to be met by a post-award section 9 applicant, seeking securing of the awarded amount before proceeding to execution, is higher than the standard which has to be met by a pre-award section 9 applicant.

Issue 62

C.A.N

October 2024

Construction Arbitration

Newsletter

R A U T R A Y & C O.

Construction Arbitration Law Firm

- **'Back-to-back' basis contract - while 'back-to-back' contracts often stipulate that a sub-contractor's payment is contingent upon the principal Employer's payment to the Contractor, this condition is enforceable only during the course of the contract - where the sub-contract is executed on 'back-to-back' basis, the sub-contractor's bills cannot be withheld by the Contractor until the same were paid by the Employer - once the parties are in a dispute, in relation to the bills claimed by the sub-contractor, the Contractor cannot defer payments in perpetuity on the ground of the pendency of certification, when it has not otherwise disputed the correctness of the bills.**

- **Interpretation of a 'pay-when-paid' clause - sub-contract on 'back-to-back' basis providing that specifically providing the obligation of the principal Contractor to pay to the sub-contractor on the actual receipt of payment from the Employer - obligation to release payments is linked to the actual inflow of funds from the principal Employer - not open to the sub-contractor to challenge the provision.**

[Kingston Enterprises v. NBCC (India) Ltd. - Delhi High Court - Decided on 16.10.2024]





- **Contractor forced to select its arbitrator from the panel of arbitrators prepared by the Employer - list of arbitrators forming part of the panel is exclusively prepared by the Employer - arbitration clause providing that the Contractor has to mandatorily select its arbitrator from a panel maintained by the Employer - such an arbitration clause is against the principle of equal treatment.**

- **Panel of arbitrators - panel of three retired Railway officers as arbitrator - Railways to send a panel of at least four names of retired railway officer(s) empanelled to work as Railway arbitrator - Contractor to suggest to General Manager of the Railways at least two names out of the panel for appointment as Contractor's nominee - General Manager shall appoint at least one out of them as the Contractor's nominee – General Manager also to appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the "presiding arbitrator" from amongst the three arbitrators so appointed - such an appointment clause is likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators - fact that the General Manager is nominating the presiding arbitrator gives rise to a reasonable doubt about the independence and impartiality of the entire arbitration proceeding.**

- **Unilateral appointment by the Employer - no prohibition on Public Sector Units (PSUs) from empanelling potential arbitrators - an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs - PSUs can give a choice to the other party to select its arbitrators from the curated list provided the other party expressly waives its objection - unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution of India for being arbitrary in addition to being violative of the equality principle under the Arbitration Act.**

[Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company - Supreme Court - Decided on 8.11.2024]



Kingston Enterprises v. NBCC (India) Ltd. - Delhi High Court - Decided on 16.10.2024

The principal Employer invited tenders for construction of additional pre-fab structures for providing accommodation (6 officers block, 26 AC block & 120 men's barrack). The sub-contractor entered into an agreement with the principal Contractor to execute the construction works under a back-to-back contract, wherein principal Contractor retained primary responsibility for the execution of the work while engaging sub-contractors for on-ground execution. The sub-contractor felt aggrieved that despite fulfilling their contractual obligations and completing the work to the satisfaction of principal Contractor, the payments due under the sub-contract were withheld. The Court observed that payment clause stipulated in the General Conditions of Contract (GCC) of the sub-contract provided that the sub-contractor shall become entitled to payment only after principal Contractor has received the corresponding payments from the Employer for the work done by the sub-contractor. Further, the sub-contractor had willingly entered into the agreement, fully aware of the payment terms stipulated in the 'pay-when-paid' clause, and had accepted the payment terms with full knowledge of its implications. The binding nature of the 'pay-when-paid' clause connotes that the sub-contractor must wait until the principal Employer has fulfilled its payment obligations to the principal Contractor.



Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company - Supreme Court - Decided on 8.11.2024

Challenge to the arbitration clause prescribed by the Central Organisation for Railway Electrification (CORE) in its contract. The Court dealt with the arbitration clause which provided that the three-member tribunal would be constituted by the Railways suggesting at least four names of retired railway officers and the Contractor would select two names out of the panel for appointment as their arbitrator. The General Manager (of the Railways) would thereafter, choose at least one person out of the two to be appointed as the Contractor's arbitrator and proceed to appoint the balance arbitrators from the panel or outside the panel and also indicate the presiding arbitrator. The Court observed that an arbitrator-appointment clause is likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators since the Contractor is restricted to choosing its arbitrator from the panel of four arbitrators nominated by the party who is a party to the dispute and the Contractor's choice is further constrained because it is made subject to the decision of the General Manager who will choose one among the two persons suggested by the party. The Court observed that law does not prohibit parties to an arbitration agreement from maintaining a curated panel of potential arbitrators. However, if the PSUs make it mandatory for other parties to select their nominees from the curated panel of arbitrators, the very factor that the PSU is choosing only a certain number of persons as potential arbitrators and not others will raise a reasonable doubt in the mind of a fair-minded person. The PSUs may conceivably have nominated a person on the panel of potential arbitrators because they have a certain predisposition in favour of the former. This doubt is reinforced when the other party is given no choice but to select its arbitrator from the curated panel. The PSUs can give a choice to the other party to select its arbitrators from the curated list provided the other party expressly waives its objection. Since the activities of the government have a public element, it is incumbent upon the government to ensure that it enters into a contract with the public without adopting any unfair or unreasonable procedure. The Court concluded that a unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution of India for being arbitrary in addition to being violative of the equality principle under the Arbitration Act. The validity of the arbitration clause providing for the procedure for appointment of arbitrators should be left to be decided by the arbitral tribunal in view of the doctrine of competence-competence.

Issue 63 C.A.N November 2024

Construction Arbitration

Newsletter

RAUTRAY&CO.

Construction Arbitration Law Firm

- **Apportionment of delay - proportion of delay attributable to each of the parties was not ascertainable - delay in handing over of drawings - Contractor delayed in executing the work, and had not deployed sufficient resources - Employer entitled to terminate the contract - retention of the bank guarantee amount, security deposit, and levy of liquidated damages by the Employer on the Contractor - Employer not able to prove loss - Contractor entitled to refund of the bank guarantee, and security deposit - although the extent of loss or damage is not required to be proven, the fact that loss or damage has been suffered must be established, even to claim liquidated damages or penalty.**

- **Liquidated damages - is no different from unliquidated damages - it cannot be granted if there is no loss or injury.**

[Union of India v. Krishna Constructions Company - Delhi High Court - Decided on 21.10.2024]



- **Claims barred by limitation - continuing breach - rejection of a demand of damages does not constitute a continuing breach of the contract on the part of the Contractor after it has been terminated - if the contract has been terminated there is no continuing wrong and the period of limitation would commence from the date of the breach - once a tender is issued by the Employer at the risk and cost of the Contractor, then, the amount which is to be claimed from the person who is guilty of breach, becomes crystalized when the risk purchase tender at a higher cost is awarded - engagement of a new contractor for completing the contract cannot extend the limitation period.**

[Gillanders Arbuthnot and Co. Ltd. v. Steel Authority of India Limited - Delhi High Court - Decided on 20.11.2024]



Union of India v. Krishna Constructions Company - Delhi High Court - Decided on 21.10.2024

The disputes between the parties could not be settled by the Dispute Resolution Committee. The parties referred the dispute to arbitration. The arbitral tribunal concluded that both the parties were responsible for the delay in completion of the contractual work. The Employer had delayed in handing over of the drawings to the Contractor; in particular, the foundational drawings had not been handed over for the first seven months, out of a total contract execution period of twelve months. The arbitral tribunal also found that the Contractor had delayed in executing the work, and had not deployed sufficient resources to the contract. The proportion of delay attributable to each of the parties was not ascertainable. The Court upheld the finding of the arbitral tribunal that the Employer had not placed any material to show that it spent more money to get the left over job completed through a third agency. There was no evidence to prove that the breach of contract by the Contractor had resulted in a legal injury to the Employer. The Employer had wrongly withheld the amounts recovered by way of performance bank guarantee, security deposit and the final bill of the Contractor.



Gillanders Arbuthnot and Co. Ltd. v. Steel Authority of India Limited - Delhi High Court - Decided on 20.11.2024

The disputes between the parties arose out of a contract for installation of a Top Pressure Recovery Turbine (TRT) (PKG-18) under 2.5 MT New Stream Expansion at SAIL's IISCO Steel Plant, Burnpur, India. The contract was for execution of work on a divisible turnkey basis for an aggregate consideration. The works under the contract were to be completed within a period of twenty-four months from the effective date of the contract. The execution of the works under the contract was delayed. According to the Employer, the contract was delayed on account of reasons attributable to the Contractor. The Employer terminated the contract and informed the Contractor that the balance works would be completed at their risk and cost by engaging another contractor. The Employer invited fresh tenders for completion of the balance work. The Employer raised a claim for damages. The Employer made a request to the ICC for arbitration, but did not deposit the necessary costs. The Employer initiated the arbitration proceedings by sending a fresh request to the ICC Secretariat. Thereafter, the arbitral tribunal was constituted. The arbitral tribunal rejected the Employer's claim as being barred by limitation. The arbitral tribunal concluded that the cause of action accrued when the contract was terminated and since the arbitration proceeding was commenced after more than 9 years, the Employer's claims were barred by limitation. Further, it observed that the clause 44.2.6 of the General Conditions of Contract (GCC) concerns the quantification of damages and not the cause of action for claiming the same. The single judge in the challenge proceeding, concluded that the arbitral tribunal had committed an error by not recognising the right of the Employer under clause 44.2.6 of the GCC and for deciding the issue of limitation without conducting a trial. The Employer had contended that although the breach of the contract occurred on the date when the contract was terminated on 29.11.2012; however, the same could not be considered as the date from which the period of limitation was required to be reckoned. The Employer relied on clause 44.2.6 of the GCC and contended that the breach was a continuing one and therefore, the limitation would begin to run from the date on which the breach ceases. The Employer took the plea that the amount due to it, could only be determined after the completion of facilities, that is, after the risk purchase contract was completed. Alternative, the limitation would begin to run from 'the breaking point' of negotiations between the parties. The Court upheld the finding of the arbitral tribunal and concluded that the Employer's claims were barred by limitation.



Issue 64 C.A.N November 2024

Construction Arbitration

Newsletter

RAUTRAY&CO.

Construction Arbitration Law Firm

- **Claim for liquidated damages - price adjustment for delay in completion - Clause in the contract provided that the provision for price adjustment and/or fixation is not to be understood or construed as a provision for liquidated damages or penalty under section 74 of the Indian Contract Act - arbitral tribunal cannot award damages in favour of the Employer without there being any averment to the effect that it had suffered losses or damages.**

- **Meaning of expression "whether or not actual damage or loss is proved to have been caused thereby" - where it is possible to prove actual damage or loss, such proof is not dispensed with - it is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.**



- **Price adjustment clause for delay in completion - where contractual terms provide for a variable consideration depending on the performance of the agreement, the said term is required to be enforced - it is not necessary that in all cases where the parties have agreed to reduction in consideration on the basis of performance, that the contractual term to that effect is to be construed as the clause for damages - in such cases, the contractual clause must be read as an integral part of the rights and obligations of the parties, which are required to be performed.**

[Indian Oil Corporation Ltd. v. Fiberfill Engineers - Delhi High Court - Decided on 20.11.2024]



- **Claim on account of price variation due to increase in the cost of cement - dispute as to which index applies, whether the price index as per the memorandum issued by the Director General, CPWD as applicable to Delhi, Faridabad, Gurugram, Ghaziabad and Noida or the price as mentioned by the Zonal Chief Engineer, CPWD, South Zone or the All India Wholesale Index issued by the Economic Advisor to the Government of India, Ministry of Commerce and Industry, was applicable - the calculation of price variation in terms of the formula under the contract should be by using the price index as declared by the Director General, CPWD.**

[PCC Infrastructure Pvt. Ltd. v. Airports Authority of India - Delhi High Court - Decided on 1.4.2024]



Indian Oil Corporation Ltd. v. Fiberfill Engineers - Delhi High Court - Decided on 20.11.2024

The Employer awarded the contract for designing, supplying, installation, testing and commissioning of high mast signage systems of various heights and types at various Employer's retail outlets in the State of Tamil Nadu. The execution of the work order was inordinately delayed. The disputes between the parties were referred to arbitration. The single judge took the view that the arbitral tribunal had wrongly accepted the Employer's claim for compensation on account of delay in execution of the works, without returning a finding that the Employer had suffered damages on account of delay or that the amount withheld was a reasonable compensation for the delay in execution of the work on the part of the Contractor. Further, the arbitral tribunal had ignored the relevant material and also awarded liquidated damages by way of price adjustment without recording a finding as to whether the Employer had suffered any loss or injury. Clause in the contract provided that the provision for price adjustment and/or fixation is not to be understood or construed as a provision for liquidated damages or penalty under section 74 of the Indian Contract Act. The contract also provided that the amount as contemplated under the General Conditions of Contract (GCC) would be payable "by way of compensation". The arbitral tribunal rejected Contractor's contention that the amount deducted was by way of penalty as the Employer had not made any claim for loss or injury. Whilst the Employer claimed that it was entitled to compensation and liquidated damages, the Contractor claimed that Clause 4.2.2.2 of the GCC contains the provision for levy of penalty, which was impermissible.

The Court concluded that in a given case where contractual terms provide for a variable consideration depending on the performance of the agreement, the said term is required to be enforced. It is not necessary that in all cases where the parties have agreed to reduction in consideration on the basis of performance, that the contractual term to that effect is to be construed as a clause for damages. In such cases, the contractual clause must be read as an integral part of the rights and obligations of the parties, which are required to be performed. The award was set aside since the arbitral tribunal awarded liquidated damages or compensation by way of price adjustment, in the absence of an averment by the Employer that it had suffered loss.



PCC Infrastructure Pvt. Ltd. v. Airports Authority of India - Delhi High Court - Decided on 1.4.2024

The Employer awarded to the Contractor the work for "Construction of part parallel taxi track for new Runway 06/24 at both sides and Provision of RESA of 240m × 90m for 06 Runway at Mangalore International Airport". The work was to be completed within a period of twenty months to be reckoned from the 15th day after the issuance of Letter of Acceptance.The work could not be completed within the stipulated period and was extended by about nine months. The delay in execution of the work was not due to the Contractor. The time for completing the work was extended without levy of penalty or compensation. The Contractor did not agree with the Dispute Redressal Committee decision and invoked arbitration. The arbitral tribunal rejected the claim of the Contractor and also the counter claims of the Employer. The Contractor claimed that the price variation clause was required to be calculated on the basis of the base rate of cement as declared by the Chief Engineer, Central Public Works Department (CPWD), South Zone as on the date of submission of the tender. The increase or decrease in price was required to be determined in reference to the said base rate either as per the cost indices / prices of cement as notified by the Chief Engineer, CPWD, South Zone from time to time or prices / indices of cement covered under the All India Wholesale Price Index of materials published by the Economic Advisory to the Government of India, Ministry of Commerce and Industry. It claimed that the price indices issued by Director General, CPWD for Delhi NCR region was not applicable for calculating the price variation in terms of clause 10CA of the GCC as the Work was to be executed in the South Zone. According to the Employer, the All India Wholesale Price Index was not relevant for calculating the price variation in respect of cement. Additionally, it claimed that the All India Wholesale Price Index referred to by the Contractor, were of series 2004-2005 and were no longer relevant. It claimed that the All India Wholesale Price Index data for series 2011-2012 in respect of Ordinary Portland Cement also reflected a downward trend in 17 months out of 24 months. The price variation in respect of the cement was required to be determined on the basis of All India Price Index published by Director General, CPWD.

The arbitral tribunal concluded that there was no ambiguity in the description for determination of the price indices (Cl and Clo) to be used for calculating the price variation as per the formula provided in the contract. It further held that there was no material, which reflected that the Contractor has raised any query in regard to the said formula or had protested that the price variation was required to be based on the base price and index notified by the Zonal Chief Engineer, CPWD in respect of the said zone. The dispute was confined only to the question as to which index applies, whether the price index as per the memorandum issued by the Director General, CPWD as applicable to Delhi, Faridabad, Gurugram, Ghaziabad and Noida or the price as mentioned by the Zonal Chief Engineer, CPWD, South Zone or the All India Wholesale Index issued by the Economic Advisor to the Government of India, Ministry of Commerce and Industry, was applicable. The Court concluded that there was no dispute that the base price of cement would be the price "at the time of the last stipulated date for receipt of tender". Thus, the base price of cement as in March 2014 would be the relevant base price. The increase and decrease in the price of cement is required to be determined "by the price indices issued by Director General (Works), CPWD". The clause also specified that the same "shall be determined by All India Wholesale Price Indices of materials as published by Economic Advisor to the Government of India, Ministry of Commerce and Industry". The Court concluded that the calculation of price variation in terms of the formula under the contract, by using the price index as declared by the Director General, CPWD, cannot be faulted with.



Issue 65

C.A.N

December 2024

Construction Arbitration

Newsletter

RAUTRAY&CO.

Construction Arbitration Law Firm

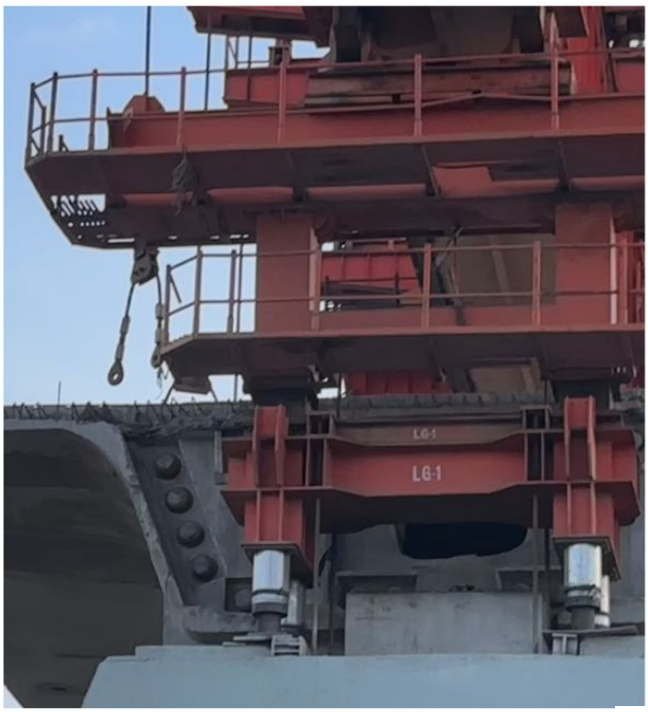
- **Claim for loss of profit due to reduced turnover of work - contract clause providing that Contractor shall have no claim to any payment of compensation or otherwise, on account of any profit or advantage which he might have derived from the execution of the work in full, but which he did not derive in consequence of determination of the contract - claim under the head loss of profit due to reduced turnover of work cannot be allowed for partial completion of work.**

[Nilakantan & Sons Private Limited v. Union of India - Madras High Court - Decided on 30.10.2024]



- **Delay in finalizing of drawings - consequence - delay in finalizing of drawings and the time to time revisions would have a major impact on the planning for the execution of the work - Contractor not able to properly plan and execute with the required pace - non-issuance of structural drawings in time and their revisions from time to time would affect the planning for the execution of the work, rotation of the shuttering and procurement of reinforcing steel of the required diameters in advance.**

- **Entry in the site order book - reliance to prove slow progress - entries made more by way of reminding the Contractor to get the mix design done timely rather than by way of pointing out delays in the execution of the work.**



- **Claim for increase in price of steel - evidence - words 'statutory rule or order' in the contract clause can be interpreted to mean both, statutory order or any other order, which is not statutory in nature - word 'order' is to be taken to mean any order issued by the agencies mentioned in the contract for the supply or purchase of steel etc. - Contractor produced orders related to the price of steel issued by the Steel Authority of India Limited and Rashtriya Ispat Nigam Limited in the period the steel was purchased by them - vouchers relating to the steel purchased by the Contractor along with the decision of the government, is sufficient.**

[Netaji Subhash Institute of Technology v. Surya Engineers - Delhi High Court - Decided on 19.11.2024]



Nilakantan & Sons Private Limited v. Union of India - Madras High Court - Decided on 30.10.2024

The Employer awarded to the Contractor the work for construction of the work of Construction of Road Over Bridge Clear Span of 2 X 35.00 m Clear Span PSC Box Girder, at Km 354/32-33, in lieu of existing level Crossing No. 116, in Magudanchavadi Yard, Jolarpettai section. The Contractor was aggrieved by the fact that nearly eight months had been lost in carrying out the sub-structure work and the design and drawings for the superstructure box girder, had not been approved by the Employer. Further, the Contractor pointed out to the Employer that for want of approval for extension of time, the work of foundation for pier 1, ready for concreting with reinforcement and progress in column in pier 2, got held up. The Contractor also informed the Employer that the delay was on account of change of officers, holdup of execution work for want of extension of currency, losses on account of idling of establishment infrastructure and labour, very high rates of the market price of reinforcement steel and not getting the first payment for the work done etc. The disputes between the parties were referred to arbitration. The arbitral tribunal partially allowed the Contractor's claims and made a finding that the contract was illegally terminated by the Employer. The Court concluded that the claim under the head 'loss of profit' due to reduced turnover of work cannot be allowed for partial completion of work. The Court upheld the award of the arbitral tribunal.

Netaji Subhash Institute of Technology v. Surya Engineers -
Delhi High Court - Decided on 19.11.2024

The work for "Construction of NSIT Complex (Phase-III) Part II at Sector 3, Dwarka, New Delhi-110045, SH: Extension of Library Building & Computer Centre at NSIT, Sector-3, Dwarka" was awarded by the Employer to the Contractor. The Contractor was not able to complete the work in time. The Employer rescinded the contract and awarded the balance work to be done at the risk and cost of the Contractor. The disputes between the parties were referred to arbitration. The Contractor raised various claims including for work done but not paid, escalation, refund of security deposit, loss of material, tools and plants, shuttering material etc. and for the advances made to the suppliers, idling of manpower, staff and machinery, loss of expected profit on the balance work, and interest. The arbitral tribunal held that the non-issue of structural drawings in time and their revisions from time to time, affected the planning for the execution of the work, rotation of the shuttering and procurement of reinforcing steel of the required diameters in advance. Further, the arbitral tribunal concluded that site order book entries relied upon by the Employer had been made more by way of reminding the Contractor to get the mix design done timely, rather than by way of pointing out delays in the execution of the work. The Court upheld the findings of the arbitral tribunal and the award.



Issue 66 C.A.N December 2024
Construction Arbitration
Newsletter

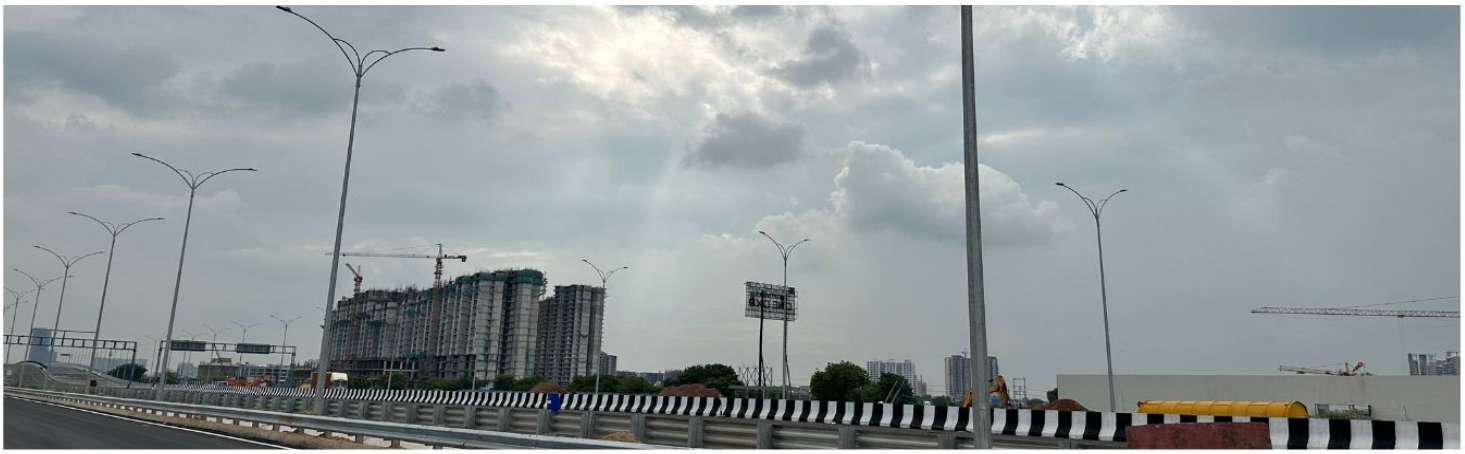
RAUTRAY & CO.
Construction Arbitration Law Firm

- **Claim for delay damages - unsubstantiated claim - primarily based on mere calculation of assumed losses based on indirect application of 'Hudson Formula' - method of computation - a percentage formula can be applied for award of damages on account of expenditure on overheads, loss of profit but same has to be computed taking into account the payments due for the unexecuted work and should exclude the payments received for the work executed.**

- **Claim for idling of plant and machinery - reduction of the claim by 15% for major repairs and depreciation - mitigation of loss - 25% of total work as per the contract was left out to be done - imperative from the doctrine of mitigation of losses to keep maximum one third of the plant and machineries, if at all they were kept at site, to complete the balance work - Contractor should produce evidence whether it had any other available work where the plants and machineries could have been utilised or whether the Contractor was prevented from participating in any other tender where the plants and machineries were required to be utilised.**

- **Claim for overheads - evidence in support of the claim - trade usage or industrial practice whether a valid form of evidence - government reports relied upon for determining the component of overhead in an irrigation project - reliance on report of the Rates and Cost Committee, to evolve comprehensive standard schedule of rates including detailed analysis of such rates which can be used for basic schedule for all projects - reports suggested that in similar kind of work it is expected that the overhead cost would be 10% of the value of work forming part of trade usage or industrial practices - award was made on percentage basis, i.e. 8% for underutilised period and 2% for unutilised period by taking monthly value of allocation of work calculated by dividing agreement value of contract by period of 15 months - Contractor did not produce the books of accounts, bills, vouchers, etc. to substantiate its claim for overhead expenses - award is not sustainable.**

[State of Jharkhand v. Himachal Construction Ltd. - Jharkhand High Court - Decided on 10.12.2024]



- **Delay by both the parties - whether the other party committed breach, cannot be decided by the party alleging breach - the Employer pointed out to the Contractor to increase the man power to expedite the work as the pace of work was very slow - letters exchanged between the parties at the relevant time, sufficient to show that the Contractor failed to respond to the Employer's assertion of slow progress - said letters sufficient to establish slow progress.**
- **Claim for bonus - Contractor is entitled to claim bonus for early completion, if it is not responsible for the delay - Contractor can claim bonus for early completion even if the works have been delayed, provided it can prove that it would have completed the works early, but for the delays caused by the Employer - delay was attributable to the Contractor since it failed to increase its manpower - both parties were liable for the delay, therefore the Contractor cannot claim bonus.**
- **Claim for increase in wages - payment of escalation on substituted items - labour escalation is not applicable on substituted items - contract providing that any substituted work shall form part of the contract as if originally provided for and the same shall be carried out by the Contractor on the same conditions in all respects including price.**

[Satish Builders v. Union of India - Delhi High Court - Decided on 10.1.2025]



State of Jharkhand v. Himachal Construction Com. Pvt. Ltd. - Jharkhand High Court - Decided on 10.12.2024

The Contractor was awarded the contract for excavation of residual work of Chandil left bank main canal. The work could not be completed within the extended time. The disputes between the parties were referred to arbitration. The Contractor raised claims primarily on three grounds namely, claim relating to the work done, claim on account of delay and damages. The arbitral tribunal allowed the claims of the Contractor. Before the arbitral tribunal no evidence was led by the Contractor with regard to actual amount spent on overheads as claimed under different sub-heads, but the Contractor relied upon trade practice based on the government reports. The award was made on percentage basis, i.e. 8% for underutilised period and 2% for unutilised period by taking monthly value of allocation of work calculated by dividing agreement value of contract by period of 15 months. Even the loss of profit was calculated and awarded on 10% basis without any evidence of actual loss. The Contractor did not produce the books of accounts, bills, vouchers, etc. to substantiate its claim for overhead expenses. The Court set aside that the award of delay damages on account of loss of overheads. Further, the Court set aside the award on account of underutilised and unutilised overheads, loss of profits and expenditure on account of underutilised and unutilised plants.

Satish Builders v. Union of India - Delhi High Court - Decided on 10.1.2025

The Contractor was awarded the contract for construction of "C/O Regional Office Building for Bureau of Indian Standard at Plot No. 4A, Sector 27B, Chandigarh, including Electrical Installation" by the Employer. The Contractor invoked the arbitration clause on the ground that the Employer failed to release justified payments against the work done as well as made unjustified recoveries. The work got delayed by 611 days. The Contractor submitted an undertaking in the application for seeking Extension of Time (EOT) that they would not claim for the damages if EOT was granted by the Employer without levy of compensation. The Contractor later contended that the undertaking had been given by them under duress. The arbitral tribunal held both parties responsible for the delay. The arbitral tribunal concluded that since the Employer justified the entire delay of 611 days and had not levied compensation on the Contractor for delay in execution, the undertaking given by the Contractor was not under duress. According to the arbitral tribunal, the Employer had decided to justify the entire period of 611 days as justified period, irrespective of the fact that the delay was contributed by both the parties. The Court upheld the finding of the arbitral tribunal that the delay was attributable to both the parties and therefore, the Contractor was not entitled to claim bonus for early completion. Further, the labour escalation was not applicable on substituted items. The findings of the arbitral tribunal was upheld by the Court.



Issue 67 C.A.N January 2025

Construction Arbitration

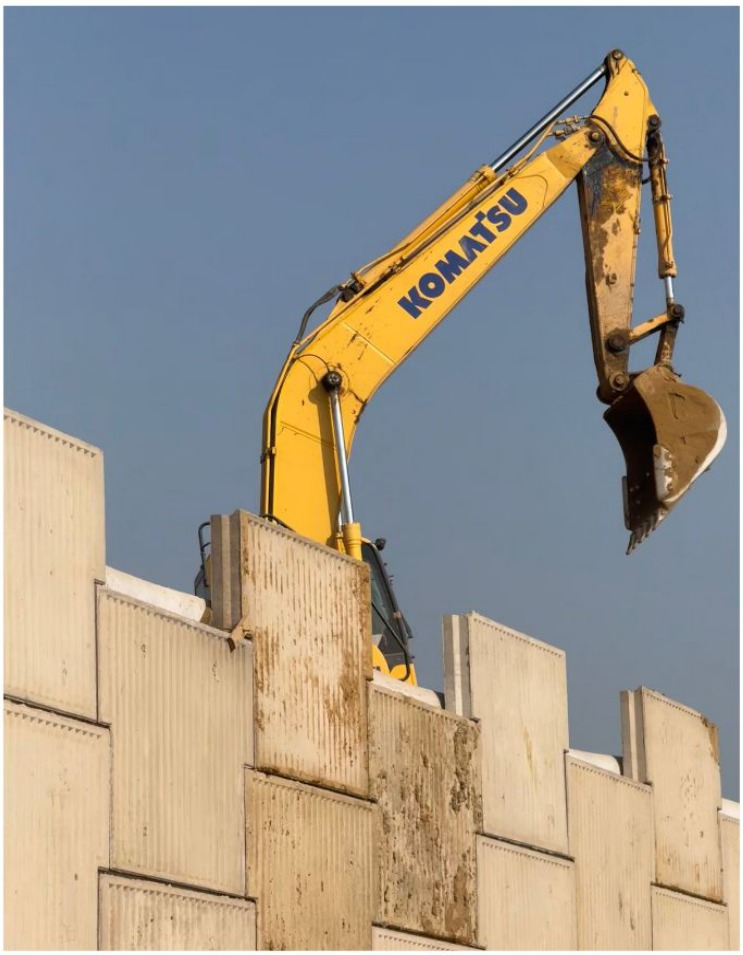
Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

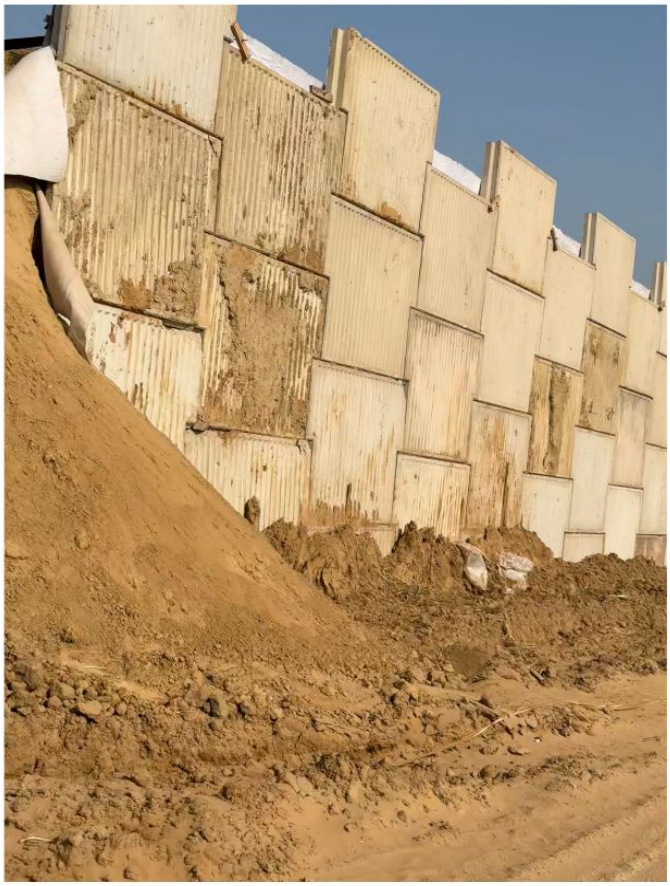
- **Quantification of loss of profit - foreclosure of contract - possession of site not handed over to the Contractor - Contractor has to prove that there was other work available that he could have secured if not for the delay - same has to be proved with reference to invitations to tender in which the Contractor could not participate due to insufficient capacity to undertake other work; or by books of accounts to demonstrate a drop in turnover.**

[Executive Engineer v. S. Bose - Calcutta High Court - Decided on 20.1.2025]



- **Stay of operation of the arbitral award - liability to deposit the awarded amount with the Court as a condition for stay against execution - Court does not have scope to go into the examination of the challenges to the arbitral award while adjudicating an application seeking deposit of the awarded amount with the Court.**

- **Applicability of principles of Code of Civil Procedure - principles of the Code are applicable mainly because public corporations are involved and because the Government Corporations have to pay large amounts under the arbitral awards.**



- **Meaning of constructive possession - means necessary for construction, operation and maintenance - it means actual physical possession and access to vacant unencumbered land without hindrances and interruptions - contractual obligation was not to give paper possession but actual physical possession - contract has to be interpreted in a commercial fashion - words "grant" and "vacant access" in a commercial contract for construction could only be construed as envisaging actual physical possession or actual physical access to an unencumbered and unhindered site.**

[National Highways Authority of India v. Yedeshi Aurangabad Tollway Ltd. - Delhi High Court - Decided on 16.1.2025]



Executive Engineer v. S. Bose - Calcutta High Court - Decided on 20.1.2025

The scope of the work under the tender was construction of Sea Dykes with Hume Pipe Sluice at New Manglutan in South Andaman under Watershed Development Project. The work was not started even till the stipulated date of completion. The Employer invoked the clause of the General Conditions of Contract (GCC) to close the contract. After the foreclosure of the contract, the Contractor invoked arbitration. The arbitral tribunal, amongst other claims, allowed the claim for loss of profit by the Contractor. The Court noted that the tender amount included 15% being percentage on cost of materials and labour to cover all overheads and profits. The Court upheld the finding of the arbitral tribunal quantifying the amount of loss of profit and limited the amount of loss of profit to 1/3rd of this 15%. Further, the Court upheld the finding of the arbitral tribunal and concluded that the site had never been handed over and work never commenced, the damages or loss claimed on account of idling of man power, machinery or expenses incurred on them without any evidence, was not sustainable.

National Highways Authority of India v. Yedeshi Aurangabad Tollway Ltd. - Delhi High Court - Decided on 16.1.2025

The Concessionaire was granted concession for four-laning of the project highway on design, build, finance, operate and transfer basis (DBFOT). There was delay in completion due to delayed land procurement, utility shifting, tree cutting, pandemic etc. The Employer insisted that the Concessionaire should submit undertaking that it would not raise any claim on the Project cost due to shifting of Project Milestone. However, the Concessionaire did not sign a supplementary agreement. The disputes between the parties were referred to arbitration. The arbitral tribunal concluded that the obligation of the Employer was to grant actual vacant access, and not mere notification of the land for acquisition. The term 'constructive possession' meant actual physical possession and access to vacant unencumbered land without hindrances and interruptions. The arbitral tribunal agreed with Concessionaire's contention that the Independent Engineer (IE) was the sole authority to determine and grant EOT. Further, the arbitral tribunal found that the Employer delayed in approving the cost of shifting and in depositing supervision charges and approving plans for shifting of the utilities. Once it was established that the Commercial Operation Date (COD) was delayed on account of material breach or default of the Employer, or for that reason, toll revenues were suspended or reduced, the Employer was liable to extend the concession period. The liability of the Employer to extend the concession period did not stand absolved merely because there was contributory material breach or default on the Concessionaire's part in delaying the COD. The wavier of damages for delay in fulfilment of conditions precedent did not absolve the Employer of its liability under the CA forever. The waiver was for the limited purpose of declaration of the Appointed Date. The damages envisaged by clause 10.3.4, it was held, were contemplated only in the event of failure of the Employer to grant vacant access to any part of the said 20% of balance land, de hors the obligation to make 80% of the land available by the Appointed Date. The Concessionaire was entitled to compensation as well as extension of the concession period. The statutory auditor's certificate was supported by back up documents including the statements of plant and machinery deployed, extracts of Monthly Progress Reports, salary statements, wage slips, pay slips, bills and invoices of contractors, attendance logs of workers, details of tax deducted at source, leave and license agreements, vehicle logs, lease agreements for plants, vehicle hire invoices, bank statements, loan account statements and extracts from the IE reports on the status of progress of work etc. The statutory auditor also confirmed, in evidence, that these documents were taken into account by it while certifying the Concessionaire's claim under clause 35.2 of the CA. The statutory auditor had deposed and confirmed the contents of his certificate. The Court concluded that the Concessionaire could not be expected to carry out construction on land which had hindrances or obstruction, even though the Employer sought to advance the argument based on the definition of "encumbrance". The Employer had failed to make out a case for waiver of the requirement to deposit the awarded amount.

Issue 68 C.A.N January 2025

Construction Arbitration

Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **No damage clause - wrongful termination - no claim for compensation on account of delays or hindrances to the work from any cause would lie - where the contract provides that extension of time would be granted to the Contractor to complete the work, the Contractor's claim for compensation cannot be sustained.**

- **Principle of business efficacy - normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen - test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended - but only the most limited term should then be implied - the bare minimum to achieve this goal - if the contract makes business sense without the term, the courts will not imply the same.**



- **Pre-estimated genuine amount of damages - party who has suffered on account of the breach is entitled for compensation for any loss or damage caused to it - in order to claim the compensation under section 73, the Contractor has to prove the actual loss or damages in accordance with the contract.**

[NTPC Limited India v. Jindal ITF Ltd. - Delhi High Court - Decided on 30.1.2025]



- **Limitation of liability clauses - clauses are not in conflict with either section 23 or section 28 of the Contract Act - clause in the contract providing Contractor shall not be entitled to damages or compensation if extensions of time to complete the work has been granted by the Employer due to delays attributable to the Employer - Employer had granted an extension of time to the Contractor by waiving liquidated damages for delays caused by the Contractor - Contractor made claims on account of delay on the part of the Employer, for which an extension was granted - since the claims were prohibited under the contract, the Contractor was rightly prevented by the arbitral tribunal from leading evidence.**

[C & C Constructions Ltd. v. IRCON International Ltd. - Delhi High Court - Decided on 31.1.2025]



NTPC Limited India v. Jindal ITF Ltd. - Delhi High Court - Decided on 30.1.2025

The Employer awarded to the Contractor the work for construction of the unloading infrastructure and the material handling system on a design, build, finance, operate and transfer (DFBOT) basis. The completion of the activities in Phase I and II (completion of construction of the material handling and unloading infrastructure system at Farakka) marked the Commercial Operation Date (COD). Disputes between the parties were referred to arbitration. The arbitral tribunal awarded damages despite the existence of a “no damages clause” in the contract. The Court set aside the arbitral award and concluded that non-adjudication of the claim, amounts to the award being totally non-speaking. The contract provided for compensation for delays committed by the Employer by extending suitably the period of COD and the Contractor would be entitled to compensation by suitably extending the period of COD, however, on account of illegal termination, the said option was not available. The Court concluded that in order to claim the compensation under section 73, the Contractor has to prove the actual loss or damages in accordance with the contract. The award of damages by the arbitral tribunal for the five years of contract in which, no activity had taken place, was totally perverse.

C & C Constructions Ltd. v. IRCON International Ltd. - Delhi High Court - Decided on 31.1.2025

The parties entered into a contract for constructing five Road Over Bridges (ROB). The work at the site was delayed for reasons attributable to the Employer. The Employer withdrew the work relating to the construction of two ROBs from the scope of work and certified the completion of the remaining work. The Contractor wrote to the Employer stating that the construction delay of ROBs was due to various hindrances at the site. The Contractor contended that the delay in construction work resulted in an additional financial burden on account of the establishment and overheads, etc., for a longer period than planned, for which the Contractor had raised a claim separately. The Employer informed the Contractor that the proposed claim for increase in financial burden was not acceptable. The Employer stated that the claim would have to be considered along with the prayer for extension. The Employer granted an extension of time (EOT) to the Contractor for completion of the works. The Contractor had also submitted an undertaking that it will not claim anything extra other than escalation for the work executed. Thereafter, the Contractor invoked the arbitration. The arbitral tribunal passed the order in the respondent's application under section 16 of the Arbitration Act in nature of an award, rejecting all the claims of the Contractor based on the provisions of the contract which prohibited the Contractor from raising claims for damages on account of delays by the Employer where extension of time had been granted by the Employer. The Court upheld that findings of the arbitral tribunal. Clause in the contract providing that in case of delay or fault on the part of the Employer, a reasonable extension of time can be granted and payment of price variation as per the formula agreed between the parties, is valid and enforceable. Importantly, the Employer had granted an extension of time to the Contractor by waiving liquidated damages for delays caused by the Contractor. Furthermore, the Contractor had raised the claim for damages two years after the date of the last extension was granted by the Employer.



Issue 69 C.A.N February 2025

Construction Arbitration

Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Bias of arbitral tribunal - the General Manager / Business Unit Head of the Employer appointed as arbitrator - the arbitrator was directly and intrinsically involved in the execution of the awarded work - the Contractor had repeated meetings with the General Manager of the Employer regarding the progress of the work and thereafter, the Employer took the decision of termination of the contract - award of the arbitral tribunal liable to be set aside.**

[Isar Engineers Private Ltd. v. NTPC-SAIL Power Company Ltd. - Delhi High Court - Decided on 3.2.2025]

- **Forfeiture of performance guarantee - termination of contract - Contractor had not started the work - arbitral tribunal rejected the claim of the Employer for the amount under the performance guarantee since the Employer had not suffered any loss - Employer within its contractual right to encash the performance bank guarantee without the need for it to prove loss.**

[Airports Authority of India v. East India Construction Company Ltd. - Delhi High Court - Decided on 3.2.2025]





Isar Engineers Private Ltd. v. NTPC-SAIL Power Company Ltd. -
Delhi High Court - Decided on 3.2.2025

The Contractor was awarded the work of civil works for raising of ash dyke by the Employer. The duration for completion of the work was twelve months. There was delay attributable to the Employer since amongst others delays, the work site was not handed over in time, drawings were provided late and the rate of additional quantities of work were not finalized. The Employer granted extension of time but recovered liquidated damages from the Contractor. Thereafter, the Employer terminated the contract. The Contractor invoked the arbitration clause. The Contractor repeatedly displayed its apprehension with the appointment of the arbitrator, both pre and post commencement of arbitral proceeding. The General Manager / Business Unit Head of the Employer was supervising the work in question and was directly involved in the execution of the work. It was the General Manager / Business Unit Head of the Employer with whom the Contractor had repeated meetings regarding the progress of the work and was also the authority that took the decision to terminate the contract. The apprehension that the arbitrator would be biased and partial towards the Employer, was held to be justified. The Court set aside the arbitral award.

Airports Authority of India v. East India Construction Company Ltd. -
Delhi High Court - Decided on 3.2.2025

The Contractor was awarded the work for 'resurfacing of existing runway at Biju Patnaik International Airport, Bhubaneswar'. The Employer issued notice to the Contractor stating that there was delay on the part of the Contractor in commencing the work. Even after time had been extended for completion, the work had not commenced. The Employer was facing difficulties because the runway was not being made available. The Engineer-in-Charge determined the contract and directed forfeiture of the earnest money deposit and the performance guarantee. Disputes between the parties were referred to arbitration. The arbitral tribunal concluded that the performance bank guarantee can be invoked only if there was a loss caused to the Employer. The Court held that the arbitral tribunal overlooked the terms of the contract and had given its conclusion based on considerations which were not part of the contract. The arbitral award was set aside.



Issue 70 C.A.N February 2025

Construction Arbitration

Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Claim for increase in the Bill of Quantities (BOQ) item - geogrid / geotextile material exceeding the BOQ quantities in the contract - whether change in quantity of the RE wall constituted a variation - power of the Engineer to revise the rates given in the BOQ in the event of increase in actual quantities - enhancement in the quantity was necessitated because of wrong information furnished by the Employer at the stage of tender - Contractor was paid by the Employer for the work done in each month as per the BOQ rate - the new Engineer appointed by the Employer decided that the rate for the increased quantity of geogrid should be renegotiated - DRB recommended that variation was not established and recommended payment of geogrid at the BOQ rate for the entire quantity - an error in the interpretation of contractual terms by an arbitrator is an error within his jurisdiction and would, therefore, not be a ground to interfere with an arbitral award.**



- **Distinction between instructed variation or uninstructed variation - contract provided that the quantity set out in the contract were estimated quantities - no instructed variation and, therefore, the excess quantity of geogrid required while executing the work, limited to the facia area, should be paid as per the BOQ rates - once a contracted price is provided and the quantities are held to be tentative, any increase or decrease in quantity must be governed by the same price - only in respect of any instructed variation arising from the instruction of the Engineer on account of any additional work or less work that there could be some element of renegotiation.**

[Somdatt Builders -NCC-NEC(JV) v. National Highways Authority of India - Supreme Court - Decided on 27.1.2025]



- **Force Majeure event - Covid - non-political force majeure - Employer had to hand over 90% of the ROW within 30 days of the furnishing of the performance security by the Contractor - there was 466 days delay in the declaration of the Appointed Date - delay in completion of works was only 80 days - Employer approved the Extension of Time (EOT) only for Covid induced reasons and the delays due to non-Covid reasons i.e. ROW issues, were rejected by the Employer's Engineer - 90 days EOT was granted by the Employer - delay of 80 days in completion of the works stood absorbed in the 90 days EOT granted by the Employer.**

[Mahakaleshwar Infratech Pvt. Ltd. v. Chief Engineer, National Highways, UPPWD - Delhi High Court - Decided on 18.2.2025]



Somdatt Builders -NCC-NEC(JV) v. National Highways Authority of India - Supreme Court - Decided on 27.1.2025

The Contractor was awarded the contract by the Employer of four laning and strengthening of the existing two lane section between Km. 470.000 and Km. 38.000 on NH-2 (construction package II-B) in the State of Uttar Pradesh. The contract was a unit rate contract comprising of a detailed Bill of Quantities (BOQ). While executing the contract, dispute arose between the parties in respect of item No. 7.07 of the BOQ which provided for reinforced earth structure including soil reinforcing geogrid with all fixtures and accessories complete as per approved design and drawing. The dispute was with respect to the exceeding of the BOQ quantities i.e. geogrid / geotextile material. The dispute related to the power of the Engineer to revise the rates given in the BOQ in the event of increase in actual quantities. The Dispute Review Board (DRB) recommended that quantities of geogrid required limited to the facia area provided in the BOQ had to be paid as per the BOQ rates. The Employer invoked the arbitration clause. The arbitral tribunal held that the quantity of geogrid given at the tender stage by the Employer was wrong and therefore, the increase in quantity was a mere increase to meet the requirement for completion of the Reinforcement (RE) wall work which was indicated by the RCC facia quantity at the tender stage. There was no change in the design but mere increase in the quantity beyond the BOQ quantity did not attract clause 52.2. The arbitral tribunal further concluded that the Engineer did not possess the power to revise the rates for additional quantity of geogrid required for actual execution of work as per the approved design. Upholding the recommendations of DRB, the arbitral tribunal held that variation in terms of clause 51.1 was not established and directed the Employer to pay the Contractor for the actual quantity of geogrid required to be executed to complete the work of RE wall as per the approved design at the BOQ rate. The Division Bench of the High Court set aside the arbitral award. The Supreme Court concluded that the Division Bench was not correct to hold that even if there was error in estimating the quantity of geogrid while preparing the BOQ, that by itself would not lead to the conclusion that the Employer cannot seek renegotiation of the rates, even if the actual quantity exceeds by over 300% and that the contract did not provide that the Employer should suffer on account of the estimated quantities mentioned in the BOQ turning out to be way off the mark when the contract is executed.

Mahakaleshwar Infratech Pvt. Ltd. v. Chief Engineer, National Highways, UPPWD - Delhi High Court - Decided on 18.2.2025

The Contractor was awarded the work for "Rehabilitation and Upgradation of Kulpahar-Mahoba Section (Km 133.520 To 158.040) of NH-76 & NH-86 (5.360 Km.) in the State of Uttar Pradesh to two lane with paved shoulder under EPC Mode." There was delay in the issuance of the Provisional Completion Certificate. The Contractor took the stand that there was a delay both in the declaration of the Appointed Date as well as on account of Employer's failure in providing complete Right of Way (ROW). The Contractor referred the disputes to arbitration including the claim for unrealized cost of overheads, idling of plants, machinery and manpower on account of prolongation of the period of the project. The arbitral tribunal returned a finding that the Employer delayed the handing over of site to the Contractor. Further, there was delay attributable to the Covid-19 pandemic which was a non-political force majeure event for which neither party could claim damages from the other. The Contractor's claim for unrealized cost of overheads, idling of plants, machinery and manpower on account of prolongation was rejected by the arbitral tribunal since the Contractor was already compensated for the delay in Appointed Date and the delay in execution of the project was attributable to force majeure due to Covid-19 pandemic. The Court concluded that the delay of 80 days in completion of the works stood absorbed in the 90 days EOT granted by the Employer. The Court upheld the arbitral award.



Issue 71 C.A.N March 2025
Construction Arbitration
Newsletter

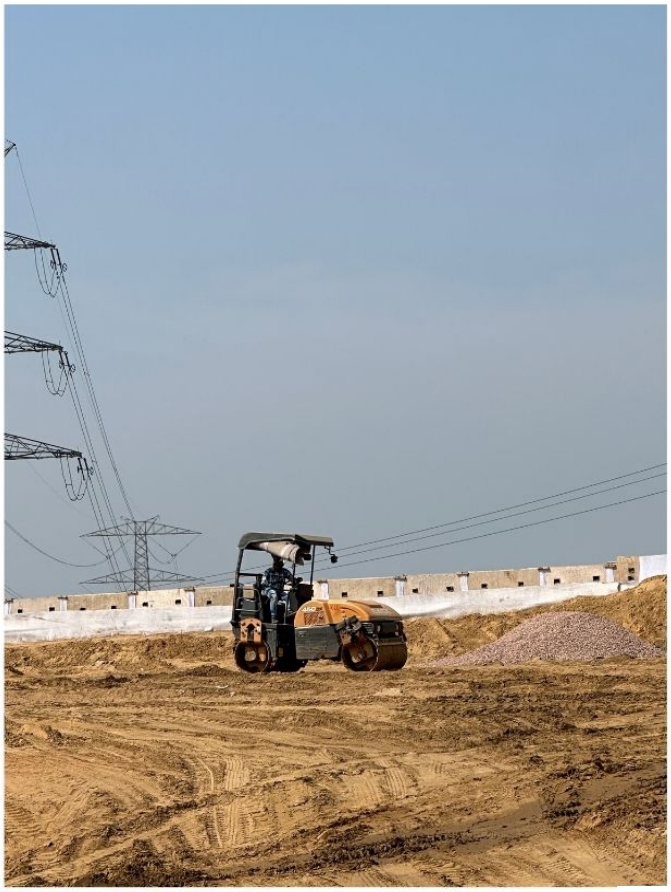
RAUTRAY & CO.
Construction Arbitration Law Firm

- **Claim for increase in scope of work - Technical Conditions of Contract (TCC) stipulated that the quantities indicated is only tentative and liable for variation at the discretion of the Employer - TCC also stipulated that the Contractor is not entitled for any additional payment even if there was any increase in quantum of welding and the Contractor shall weld the joints of site routing piping as per site requirement and no extra payment shall be made for such additional joints - Contractor's raised a claim for payment for distinct ratios of Equated Inch-Dia/Metric Ton and not for the increase in the quantum of welding - Employer was liable to pay to the Contractor for the additional work executed.**

[Bharat Heavy Electricals Limited v. Offshore Infrastructures Limited - Madras High Court - Decided on 14.12.2024]

- **Delay in handing over of site for construction - ground conditions did not permit commencement - encroachments at site - claim for idling of establishment and equipment - Contractor had not placed reliance on the "generally acceptable norms of inputs towards employment of labour, machinery, and overheads" during the arbitration proceeding for computation of its claim - methodology adopted by the arbitral tribunal not tenable - incumbent on the arbitrator to put the "generally acceptable norms" to the parties so that they would be aware of the norms and could advance submissions.**





- **Reliance on photocopies of measurements books (MBs) - sufficient opportunity had been granted to the Employer to trace the originals - adverse inference drawn against the Employer.**

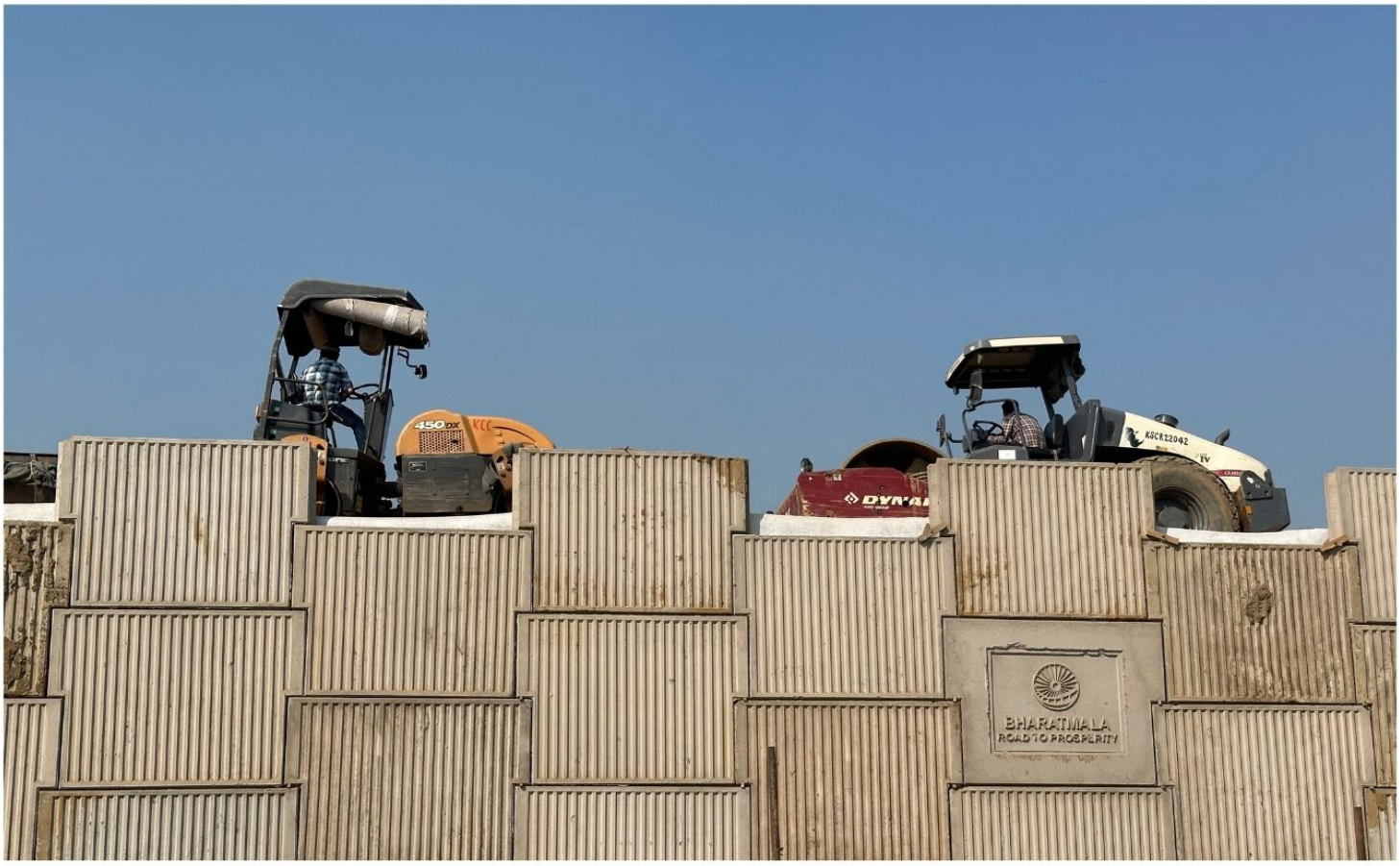
- **Release of earnest money or security deposit to the Contractor - clause proscribing refund of security deposit till the Contractor produces a clearance certificate from the labour officer - only upon grant of clearance by the labour officer the Contractor was entitled to seek release of the security deposit - presumption of clearance having been given by the labour officer on the expiry of six months from completion of work would have arisen only if the Contractor had written to the labour officer for obtaining a clearance certificate - if the Contractor has not applied to the labour officer for a clearance certificate, there is no question of any presumption arising at all of such a certificate having been issued, on the expiry of six months from the completion of work.**

[North Delhi Municipal Corporation v. R&T Enterprises - Delhi High Court - Decided on 5.8.2024]



Bharat Heavy Electricals Limited v. Offshore Infrastructures Limited - Madras High Court - Decided on 14.12.2024

The Employer awarded to the Contractor the work for piping, which encompassed erection, testing, and commissioning of piping systems. The work was divided the piping works into three distinct packages. The Employer amended the Contractor's scope of work to include additional tasks involving medium pressure steam, low pressure steam and carbon steel seamless IBR piping. The Contractor sought revision in rates. Meanwhile the Contractor proceeded with the work, operating under the assumption that the Employer would agree to the revised rates for the additional tasks, but was ultimately denied additional compensation after significant work was completed. The Employer refused payments until the Contractor issued a "No Claim Certificate". The Contractor initiated arbitration proceedings. The arbitral tribunal arrived at the finding that the Equated Inch-Dia (EID) had drastically increased for Carbon Steel Piping (IBR) from what was contemplated in the tender document and what was actually executed by the Contractor. The Employer contended that the work is expressed in terms of erected weight to be in MT and the notes in the Technical Conditions of Contract (TCC) made it clear that the quantities indicated is only tentative and liable for variation at the discretion of the Employer. The Employer contended that the TCC provided that the Contractor is not entitled for any additional payment even if there is any increase in quantum of welding and the Contractor shall weld the joints of site routing piping as per site requirement and no extra payment shall be made for such additional joints. The arbitral tribunal observed that the clause for non-payment of extra amounts for additional joints was not relevant since it was not the case of the Contractor that additional joints are required as per site routing piping. The Contractor had raised a claim for payment due to the Contractor for distinct ratios of EID/MT and not the increase in the quantum of welding. The addition of MP and LP Steam Piping therefore grossly changed the quantities of ID & EID while having the effect of reducing of tonnage. The time was not the essence of the contract and the Employer was responsible for the delay in completion of the work. The Employer was liable to pay to the Contractor compensation under section 55 and 73 of the Indian Contract Act. The Court upheld the award made by the arbitral tribunal.



North Delhi Municipal Corporation v. R&T Enterprises - Delhi High Court - Decided on 5.8.2024

The Employer awarded to the Contractor the work of widening and improvement of the carriageway of roads in Kirti Nagar Industrial Area. The disputes between the parties were referred to arbitration. The Contractor contended that though it had mobilised and deployed the requisite resources at the site as per the date of scheduled commencement of work, the ground conditions did not permit commencement. The resources of the Contractor remained idle due to encroachments by the residents and public. The arbitral tribunal arrived at the finding on the claim for unpaid bill by taking the differential area, between the figure recorded in the final bill and the figure recorded in the MBs. The Court observed that it was a justifiable mode of calculation. Further, since the Employer did not produce the original MBs, the arbitral tribunal was justified in drawing an adverse inference against the Employer. However, the arbitral tribunal erred in holding that the clearance certificate is deemed to have been received by the Employer for the purpose of release of security deposit since the Contractor had never written to the labour officer for a clearance certificate. The assumption of the arbitral tribunal to award claim for idling of establishment and equipment based on "generally acceptable norms of inputs towards employment of labour/machinery/overheads" which was not referred at any stage of the arbitration proceeding was erroneous. It was incumbent on the arbitrator to put the generally acceptable norms to the parties so that they would be aware of the norms and could advance submissions thereon. Moreover, the award did not set out the basis of the generally acceptable norms, and the source from which the said norms could be derived. An award which is predicated on personal knowledge of the arbitrator, the basis of which is not disclosed in the award or in the arbitral proceeding which led up to the award, is contrary to fundamental policy of Indian law.

Issue 72

C.A.N

March 2025

Construction Arbitration

Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Right to commence fresh arbitration after the award is set aside - whether the disputes between the parties stood adjudicated on merits and is barred by res judicata preventing the same issues being adjudicated a second time - the setting aside of an arbitral award would place parties to the arbitration in the original position that they were in, before the proceedings began, leaving it open to them to arbitrate again - is an essential feature of the legislative design and structure of the Act - the court cannot correct errors of the arbitral tribunal - it can only quash the award leaving the parties free to begin the arbitration again if it is desired - therefore, parties would be restored to the original pre-arbitral award position.**

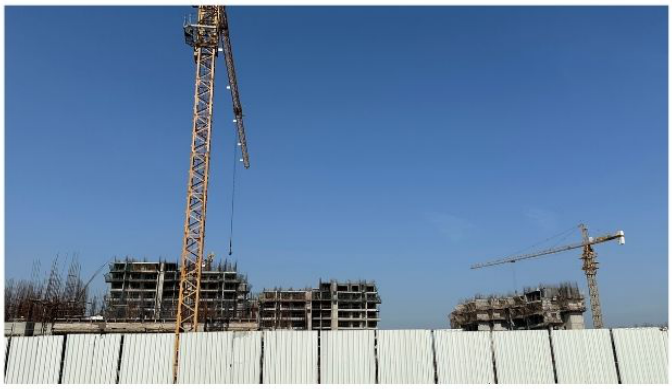
[Batliboi Environmental Engineering Ltd. v. Hindustan Petroleum Corporation Limited - Bombay High Court - Decided on 11.3.2025]



- **Computation of damages - reliance on rough but just calculations where exactitude is unattainable - discretion of arbitral tribunal to adopt 'honest guesswork' for determining damages or claims in the absence of precise evidence, provided such discretion is exercised reasonably.**

- **Force majeure event - no clause in the contract - when a contract explicitly provides a force majeure clause, the parties must adhere to its invocation procedure, failing which relief under the clause is unavailable - government notification of pandemic issued stipulated that there must be specific information of the invocation of the force majeure clause before any benefit is taken - where the contract explicitly requires a party to notify the other in writing to claim force majeure, either of the parties must formally invoke the force majeure clause, and any subsequent reliance without such invocation is legally impermissible.**

[IL&FS Paradip Refinery Water Limited v. Indian Oil Corporation - Delhi High Court - Decided on 17.4.2025]



Batliboi Environmental Engineering Ltd. v. Hindustan Petroleum Corporation Limited - Bombay High Court - Decided on 11.3.2025

The Contractor was awarded the work for construction of a sewage treatment reclamation plant at a refinery of the Employer on a turnkey basis. Disputes between the parties were referred to arbitration. The award in favour of the Contractor was set aside by the Court. The Contractor invoked fresh arbitration on the ground that the award had been set aside and the Contractor's claims had not been dismissed on merits. The Court observed that the jurisdiction created for purposes of judicial review by the courts of an arbitral award is a limited one, which is governed by sections 34 and 37 of the Arbitration Act. The Supreme Court in appeal, had expressly stated that it did not intend to pronounce upon the merits of the matter. The setting aside of an arbitral award would place parties to the arbitration in the original position that they were in, before the proceedings began, leaving it open to them to arbitrate again, is an essential feature of the legislative design and structure of the Act. No court is permitted to modify the arbitral award, and to substitute its judgment for the judgment of the arbitral tribunal. The section 34 judgment essentially examined if the arbitral award was in conflict with the most basic notions of morality and legality, or was perverse, that it warranted being set aside. It came to the view that the arbitral award did not deserve to be set aside. The section 37 judgment essentially examined if the section 34 judgment was valid in refusing to interfere, and came to the view that the arbitral award deserved to be set aside. The Supreme Court judgment reviewed the section 37 judgment and held it to be a judgment validly arrived at, unworthy of interference. The necessary corollary would be that the position of the parties undisturbed by the arbitral award would stand restored. The Court in the section 37 proceeding was not exercising an appellate power over the arbitral award but only an appellate review over the section 34 judgment. The Supreme Court held that the arbitral award itself was not an expression of an opinion on merits. The Supreme Court had observed that arbitral award was not accurate in its approach and assessment. The Supreme Court had ruled that there is an overlap and a partial double-count of losses in the arbitral award. Therefore, the arbitral award, in its terms, was not defensible and it would not translate into a finding on merits on what the amount of damage for the loss ought to be awarded, if at all. The Supreme Court was returning findings on how the arbitral award did not provide reasons. The law indeed required consideration of the merits of the appeal before the Supreme Court i.e. to adjudicate whether the arbitral award was rightly held to be invalid in terms of the contours of the jurisdiction under section 37 read with section 34 of the Act. The decision of the Supreme Court was a negation of the validity of the arbitral award and not a positive affirmation of the merits of either party's case. The Court concluded that the parties should be restored to the original pre-arbitral award position.



IL&FS Paradip Refinery Water Limited v. Indian Oil Corporation - Delhi High Court - Decided on 17.4.2025

The Contractor was awarded the work for transportation of water from Mahanadi River at Cuttack to Paradip for Employer's Paradip Refinery Project on Build-Own-Operate-Transfer Basis. Upon project completion, disputes arose between the parties leading to claims by the Contractor. The arbitral tribunal held that the claim for additional cost due to change in alignment for laying pipeline had been agreed in the minutes of meeting, which was accepted by the Contractor. It was held that the Contractor unequivocally accepted the offer of the Employer and waived its right to claim any further amount on this account. However, the arbitral tribunal went on to hold that the said amount was only towards extra work done and not towards the de-scoped work. The Court observed that a one-time down payment had been approved by the competent authority for payment to be made to the Contractor instead of a payment in monthly equated instalments. Therefore, the single judge was correct in setting aside the award of claim for additional costs due to change in alignment which was the descoped work. The Contractor contended that neither the arbitral tribunal nor the learned single judge considered the fact that there was no invocation of the force majeure clause by the Employer and that the plea of force majeure was taken ex-post facto without any basis. Therefore, disallowing the claim for interest due to extended construction period was not correct. The Contractor relied on the government notification issued by the Ministry of Finance in this regard which stated that there must be specific information of the invocation of the force majeure clause before any benefit is taken. The Court observed that the notification was issued after the pandemic but the contract was entered into prior to pandemic. There was no clause in the contract which stipulated that any party seeking to invoke the force majeure clause must give notice. The deduction of amount made by the Employer in the form of counter claim against the Contractor towards descoping of the work was contrary to its averment of one-time payment and therefore, could not have been allowed by the single judge.



Dharmendra Rautray &
Ginny Jetley Rautray

RAUTRAY & CO.
Law Firm

B3/18 Vasant Vihar,
Paschimi Marg,
New Delhi – 110057
Tel: +91.11.46552244 / 46113964
E: mail@rautray.com



TOP TIER FIRM
Legal500
ASIA PACIFIC
2025