

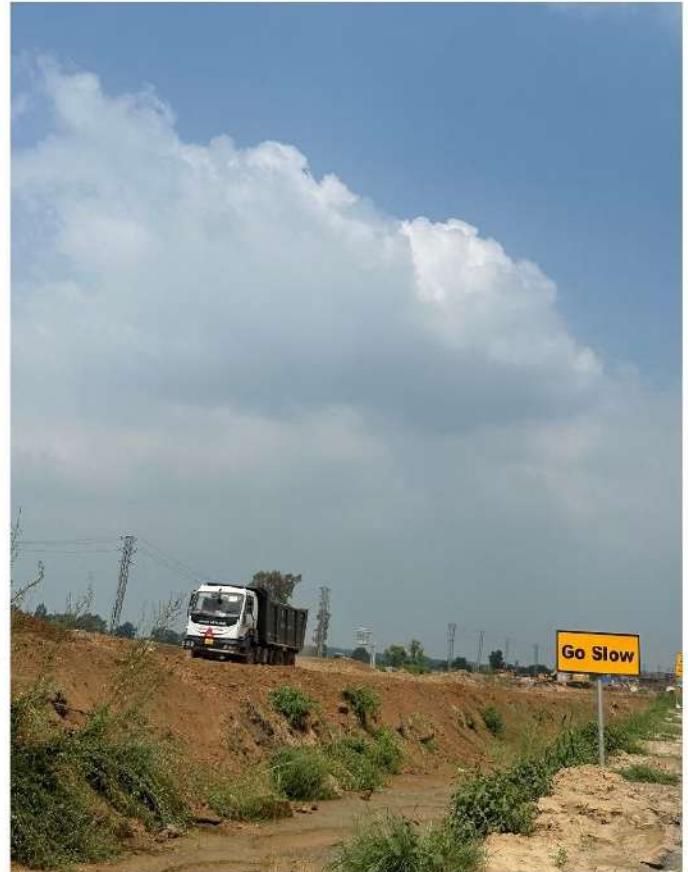
# Construction Arbitration Newsletter

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.

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.



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