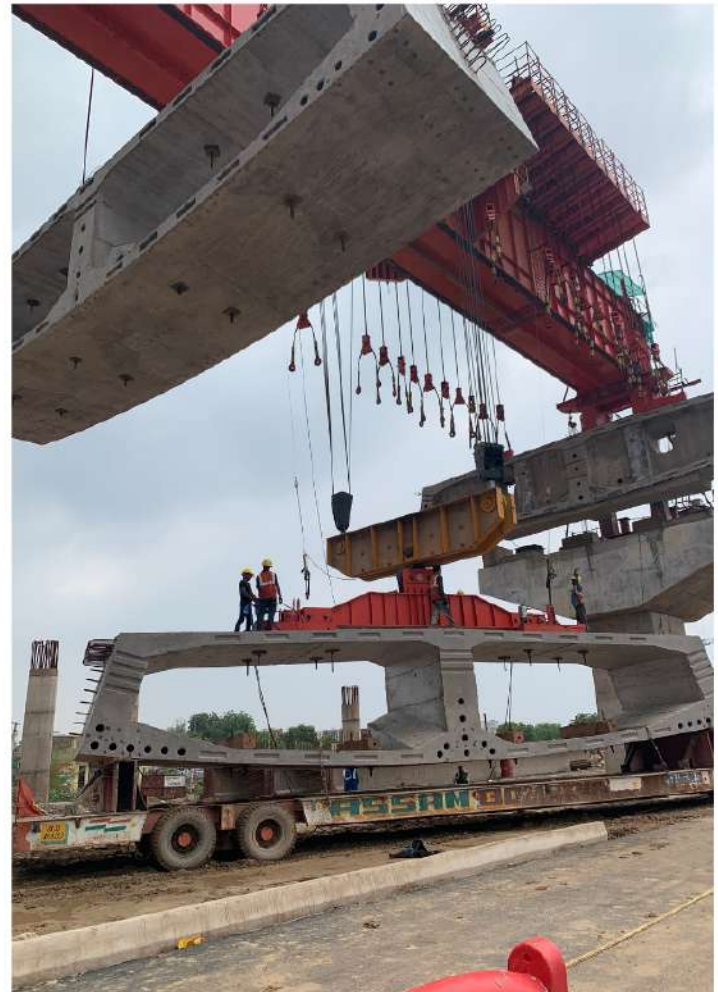


Construction Arbitration Newsletter

Construction Arbitration Law Firm

- **DBFOT Contract - the Independent Engineer (IE) is the sole competent authority under the contract to determine the Extension of Time (EOT).**
- **Delay in Issuance of Provisional Completion Certificate (PCC / PCOD) - failure to receive a PCC/PCOD, prevents the Concessionaire / Contractor from collecting toll and has a serious economic implications and also adds pressure to repay the principal and interest to the banks.**
- **Supplementary Agreement signed under duress - IE seeking approval of the Authority for issuing the PCC after the undertaking given by the Contractor to waive its claims, shows that the Supplementary Agreement was signed under duress.**
- **Extension of concession period equivalent to the days of construction delay not the only remedy - Concessionaire / Contractor entitled to compensation of additional costs incurred by it towards overheads, plants and machineries hire charges etc. under Clause 35.2 of the Concession Agreement.**



*[National Highways Authority of India v. IRB
Pathankot Amritsar Toll Road Ltd. - Delhi High Court -
Decided on 8.3.2022]*

- **Signing of the Variation Order - acceptance by the Contractor of rates fixed by the Engineer due to inordinate delay in determining the rates and signing the same for its payments to be processed - Contractor entitled to rates submitted by it and accepted by the Engineer - conduct of the Engineer / Employer relevant, since they permitted the Contractor to proceed with the work on the basis of the rates submitted by it.**
- **Variation in the contract value exceeding 15% of the Effective Contract Price - Contractor entitled to additional expenditure on account of overheads and profit resulting from increase in the value of the Contract and towards execution of additional items beyond the permissible 15%.**
- **Claim for costs incurred due to idling of men and machinery on account of stoppage of work due to transporters' strike - evidence supporting the claim - Contractor relied on MORTH Standard Data Book which indicated the usage charges in respect of machinery - Court held that the element of estimation in assessing costs cannot be questioned.**

[National Highways Authority of India v. KMC Construction Ltd. - Delhi High Court - Decided on 23.12.2021]



**National Highways Authority of India v. IRB Pathankot Amritsar
Toll Road Ltd. - Delhi High Court - Decided on 8.3.2022**

The Employer / Authority entrusted the work of development, maintenance and management of Pathankot to Amritsar Section of National Highways No. 15 from km 6.082 to km 108.502 to the Concessionaire / Contractor on design, build, finance, operate and on transfer basis (DBFOT). However, the work could not be completed within the time stipulated and time was extended. A Provisional Completion Certificate (PCC) was issued to the Concessionaire. After three years of issuance of Provisional Completion Certificate, the Concessionaire requested for extension of the concession period. The Concessionaire invoked arbitration clause seeking compensation under Clause 35.2 of the Concession Agreement (CA) towards increase in capital cost due to delays attributable to the Authority.

The award of the Arbitral Tribunal was upheld by the Court holding that the Supplementary Agreement signed by the Concessionaire as a pre-condition for issuance of the Provisional Completion Certificate, was void. The IE was right in granting EOT on account of hindrances at site, delay in obtaining tree cutting permission by the Authority, delay in shifting of utilities, and delay in handing over possession of land due to court cases. The Court held that the signing of the undertaking by the Concessionaire waiving its rights under the contract and reliance placed by the Project Director of the Authority seeking approval from the Authority for issuance of PCC, is an important background to conclude that it was signed under duress. The signing of the Supplementary Agreement as a pre-condition for the issuance of PCC, shows that the Concessionaire did not voluntarily give up valuable claims for compensation and extension of the concession period on account of Authority's default without any reciprocal consideration. The Court held that since the Authority was in default or breach, it was liable to pay all direct costs, including interest payments on Debt, O&M Expenses, any increase in capital costs on account of inflation and all other costs to the Concessionaire and the Authority was also liable to extend the concession period.

National Highways Authority of India v. KMC Construction Ltd. - Delhi High Court - Decided on 23.12.2021

The Contractor was awarded the work of 'Widening to four lanes and strengthening of the existing two lane carriageway between Km 278/000 to Km 340/000 of Udaipur-Ratanpur-Gandhinagar Section of NH-8 in Rajasthan, on EPC basis. The Contractor completed the work at a price higher than the original contract price. The disputes between the parties were referred to arbitration. The Court held that the Arbitral Tribunal's determination of a reasonable compensation should not be interfered with by the Court especially in the case where it is not contested by the Employer. The rates submitted by the Contractor at the time of executing the items of works having not been objected to by the Employer and the Contractor having been allowed to proceed with and complete the items of work, it is a sufficient ground to preclude the Employer from challenging the rates after the work is completed. The signing of the Variation Orders by the Contractor was under pressure as there was an inordinate delay in determining the rates and the Contractor was forced to sign it for processing its payments. The Court upheld the Arbitral Tribunal's finding that the general overheads charges at the rate of 6% of the additional work done is a reasonable compensation, keeping in mind that the initial establishment of the Contractor required augmentation above the BOQ rates. The additional overheads claimed by the Contractor was not one of damages but of additional contract price and it was entitled to receive the same on account of additional works executed by it. The Court held that in determining the cost of idling there is some element of estimation involved in assessing the cost. If the measure is based on relevant material, the award cannot be called into question.



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