

Construction Arbitration Newsletter

Construction Arbitration Law Firm

- **Disruption claim - proof of compensation - Contractor made a disruption claim on the basis that the Contractor mobilised manpower and equipment to perform obligations under the contract, but such manpower and equipment could not be put to use during the disruption period for reasons attributable to the Employer - the Contractor seeking compensation from the Employer should (i) specifically identify the disruption period and prove that the Employer was responsible for non-performance during that period; and (ii) provide evidence of the expenditure incurred towards manpower and/or equipment, as the case may be, during such period.**
- **Prohibition of claims during the extended period of contract - disruption claim cannot be allowed in the absence of evidence of disruption and identification of the disruption period.**
- **Power of Employer to reduce scope of work - clause providing that the Contractor shall not be entitled to any compensation but shall be paid only for actual quantity of work done - to claim Loss of Profit for the unexecuted work, the Contractor must produce evidence in support.**

[General Manager, Southern Railway v. URC Construction (P) Ltd. - Madras High Court - Decided on 15.11.2022]



- **Undertaking letter issued by the Contractor to the Employer not to claim differential amount on the bitumen cost - letter issued under duress - evidence of duress - Contractor able to establish that the Employer withheld the bill amount - undertaking letter issued by the Contractor after the completion of the works.**

- Proving duress – surrounding circumstances relevant – Employer must give a specific denial on the issue of duress - failure to do so would amount to admission.
- Pleading duress – a specific averment must be made in the statement of claim that the Contractor's undertaking giving up the claim was written only to secure the release of amounts wrongfully withheld by the Employer.

*[National Highways Authority of India v. JMC Construction Pvt. Ltd. - Delhi High Court -
Decided on 2.9.2022]*



**General Manager, Southern Railway v. URC Construction (P) Ltd. - Madras
High Court - Decided on 15.11.2022**

The Employer awarded a contract to the Contractor for earth work for forming a bank between kilometres 139 - 130, Reach IIIB, in relation to the gauge conversion of Mayiladuthurai - Karaikudi section. The contract also included the construction of a limited use subway (LUS). A decision was taken to eliminate the construction of the LUS from the scope of work. Several extensions of time were granted by the Employer to the Contractor to complete the works. After completion, the Contractor made several claims pertaining to amounts due under the final bill; release and return of the bank guarantee; hire charges in respect of machinery; loss of profit for the un-executed value of work; damages towards head office overheads for the extended contract period; and interest. The arbitral tribunal made an award allowing claim towards payment of final bill, release of bank guarantee, towards loss of hire charges for machinery and loss of profit for unexecuted contract value, costs of arbitration and interest. The Court setting aside the award held that a claim for losses caused on account of disruption should be proved through evidence of expenditure incurred during the disruption period. The Court further set aside the award towards losses incurred due to idling of machinery, since the Contractor failed to identify the disruption period in its pleadings and also failed to produce evidence in support. The claim for loss of profit was also disallowed by the Court due to the failure of the Contractor to produce evidence.

The Employer awarded the works regarding “short term improvement and routine maintenance of Gundugolanu-Vijaywada Section NH-5, from Kms. 1022.494 to Kms. 1100.694 in the State of Andhra Pradesh” to the Contractor. Dispute arose between the parties upon completion. The Contractor, amongst others, raised a claim for variance in actual percentage of Bitumen used in the BC work. The arbitral tribunal held that as per the contract the Employer was required to pay the additional cost to be incurred on the excess quantity of bitumen. However, the Employer, after completion of the works, insisted the Contractor should issue an undertaking letter that it will not claim the differential amount on the bitumen cost and the Employer offered to pay the bill amount, withheld amount and the liquidated damages amount. Despite the Contractor issuing the undertaking, the Employer refused to make the payment and also denied the differential cost of the bitumen. The Court held that as per the contract, the variation in actual percentage of bitumen used is required to be assessed and the payment had to be adjusted and the Contractor is entitled to the additional payment. The Court upheld the finding of the arbitral tribunal that there was no dispute between the parties on the quantity of bitumen used in the BC work and the amount was arrived by the Engineer based on the actual quantity bitumen used which was verified by an independent agency and payment was recommended. The Court looked into the surrounding circumstances and found that the Employer owed substantial sums to the Contractor and accepted the contention of the Contractor that the undertaking was issued by it on the assurance by the Employer that the sums wrongfully withheld by the Employer would be released upon issuing the undertaking. The Court held that the undertaking was issued by the Contractor under duress for the reason that the payments were not being released.



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