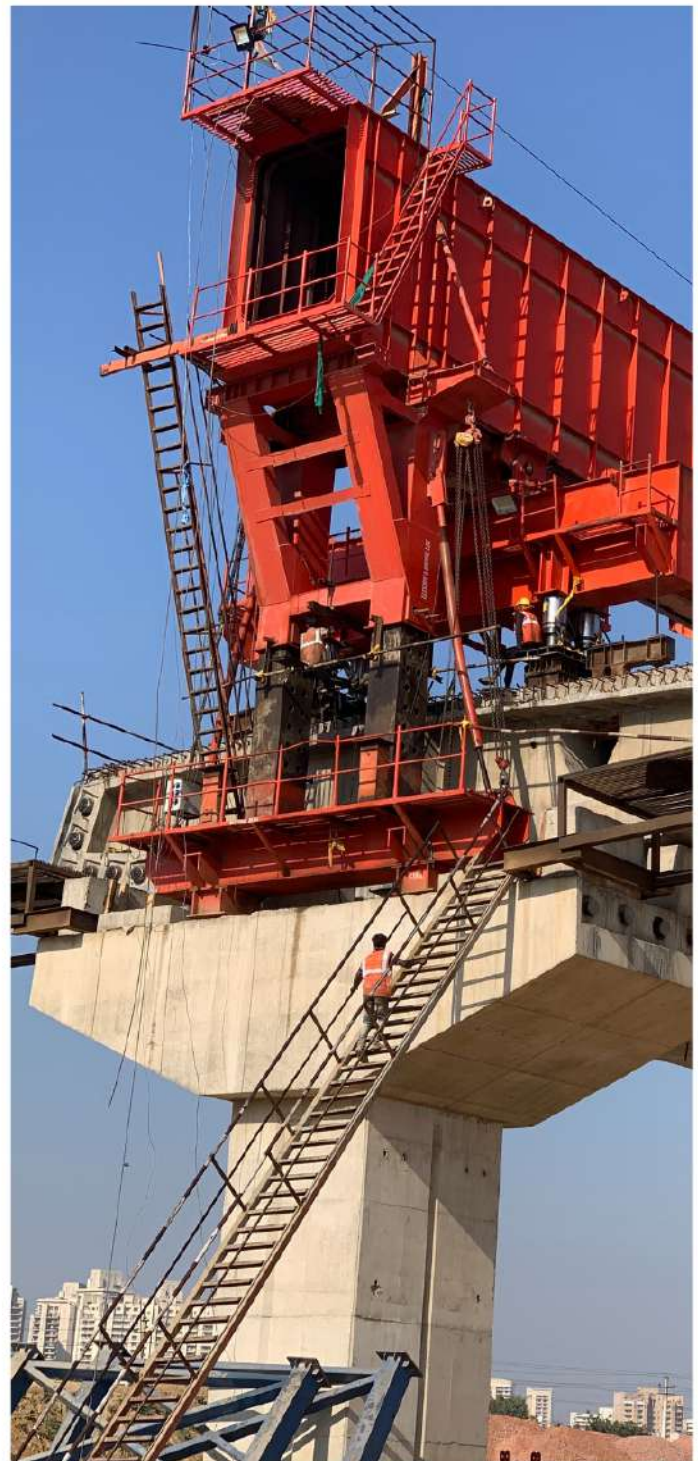


Construction Arbitration Newsletter

Construction Arbitration Law Firm

- **Termination of contract – non-compliance with the contract procedure prior to termination, and failing to issue a cure period notice, would render the termination illegal.**
- **Cure Period notice not issued – contract required the Employer to give a thirty days cure period notice – failure of the Employer to comply with the contractual provision would deprive the Contractor to remedy or rectify the defaults within the time stipulated in the cure period notice.**
- **Cure Period notice should be issued even where the Contractor is alleged to have abandoned the site and repudiated the contract.**
- **Abandonment of site – intention of the Contractor relevant to ascertain whether the site had been abandoned – arbitral tribunal should take into consideration the willingness of the Contractor to complete the works and the site conditions including the presence of plants and machineries at site on the date of termination of the contract.**
- **Rate of earthwork whether included in the rate for other sub-items of earthwork – in an item rate contract, if any item not provided in Schedule of Rates (SOR) it needs to be paid – matter of interpretation of the SOR - arbitral tribunal finding shall be final where there are such ambiguities in the contract - question of interpretation of the contract is within the jurisdiction of the arbitral tribunal.**
- **Hard rock encountered – whether the Contractor should have anticipated the presence of hard rock, is a question to be determined by the arbitral tribunal.**

*[Engineers India Limited v. Kimiya Engineers Pvt. Ltd.
- Delhi High Court - Decided on 18.4.2022]*



- **Hindrances encountered due to adverse geological conditions – Contractor required to conduct its own due diligence of the site conditions – contract precluding the Contractor from making any claims on account of adverse geological occurrences or conditions – held, Contractor had no control over the methodology to be used; the technology to be adopted; or the alignment of the road and the tunnel.**
- **Adverse geological conditions at site – failure to provide the Contractor with a detailed geo-technical survey conducted in respect of the site or re-appraise the technology or methodology stipulated by the Employer, would entitle the Contractor to raise additional claims.**
- **Declaration submitted by the Contractor that it had inspected / investigated the site of work and had fully familiarised itself with all aspects of working conditions, geo-physical / terrain conditions, sources and availability of construction materials etc. – held, the Contractor was not expected to go into the correctness of the choice of alignment, choice of technology, choice of technical description of work, choice of specification of execution, choice of methodology to be adopted and the machines to be deployed – the declaration did not preclude the Contractor from raising its claims against the Employer.**
- **Reliance by the Employer on the clause requiring due diligence in the Notice Inviting Tender (NIT) – Employer cannot absolve itself from the overall feasibility of the project – Contractor had no control over the methodology to be used; the technology to be adopted; or the alignment of the road and tunnel – bidders had only fifteen days to submit the bids after the issuance of NIT – it was not expected that the bidders would carry out a detailed geo-technical survey at the site prior to submitting their bids.**

[Konkan Railway Corporation Limited v. SMS Infrastructure Ltd. - Delhi High Court - Decided on 11.4.2022]

Engineers India Limited v. Kimiya Engineers Pvt. Ltd. - Delhi High Court - Decided on 18.4.2022

The Employer / EIL invited bids for the construction of a multi-storied building for housing offices. There was delay in handing over of the site, unprecedented rain etc. which led to the delay in completion of the Project. The Contractor was granted extension of time. However, the Employer claimed that the delay in completion was due to the Contractor. The Contractor invoked arbitration. The arbitral tribunal allowed some of the claims of the Contractor and rejected the counter-claims of the Employer holding that the termination of the contract by the Employer was illegal. The Employer had also contended that the Contractor had abandoned the site. The Court upheld the award of the arbitral tribunal and its finding that the delay was caused due to late handing over of site by the Employer, non-appointment of external agencies, approval of rates for use of materials etc. The arbitral tribunal's finding that the delay was due to unprecedented rains which did not permit excavation and encountering of extremely hard rock by the Contractor, was upheld by the Court. The Court upheld the finding of the arbitral tribunal that the termination of the contract by the Employer was illegal, since the Employer had not complied with the contractual provisions. The contract required the Employer to issue a cure period notice to the Contractor prior to termination, to enable the Contractor to remedy its defaults. Further, it was held that the Contractor had not abandoned the site as it was still at site on the day the site was handed over to the Employer and the Contractor was always willing to complete the project.

**Konkan Railway Corporation Limited v. SMS Infrastructure Ltd. - Delhi
High Court - Decided on 11.4.2022**

Disputes arose between the Employer and the Contractor with respect to a contract for construction of “B.G. Single Line Tunnel No. 2, (Kotli Tunnel) from KM 33.095 to 38.450 on the Katra - Laole Section of the Udhampur - Srinagar - Baramulla Rail Link Project”. The exclusionary clause in the contract precluded the Contractor from making any claims against the Employer and stated that the drawings for the tunnel works were tentative and were meant for general guidance only. The tender documents required the bidders to visit the site of work and investigate actual conditions regarding nature and conditions of the soil, etc. The arbitral tribunal arrived at a finding that the Employer had not carried out the geo-technical survey or conducted the necessary exercise on ground, before drawing up the feasibility report. It had simply relied on satellite images and decided the alignment on that basis. The Contractor had encountered heavy inflow of water and aggregate while carrying out the excavation and it was not possible to carry out construction of a single tunnel given the conditions. Further, the exclusionary clause did not preclude the Contractor from raising its claims against the Employer. The Court upholding the award stated that the exclusionary clause did not preclude the Contractor from raising a claim premised on the delays on account of the adverse conditions encountered by it. The Employer could not have absolved itself from the responsibility with regard to the overall feasibility of the Project, the choice of methodology and technology as none of them were in control of the Contractor.



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