

Construction Arbitration Newsletter

Construction Arbitration Law Firm

- **Claim for hire charges for machinery during the disruption period - Contractor mobilised manpower and equipment to perform obligations under the contract, but it could not be put to use during the disruption period for reasons attributable to the Employer – Contractor 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 man power and/or equipment, as the case may be, during such period.**
- **Difference in prolongation and disruption claim – elongation of the contract period from 15 to 47 months is not relevant for proving of disruption claim – claim for losses caused on account of disruption should be proved through evidence of expenditure incurred during the disruption period.**
- **Prohibition on claims during the extended period of contract and prohibition on claims for delay in approval of drawings, changes, modifications, etc. – Contractor must prove whether the disruption period was during the original contract period or the extended period – if disruption occurred during the extended period the prohibition clause will be applicable.**
- **Loss of profit claim - reduction in the scope of work - Contractor's right to claim compensation - Employer failed to modify the contract in writing as per the requirement of the contract – prohibition in the contract that the Contractor shall not be entitled to compensation for works carried forward into the extended period of time will not preclude a claim for loss of profit arising out of reduction in the scope of work.**
- **Proving of loss of profit – loss of profit claim is a claim for loss of anticipated profits - given the nature of the claim, it is not possible for the Contractor to provide evidence of actual loss of a specific sum of money - actual loss of profit need not be proved by the Contractor - Contractor should however provide evidence of the profit margin reckoned or factored by the Contractor while submitting the bid or in the alternative produce evidence of profit earned by the Contractor in similar projects previously executed.**
- **Claim under section 73 of the Contract Act – must be proved through evidence and necessary pleadings should be made in support of the claim.**

[General Manager, Southern Railway v. URC Construction (P) Ltd. - Madras High Court - Decided on 2.11.2022]



- **Right to refer the disputes to arbitration - limitation period - time spent by the parties in negotiating an amicable settlement is required to be excluded - period of limitation for referring the disputes to arbitration cannot commence till the parties have exhausted the necessary pre-reference procedure - if the arbitration clause requires the parties to engage in negotiations or to attempt to resolve the disputes in mediation/conciliation, the right to refer the disputes to arbitration would arise only after the negotiations for an amicable settlement have failed and the parties have exhausted their remedy to resolve the disputes through mediation/conciliation.**
- **Arbitration clause requiring the parties to attempt resolving disputes by mutual negotiations - a party could not have sought a reference to arbitration prior to referring the disputes for resolution to the respective Chief Executives - period of limitation for referring the disputes to arbitration would commence from the date the attempt to resolve the dispute through the Chief Executive failed.**

[Welspun Enterprises Ltd. v. NCC Ltd. - Delhi High Court - Decided on 10.10.2022]



General Manager, Southern Railway v. URC Construction (P) Ltd. - Madras High Court - Decided on 2.11.2022

The Employer awarded the Contractor the contract for earth work for forming a bank between kilometres 139 - 130, Reach IIIB, in relation to the gauge conversion of Mayiladuthurai - Karaikudi section. Subsequently, the Employer took the decision to descope the construction of the Limited Use Subway (LUS) from the scope of work. The work was delayed and the Employer granted several extension of time. After completion of the works the Contractor raised its claims. The arbitral tribunal allowed claims towards loss of hire charges for machineries, payment under the final bill, loss of profit for unexecuted contract value, and release of bank guarantee. The Court set aside the award allowing the claim for hire charges for machinery during the disruption period and loss of profit due to reduction in the scope of work on the ground that the Contractor failed to identify the disruption period and did not adduce evidence of profit margin reckoned or factored by the contractor while submitting the bid or in the alternative profit earned by the Contractor in similar projects previously executed.

An Engineering, Procurement and Construction (EPC) contract in respect of “Balance Offsite & Utilities and Interconnection with Panipat Refinery/Marketing Terminal (EPCC-9 Package)” in the Panipat Naphtha Cracker Project was executed between Indian Oil Corporation Limited (‘IOCL’) and Nafto Gaz India Private Limited (‘Nafto Gaz’). Subsequently, Nafto Gaz awarded the said EPC contract in favour of NCC. NCC sub-contracted the work in respect of the inter-connecting flyover between the existing Panipat Refinery and Panipat Naphtha Cracker Project (PNCP) to Welspun. The completion certificate was issued by NCC on 30.11.2010. Welspun raised various claim which was denied by NCC. In accordance with the Dispute and Settlement Clause in the Memorandum of Agreement, Welspun referred the dispute to the Chief Executives of NCC and Welspun. The attempt to resolve the disputes between the parties failed on 21.12.2012. Welspun invoked the agreement to refer the disputes to arbitration by a notice dated 27.01.2014. Before the arbitral tribunal, NCC raised a preliminary objection that the claims were barred by limitation. The arbitral tribunal held that Welspun's claims as included in the Final Bill were barred by limitation. The arbitral tribunal (majority) held that the cause of action for invoking the arbitration had arisen on 03.08.2010, when the promise to pay was made as well as thereafter, when the Final Bill was certified 30.10.2010. The Court took note of the fact that the dispute resolution governing the parties required the parties to make an endeavour to resolve the differences by mutual negotiations. The parties had agreed that if such disputes could not be resolved within a period of one month from the date they had arisen, they would refer the same to their respective Chief Executives. It is only when the Chief Executives of the respective parties fail to resolve the dispute, the disputes could be referred to arbitration. The Court held that the period of limitation would not commence prior to the parties exhausting the agreed pre-reference procedure / remedies. The cause of action for the purpose of limitation would commence from the ‘breaking point’ of the negotiations. If the arbitration clause requires the parties to engage in negotiations or to attempt to resolve the disputes in mediation / conciliation, the right to refer the disputes to arbitration would arise only after the negotiations for an amicable settlement have failed and the parties have exhausted their remedy to resolve the disputes through mediation / conciliation.



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