

# Construction Arbitration Newsletter

## Construction Arbitration Law Firm

- **Disputes under a Works Contract cannot be submitted to arbitration under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act).**
- **Works Contract is essentially an indivisible contract which may involve not just the supply of goods but also the provision of labour and service.**
- **MSME unit must disclose its MSME status at the time of entering into the contract so that the Employer can take a considered decision whether proceed to award the contract to such unit.**
- **A dispute under Works Contract cannot be referred to the MSME Facilitation Council - can be referred to arbitration as per the contract only if there is an independent arbitration clause between the parties.**
- **Works Contract - meaning of - it may involve supply of goods in the execution of the contract - even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be Works Contract.**
- **Characteristic of Works Contract - involves activity of manufacture, erection, installation and commissioning.**

*[M/s P.L. Adke v. Wardha Municipal Corporation - Bombay High Court - Decided on 1.3.2021]*



- Time is of essence - merely having a clause in the contract making time the essence of it would not be determinative.
- Time extension clause in contract - contracts containing provision for extension of time or payment of penalty on default would dilute the obligation of timely performance and render the clauses imbuing time as essence of the contract ineffective - generally, in construction contracts, time is not of the essence - whether time is of the essence in a contract, has to be determined from the reading of the entire contract as well as the surrounding circumstances.
- Waiver of Liquidated Damages - once Liquidated Damages has been waived in the first extension, subsequent extension cannot be coupled with Liquidated Damages unless a clear intention flows from the contract.
- Grant of general damages where claim for Liquidated Damages cannot be allowed - if time is not the essence of the contract and Liquidated Damages cannot be claimed, a claim for general damages or actual loss or compensation, instead of the pre-estimated loss can be allowed.

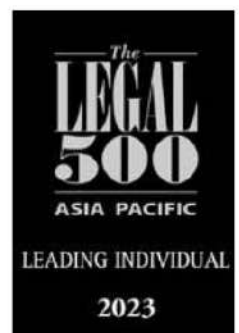
*[Welspun Specialty Solutions Limited v. Oil and Natural Gas Corporation Ltd. – Supreme Court of India - Decided on 13.11.2021]*



**M/s P.L. Adke v. Wardha Municipal Corporation - Bombay High Court - Decided on 1.3.2021**

The Contractor was registered under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act) and claimed to have supplied goods and rendered services to the Employer. The Employer contended that the work to be carried out under the contract was not for purchase and supply but was a works contract and therefore disputes between the parties cannot be referred to arbitration proceedings conducted under the ambit of the MSMED Act. According to the Employer the works involved construction of SBR type sewage treatment plant and 'Nalla' interception works. The Court dealt with the question whether merely by applying for registration or being classified as a medium or small enterprise, and not having alerted the Employer of this fact while bidding and or while accepting the work order, the Contractor can be permitted to invoke the provisions of the MSMED Act. The Court held that the Contractor cannot invoke the MSMED Act provisions since the Employer for the first learnt about the Contractor's status as a Micro, Small and Medium Enterprises unit after the bidding was completed and it was elected successful bidder. A works contract is indivisible but by legal fiction is divided into two parts for sale of goods and the other for supply of labour and services. The term 'works contract' as used in Clause (29A) of Article 366 of the Constitution of India takes in its sweep all genre of works contract and is not to be narrowly construed. The concept of a dominant nature tests does not apply to a works contract. It further concluded that the works contract being indivisible and absent the need to deconstruct the contract into its components of sale supply and performance of labour related work it was evident that the MSMED Act cannot be made applicable. In the absence of an arbitration clause in the contract even the Arbitration Act, 1996 would not apply.

The Employer floated a global tender for purchase of seamless steel casing pipes. During the execution of contract, there were certain delays in meeting the obligation as required under the contract. The Employer granted various extension of time. Subsequently, the Employer imposed liquidated damages for delay caused by the Contractor. The arbitral tribunal held that liquidated damages, which are pre-estimated damages, cannot be granted as there was no breach of contract due to the fact that time was not the essence. Accordingly, the arbitral tribunal proceeded to determine the actual damages based on the evidence furnished. The Employer challenged the award on the ground that the arbitral tribunal could have granted liquidated damages as it was a genuine and reasonable pre-estimate of the possible damages negotiated between the parties at the time of entering into contract. The District Court held that the arbitral tribunal was correct in holding that time was not the essence of the contract and only the losses actually suffered could be granted. The Supreme Court upheld the award and concluded that the interpretation of the contractual provisions by the arbitral tribunal was plausible and reasonable.



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Author of the book “Principles of Law of Arbitration in India”

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