

Construction Arbitration Newsletter

Construction Arbitration Law Firm

- **Employer reserving its right to amend the pleadings and the counter claim - mere averment in the counter claim that the party reserves its right to amend its pleadings would not confer an unfettered right to amend.**
- **Application to update counter claims by the Employer - updating the counter claims, which in effect results in amendment of the counter claims, cannot be permitted after a long lapse of time.**
- **Loss of Profit claim - contributory delay by the Contractor - award of 50% of loss of profit due to delays caused by the Contractor for the unexecuted work is reasonable.**
- **Contributory delay by the Contractor - if the Contractor has not complied with the terms of the contract and is also responsible, even if not equally, for the delay, the Contractor will not be entitled to claim the full amount of the loss of profit.**

[NTPC Ltd. v. Larsen and Toubro Ltd. - Delhi High Court - Decided on 27.3.2023]

[KMC Brahmaputra Infrastructure Ltd. v. Chief Engineer, Roads & Bridges, Government of Sikkim - Sikkim High Court - Decided on 20.12.2022]



- **Impact of delay on work - Critical path analysis - the standard engineering principles require consideration of only critical activities in arriving at the impact of delay.**
- **Contributory delay - it is the duty of the Engineer to assess whether the delays are of critical in nature and would impact time and require extension of the contract period.**
- **Critical path analysis - Engineer cannot make a general mention of the Contractor's delay without putting the same into a test whether the delays are of critical in nature having impact on the overall completion of the works.**
- **Concurrent delay - 'but for' or 'dominant test' - the party alleging delay must show the 'root cause' for all the disruptions in the progress of the work.**
- **Consequence of contributory or concurrent delay by the Contractor - if the Contractor is responsible for delay, the Contractor will not be entitled to any additional amounts in the form of overheads, price escalation etc.**
- **Quantification of Overhead claims - Standard Data Book of MoRTH - average overheads for roads, minor structures and major structures is considered to be 8%, 20% and 25% respectively - average percentage of 17.67% adopted by the arbitral tribunal is reasonable.**
- **Claim for additional costs on account of extending stay of plant and equipment at site - proof of certification by the Chartered Accountant of the Contractor with reference to the account books, stock register etc., sufficient - Chartered Accountant should consider and extract the equipment deployed during the extended period of the contract based on the monthly progress reports.**

[National Highways Authority of India v. M/s Hindustan Construction Co. Ltd. - Delhi High Court - Decided on 24.2.2016]



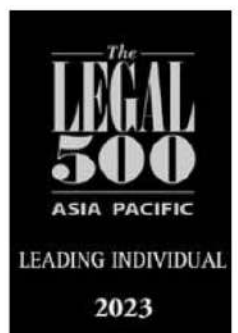
The Employer sought to amend its counter claims after a long delay which was rejected by the arbitral tribunal. The arbitral tribunal granted the Employer the liberty to invoke fresh arbitration, if permissible, under the contract with regard to the updated claims. The Employer challenged the decision of the arbitral tribunal as if it was a final award on the updated counter claims. The Court held that the arbitral tribunal had refrained itself from going into the issue of limitation and waiver of the counter claim and mere rejection of the application for amendment did not mean that the arbitral tribunal had made a final decision on the counter claims and therefore the challenge petition filed against the said decision is not maintainable. The Court concluded that the arbitral tribunal has power to exercise its jurisdiction in not allowing any amendment that would further delay the proceedings.

**KMC Brahmaputra Infrastructure Ltd. v. Chief Engineer, Roads & Bridges,
Government of Sikkim - Sikkim High Court - Decided on 20.12.2022**

The Contractor was awarded the contract to construct a two-lane Gangtok Bypass Road, from Ranipool to Burtuk in East Sikkim, measuring 23.14 kms. The Contractor put forth a proposal to the Employer to foreclose the contract without any adverse consequence on the Contractor and undertaking not to claim compensation if the foreclosure materialised. Before a response was furnished by the Employer, the Contractor terminated the contract. The disputes between the parties were referred to arbitration. The arbitral tribunal made an award and, amongst other claims, awarded loss of profit to the Contractor. The Employer challenged the award of loss of profit on the ground that Contractor had not complied with the terms of the contract and was also responsible for the delay. The Court upheld the award allowing only 50% of the claim for loss of profit by the Contractor.



The Contractor was awarded the contract to construct the Allahabad By-Pass, requiring construction of a road from Km.158 to Km.198, except the Ganga Bridge. There was delay in completion of the work. The Contractor raised various claims including prolongation costs. The arbitral tribunal noted that the Contractor had sought overall extension of time for 1209 days whereas the extension of time granted was for 1027 days, leaving a deficit of 182 days. The reason for the shortfall was not explained by the Engineer. The Engineer commented on initial delays in mobilization contributed by the Contractor. However, the Engineer during the construction period granted extension of time (EOT) with costs, towards the first interim EOT application submitted by the Contractor. The arbitral tribunal arrived at a finding that the Engineer had failed to assess whether the delays were critical in nature, and impacted the time and required extension of the contract period. Due to lack of evidence on the contributory delays caused by the Contractor, the arbitral tribunal held that the Employer was liable for the period the Engineer granted the EOT. The Court noted that despite being given an opportunity, the Employer failed to produce the quantified effect of contributory delays by the Contractor. The Court concluded that the challenge to the majority award on the issue of delay being attributable to the Employer is unsustainable and a question of appreciation of evidence and finding of fact, which is within the exclusive jurisdiction of the arbitral tribunal.



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