

Construction Arbitration Newsletter

Construction Arbitration Law Firm

- **Whether time is of essence of the contract – contract providing for extension of time for completion of the works – whether or not time was of essence of the contract would essentially be a question of the intention of the parties to be gathered - even where the parties have expressly provided that time is of the essence of the contract, such a stipulation will have to be read along with other provisions of the contract, and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental - if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract, such clauses would be construed as rendering ineffective, the express provision relating to the time being of the essence of contract.**
 - **Grant of successive Extension of Time (EOT) by the Employer, that too with retrospective effect, shows that the time was not the essence of the contract – in discerning whether the time is of the essence of the contract, the important consideration remains the intention of the parties.**
 - **Apportionment of delay - 70% delay attributable to the Employer but the remaining 30% of the delay not attributable to the Contractor - the arbitral tribunal was justified in rejecting the counter claim of the Employer.**
 - **No Claim Certificate signed by the Contractor including in the final bill - whether Contractor barred from claiming further amounts from the Employer - Employer was in the dominant position and did not clear the Contractor's bill on time - undue pressure can be gathered from the surrounding circumstances such as when the contract works get prolonged beyond the stipulated date of completion, inter alia, due to late approvals and grant of extension of time by the Employer, without levy of liquidated damages, the demand of the Employer that till such time a no claim certificate / undertaking is tendered by the Contractor the final bill shall not be paid - in addition, if the Contractor's final bill is kept pending by the Employer for a long duration it would be a pointer towards exploitation of the dominant position by the Employer.**
- [Union of India v. Glove Civil Projects Pvt. Ltd. - Delhi High Court - Decided on 18.4.2023]*



- **In-principle Way leave permission - obligation of the Employer - obtaining of the No Objection Certificate (NOC) was a pre-requisite for obtaining the way leave permission, which is an integral part of the basic way leave permission.**
- **Payment against descoped work - parties settlement of payment against descoped work cannot be overlooked by the arbitral tribunal - the arbitral tribunal cannot resort to guess work and award damages - arbitral tribunal can decide ex aequo et bono under section 28 (2) of the Arbitration and Conciliation Act, 1996, only if the parties have expressly authorised the arbitral tribunal.**
- **Final settlement of claim for extra works between the parties - arbitral tribunal cannot carve out exceptions to such settlement and state that the settlement did not include the claim of interest payable by the Employer for the extra work.**
- **Change in the methodology of executing work - quantification of additional work - claim by the Contractor that for laying of pipeline it had adopted tunnelling method instead of open cut method during a joint site visit - the change in the methodology of laying the pipeline resulted in additional work executed by the Contractor - arbitral tribunal can resort to honest guess work after considering various facts and evidence - arbitral tribunal can arrive at a conclusion on the quantification of the claim by resorting to honest guess work if there is some material on record.**
- **Railway permission to lay pipeline - payment of supervision and departmental charges - the said charges are integrally connected with the grant of way leave facility and the Employer had to bear the cost.**
- **Political Force Majeure event - order of the competent authority of the Government of Orissa withdrawing the earlier permission and restraining the Employer to proceed on the originally approved route - revocation of permission and proposed re-grant of permission issued by competent authority operated against the Contractor as well - event constituted a political force majeure event.**

[Indian Oil Corporation Ltd. v. IL&FS Paradip Refineries Water Ltd. - Delhi High Court
- Decided on 3.5.2023]



**Union of India v. Glove Civil Projects Pvt. Ltd. - Delhi High Court -
Decided on 18.4.2023**

The Contractor was awarded the work for construction of new building blocks. The works was completed with a delay of 32 months. The disputes between the parties were referred to arbitration. The arbitral tribunal concluded that the Employer had exploited its dominant position and the Contractor was compelled to issue the full and final certificate only for getting its legitimate payments under the bills pending with the Employer. The arbitral tribunal stated that neither the no claim certificate submitted by the Contractor to the Employer nor the undertakings along with the EOT application(s) to the Employer constituted acceptance of full and final payment. The Court upheld the award and concluded that the findings of fact by the arbitral tribunal cannot be interfered with.

**Indian Oil Corporation Ltd. v. IL&FS Paradip Refineries Water Ltd. -
Delhi High Court - Decided on 3.5.2023**

The Employer awarded the Contractor work to construct facilities such as water intake structure, laying of pipeline, construction of water reservoir at the refinery, water treatment plant and three treated water sumps on Build, Own, Operate and Transfer ('BOOT') basis. The Contractor raised various claims under the BOOT Agreement. The arbitral tribunal allowed claim of the Contractor for refund of amount deducted towards payment made by the Employer to the Orissa Forest Development Corporation (OFDC). The Employer deducted sums from the Contractor on the ground that the Contractor had the responsibility to obtain permission from OFDC and bear the cost. The arbitral tribunal concluded that the obligation to obtain the 'in-principle way leave permission' from the Government of Orissa was that of the Employer and accordingly the Employer should have paid the cost to OFDC. The obtaining of the No Objection Certificate (NOC) was a pre-requisite for obtaining the way leave permission, which was an integral part of the basic Way leave permission, which was to be obtained by the Employer. The amount had to be refunded by the Employer to the Contractor with interest from the date of last deduction up to the date of award. The Court set aside the award of the arbitral tribunal allowing the claim for interest by the Contractor, since parties had agreed to a lump sum amount under the final settlement agreement. The arbitral tribunal rejected the Employer submission that the change from open cut method to tunnelling method for laying of pipeline was not a change in scope of work. The Court upheld the finding of the arbitral tribunal that the change of methodology of laying pipeline resulted in additional work. Further, the withdrawal of the earlier permission and restraining the Employer to proceed on the originally approved route constituted a political force majeure event.



Dharmendra Rautray
Barrister (Lincoln's Inn, London)

Rautray & Co.
Law Firm
B3/18 Vasant Vihar,
Paschimi Marg,
New Delhi – 110057
Tel: +91.11.46552244 / 46113964

M: 9899988878
E: dharmendra@rautray.com

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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.