

# Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Recommendation of Extension of Time (EOT) by the Independent Engineer (IE) - IE's letter should attribute delay on account of material breach of the Concession Agreement (CA) by the Employer to enable the Concessionaire to claim compensation from the Employer.**
- **Causes or events of delays for grant of EOT sufficient for the Contractor to claim EOT but not necessarily to maintain a claim for compensation unless the IE attributed the delays due to material breach by the Employer.**
- **Delay in Railway permission - Commission of Railway Safety (CRS) clearance and shifting of Level Crossing gates for ROB - arbitral tribunal should determine material breach on the part of the Employer in terms of the obligations stipulated in the Concession Agreement.**
- **Supplementary Agreement - economic duress - proof of - threat should be of a nature that pressurises the party to execute a waiver of its rights or enter into a settlement agreement contrary to its free will - averment of threat from the Employer essential and must be raised during the relevant period.**
- **"Material default or breach" of the Employer - Concessionaire's entitlement to compensation or extension of the concession period is dependent on establishing the "material default or breach" of the Concession Agreement by the Employer - specific finding of the arbitral tribunal is necessary.**

*[National Highways Authority of India v. IRB Pathankot Amritsar Toll Road Ltd. - Delhi High Court - Decided on 3.7.2023]*





- **Constructive possession of Right of Way (ROW) - work fronts available for construction of two lane carriageway - upon issuance of notification under Section 3 (D) (i) of the National Highways Authority of India Act, 1998 ('1998 Act'), the title of the land covered, vested in the Central Government and thereafter the Employer can hand over constructive possession to the Concessionaire - Concessionaire is entitled to carry out all the required operations for completion of the Project, immediately upon the issuance of the Section 30 notification read with Section 3F (1998 Act) - Concessionaire not entitled to take advantage of Section 3E, 3G and 3H of the 1998 Act.**
- **Vacant access of ROW - Concessionaire was given free access in terms of the Concession Agreement since the Employer had the legal authority to grant a license to the Concessionaire.**
- **Delay in execution of works in available stretches - breach of obligation by Employer - Employer not to be blamed for any delay that may have been caused in issuance of No Objection Certificate (NOC) by the electricity board or utility owner - Employer cannot be held responsible for the delay in forest land clearance by MoEF.**
- **Pre-existing site conditions - knowledge of - handing over of ROW on "as is where is" basis - Employer is only required to render necessary assistance to the Concessionaire - removal of religious structures and encroachments was the obligation of the Concessionaire by negotiating with the entities in control of the religious structures for re-location - Concessionaire had accepted and agreed to "bear any and all risks arising out of the inadequacy or physical condition of the Site" as per the provision of the CA.**

*[Bhopal Sanchi Highways Private Limited v. National Highways Authority of India  
- Delhi High Court - Decided on 26.5.2023]*

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**National Highways Authority of India v. IRB Pathankot Amritsar  
Toll Road Ltd. - Delhi High Court - Decided on 3.7.2023**

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The Employer / Authority entrusted the work of development, maintenance and management of Pathankot to Amritsar Section of National Highways No. 15 from km 6.082 to km 108.502 to the Concessionaire / Contractor on design, build, finance, operate and on transfer basis (DBFOT). However, the work could not be completed within the time stipulated and time was extended. A Provisional Completion Certificate (PCC) was issued to the Concessionaire. After three years of issuance of PCC, Concessionaire requested for extension of the concession period. The Concessionaire invoked arbitration seeking, amongst others, compensation under Clause 35.2 of the Concession Agreement (CA) towards increase in capital cost due to delays attributable to the Authority. The arbitral tribunal concluded that the Supplementary Agreement signed by the Concessionaire as a pre-condition for issuance of the Provisional Completion Certificate, was void. The Court held that the arbitral tribunal had committed a fundamental error in not addressing the real dispute i.e whether the Employer was in material default of the CA. Further, it is impermissible for an arbitral tribunal to conjure up an interpretation of an agreement contrary to the case set up by the Contractor and contrary to the understanding of both the parties, merely to support its conclusion. The interpretation of the Supplementary Agreement was contrary to its plain language and the admitted intent of the parties and the pleading of the Concessionaire. The plea of duress cannot be accepted in absence of any material to establish the financial predicament of the party raising the plea of economic coercion, or any material to establish the crushing nature of the adverse economic implication. Deposition of a witness regarding the threat to sign the Supplementary Agreement is of no relevance if the party has not set up a case in its pleadings.





**Bhopal Sanchi Highways Private Limited v. National Highways Authority of India**  
**- Delhi High Court - Decided on 26.5.2023**

A Concession Agreement (CA) was signed between the parties for the length of 53.775 km and the Concessionaire / Contractor was responsible for constructing project facilities as well as Operation and Maintenance of the Project Highway and other obligations. Upon achieving the Provisional Completion of the Project Highway, the Concessionaire was entitled to receive payment of Annuities @ Rs. 12.95 crores at half yearly intervals for a period of 15 years from the Appointed Date excluding the Construction Period. Disputes between the parties arose in relation to completion of work on time. The Concessionaire terminated the contract on the ground that the Employer failed to meet its obligations under the Concession Agreement. The Employer terminated the contract on the ground that the Concessionaire failed to execute its obligations within the contract in the stipulated time period. The Employer argued that it was only required to give constructive possession of the land. The Concessionaire argued that the Employer was required to grant “vacant access and right of way” and not only the constructive possession of the Right of Way. The arbitral tribunal recorded a finding that the Joint Memorandum recorded that 80% of the land was made available to the Concessionaire on the Appointed Date. Further, the Concessionaire was estopped from contending that the Employer was in breach of the condition precedent to make 80% of the land required on the Appointed Date in view of the waiver of its rights to claim damages. The Concessionaire was not prepared to take up any work on the Right of Way which had vested in the Central Government on the issuance of Notification under Section 3(D). The termination of the CA was due to default of the Concessionaire to perform its obligations under Clause 10.3.5 of the CA. The delay in compliance of conditions precedent by the parties was mutually waived by signing the Supplementary Agreement. The Court upheld the findings of the arbitral award and also the conclusion of the arbitral tribunal rejecting the claims raised by the Concessionaire.



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Successfully handled construction arbitrations relating  
to DBFOT projects, EPC Contracts and FIDIC based  
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