

Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Change in law event - increase in minimum wages - Contractor entitled to reimbursement of additional expenditure incurred on account of increase in the basic minimum wage rate - amount cannot be awarded by the arbitral tribunal based on a notional basis.**
- **Change in law event - increase in minimum wages - proof of - affidavit of Contractor's witness affirming that he had collated the data - affidavit filed showing payments made by the Contractor or its subcontractors to workers / labourers for the relevant period along with details submitted relating to one subcontractor for each month - tabular statement filed by witness showing actual quantity of man days with respect to increase in minimum wages - arbitral tribunal had before it relevant material to consider the claim of the Contractor and make an award.**
- **Opportunity granted to the Contractor to prove its claim after the award is made by the arbitral tribunal is violation of principle of finality of an award and the award is liable to be set aside.**
- **Deposition of expert witness on man days - in contracts of similar nature, increase in wages is compensated by notional formulas and not on the basis of actual reimbursement as a Contractor would execute works by various methods - witness deposed that a Contractor has the option to deploy a higher work force and use mechanical means to a lesser degree; alternatively he may deploy higher number of machines and use a lean labour force - arbitral tribunal could rely on such deposition and draw an inference.**

[NTPC Limited v. L&T - MHPS Boilers Pvt. Ltd. - Delhi High Court - Decided on 18.7.2023]



- **Sub-contracting work without Engineer's prior written consent - no objection raised by Employer from the beginning - parties can subsequently agree to the subletting of the work by the Contractor.**
- **Privity of contract between Employer and sub-contractor - no privity of contract between the Employer and another contractor can arise out of a sub-contract concluded between the Employer's main contractor and the other contractor.**
- **No claim certificate - issuance of no claim certificate as a pre-condition for grant of extension of time (EOT) would not bar the Contractor from raising a claim subsequently against the Employer - Contractor may be required to lead oral evidence to prove compulsion in furnishing the certificate - if no claim certificate is issued by the Contractor as pre-condition to grant of EOT by the Employer, then it can be concluded that it was not given voluntarily especially when the Contractor has already made huge investments.**
- **Purpose of cross-examination in arbitration - where written pleadings have been skeletal, formal documents in which only the issues have been defined and no documentary or witness evidence has been submitted in writing, the arbitral tribunal would probably consider it necessary to hear oral evidence before being satisfied that the participating party has discharged the burden of proof in relation to its claims (or defences).**
- **Maintainability of claim brought by a Joint Venture (JV) entity in arbitration - Section 69 (2) of the Indian Partnership Act not applicable and does not bar an unregistered JV from bringing claims before an arbitral tribunal.**
- **Revision of rates beyond the contract period for delay caused by the Employer - Clause in the contract providing that the price adjustment shall apply only for work carried out within the stipulated time or extension granted by the Employer and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor - arbitral tribunal is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations - arbitral tribunal can award excess amount on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause.**

[THDC India Limited v. PCL – Intertech Lenhydro Consortium JV - Delhi High Court - Decided on 12.7.2023]



**NTPC Limited v. L&T – MHPS Boilers Pvt. Ltd. - Delhi High Court -
Decided on 18.7.2023**

The Employer awarded the Contractor work for setting up of Steam Generator, Tanda Thermal Power Project Stage - II (2 × 660 MW) located at Vidyut Nagar, District Ambedkar Nagar, Uttar Pradesh on EPC basis. There were three packages and therefore three contracts were entered into between the parties. Disputes between the parties arose with respect of works to be carried out by the Contractor for the third package, for 'Inland Transportation including Port Clearance, Port Charges and Inland Insurance Charges for Plant and Equipment and Mandatory spares covered under the first and second contract, Installation Services of Steam Generator Package for Tanda Thermal Power Project, Stage II (2 × 660 MW)". The contract for third package involved performance of various installation services, civil works and structural activities for which labour was deployed at the relevant site. The Special Conditions of Contract ("SCC") provided for reimbursement of additional cost or expenditure caused to the Contractor, on account of enactment of new law, modification of existing act or statute as the same was not covered under the Price Adjustment provision. The arbitral tribunal, based on justification of the amount paid by the Contractor, partially allowed the claim of the Contractor relying on the notification issued by the Ministry of Labour and Employment. The arbitral tribunal while disallowing the partial claim of the Contractor observed that the Contractor had led no evidence to prove that the amount was actually paid to the labourers by way of enhanced minimum wages. The arbitral tribunal further observed that the Contractor is allowed time to prove that it had incurred an expenditure in excess of the amount awarded and in case of disagreement they could take assistance of a Chartered Accountant for the purpose of examining the documents furnished by the Contractor in support of its claim and the Chartered Accountant can issue a certificate of the amount payable by the Employer to the Contractor. Both the Employer and the Contractor challenged the award. The Court set aside the award allowing the Contractor once again to place before the Employer, its claim for reimbursement of additional expenditure incurred on account of increase in the basic minimum wage rate. The Court held that the making of the award based on the deposition of witness affirming that he had collated the records and data submitted by the Contractor and had produced his tabular statement showing actual quantity of man days with respect to increase in minimum wages, cannot be faulted with.



The Contractor was awarded a contract for construction of “Civil Works of Dam, Spillway and Power House of 400 MW Koteshwar Hydro Electric Project at Koteshwar, Uttarakhand”. The work envisaged under the contract could not be completed in the original contract period of 45 months. The completion period was extended twice by the Employer on the request of the Contractor. The Contractor was made to furnish two “no claim certificates” during the course of the contract. According to the Contractor the delay was caused by the Employer in approving constructions drawings and their frequent revisions; adverse geological conditions; slope failure and execution of increased quantities of excavation and slope stabilization works; conveying decisions and changes in concrete placement methodology; treatment of cracks in the foundation blocks of dam; obstruction by villagers, including strikes etc. The Contractor raised claim for losses suffered due to non-handing over of land; extra rates for slope stabilization extra rates and payments for working in hazardous conditions outside the project area; construction of approach road; construction of diversion structure (upstream dyke); purchase of sand and coarse aggregates for tunnel lining; idling of plant and machinery, overheads; escalation; extra costs due to mobilization advance towards interests and bank guarantees etc. The Employer raised several counter claims against the Contractor. The Court upheld the arbitral award and the claims of the Contractor and concluded that the furnishing of the 'No Claim Certificate' was a pre-condition imposed by the Employer for grant of EOT and it was not contemplated under the contract. The certificate was not given voluntarily by the Contractor and it did not preclude the Contractor from raising its claims. The claim of the Contractor for revised rates due to prolongation of the contract period was allowed. The Court drew a distinction between a claim for Price Adjustment and revision of BOQ rates. The latter is on account of escalation of rates during the extended period of construction. The award of claim for overheads based on a formula taking into account the provision of overheads in the contractual rates was upheld by the Court. The Court, however, set aside the award of pendent-lite interest in view of a clear prohibition in the contract.



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