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Construction Arbitration

Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

ROLE OF A QUANTUM EXPERT: DO's & DON'T'S

- **If there is no extension of time claim the need to present the report of a programming expert on either side would be of little assistance to the arbitral tribunal.**

- **A quantum expert should not take the party's pleaded claims at face value and must check the underlying documents that supported or undermine them.**

- **The quantum expert must not uniformly accept the rates at which the party appointing him or her has adopted or claimed.**

- **The expert should adopt the rates which any quantity surveying or expert opinion would have applied and not simply because the rates have been agreed by the parties.**

- **The expert should not adopt the statements of a witness of the party appointing him for preparation of his expert report.**

- **An expert should not avoid valuing the claims on any basis, or on any assumption, other than the basis on which the party appointing has prepared his claim in order to avoid a situation where the claim of the party appointing the expert was found to be wrong the arbitral tribunal would have no alternative figures to decide in favour of that party.**

- The report of the quantum expert should not be based on made-up or calculated rates and the expert must take into account the actual costs incurred by the party claiming. On this basis alone, an alternative claim for damages for breach of contract would never be entertained by the arbitral tribunal.

- The expert should avoid errors in his report as it may fatally undermine both his credibility and the credibility of the case of the party appointing the expert.

- An expert should not disown his own report during the cross-examination.

- The report must be presented with great clarity and avoid any convoluted mode of dealing with an issue in question before the arbitral tribunal. For example, if the expert has calculated various rates in his report because he thinks it was necessary to do so, he should use the rates for arriving at his calculations and not adopt the rates used by the party appointing him which he has not calculated at all.

- The expert should not append documents to his original report which he had either not looked at all, or had certainly not checked in any detail. He must check the accuracy or reliability of their contents.

- The expert should not make assertions which are not his own but adopted from a witness of the party appointing him.

- A quantum expert should check the claims himself and not insert in his reports as conclusions which are based on what others have told him. He should take into account what are considered as fair and reasonable rates.

- Delay due to failure by the Employer to take timely action in removing impediments and obstacles - Contractor cannot be expected to complete the work if the Employer fails to fulfil its obligations under the contract.

- Finding of the arbitral tribunal that the entire delay was caused by the Employer - arbitral tribunal must set out its analysis and examine the facts and contention of the parties to arrive at the conclusion that the Employer was entirely responsible for the delay - relevant material facts and respective position of the parties with respect to delay caused and proper reasons must be given by the arbitral tribunal.

- Claim for loss of overhead and profit - computation based on 10% of the contract value - means to mitigate loss must be considered by the arbitral tribunal while awarding compensation - arbitral tribunal must provide the method and the manner in arriving at the figures.

- Claim for loss of overhead and profit - computation should take into account the loss towards overheads and profit for payments due for the un-executed work and exclude payments already received or receivable for the work executed - damages towards expenditure on the overheads and loss of profit are proportionate and not payable for the work done and paid or payable.

- Hudson's formula - computation of overhead and profit - Hudson's, Emden's and Eichleay's formulae deal with theoretical mathematical equations but are based on factual assumptions - while applying a particular equation or method, the assumptions should be examined.

- Hudson's formula - based on three assumptions - evidence required to be furnished by the Contractor - (a) first, the Contractor is not habitually or otherwise underestimating the cost when pricing; (b) secondly, the profit element was realistic at that time; (c) lastly, there was no fluctuation in the market conditions and the work of the same general level of profitability would be available at the end of the contract period - the Contractor should furnish relevant materials in satisfaction of the assumptions for applying the Hudson's formula - the Contractor is entitled to the loss sustained by the breach of contract unable to deploy resources elsewhere and had no possibility of recovering cost of the overheads from other sources, e.g from an increased volume of the work - in both Hudson's and Eichleay's formulae, the amount to be recovered is determined weekly or monthly, which the delay in the contract completion is expected to earn.

- Applying Hudson's Formula as basis for computation - should be applied with caution and as a last resort where no other way to compute damages is feasible or mathematically accurate.

- Loss of profit - evidence to prove loss - books of accounts to demonstrate a drop in turnover and establish that this result is from the particular delay rather than from extraneous causes - if loss of turnover resulting from delay is not established, it is merely a delay in receipt of money, and as such, the Contractor is only entitled to interest on the capital deployed and not the profit, which should be paid - Contractor must establish that it was for loss on account of delay in work attributable to the Employer.

[Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corporation Limited - Supreme Court - Decided on 21.9.2023]

Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corporation Limited - Supreme Court - Decided on 21.9.2023

The Employer awarded to the Contractor a turnkey contract for erection, testing and commissioning of 23 MLD capacity Sewage Water Reclamation Plant in Mahul Refinery area. There was delay in completion of the work. The contract period was extended twice by the Employer upon requests by the Contractor. Thereafter, the Contractor abandoned the work. The parties accepted that 80% of the work was completed by the Contractor. The Contractor raised a claim against the Employer on account of delay caused, additional expenses incurred and losses suffered by it. The arbitration clause was invoked by the Contractor. The arbitral tribunal allowed some of the claims raised by the Contractor including loss of overhead and profit, idling of machinery and loss incurred due to increase in cost of material and labour. The arbitral tribunal held that the Employer was fully responsible for the delay due to its failure to take timely action in fulfilling its contractual obligations. The Court held that the amount awarded towards loss of overheads and profit without justification of the computation of the loss, was highly disproportionate and exorbitant. Further, the Court concluded that while arbitration is a private form of dispute resolution, the conduct of arbitral proceedings must meet the juristic requirements of due process and procedural fairness and reasonableness, to achieve a 'judicially' sound and objective outcome. If these requirements, which are equally fundamental to all forms of adjudication including arbitration, are not sufficiently accommodated in the arbitral proceedings and the outcome is marred, then the award would invite intervention by the Court. A finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. Accordingly, the Court set aside the award due to lack of reasoning in arriving at the conclusions and calculation of the amounts awarded.

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- "Leading Individual" in Dispute Resolution - Asia Pacific Legal 500 – 2022.

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