

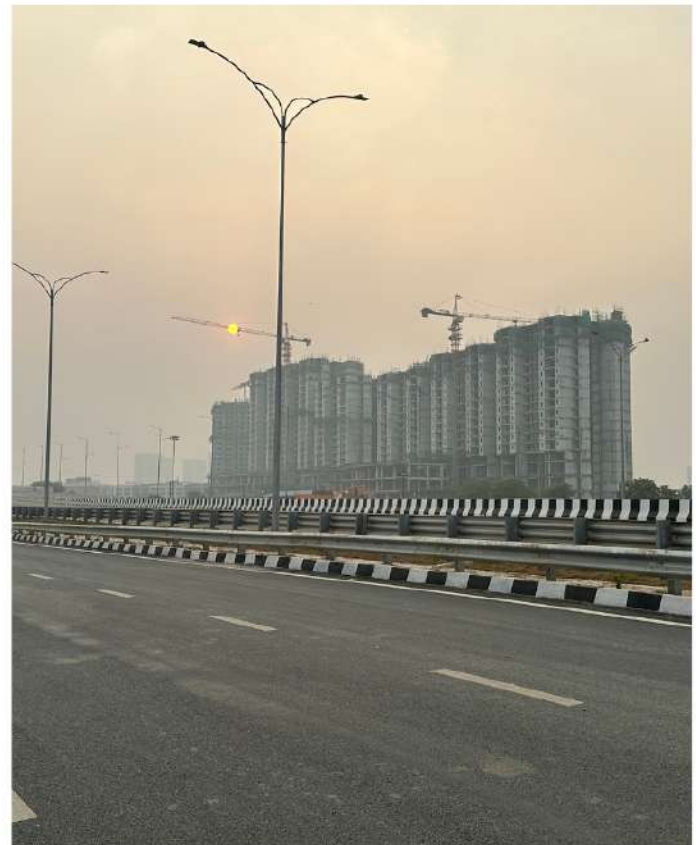
Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Limitation of liability - contract provided that the aggregate damages payable to the Contractor would be limited to 1% of the contract price - award of damages beyond the maximum ceiling stipulated in the contract - clauses limiting the liability of the Employer is applicable only for delay in providing ROW or approval of General Arrangement Drawings (GAD) by the Railways, delay in handing over of site and delay in shifting of utilities and not to claims arising from non-commencement of work due to inability of the Employer to fix the Appointed Date i.e. date of commencement of work - Employer liable to compensate the Contractor for idling of resources mobilised at site in anticipation of the fixing of the date for commencement of work.**
- **Delay in fixing of Appointed Date - 16 months delay - idling of resources mobilised by the Contractor - non-commencement of work due to inability of the Employer to fix the Appointed Date is not a case of delay per say in handing over the site - prescribed ceiling for working out the damages was applicable only to the delay caused in handing over the remaining 10% of site of work since Employer was required to hand over minimum 90% of the site within 15 days of signing of the contract.**

[National Highways Authority of India v. Ashoka Buildcon Limited - Delhi High Court - Decided on 13.9.2023]



- BOQ item of work for construction of embankment with fly ash - measurement - words “with Fly Ash” are qualifying the type of embankment - measurement shall be by taking cross sections at suitable intervals before the start of embankment work and after completion of embankment of work - necessary to measure embankment as a whole and not the individual materials comprising embankment - had the item been described as “Providing fly ash for embankment” then it would have been appropriate to measure fly ash material only - therefore the whole cross section of the pond ash embankment should be measured as one cross section for determination of the work under Item No. 2.02 (b).
- Technical experts as arbitrators - award passed by members of the arbitral tribunal who are engineers and are nominated in accordance with the agreed procedure between the parties, is not meant to be scrutinized in the same manner as one prepared by legally trained minds.
- Error in interpretation of a contract by an arbitrator - is an error within his jurisdiction - if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground.
- Relevance of dissenting award - dissenting opinion cannot be treated as an award if the majority award is set aside.

[National Highways Authority of India v. M/s Hindustan Construction Co. Ltd. - Supreme Court - Decided on 24.8.2023]



National Highways Authority of India v. Ashoka Buildcon Limited - Delhi High Court - Decided on 13.9.2023

The Contractor was awarded the work for construction of Two/Four laning with paved shoulders of Govindpur (Rajgunj)-Chas-West Bengal Border section of NH-32 from km. 0.000 to km. 56.889 in the State of Jharkhand on NHDP Phase-IV on Engineering, Procurement, and Construction (EPC) mode. Disputes between the parties were referred to arbitration. The Employer was required to hand-over 90% of the ROW within 15 days of signing of the contract. There was a delay of 16 months in fixing of the Appointed Date. The Contractor had mobilised its resources at site which remained idle due to delay in fixing of Appointed Date. The arbitral tribunal concluded that the claims of the Contractor arose from the delay caused by the Employer in fixing the Appointed Date and it was not a case of delay in handing over of the site. The ceiling prescribed in the contract limiting the damages to 1% of the contract price was applicable only to delay caused in handing over of the remaining 10% of the site for execution of work.

The arbitral tribunal allowed Contractor's claim for overheads, idling of resources mobilised at site including plants and machinery, expenditure incurred towards demobilizing few equipment and manpower to mitigate the losses, loss of bonus, loss of opportunity, interest etc. The arbitral tribunal worked out the overheads based on the MoRTH Standard Data Book formula and observed that the equipment and other resources were carrying out productive work consuming Petroleum, Oil and Lubricants (POL) and incurring expenditure on the maintenance etc. for the mobilized equipment. However, the arbitral tribunal concluded that since there was delay in fixing the Appointed Date and work had not commenced, the saving accrued on account of POL had to be deducted from the computation of the Contractor's claim for overheads. The Court upheld the award of the arbitral tribunal.

**National Highways Authority of India v. M/s Hindustan Construction Co. Ltd. -
Supreme Court - Decided on 24.8.2023**

The Employer awarded to the Contractor the work of construction of the Allahabad Bypass Road from KM 158 to KM 198 (except Ganga Bridge). The project was completed. However, certain disputes arose inter se the parties with reference to different areas of the contract; these were referred to arbitration. Since the Contractor was not satisfied with the opinion of the Dispute Resolution Board (DRB) the dispute was referred to arbitration. The specific point of dispute was whether any outstanding amount "on account of 'construction of embankment' with pond ash in accordance with BOQ Item No. 2.02 (b) read with clause 305.2.2.3 of the Technical Specifications" was payable to the Contractor. The arbitral tribunal, comprised of technical personnel, concluded that the method of measurement adopted by the Engineer, wherein the area of the cross section has been bifurcated to account for area occupied by the soil and pond ash for determination of quantum of the embankment in two different items, is contrary to the technical specification Clause 305.8. The whole cross section of the pond ash embankment should be measured as one cross section for determination of the work under Item No. 2.02 (b). The Division Bench of the High Court set aside the award holding that the arbitral tribunals' majority view was based on an implausible interpretation of the contract. The Supreme Court allowed the Contractor's appeal. The Contractor argued that the preamble to the BOQ and the technical specifications read together also mandate that the rates given in BOQ item 2.02 (a) and (b) are for the construction of embankment i.e., soil embankment and pond ash embankment and not for the usage of materials in an embankment. The Employer took the stand that wherever soil was used it had to be paid as per Clause 2.02(a) and wherever pond ash was used, payment had to be as per Clause 2.02 (b) read with technical specification 305.2.2.3. The Court reinforced the settled position that the expert personnel acting as arbitrators, are suitably placed to resolve technical disputes by utilising their expertise when they act as arbitrators. The Court held that the conversion of the dissenting opinion, into a tribunal's findings, in the event a majority award is set aside and elevation of that opinion as an award, would be inappropriate and improper.



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