

# Construction Arbitration Newsletter

## Construction Arbitration Law Firm

- **BOQ items referring to Tender Drawings, does not amount to acknowledgement of a work as an “extra item” – since the tender drawings accompanied in the tender document were only indicative in nature, to enable the tenderer to make an offer.**
- **Rejection of claim for extra item a finding of fact - cannot be interfered with by court.**
- **Rejection of Contractor’s claim for additional costs due to delay – correct if Contractor has accepted the Extension of Time (EOT) on the condition that Employer too is not imposing any Liquidated Damages while granting the EOT.**
- **Prolongation Costs – Contractor must adduce evidence of the plants and machineries used and workers employed during the extended period of the contract.**
- **Coercion – correspondence between parties important to establish whether the Contractor accepted the EOT waiving its claim for additional or extra costs. Contractor needs to lead evidence to show existence of coercive circumstances.**

*[Innovators Façade Systems Limited v. Airport Authority of India - Delhi High Court. - Decided on 5.5.2022]*



- Power of the Arbitral Tribunal to award interest – Section 31 (7) (a) of the Arbitration and Conciliation Act, 1996 which deals with the power of the Arbitral Tribunal to award interest, would operate if it is not otherwise agreed by the parties.
- Arbitral Tribunal will not have power to award interest – if there is an agreement between the parties and will have to be guided by the agreement between the parties.
- Arbitral Tribunal not bound to award interest under the 1996, Act.
- Arbitral Tribunal has discretion to award interest on the whole or any part of the money - it can grant interest for the entire period or any part thereof or no interest at all.
- Termination Payment – rate of interest on Termination Payment would be as per the Concession Agreement and the Arbitral Tribunal cannot modify it.

*[Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation - Supreme Court of India - Decided on 5.5.2022]*



**Innovators Façade Systems Limited v. Airport Authority of India - Delhi High Court - Decided on 5.5.2022**

The Employer awarded the Contractor / Claimant work for providing façade and glass elevation, glazing, structural glazing, cladding works and other kind of steel and aluminum work in the buildings at NSCBI Airport, Kolkata. The Contractor commenced the Project but could not complete the same within the stipulated timelines and requested for extension of time from the Employer. The Employer granted EOT upon the Contractor furnishing an undertaking that it would not claim any extra or additional amount in case EOT was granted without levy of Liquidated Damages by the Employer. On receiving such undertaking the Employer extended the completion period. The Contractor raised claims for additional costs due to prolongation of the contract period but it was rejected by the Employer.



The court held the finding of the Arbitral Tribunal that the letters written by the Contractor itself stated that there shall not be any additional or extra claim to the Employer other than admissible as per contract if extension of time is granted to them without any levy of Liquidated Damages. In terms of the said request extension of time for completion of the project was given by the Employer making it clear in the letter itself that it is also not imposing any Liquidated Damages for granting such extension of time. Having taken a stand like that and obtaining such extension to complete the project without levy of Liquidated Damages by the Employer, the Contractor cannot turn back and seek extension on the ground that the extension was granted on the basis of the letter written by it which was obtained by force or coercion. The court reiterated that it shall not re-appreciate evidence placed before the Arbitral Tribunal and reverse a finding of fact in a proceeding challenging the arbitral award.

### **Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation - Supreme Court of India - Decided on 5.5.2022**

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The Contractor / Concessionaire entered into a Concession Agreement with the Authority Delhi Metro Rail Corporation. During the course of operations of the project, a dispute arose between the Concessionaire and the Authority. The Concessionaire terminated the Concession Agreement. The Authority referred the dispute to the Arbitral Tribunal. The Authority later challenged the award made by the Arbitral Tribunal in a section 34 proceeding. The Delhi High Court upheld the Arbitral Award. In the execution proceeding, the Concessionaire contended that the sum of the Award includes interest for a period from the date on which the cause of action arose to the date on which the award was made. The Court held that discretion with regard to grant of interest would be available to the Arbitral Tribunal only when there is no agreement to the contrary between the parties. The phrase “unless otherwise agreed by the parties” clearly emphasizes that when the parties have agreed with regard to any of the aspects covered under Section 31(7)(a) of the 1996 Act, the Arbitral Tribunal would cease to have any discretion with regard to the aspects mentioned in the said provision. Only in the absence of such an agreement, the Arbitral Tribunal would have a discretion to exercise its powers under Section 31(7)(a) of the 1996 Act. The Court held that in the case of *Hyder Consulting (UK) Limited v. Governor, State of Orissa through Chief Engineer*, (2015) 2 SCC 189, there was no agreement between the parties with regard to payment of interest. As such, in the case of *Hyder Consulting (UK) Limited* (supra), the Court did not have an occasion to consider the import of the phrase “unless otherwise agreed by the parties”. The Arbitral Tribunal, therefore, was right to give effect to the specific agreement between the parties with regard to the rate of interest.



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