

Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Supplementary Agreement - objection to the signing of the Supplementary Agreement - economic duress or coercion - Contractor sought extension of the scheduled project completion date and also requested for extension of the concession period for the entire period of delay - agreement recording that parties delayed the project and had agreed not to make any claims upon each other - Employer issued a Policy Circular requiring signing of a Supplementary Agreement which should include an undertaking by the Concessionaire to forego any claims against them for delay in handing over the affected stretch - much after the date of the completion only 87% of the total stretch of the highway project was handed over in separate phases - held, Contractor was coerced into signing the Supplementary Agreement and waive all its claims against the Employer for the delays caused by the Employer.**
- **Detailed Project Report (DPR) - relevance of - may not be binding or final and the Contractor is required to carry out its own traffic study but DPR projections cannot be ignored in circumstances where loss is suffered by the Contractor.**
- **Prohibition on the Employer to construct an additional tollway - alternative competing route bypass for commercial vehicles - the widening and strengthening of alternate route had created a bypass to the project highway and led to diversion of traffic.**

[National Highways Authority of India v. TK Toll Private Limited - Delhi High Court - Decided on 9.8.2023]



- **Bypass - definition of - stretch of road which circumvents the traffic congestion and slows down vehicular movement - a road to be a bypass need not be constructed with the intention of bypassing the project road - need not be a new road - does not have to start and end at points proximate to the road which is bypassed - alternate road if made viable for heavy commercial traffic resulting in substantial diversion of traffic from the project highway, affecting the toll revenue would entitle the Contractor to claim compensation for the loss suffered due to diversion of commercial traffic.**

*[National Highways Authority of India v. GMR Ambala Chandigarh Expressways Private Limited
- Delhi High Court - Decided on 20.9.2023]*



**National Highways Authority of India v. TK Toll Private Limited -
Delhi High Court - Decided on 9.8.2023**

The Employer awarded the Contractor the contract for design, engineering, finance, construction, operation and maintenance of Trichy - Karur Section from km 135.800 (Excluding Lalapet ROB) to Km 218.000 of National Highway - 67 (NH - 67) in the State of Tamil Nadu on Build, Operate and Transfer (BOT) basis. The dispute between the parties were referred to arbitration. A Supplementary Agreement was executed for issuance of a partial Provisional Certificate for the partial stretch, and both parties gave up all their claims against each other for the delay and extension of scheduled project date. The arbitral tribunal concluded that there was major delay of handing over of the land on the part of the Employer and therefore the Contractor sought extension of the scheduled project completion date and also requested for extension of the concession period for the entire period of delay. Further, the Supplementary Agreement had been executed by the Contractor under coercion or economic duress. The Court found that after the date of the completion only 87% of the total stretch of the highway project was handed over in separate phases. The Employer did not act upon the recommendations of the Independent Consultant in the matter of extension of period of completion as well as the period of concession, although such recommendations were binding. Hence, the Contractor cannot be said to have waived its right to claim against the Employer by signing the Supplementary Agreement.

The Contractor was awarded with the work for improvement, maintenance, operation and strengthening of two-lane road and widening to four lane dual carriage way of Ambala Chandigarh Section. The work was awarded to the Contractor on a 'negative grant' basis. Subsequently, the Contractor raised allegations of reduction in traffic on the Project Highway due to competing roads and alleged improvements on Tepla-Banur-Kharar section of State Highway and Lehli-Banur road by the State of Punjab and its impact on Ambala-Chandigarh Section. The Employer rejected the claim of the Contractor for compensation stating that improvement of peripheral roads did not constitute "additional toll-way". The dispute between the parties was referred to arbitration. The arbitral tribunal concluded that the claim filed by the Contractor was not maintainable. The Contractor's petition challenging the award was allowed by the single judge. The Division Bench upheld the finding of the single judge. The Court held that there was no risk for diversion of traffic to an alternate route at the time of the bid but there was diversion of traffic off the project highway with the widening, strengthening and improvement of the alternate road.



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