

# Dispute Resolution Hotline

January 31, 2012

## PENDENTE LITE INTEREST TO BE DENIED IF BARRED BY THE CONTRACT

### INTRODUCTION

The Delhi High Court ("**Court**") in the matter of *THDC India Limited ("Petitioner") v. Jaiprakash Associates Limited ("Respondent")* held that *pendente lite interest* under the Arbitration and Conciliation Act, 1996 ("**1996 Act**") can be paid only if the contract between the parties does not expressly prohibit it.

### BACKGROUND

The Petitioner had awarded certain construction work for its Tehri Hydro Dam Power Project to the Respondent vide contract dated December 28, 1998 ("**Contract**"). The contract provided for arbitration in case of a dispute.

Clause 50 and Clause 51 of the Contract read as follows:

#### Interest on money due to the contractor

"No omission on the part of the Engineer in charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his account, be due to him."— Clause 50

#### No claim for delayed payment due to dispute etc

"No claim for interest or damage will be entertained or be payable by the corporation in respect of any amount or balance which may be lying with the corporation owing to any dispute, difference or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer in charge in making intermediate or final payments or in any other respect whatsoever."— Clause 51

Owing to a dispute the Respondent invoked the arbitration clause vide letter dated November 1, 2007. The Arbitral Tribunal allowed the claims of the Respondent and awarded the Respondent *pendente lite* interest at 10% per annum and future interest at 18% per annum till the date of actual payment.

Aggrieved by this the Petitioner challenged the Award passed by the Arbitral Tribunal under Section 34 of the 1996 Act

### ARGUMENTS

#### Contentions of the Petitioner

The Petitioner confining its challenge to the award of *pendente lite* interest submitted that the Arbitral Tribunal erred in interpreting Clauses 50 and 51 of the Contract. He submitted that there was a complete bar against payment of interest for any amount. According to him in Clause 50, the phrase "...nor upon any balance which may on the final settlement of his account, be due to him" indicated that there was no liability on the part of the Petitioner to pay *pendente lite* interest on an amount which is later determined as being due to the Respondent

#### Contentions of the Respondent

The Respondent submitted that since there was no specific bar in the Contract against payment of *pendente lite* interest, the Arbitral Tribunal was justified in awarding such interest.

It was submitted that Clause 50 of the Contract was not attracted in the instant matter as it dealt entirely with ascertained amounts. i.e., the amounts which were not in dispute, viz. interest on any guarantee or any balance amount upon final settlement of the contractor's account by the Petitioner upon the final measurement of the work done. A claim made by the contractor for further sums would give rise to a dispute which would be an unascertained amount, and hence would not be covered by Clause 50.

As regards Clause 51 of the Contract, it was submitted that it dealt with any amount lying with the corporation owing to (a) any dispute (b) difference or (c) misunderstanding between the parties or any delay in making intermediate payment or final payment. The Respondent urged the interpretation of Clause 51 to mean interest on only ascertainable sums and not otherwise.

### JUDGMENT

The Court opined that claim for *pendente lite* interest in arbitration proceedings had been dealt with in various decisions which were classified as those arising under the Arbitration Act 1940 ("**1940 Act**") and those under the 1996 Act.

It examined that under the 1940 Act the arbitrator had the power to award interest for the pre-reference, *pendente lite*

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and post-reference periods if there was no express bar in the contract regarding award of interest. It further took notice of the changed legal position under the 1996 Act. It stated that under Section 31.7 of the 1996 Act ("Section") the difference between pre-reference and pendent lite interest have been done away with and both have been merged together and recognized as one. The Court observed that under the 1996 Act an arbitrator did not have the liberty to award pendent lite interest in case of any bar against interest contained in the contract between the parties.

As far as Clause 50 of the Contract is concerned, this Court stated that it refers to only ascertained sums. Reference in Clause 50 to "interest upon any guarantee", "payment in arrears" and any balance which may on the final settlement of the account be found due to the contractor makes it clear that this clause refers to are "ascertained" sums only.

As regards Clause 51 the Court held that the operative words in the clause were "in respect of" and "any other respect". Thus, though the clause also mentioned some ascertainable sums on which interest was not payable, it was not restricted to those sums only but it further meant that "no interest..will..be payable..in any other respect whatsoever." It went on to also state that as there were two separate clause, 50 and 51 and Clause 50 having dealt with only ascertainable sums, the only logical conclusion was that Clause 51 would deal with not just ascertainable sums but unascertainable ones too. The Court held that the clause was comprehensive and bars interest under any head in clear and categorical terms.

The interpretation placed on Clause 51 of the Contract by the Petitioner was allowed to prevail and therefore no pendent lite interest was to be paid. The impugned Award of the Arbitral Tribunal was modified to the extent that the award by it of pendent lite interest as it was held to be contrary to the express agreement between the parties in terms of Section and therefore unsustainable in law.

## ANALYSIS

In this judgment, the Court has refused to give a sweeping power to the arbitrators to award interest and has in fact interpreted the Section in a way that would respect the agreement between the arbitrating parties, thus ensuring that in a contractual relation the contract remains the most powerful law binding the parties. The Court has given a clear interpretation to the Section and has stated that pendent lite interest under the 1996 Act can be paid only if the contract between the parties does not expressly prohibit it.

– Prateek Bagaria & Vyapak Desai

You can direct your queries or comments to the authors

*Special thanks to Varuna Bhanrale – intern with Mumbai office for his immense contribution.*

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