

(2010) 05 DEL CK 0012

In the Delhi High Court

Case No : CS (OS) No's. 1475A of 1996 and 1480 of 2003

General Electric Inc. Canada and Another

APPELLANT

Vs

National Hydroelectric Power Corporation Ltd.
 National
Hydroelectric Power Corporation Ltd. Vs General Electric Inc.
Canada and Another

RESPONDENT

Date of Decision : 18-05-2010

Acts Referred:

Arbitration Act, 1940 — Section 14, 17, 29, 30, 33
Civil Procedure Code, 1908 (CPC) — Section 34
Contract Act, 1872 — Section 28
Evidence Act, 1872 — Section 91, 92

Citation : (2010) 2 ARBLR 345

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Sandeep Sethi and Abhinav Vashist, in CSOS No. 1480/2003, B. Dutta and Sachin Datta, in CSOS No. 1475A/1996, for the Appellant; B. Dutta and Sachin Datta in CS(OS) No. 1480/2003, Sandeep Sethi and Abhinav Vashist in CS(OS) No. 1475A/1996, for the Respondent

Judgement

Valmiki J Mehta, J.

I.A. No. 4860/2004 in CS(OS) No. 1480/2003

1. Objections to the Award dated 7.5.1996 (impugned Award) have been filed under Sections 30 and 33 of the Arbitration Act, 1940 by means of the subject IA and which is being disposed of by means of the present judgment. The applicant-objector is also referred to as the petitioner and the non-objectors are also referred to as the claimants/respondents.

2. The impugned Award came to be passed by the Arbitration Tribunal constituted by the International Chamber of Commerce (for short "ICC") Paris and which Tribunal comprised of three members namely Justice Raghunandan S. Pathak, Jeffrey M. Hertzfeld and John Murray Lord Dervaird. By the impugned

Award the Arbitration Tribunal accepted the claims filed by the respondents/non-objectors against the petitioner/objector. The objector is M/s National Hydro Electric Power Corporation Ltd. and the claimants/non-objectors are M/s MIL Group Inc. a Corporation Incorporated under the laws of Canada and Canadian General Electric Company Ltd. a company similarly incorporated.

3. A contract dated 3.8.1984 was entered into between the objector as the owner of the project and the non-objectors as the suppliers of goods and services. The project in question was the Chamera Hydroelectric Project on the Ravi River in the State of Himachal Pradesh. Whereas Canadian General Electrical Company Ltd. (GE) provided the machinery and services with respect to Generator Core Package, MIL Group Inc. (MIL) supplied machinery and services with respect to the Turbine Core Package. The disputes between the parties arose with respect to the price variation claims made by the non-objectors against the objector with respect to the equipment and the tools supplied as also the consultancy services provided. Incidental issues also arose with respect to this main claim of price variation and which incidental issues pertain to rate of interest, existence or otherwise of force majeure conditions and the issue of limitation. The Arbitrators, as already stated above, accepted the price variation claims and also awarded interest to the non-objectors leading to the filing of the objections to the impugned Award by the petitioner herein.

4. Before this Court, the same issues and arguments were raised, as was done before the Arbitration Tribunal. I will take up and decide each aspect one by one.

5. The issue of price variation encompasses within it, the entitlement to price variation not only with respect to the basic equipment supplied, but also with respect to tooling supplied for the purposes of installation and commissioning and also as regards consultancy services. In order to determine the issues with respect to price variation, it is also necessary to decide two defences of the objector that the claims were time barred and there were no force majeure conditions which entitled the non-objectors to supply the equipment with delay. It was contended by the objector that the delay was on the part of the non-objectors/claimants and thus they cannot get the benefit of price variation in supply of the equipment, tools and consultancy services.

6. The first issue which was taken up by the Arbitration Tribunal and is also being taken by me, is the issue with regard to the claims being time barred. It is a mis-description to call the present defence in that the claims were barred by limitation, because the defence was not the usual defence of the claims being barred as per the limitation period provided under the Limitation Act, 1963 but the defence was that the claims were not filed within the period as required under a particular clause viz Clause 15.1 of the General Terms and Conditions of the Contract and consequently, it was contended that since the claims were filed beyond the period as prescribed under Clause 15.1, therefore, the same were barred. In fact, this issue was argued by the objector as an issue touching jurisdiction of the Tribunal.

On 18.2.1994, the claimants filed a request for Arbitration in accordance with Clause 15.1 of the Contract. Prior thereto on 22.10.1993 the claimants intimated their intention to submit the disputes to arbitration in accordance with Clause 15.1. At that stage it was not contended by the objector that the claims were out of time in October, 1993, and, this issue was raised for the first time only in the arbitration proceedings.

7. In order to understand the contention of the objector and the decision thereon of the Arbitration Tribunal on this aspect, it is necessary to reproduce Clause 15.1 of the contract at this stage and which reads as under:

In the event of any controversy or claims between NHPC and any other Party pursuant to this Contract, or any alleged breach hereof, every effort will be made to attempt to settle such disputes in an equitable manner. If such settlement is not made within 120 days after the written demand therefore has been submitted by one to the other, then upon either NHPC or the affected Canadian Party giving written notice one to the other, the matter shall be submitted within the subsequent 120 day period for arbitration subject to the rules of procedure of the International Chamber of Commerce, Paris by a board of three arbitrators.

The objector contended that the demand to settle the disputes has to be submitted within an overall period of 240 days once the period begins to run i.e first 120 days to reach the settlement and the second period of 120 days thereafter starts immediately on the 121st day, till the 240th day and the matter can be referred to arbitration up to the 240th day but not a day after the 240th day. It was contended that once the overall concurrent period of two periods of 120 days each expired i.e. a total period of 240 days concurrently, then, there cannot be reference of disputes to arbitration. On the basis of the aforesaid interpretation as was sought to be canvassed by the objector on the basis of Clause 15.1 it was argued that since the first request was made on 29.4.1992, the period of 240 days had expired when the request for arbitration was made on 18.2.1994. The claimants however contended that the two periods of 120 days each did not run concurrently and the second period of 120 days begins only when a notice was given by the claimants after the failure of the settlement talks between the parties. The arguments and the contentions of the claimants found favour with the Arbitration Tribunal which held as under:

2.4 The Tribunal is satisfied that the Claimants' interpretation is to be preferred. The natural reading of the relevant part of the Clause is that the words "then upon either NHPC or the affected Canadian Party giving written notice one to the other "qualify the phrase" the subsequent 120 day period"; that is, the 120 days period these referred to is subsequent to the giving of the written notice just referred to. The Respondents' interpretation gives no content to the word "upon". It was stated to the Tribunal by Counsel for the Respondents that claims of this type must be construed strictly. He made that submission under reference to Mustill & Boyd: Commercial Arbitration 1st Edition, 167 but the relevant passage states "Claims of this type must be construed strictly, and a claim will

not be barred by lapse of time unless the provision clearly applies to the claim in question". It is clear therefore that what the authors of Mustill & Boyd had in mind was that such claims should be construed strictly against the party seeking to rely thereon, so as not to render the claim effective to bar resort to arbitration unless it is quite clear that it must do so. For the reasons already stated, the Tribunal is in any event of the view that on a proper construction of Clause 15.1 the time limit for resort to arbitration was one of 120 days which did not begin to run until the Claimants' letter of 22nd October, 1993. (It should be recorded that it was not in dispute before the Tribunal that that was the only written notice requiring arbitration.) The reference to arbitration was therefore timeous and this arbitration is duly based on Clause 15.1.

8. I do not find any error in the interpretation as put forth by the Arbitrators on Clause 15.1 of the contract. The Arbitrators act within their jurisdiction when they interpret a Clause in the contract and merely because two interpretations are possible, this Court is not entitled to interfere with one interpretation which is adopted by the Arbitrators, once the interpretation which is adopted is plausible and possible.

Further, it is necessary that every attempt should be made to interpret a clause so that valid legal rights are not extinguished by purely technical interpretations which would thwart justice. The legislature in furtherance of this wisdom has now amended Section 28 of the Contract Act, 1872 and has added an additional Sub-section in Section 28 whereby extinguishing of the rights of a party by a Contractual Clause before the expiry of the period of limitation as provided under the Limitation Act, 1963 has been held to be void. While exercising jurisdiction under Sections 30 and 33 of the Arbitration Act, 1940, this Court does not sit as a court of appeal over the Award of the Arbitrators. Unless and until the interpretation of the Arbitrators of a contractual clause is an interpretation which is wholly perverse i.e. one which no reasonable man well informed of all the facts and law would have taken, courts do not interfere with the interpretation as given of the contractual clauses by the Arbitrators.

9. I, therefore, reject the contention raised on behalf of the objector that the claims filed by the claimants were barred on account of Clause 15.1 of the Contract.

10. The second defence of the objector going to the root of the matter was the objection that the claimants were themselves guilty of delay in the supply and consequently, they were not entitled to the benefit of the price variation clause. It was contended that the force majeure clause in the contract could not assist the claimants because there were no force majeure conditions. The Arbitration Tribunal has rejected this contention of the objector. In fact, the Arbitration Tribunal found that this was not an issue which was ever seriously contested and canvassed in the arbitration proceedings and in fact no evidence had been led by the objector on the issue of force majeure. In this regard, the Arbitration Tribunal while dealing with this aspect of force majeure has held as under:

4.1. ...However, at the stage of the hearing the Respondents sought in their later submissions to argue an entitlement to resist all the price calculations. The apparent basis upon which they sought to do so was that the delay of some three years between 1988 and 1991 which the Claimants attributed to force majeure was not entirely so. No material was put or attempted to be put before the Tribunal hearing on this issue. In these circumstances the Tribunal is not concerned with any question of delay.

Before this Court, it was very vehemently contended on behalf of the objector that the Arbitration Tribunal has clearly fallen into an error because the objector had clearly taken up the defence of disentitlement of the claimants to price variation and it was therefore contended that the Arbitrators could not have brushed aside this defence. It was further contended that the onus of proof to prove the existence of force majeure conditions was on the claimants and in which they miserably failed. It was thus sought to be concluded on behalf of the objector that since there were no force majeure conditions, consequently, the delay in the supply is on account of the own faults of the claimants and hence the claimants are not entitled to the benefit of the price variation clause.

11. In my opinion, this objection of the objector is also wholly misconceived. The objector in its pleadings has not disputed that there took place in August, 1988 force majeure conditions such as earth quakes and floods in India which did in fact cause a delay in the project. In its pleadings filed in the arbitration proceedings the claimants and the objector respectively stated as under:

Pleadings of claimants

52. The project experienced approximately a three year delay from August 1988 to 1990 due to force majeure conditions of earthquakes and floods in India. On 23 August, 1988 SNC/Acres duly wrote to NHPC" stating that:

In accordance with the provisions of Article 14 of the General Terms and Conditions, we are notifying the Corporation [NHPC] that a Force Majeure condition is developing at the Chamara Hydroelectric project as a result of floods and washouts, which may affect the timely commissioning of the Generating Units in accordance with the Contract" (Appendix A Exhibit 11)

As a result of the floods and washouts, the infrastructure had to be substantially reconstructed before the GE and MIL equipment could be shipped. Due to these conditions, the Claimants could not commission the equipment they had manufactured and delivered until 1991-92. The various turbines and generators and related equipment were kept in storage for approximately three years pending clean-up and repairs to the power house complex. The earthquakes and floods had thus set the project back about three years.

53 In 1990-91, as work recommenced by the Claimants, the issue of NHPC" inexplicably withholding payments, was revisited. It appeared that there was a dispute over the escalation calculations, but NHPC" had not expressed any

particular objection.

Pleadings of Objector

52. "The Respondents deny that Force Majeure conditions because of earthquakes and floods continued for three years from August 1988 to 1990 as alleged by the Claimants. Damages to the infrastructure due to the floods in August 1988 were restored promptly and the construction activities on most of the installations in the Project had continued without interruption during the above said period.

53. The contents of this para are completely denied. As already explained in Para 52 above, the construction work at Chamera Project had not remained suspended during the period August, 1988 to 1990 as alleged by the Claimants. The construction activity on all the installations in the Project had continued uninterruptedly during the said period. The payments pertaining to the price variation claims of the Claimants were regulated as per the relevant contractual provisions and the so-called "with-held payments" as alleged by the Claimants were, in fact, the result of recoveries /set off of the over-payments made earlier by the respondents on the basis of wrong price variation of the Claimants.

From the aforesaid pleadings one fact is absolutely clear that there were damages to the infrastructure due to floods in August, 1988. Once force majeure conditions are found to exist, if the objector contended that the situation was restored promptly, the onus of proof surely shifted upon the objector to show as to when the force majeure conditions ceased to exist. Surely when there is damage on account of floods and earthquakes " promptly" cannot have any meaning. In fact, it is for this reason I tend to accept the findings of the Arbitrators that this issue was not canvassed with fervor and vehemence before the Arbitrators and it is only sought to be canvassed with a lot of fervor before this Court by the objector because the Award is now against the objector, and, the objector would definitely seek to use all the weapons in its armory to dislodge the Award. I, therefore, am unable to agree with the contention as raised by the counsel for the objector that the force majeure conditions did not exist or that it was for the claimants to prove the force majeure conditions.

12. That takes me to the main issue of the entitlement to price variation claims. This claim of price variation was argued and can be dealt with under two heads. First is the price variation claims on equipment and consultancy for which the same arguments apply and secondly for the price variation on tooling with respect to which different arguments were raised.

Issue of price variation on equipment and consultancy

13. In order to understand and appreciate this issue, it is necessary to reproduce the relevant clauses of the contract and which read as under:

2. SCOPE OF WORK

2.1 MIL Scope of Work-Turbine Core Package

Marine Industries Limited will supply the Turbine Core Package as hereinafter described, and effect delivery FAS INCOTERMS of the said Turbine Core Package to NHPC on principal to principal basis, the title to which shall pass to NHPC outside India on negotiation of documents of title.

2.1.1 Turbines and Inlet Valves

3 Francis turbines, 3 electro-hydraulic governors, 3 lattice-type butterfly inlet valves including conducting turbine model tests, including submission of report, spare parts for turbines, governors and butterfly inlet valves and necessary auxiliary equipment, as per the Technical Specifications 7161-4-4500-TS-001-00 for Turbine, Governor and Auxiliaries and 7161-4-4500-TS-002-00 for Turbine Inlet Valves and Auxiliaries.

The limit of the turbine supply will include extension of spiral casing up to the downstream flange of butterfly valve along with the make-up piece.

2.1.2 Gates

Various gates, hoists, embedded parts and other related equipment as per the following Technical Specifications:

7161-2-4500-TS-001-00 Low Level Sluice Gates and Bulkhead Gates
7161-2-4500-TS-002-00 Diversion Tunnel Gates and Guides
7161-4-4500-TS-003-00 Draft Tube Gates and Guides
7161-3-4500-TS-002-00 Tailrace Tunnel Outlet Portal Stoplog, Guides and Follower
7161-3-4500-TS-001-00 Power Tunnel-Bulkhead Gate, Intake Gate and Embedded Parts
7161-3-4500-TS-003-00 Surge Shaft Stoplogs, Guides and Followers

2.1.3 Tools, Testing and Installation Equipment
MIL will supply all special tools, testing and special installation equipment required for the installation, testing and commissioning of the Turbine Core Package as per the Technical Specifications.

2.1.4 Supervisory Services for Installation, Testing and Commissioning

MIL will provide supervisory services for the management of installation and supervision of testing and commissioning of the Turbine Core Package, hereinafter described throughout this Annex B as "Consultancy Services". The installation of the Turbine Core Package shall be the responsibility of NHPC who shall award the contract to an installation contractor under a separate contract in consultation with MIL.

2.2 CGE Scope of Work- Generator Core Package

Canadian General Electric Company Limited will supply the Generator Core Package as hereinafter described, and effect delivery FAS INCOTERMS of the said Generator Core Package to NHPC on principal to principal basis, the title to which shall pass to NHPC outside India on negotiations of documents of title.

2.2.1 Generators

Three (3) only Type ATI, 200,000 KVA, 13800 volts, 3 phase, 50 Hz, hydroelectric generators, complete with static exciters, grounding cubicles, station tools, testing, commissioning and maintenance equipment and spare parts all as per the Technical Specifications 7161-4-4700-TS-001-00 for Generators and Excitation Systems.

2.2.2 Bus Ducts

Three (3) sets Isolated bus duct equipment, each set as per the Technical Specifications 7161-4-4700-TS-002-00 for Isolated Phase Bus Duct.

2.2.3 Unit Auxiliary Transformers

Three (3) sets 1250 KVA, 3 phase, 50 Hertz, indoor dry type mental enclosed unit auxiliary transformers as per the Technical Specifications 7161-4-4700-TS-005-00 for the Unit Auxiliary Transformer.

2.2.4 Tools, Testing and Installation Equipment

CGE will supply all special tools, testing and special installation equipment required for the installation, testing and commissioning of the Generator Core Package as per the pertinent Technical Specifications.

2.2.5 Supervisory Services for Installation, Testing and Commissioning

CGE will provide supervisory services for the management of installation and supervision of testing and commissioning of the Generator Core Package, hereinafter described throughout this Annex B as "Consultancy Services". The installation of the Generator Core Package shall be the responsibility of NHPC who shall award the Contract to an installation contractor under a separate contract in consultation with CGE.

3. CONTRACT PRICES AND TERMS OF PAYMENT

3.1 MIL Contract Prices

3.1.1 The Contract Price for the Equipment delivered FAS Eastern Canadian Port or other port of origin, described in Articles 2.1.1, 2.1.2 and 2.1.3 hereof shall be thirty-nine million two hundred and sixty thousand CANADIAN dollars (CAN. \$39,260,000.00) Net.

3.1.2 The Contract Price for the Consultancy Services described in Article 2.1.4 hereof shall be three million six hundred and forty thousand CANADIAN dollars (CAN. \$3,640,000.00) Net.

3.1.3 The Contract Prices are subject to variation in accordance with the Price Variation as per Article 4.1 and 4.3 hererof.

3.2 CGE Contract Prices

3.2.1 The Contract Price for the Equipment delivered FAS Eastern Canadian Port or other port of origin, described in Articles 2.2.1, 2.2.2 2.2.3 and 2.2.4 hereof shall be twenty million seven hundred and eighty one thousand, six hundred and thirty nine CANADIAN dollars (CAN.\$ 20,781,639.00) Net.

3.2.2 The Contract Price for the Consultancy Services described in Article 2.2.5 hereof shall be two million four hundred and eighteen thousand, three hundred and sixty one CANADIAN dollars (CAN.\$ 2,418,361.00) Net.

3.2.3 The Contract Prices are subject to variation in accordance with the Price Variation as per Articles 4.2 and 4.3 hereof.

3.3 Terms of Payment

NHPC shall pay or cause to be paid the Contract Price as set forth in Articles 3.1.1 and 3.2.1 hereof (referred to as FAS Contract Price in this Article 3.3) in accordance with the following terms:

3.3.1 Subject to Articles 13.1.1, 13.1.2 and 13.1.3 of the General Terms and Conditions of this Contract, 15% (fifteen percent), free of interest, of the FAS Contract Price for the supply of the Turbine Core Package and Generator Core Package shall become due and payable as advance, immediately after the signing date of the Contract and upon presentation of the invoice and advance payment bond as per Article 12.1 of this Annex B.

3.3.2 75% (Seventy-five percent) of the FAS Contract Price for the supply of the Turbine Core Package and Generator Corer Package in quarterly progress payments as per schedule of payments shown in Appendix B1 and B2 respectively to this Annex B related to the schedule of Work progress.

3.3.3 Subject to Article 19 of this Annex B, 10% (ten percent) of the FAS Contract Price on the completion of the shipment for each Unit of each Major Equipment Group due against presentation of shipping documents including warehouseman's receipt, dock receipt or airway bill evidencing delivery. However, where manufacturer is ready for shipment from work-shop to Port of Shipment but NHPC is not able to arrange for shipment within thirty (30) days for certain reasons at the appropriate time, NHPC shall make payment to the Manufacturer upon Manufacturer's readiness to Ship being established but the delivery and transfer of ownership shall pass to NHPC only as per the provisions of Article 1(7) of the General Terms and Conditions.

Each shipment for each Unit of each Major Equipment Group for which Readiness to Ship has been established, will be held at the Manufacturer's Plant for a further period of thirty (30) days free of storage charge and duly insured without cost of NHPC and thereafter, if required, mutually acceptable arrangements will be made for further storage and insurance coverage, as necessary.

3.3.4 All invoices shall normally be verified for payment by NHPC within thirty (30) days after receipt by NHPC. In the event of a dispute in respect of any part

of the claim, only the disputed portion of the claim may be withheld. NHPC will advise the Manufacturer immediately of the nature of the specific dispute and ask for detailed clarification or proof of claim. The Manufacturer will either submit written clarification or proof of claim, acceptable to NHPC, upon which NHPC will approve the release of the disputed portion of the claim, or the Manufacturer will correct the claim if found in error.

3.3.5 In the event the verification of an invoice is not done by NHPC within forty-five (45) days of its receipt without any objection or dispute in respect of any part of any claim being raised, the invoice shall be deemed to have been verified.

3.4 Terms of Payment for Consultancy Services

3.4.1 NHPC shall pay or cause to be paid that portion of the Contract Price set forth in Articles 3.1.2 and 3.2.2 hereof in accordance with the following terms:

3.4.2 20% (twenty percent), free of interest, of the Contract Price set forth in Articles 3.1.2 and 3.2.2 hereof for the Consultancy Services of the Turbine Core Package and the Generator Core Package shall become due and payable, as advance, on the date which the Manufacturer notifies to NHPC as the date of its readiness to mobilize for that part of the work to be performed at the site and upon presentation of the invoice therefore and an advance payment bond in a like amount in the form appended hereto as Appendix B-5 of Annex B.

3.4.3 70% (seventy percent) of the Contract Price set forth in Articles 3.1.2 and 3.2.2 hereof for the Consultancy Services of the Turbine Core Package and the Generator Core Package shall become due and payable in monthly payments as per the schedule of payments appended thereto as Appendix B-3 and B-4 of Annex B, subject to verification by NHPC in relation to the progress of the work.

3.4.4 10% (ten percent) of the Contract Price set forth in Articles 3.1.2 and 3.2.2 hereof for the Consultancy Services of the Turbine Core Package and the Generator Core Package shall become due and payable within thirty (30) days of completion of the work provided that if commissioning is delayed through causes beyond the control of the Manufacturer, such payment shall become due and payable thirty (30) days after the date on which the Manufacturer was ready for commissioning.

3.4.5 All invoices shall normally be verified for payment by NHPC within thirty (30) days after receipt by NHPC. In the event of a dispute in respect of any part of any claim, only the disputed portion of the claim may be withheld. NHPC will advise the Manufacturer immediately of the nature of the specific dispute and ask for detailed clarification or proof of claim. The Manufacturer will either submit written clarification or proof of claim acceptable to NHPC, upon which NHPC will approve the release of the disputed portion of the claim, or the Manufacturer will correct the claim if found in error.

3.4.6 In the event the verification of an invoice is not done by NHPC within forty-five (45) days of its receipt without any objection or dispute in respect of any

part of any claim being raised, the invoice shall be deemed to have been verified.

4. PRICE VARIATION

4.1 Turbine Core Package

4.1.1 Turbines

All prices for the turbines and butterfly inlet valves are subject to variation for changes in labour and material costs.* Such variation, involving increases or decreases in the prices stated herein, is to be determined in accordance with the following:

LABOUR

a) For the purpose of variation, the proportion of the price representing labour is accepted as an amount equal to 50% (fifty percent) thereof.

(b) The above amount accepted as representing labour will vary for changes in labour cost. Such variation will be based upon the average hourly earnings in the electrical industrial equipment manufacturing S.I.C. 315 Cat. No. 72-002, Table No. 11 for total Canada, Published monthly by Statistics Canada.

*However, the prices shall not be subject to variation for the period during which the delivery is delayed by the Manufacturer for reasons other than Force Majeure.

MATERIAL

For the purpose of variation, the proportion of the price representing material is accepted as an amount equal to 40% (forty percent) hereof.

The above amount accepted as representing material will vary for changes in material costs. Such variation will be based upon the selling price of primary metal industries (D52710) Cat. No. 62-011, Table No. 1, published monthly by Statistics Canada.

FORMULA

Each payment will be subject to price variation as follows:

a) 100% (one hundred percent) of the claim for price variation shall be chargeable and payable on a quarterly basis, based on 100% (one hundred percent) of the progress payments claimed, i.e. without holdback, for the quarter.

b) $P_1 = P_0 \times A(L_1 - L_0) + B(M_1 - M_0)$ L_0 M_0 P_1 = Amount of variation claimed.
 P_0 = Payment for which variation is being claimed without holdback. A = Percentage of payment applicable to labour (50%). B = Percentage of payment applicable to material (40%) L_0 = Labour index at base date April 1984. L_1 = Labour index as averaged over the quarterly variation period. M_0 = Material index at base date April 1984. M_1 = Material index as averaged over the quarterly variation period.** **For the variation claimed in respect of the last 2 quarterly payments prior to shipment, the labour index used in respect of the

second previous quarterly payment shall be used.

******For the variation claimed in respect of the last 2 quarterly payments prior to shipment, the material index used in respect of the second previous quarterly payment shall be used.

4.1.2 Gates

All prices for the gates are subject to variation for changes in labour and material costs.* Such variation, involving increases and decreases in the prices stated herein, is to be determined in accordance with the following:

LABOUR

a) For the purpose of variation, the proportion of the prices representing labour is accepted as an amount equal to 50% (fifty percent) thereof.

b) The above amount accepted as representing labour will vary for changes in labour cost. Such variation will be based upon the average hourly earnings in the metal fabricating industries S.I.C. Code 300-309, CANSIM No. L5629, Table No. 2, Cat. No. 72002 published monthly by Statistics Canada.

MATERIAL

a) For the purpose of variation, the proportion of the prices representing material is accepted as an amount equal to 40% (forty percent) thereof.

b) The above amount accepted as representing material will vary for changes in material costs. Such variation will be based upon the selling price of primary metal industries Code 12-2910-707, CANSIM No. D-527-757, Table No. 1, "Plate Carbon and Alloy".

* However, the prices shall not be subject to variation for the period during which the delivery is delayed by the Manufacturer for reasons other than Force Majeure.

FORMULA

Each payment will be subject to price variation as follows:

a) 100% (one hundred percent) of the claim for price variation shall be chargeable and payable on a quarterly basis, based on 100% (one hundred percent) of the progress payment claimed, i.e. without holdback, for the quarter.

b) $P1 = Po \times A(L1 - Lo) + B(M1 - Mo)$ Lo Mo $P1$ = Amount of variation claimed.
 Po = Payment for which variation is being claimed without holdback. A = Percentage of payment applicable to labour (50%). B = Percentage of payment applicable to material (40%) Lo = Labour index at base date April 1984. $L1$ = Labour index as averaged over the quarterly variation period. Mo = Material index at base date April 1984. $M1$ = Material index as averaged over the quarterly variation period. ****** * For the variation claimed in respect of the last quarterly payment prior to shipment, the labour index used in respect of the

previous quarterly payment shall be used.

** For the variation claimed in respect of the last 2 quarterly payments prior to shipment, the material index used in respect of the second previous quarterly payment shall be used.

4.2 Generator Core Package

All prices for the Generator Core Package are subject to variation for changes in labour and material costs. * Such variation, involving increases or decreases in the prices stated herein, is to be determined in accordance with the following:

LABOUR

a) For the purpose of variation, the proportion of the price representing labour is accepted as an amount equal to 50% (fifty percent) thereof.

b) The above amount accepted as representing labour will vary for changes in labour cost. Such variation will be based upon the average hourly earnings in the electrical industrial equipment manufacturing, S.I.C. 336 Cat. No. 72-002, Table No. 11 for total Canada, published monthly by Statistics Canada.

MATERIAL

a) For the purpose of variation, the proportion of the price representing material is accepted as an amount equal to 40% (forty percent) thereof.

b) The above amount accepted as representing material will vary for changes in material costs. Such variation will be based upon the selling price of primary metal industries (D527100) Cat. No. 62-011, Table No. 1, published monthly by Statistics Canada.

* However, the prices shall not be subject to variation for the period during which the delivery is delayed by the Manufacturer for reasons other than Force Majeure.

FORMULA

Each payment will be subject to price variation as follows:

a) 100% (one hundred percent) of the claim for price variation shall be chargeable and payable on a quarterly basis, based on 100% (one hundred percent) of the progress payment claimed, i.e. without holdback, for the quarter.

b) $P1 = Po \times A(L1 - Lo) + B(M1 - Mo)$ Lo Mo $P1$ = Amount of variation claimed. Po = Payment for which variation is being claimed without holdback. A = Percentage of payment applicable to labour (50%). B = Percentage of payment applicable to material (40%) Lo = Labour index at base date April 1984. $L1$ = Labour index as averaged over the quarterly variation period. Mo = Material index at base date April 1984. $M1$ = Material index as averaged over the quarterly variation period. ** * For the variation claimed in respect of the last quarterly payment prior to shipment, the labour index used in respect of the

previous quarterly payment shall be used.

** For the variation claimed in respect of the last 2 quarterly payments prior to shipment, the material index used in respect of the second previous quarterly payment shall be used.

4.3 Consultancy Services

Prices for the Consultancy Services are subject to variation. However, the prices shall not be subject to variation for the period during which the Manufacturer is delaying the Consultancy Services for reasons other than Force Majeure. Such variation, involving increases or decreases in the prices stated herein, is to be determined in accordance with the following formula and each payment will be subject to such price variation:

a) 100% (one hundred percent) of the claim for price variation shall be chargeable and payable on monthly basis, based on 100% (one hundred percent) of the progress payment claimed, i.e. without holdback, for the month.

b) $P_1 = P_0 (L_1 - L_0) \times 0.92$ L_0 P_1 = Amount of variation claimed. P_0 = Payment for which variation is being claimed without holdback. L_0 = Labour index at base date of 1st April, 1984. L_1 = Labour index at date for which payment is claimed. The above labour indices shall be those published monthly by Statistics Canada, for the relevant month, Electric Utility Construction Price Index (Cat. No. 62-007 D 482208) for Engineering and Administration of Hydro Electric Generating Stations.

A reading of the aforesaid clauses shows that the scope of the work of MIL for the Turbine Core Package is contained in Clauses 2.1 to 2.1.4 and the scope of work of GE for Generator Core Package is contained in Clauses 2.2 to 2.2.5. The contract prices for MIL are contained in Clauses 3.1.1 to 3.1.3 and the contract prices for GE are contained in Clauses 3.2.1 to 3.2.3. So far as payment is concerned, with respect to equipment, 15% was to be paid as advance, 75% as progress payment and the balance 10% on the completion of shipment of each unit. The only difference with respect to the consultancy services was that the advance was 20% and progress payment was 70%. The contract prices by virtue of Clauses 3.1.3 (for MIL) and 3.2.3 (for G.E) were subject to price variation as per Clauses 4.1 and 4.3 with respect to MIL and 4.2 and 4.3 with respect to G.E. The price variation formulae for GE and MIL are same and as per which formulae out of the 100% payment under the contract only 90% of the payment was subject to escalation being comprised of the components of material and labour. The balance 10% payment was therefore obviously towards the profit margin of the claimants on which no escalation was allowable and also was not allowed. It is thus the material and the labour components which were to be subject to price variation i.e. 90% of the total payment was to be subject to price variation.

Keeping the aforesaid broad categorization of the clauses of the contract let us examine the stand and the arguments of the respective parties with respect to

price variation claims on equipment and consultancy.

The claimants contended that price variation was payable on the entire 90% component of the price whereas the objector contended that price variation could only be allowed on the progress payments to be made of 75% (for equipment i.e. 90% of 75%) and 70% (for consultancy i.e. 90% of 70%). What the objector therefore contended was that the advance price to be paid and the balance 10% payable on shipment were not subject to price variation. The Arbitrators have held that the entire payment of 90% of the price is subject to price variation. Payment is no doubt made of all the bills, which may indicate that price variation is given for the entire amount of 100% of the price, however, by virtue of the factor of only the material and labour component being included in the formulae, the price variation was in fact granted only for the 90% of the price. The Arbitrators have held that in terms of the formulae, the entire 90% payment of the price is subject to price variation because the clauses which contained the price variation formulae begins with the expression " each payment will be subject to price variation as follows." The Arbitrators have buttressed their conclusion by reference to Clauses 4.1.1 (Turbine Core Package) and 4.2 (Generator Core Package) which use the expression "All prices..... are subject to variation for changes in labour and material costs". In my opinion, the conclusion is buttressed by reference to Clauses 3.1.3 and 3.2.3 which state that "contract prices" i.e. the entire contract prices are subject to price variation. The logic and the life of the provision entitling price variation for the entire component of 90% of the price argued by Mr. Sandeep Sethi, Sr. Advocate on behalf of the claimants/non-objectors was that the base price given for the contract was of many months earlier than arriving at the contract itself i.e. by the time the contract was arrived at the actual prices were in fact higher than the base prices on which the bid was submitted. It was further canvassed that surely once the contract is performed and there is an actual escalation in the prices therefore the payments were infact to be made in terms of the price variation clause because the prices actually rose. It was therefore, contended that merely because certain price was paid in advance cannot mean that price escalation is not payable because even qua the advance payment portion with respect to the labour and material component thereof actual escalation took place and which escalation had necessarily to be compensated by the price variation clause. It was contended that advance payment given is used in a different manner and for different requirements under the contract by the respondents and merely because price is paid in advance would not mean that the advance price component is not towards labour and material on which in fact actual escalation did take place during performance of the contract. It was therefore argued by Mr. Sandeep Sethi that in terms of both the expressions used of "all prices" and "each payment" as also the life and the rationale of the clauses as reproduced above, the same did in fact entitle the claimants for the price variation. Mr. Sethi also sought to remove a confusion which was sought to be created on behalf of the objector that there is a big mystery in the expression "grossing up" as was being used by the claimants and

the Arbitrators. Mr. Sethi, and in my opinion rightly, pointed out that what grossing up meant was that progress payments were only 75% or 70% of the price and they had to be factored up for 100% of the price payable by assuming that no advance payment was made, therefore, the progress payments were multiplied by 100×75 or 100×70 i.e., the fact thereof was that the progress payment bills were theoretically enhanced as if advance payment was not made, however, the advance payment was not claimed the second time in the progress payment but it was only the escalation part of the advance payment which was claimed in the progress payment bills. It was therefore contended that unnecessary hype and apprehension is sought to be created on account of the use of the expression "grossing up" by the Arbitrators, when, the only thing is that the effect of price escalation is granted for the 90% of the price payable. I also agree with Mr. Sandeep Sethi, Sr. Advocate that the expression "based on" as used in the price variation formula will not in any manner help the objector to contend that price variation is not payable on the 100% of the 90% component of the total price. The expression "based" is only to indicate the apportionment of the advance price paid in the different bills of progress payment raised for being paid during the currency of the contract. The arbitrators have also given correct reasoning on this aspect which I agree to.

14. I am unable to accept the argument as advanced on behalf of the petitioner-objector that price variation should only be granted towards the progress payment of 75% and 70% and not with respect to the entire price under the contract being 90% of the total price payable. I accept the contentions and arguments as raised on behalf of the claimants/non-objectors as stated above. The Arbitrators have also given valid reasoning and rationale for accepting the stand of the claimants/non-objectors. Once there are two interpretations possible of the relevant clauses of the contract and the Arbitrators have adopted one reasonable interpretation of the contractual clauses, this Court would not interfere with such an interpretation merely because it is of another view. Of course, I must hasten to add that I am not of the other view as is sought to be canvassed on the arguments as raised by the objector that price variation should not be given for the entire 90% component of the prices payable under the contract. The Arbitrators have dealt with this aspect in the following paragraphs of the Award and which I adopt and accept.

3.9 Before the Tribunal it was contended on behalf of the Claimants that the correct application of the formula in the case of Equipment was to "gross up" the relevant progress payment in relation to which a price variation was being claimed. The reason for so doing was that as in the case of the equipment contracts 15% of the Contract Price was paid in advance and 10% was paid at the end, the progress payment only amounted to 75% of the whole. If, therefore, the price variation was treated as referable only to the actual amount of any particular progress payment, the result would be to deprive the parties of that proportion of the price variation which should have related to the prior and posterior payments. So to do would be to ignore the words of the Contract which

provided that the Contract Prices were subject to variation, without suggesting that the whole of the Equipment Contract Prices were not so subject, except in so far as the Contract expressly limited the variation to 90% of the whole Contract Price. Further it ignored the express provision in Clause 4.1 and 4.2 in every case that "each payment will be subject to price variation". Lastly, it gave no explanation to the reference in head (a) of the formula to the claim for price variation being based on 100% of the progress payment claimed.

3.10 For the Respondents it was contended that nowhere in the Contract provisions was there any reference to "grossing up" in the manner suggested by the Claimants. The reference in head (a) of the formula was intended to ensure that the claim for price variation at any particular progress payment stage was related to the whole of the progress payment then being claimed (that is without any holdback at all) and whatever the fate of the progress payment itself in so far as it might be diminished by holdback, the whole of the price variation upon the whole of that progress payment was then to be chargeable and payable. The Contract, it was argued, must be construed strictly on its terms, and nothing should be implied which does not clearly emerge from the language used in the Contract. The Respondents expressly stated that they rested their entire case for limited price variation upon Clause (a) of the price variation formula. They did nevertheless point out that in other contracts in this project which they drew to our attention price escalation was not applied in respect of (at least) the advance payment portion of the price. The difficulty that the Tribunal has with that branch of the Respondents' argument is that in each of the three cases to which our attention was drawn, there was an express provision to that effect in the Contract itself. Thus in the portion of the Purchase Order placed on M/s Federal Pioneer (Appendix IV to Mr. Jamwal's statement) Clause 9.1(a) in respect of fabrication states: "The amount of the contract price subject to escalation with respect to fabrication costs is ninety per cent (90%) of the ex-works price (excluding certain costs)... The amount of the advance payment shall not be subject to escalation". Similarly the Purchase Order placed on M/s ABB (Appendix V to Mr. Jamwal's statement) provided 3.0 Price Variation...." (a) The amount of the contract price subject to escalation with respect to fabrication costs in ninety (90%) per cent of the ex- works price (excluding certain costs).... The amount of the advance payment shall not be subject to variation". Again, in reference to the Dominion Bridge Quebec, the Respondents have produced (Appendix A, item 1) a letter dated 22nd September 1992 which states: "A) 10% Down Payment. As per Clause 12.1 (b) of the Special Conditions dated April 1986 for the spillway Radial and Wheeled Bulkhead Gates, the 10% down payment is not subject to escalation". They have also produced an Instruction to Bidders which states in 12.1(a) "The proportion of the contract price subject to escalation with respect to fabrication costs is sixty five per cent (65%).... but not including the amount of the down payment (10%).

3.11 In approaching the issue of the proper construction of the Price Variation formula, the Tribunal considers that it is their task to construe the words used in

this part of the Contract in their setting as a whole. To that end Articles 3 and 4 of Annex B in particular have to be considered. Upon so doing it is expressly clear from the general words to which reference has already been made in Article 3 that the Contract Prices are subject to price variation. This in ordinary language would normally be taken to mean that the variation provision would apply to the whole Contract Price. Further the provision in relation to each aspect of the equipment contract prices is that "all prices" are subject to variation. More significantly perhaps, the provision relating to the variable elements provides that (to take an example) (a) For the purpose of variation, the proportion of the price representing labour is accepted as an amount equal to 50% thereof and (b) the above amount accepted as representing labour will vary for changes in labour costs. Such variation will be based upon [particular index]-Article 4.1.1 etc. The natural reading of that provision is that the whole sum which is 50% of the relevant Contract Price will vary for changes in labour costs. There is no suggestion that part only of that amount will vary. On the contrary what is made clear at that stage is that, on the face of it, two parts of the whole, i.e. the amounts representing 50% and 40%, will vary for changes in the relevant costs (material and labour). The remaining 10% will not vary.

3.12 The matter is however put beyond doubt by Articles 4.1.1, 4.1.2 and 4.1.3, each of which clauses provide that such payment is subject to price variation. The express provision, without qualification, imports that the parties agreed that all payments which were to be made in respect to each of the Contract Prices would be subject to price variation. Clause (a) of the formula provides that 100% (one hundred per cent) of the claim for price variation shall be chargeable and payable on a quarterly basis, based on 100% (one hundred per cent) of the progress payment claimed, i.e. without holdback, for the quarter. That suggests that at any stage at which a price variation claim is being made it has to be based on the whole (i.e 100%) of the progress payment claimed. That is not the same as saying that it is to be limited to the progress payment claimed. The contention put forward by the Respondents would be exactly the same if the word "based" were omitted from head (a) of the formula. The consequence of the Respondents' interpretation is not only that it gives no content to the word "based" in head (a) but that it cannot be reconciled with the commencing words of the relevant clause that each payment will be subject to price variation. If content is to be given to the whole of Article 4.1.1 then the phrase each payment must be reconciled with the formula also contained in Article 4.1.1 that claims for price variation shall be based on 100% of the progress payment claimed. That can clearly be done by aggregating the advance and the final payments, in the case of equipment 25% of the whole, and then applying a grossing up formula so that each progress payment carries with it the additional 25% for the purpose of arriving at the overall price variation.

3.13 It appears to the Tribunal that so to proceed can be seen to be consonant with the general scheme of the payment provisions. If 15% of the Contract Price is to be paid in advance then, given that the Contract Price is to be subject to

price variation, it cannot be ultimately determined what that amount which represents 15% of the Contract Price will be until the conclusion of the period and the application of the last variation indices. Similarly, in relation to the 10% which is withheld, the calculation of what variation is appropriate should be made on an ongoing basis. (It would of course have been possible if the formula had in (a) referred to payments and not to progress payments to apply the formula to all payments.) Such an approach however would have been less accurate in so far as it would not have resulted in price variation being calculated so close to the event as is the case when the "grossing up" formula is applied. However the language of the formula here, by limiting the payments upon which the price variation is based to the progress payments, requires the formula to be applied in relation to these progress payments, in such a way that the overall Contract Prices are appropriately varied. The grossing up method is simply a technique for achieving that result. It should be noted that the mathematical consequence of applying a factor of 100/75 to the Interim progress payments is effectively to apply the formula to the full Contract Price. For these reasons the Tribunal is of the view that considering the Contract as a whole and the price and price variation provisions in particular, the proper interpretation and application thereof requires the whole Contract Price (less 10%) to be subject to variation and that the appropriate technique to calculate that variation in accordance with the formulae is by grossing up each interim (progress) payment by a factor of 100/75. Only by so doing is full effect given to the words used in the Contract between the parties.

3.14. So far as the Consultancy Agreements are concerned, similar considerations apply. In language similar to the Equipment provision the Contract provides that the "Contract Prices" (which include as separate items Consultancy Prices) are subject to price variation (Articles 3.1.3, 3.2.3) and that Prices for the Consultancy Services are subject to variation (Article 4.3). Further "each payment will be subject to such price variation"- Article 4.3. The formula in Clause (b) is different in that there is only one item, labour, subject to price variation; but it comprises 92% of the whole leaving the fixed element at 8%. By Clause (a) the variation claimed is based on 100% of the monthly progress payments. The advance is 20% and the final payment 10%. For exactly the same reasons as already discussed, the use of a grossing up technique, in this case 100/70, is necessary in order to achieve the result the Contract seeks that each payment is subject to price variation but that the calculation is made based on progress payments only.

Price variation on tooling

15. That takes me to the aspect with respect to price variation on tooling. At the outset, the Award did seem difficult to accept on this aspect because with respect to the claim of price variation on tooling the claim of GE was rejected and against which no objections have been filed whereas the claim for price variation on tooling for MIL was allowed. If we read the contractual clauses as they are, then,

at first blush one seems to come to the conclusion that price variation cannot be granted on tooling to MIL because tooling falls under Clause 2.1.3 and price variation is only on turbines and butterfly inlet valves falling under Clauses 2.1.1 and 2.1.2, more so because for the Generator Core Package of GE, all prices were subject to price variation. A conclusion could therefore have been canvassed for acceptance that since with respect to the scope of supply as envisaged for MIL which contains equipment, tooling and consultancy services since price variation could only be granted for turbines, butterfly inlet valves and consultancy, price variation therefore could not have been claimed for tooling supplied by MIL which forms part of Clause 2.1.3 and Clause 2.1.3 was not subject to price escalation but only Turbines and butterfly inlet vales were subject to price variation in view of the language of Clause 4.1.1.

However the above prima facie conclusion is in fact wrong and the issue has been clarified by Mr. Sandeep Sethi, learned senior counsel for the claimants/non objectors. The clarification which has been given, and also one which has been accepted by the Arbitrators and which I also accept, is that the total price paid to MIL for the consultancy services was Canadian Dollars \$ 3,640,000. In this price for consultancy services payable to MIL, the price of tools were included i.e. price of tools was not included in the price of equipment of Canadian Dollars \$39,260,000 in which, prima facie, the cost of tooling was included under Clause 2.1.3. This contention on behalf of the non-objectors is shown to be correct when we refer to the bill raised by the claimants for the consultancy services of the value of Canadian Dollars \$3,640,000 in terms of Clause 3.1.2 of the contract. On doing so we find that this amount of Canadian Dollars \$ 3,640,000 includes the cost of tools of Canadian Dollars 5,31,990. The letter dated 13.2.1987 addressed by MIL to the objector (page 1548 of the paper book before the Arbitrators) clearly shows that payment of the price of consultancy services of Canadian Dollars \$3,640,000 included the cost of tools. The objector itself accepted this position by its letter dated 27.11.1987 (page 1568 of the paper book of the Arbitrators) and alongwith which letter when the price break-up is given for the consultancy services totaling to Canadian Dollars \$3,640,000, the price of Canadian Dollars \$ 5,31,990 with respect to tools is shown as a part of the price of consultancy services of Canadian dollars \$3,640,000. Once this conclusion is clear that the price payable for consultancy services includes the price of tooling and admittedly, the price payable for consultancy was in fact subject to the price variation in terms of Clause 4.3 of the contract, it is clear that the cost of tooling is also subject to price variation being part of consultancy services so far as MIL is concerned.

16. If there was any doubt whatsoever in this regard that the price variation ought not to be granted on the tooling component with respect to MIL, the same is removed by the agreed stipulations dated 14.9.1995 signed by all the parties before the Arbitration Tribunal and which shows that with respect to MIL, consultancy included the price variation on tooling. This stipulations are signed by both the parties as also their counsel and the same reads as under:

The following amounts are owed as regards GE and MIL Consultancy:

Owed to

With respect to

Amount owed (SCdn) under GE's /MIL's Interpretation

Amount owed (SCdn) underNHPC's Interpretation

GE

Consultancy

\$437,518

\$187,484.60

MIL

Consultancy

(a) Including price variation on tooling:

(b) Excluding price variation on tooling:

\$ 405,727.57 \$ 190,989.00

\$59,958 (-) \$ 90,394.36

sd/- sd/- sd/- sd/- sd/-

In view of the aforesaid agreed stipulations, it is more than abundantly clear that it was the admitted case of the objector that price variation on tooling in fact formed a part of the consultancy services so far as MIL is concerned. In my opinion, in view of the letter dated 27.11.1987 of the objector itself shows tooling as part of the consultancy and then the agreed stipulations before the Arbitrator, leaves no manner of doubt that escalation was payable on tooling because tooling forms part of consultancy and escalation was payable on consultancy in terms of para 4.3 of the contract.

17. The Arbitration Tribunal has given its conclusions in the following para of the Award with which I agree and adopt:

3.28 As already stated, Article 4.3 of Annex B is provides without any exception that prices for Consultancy Services were subject to variation in accordance with the state formula. Nothing in the contractual documents alters that. The Correspondence between the parties in 1987 relative to Consultancy Services provided by MIL refers in respect of tooling to a "fixed amount as per contractual document." This must relate back to the Contract including its Annexes which provide expressly for price variation. Accordingly it does not exclude the tooling price element from variation. Further, it should be observed that the Price Breakdown referred to in 1987 refers back to the Contract Price of \$3,640,000

agreed in 1984 as the 1984 prices basis; and in terms of the same correspondence the option to purchase tooling from MIL might not be exercised until May 1988 (letter from MIL dated 13 February 1987). Against that background, express language conflicting MIL to the price agreed in 1984 would have been required, and no such express provision has been demonstrated.

18. In my opinion, there is an additional reason to accept the conclusion of the Arbitrators and the arguments of the non-objectors that price variation is payable for tooling and for rejecting the stand and arguments of the objector that price variation is not payable on tooling to MIL. This is for the reason that though the contract may prima facie appear to say something different but if the parties during the performance of the contract understand the contract in a different manner, then, it cannot be contended that by doing so the parties are amending the contract and which is impermissible under Sections 91 and 92 of the Evidence Act, 1872. It has been held by the Courts that interpretation of a contract when done by the very parties to the contract who entered into the contract, in fact, shows that the language of the contract did not mean prima facie what the written words of the contract show but in fact, means what the parties have subsequently understood the contract to be by means of acting upon the same. Reference, in this behalf, is invited to the judgment of the Supreme Court in *The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another*, of which reads as under:

11. In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement make their own contracts; they can also by mutual agreement, remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reasons why the courts should not give great weight to these further expressions by the parties in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidenced by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation. (see *Corbin on Contracts*, vol. 3, pp. 249 and 254-255).

Therefore, since the objector itself has understood the contract in a particular price variation, tools are also therefore clearly subject to price variation. That the objector itself has understood it to be so, is clear from its letter dated

27.11.1987 referred by me above and also the agreed stipulations dated 14.9.1995 filed before the Arbitrators.

I am also of the opinion that the reasoning of Godhara Electricity case (supra) will equally apply to the price variation issue qua the equipment and consultancy inasmuch as various bills of the claimants over years were in fact paid by the objector as per the interpretation agreed by claimants/non-objectors and as also given by the Arbitration Tribunal in the impugned Award.

19. That leaves me with the issue with regard to the rate of interest granted under the Award. The Arbitrators have, in this regard, somehow without justifiable/understandable reasons, awarded two separate rates of interest. Whereas interest has been awarded at 6% per annum during the pendency of the proceedings i.e. from 14.2.1994 till the date of the Award, however, from the date of the Award till payment, interest has been awarded @ 10% per annum. I do not find any legal basis or justification for having such a high rate and also two separate rates of interest for two separate periods. In fact, the provision of Section 34 of the Code of Civil Procedure, 1908 fixes the rate of interest @ 6% per annum ordinarily and uniformly where no other provision is made. I have already stated that the Award gives no acceptable reasons for giving two separate rates of interest. Further, in my opinion, the rate of interest of 10% is indeed very high because international transactions are governed by LIBOR rates which are low and also considering the present scenario in which it has been held by the Supreme Court in the recent catena of decisions in the cases of Rajendra Construction Company Vs. Maharashtra Housing and Area Development Authority and Others, McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd., & Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, and State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd (2009) 3 Arb. LR 140 that the Courts should lean against high rates of interest granted by the Award and in fact ought to reduce the high rates of interest as granted by the Award. Considering that this is an international transaction involving foreign companies and where LIBOR rates are the base for grant of interest, I feel that in the facts and circumstances of the case, interest @ 4% per annum simple is the appropriate rate to be granted during the pendency of the arbitration proceedings and thereafter till Award is made a rule of the Court by means of this judgment. I am supported in this view by a Division Bench judgment of this Court reported as M.M.T.C Vs. AL Bamar Company Ltd., . In para 10 of this judgment it is held as under:

10. That leaves us with the issue with regard to the interest and in fact was the only issue seriously urged before us by the counsel for the appellant. As per the award, the respondent has been granted its claim of US Dollars 52,913.97 along with interest at International Lending Rate (LIBOR) of 7%. We are inclined to interfere with this part of the award and the judgment of the learned Single Judge whereby interest has been granted at 7%. We find that in international transactions interest at 7% is indeed on the higher side more so, when the

appellant is already prejudiced by the increase in the value of the dollar as compared to the Indian rupee. Also, internationally, and of which we take judicial notice, that the LIBOR rate has fluctuated in the intervening period and is presently around 3%. From January, 2002, till 2009, the LIBOR rate has fluctuated from around 3% in 2002 to 6/7% during 2006-2007 and thereafter came down again to about 3% and even less. Therefore, considering the facts and circumstances of the case, and more particularly the trend in the reasoning in the recent judgments of the Hon"ble Supreme Court in reducing the interest granted in the award on account of passage of time from the date of passing of the award till the time the matter comes up in the court, we reduce the rate of interest as granted under the award from 7% to 3 1/2% . The relevant judgments of the Supreme Court on this issue are the judgments of Rajendra Construction Company Vs. Maharashtra Housing and Area Development Authority and Others, McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd., and Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another,

While granting this rate of interest, I am mindful of the fact that foreign exchange rate fluctuation from 1992 would have an impact, however, considering all the circumstances, facts, LIBOR rates over this long period and other incidental issues, I have held and I am of the clear opinion that 4% interest per annum simple ought to be awarded from 14.2.1994 till the passing of the Award and thereafter till Award being made rule of the Court.

20. That leaves me as regards the aspect of the rate of interest from the date of this judgment till payment in terms of Section 29 of the Arbitration Act, 1940. Though the Award states that the interest is payable till payment, in law, this has to be construed as only till the Award is made a rule of the Court. I, therefore, award further interest @ 6% per annum from the date of this judgment till payment, however, in case payment is made by the objector under the Award and as modified by this judgment within a period of two months of the date of this judgment , then, interest shall only be @ 3% per annum simple from the date of this judgment till payment. However, in case payment is not made within a period of two months from the date of this judgment, interest will continue to remain @ 6% per annum simple. The reason for awarding these different rates of interest is that the objector knows as per this judgment its crystallized liability under the Award and therefore is entitled to a reasonable time for payment, however, in case the objector even after the expiry of a period of two months fails to pay then claimants/non objectors should be entitled to commercial rate of interest considering LIBOR rate. I have also kept in view the fact that pendency of objections of the petitioner has deprived the respondent/claimants of its moneys since 1996 i.e roughly about fourteen years.

21. Before concluding, I must note that an Award is ordinarily interfered with and the findings are so perverse that it shocks the judicial conscience or interpretation of documents and its clauses is such that the interpretation is not

one which any reasonable man could have taken. It has been time and again held that a Court while hearing objections to the Award will not substitute its views for the views of an Arbitrator unless the view of the Arbitrator is ex facie liable to be set aside or is illegal or it shocks the judicial conscience by a perverse finding/interpretation. As already stated, this Court does not sit as an Appellate Court to re-appraise the findings as arrived at in the Award. Therefore, in view of the settled parameters of hearing objections to an Award under Sections 30 and 33 of the Arbitration Act, 1940, I find that the objections are without substance and dismiss the same, leaving the parties to bear their own costs. The Award dated 7.5.1996 is thus made a rule of the Court subject to modification of the rate of interest as stated above. Let a decree be drawn up accordingly. Suit No. 1475-A/1996, which is a petition under Sections 14 & 17 of the Arbitration Act, 1940 will also stand disposed of accordingly.