

EXTENSION OF THE TIME ISSUE IN CONTRACTS

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I. ABSTRACT-

The essence of a contractual bonding rests on the unanimity of the parties to agree and proceed with various aspects of the agreement. In this sense, the clauses are designed and thereafter proceeded to be obeyed as an obligation. Developing under this fundamental aspect, four elements are to be carefully inspected to render a contract valid according to the Indian Contract Act, 1872, namely free consent, competency of the parties, lawful consideration and the contract not to be void under the prevailing law of the land. The consideration of the work all lies futile without an effective timing attached to it. While time limits can be extended, they surely call for damages if there is any serious harm or injury associated with it.

KEYWORDS-Time, Extension of time, Delay, Contract, Damages, Consideration, Building contracts, EPC

II. TIME AND EXTENDING TIME IN THE CONTRACT

Time is the most crucial factor in determining the contract, but there are also situations and cases when the time gets extended or needs to be extended. It is a safeguard to carry on with a contract by altering deadlines as initially may have been prescribed. However, there are certain elements to it –

- Mutual agreement on the EOT
- Nature of granting of EOT
- Default of the parties and fixation of liability for the extension
- Need for the extension to be judged as well.

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In the present case, it is most humbly presented that the contractor sought EOT on clearly defined grounds in each situation and the mere asking for EOT cannot equate with a fundamental incapacity of the contractor to ply with contractual deadlines as other factors are at work in transnational contracts.

In the famous case of *Henry Boot Construction Ltd. v. Malmaison Hotel*², the issue of concurrent causes of delay was analysed and it was held by the Court that in case of delay is caused by factors which are beyond the control of the contract then extensions of time are to be granted and no costs can be recovered on the same. This was considered to be the Malmaison approach and the same can be applied in the present case for factors namely:

- Inspection as a preliminary prerequisite to the work, the delay in which was not attributable to the Contractor at all.
- The pandemic outbreak as declared by the World Health Organisation and the imposition of lockdown measures stagnated the process in Asgard.
- The lack of relevant permits from the Asgardian Ministry further delayed a prompt initiation of the Refurbishment phase of the contract.

Damages are an as intrinsic aspect of a breach- the deliberate non -conformity with an imposed and consented application and any breach whatsoever alleged has to be duly proven and established to claim damages as held by Supreme Court in the cases of *P Radhakrishna Murthy v. NBCC Ltd*³. and *J.G. Engineers (P) Ltd., v. Union of India*⁴. In the case of *ONGC v. Saw Pipes*⁵, it was further highlighted that the proof of loss or damages has to be substantially shown along with the establishment of proof in toto. The requirement of proof of damages has been further highlighted in the ruling in *Raheja Universal Pvt. Ltd. v. B.E. Bilimoria & Co. Ltd.*⁶, where setting aside the arbitral award of liquidated damages has been upheld due to ant of proof of actual loss.

² Henry Boot Construction Ltd. v. Malmaison Hotel 1999 70 Con LR 32

³ P Radhakrishna Murthy v. NBCC Ltd (2013) 3 SCC 747

⁴ J.G. Engineers (P) Ltd., v. Union of India (2011) 5 SCC 758

⁵ ONGC v. Saw Pipes (2003) 5 SCC 705

⁶ Raheja Universal Pvt. Ltd. v. B.E. Bilimoria & Co. Ltd. (2016) 3 AIR Bom R 637

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In the present case, damages as a result of shifting of deadlines cannot be held as a ground for breach due to the presence of consent, compliance with the amendment and revision procedure of the contract and the EOT drafting in the contract itself.

Courts of Scotland in cases like *City Inn v. Shepherd Construction Ltd*⁷, have highlighted an approach in which the apportionment technique is followed when the causal factors are attributable to both parties of the contract. It rests on the principle of mutuality and sharing. The same has also been upheld by Hong Kong Courts in *HingConstruction Co Ltd v Boost Investments Ltd*⁸.

Although concurrent delays due to two or more allied reasons are quite settled in the United Kingdom, in India, the tendency for not granting damages in concurrent delays is notable in the case of *Essar Projects (India) Ltd. &Ors. vs Gail (India) Ltd*⁹. In this case, the court had refused to grant liquidated damages to the employer.

Damages in this case signify a breach of obligation on the part of the contractor that does not set the state of affairs rightly. In the case of *Peak Construction (Liverpool)Ltd. v. McKinney Foundations Ltd*¹⁰, the English Courts refused to grant damages analysing the fault of the employer in not having clarity of directions.

Further in the case of *North Midland Building Ltd. v Cyden Homes Ltd*¹¹, it was analysed that if a particular time frame has been set beyond which delay cannot be excused then it becomes imperative to claim the damages on the same. However, in the present EPC contract in dispute, no such provisions have been expressly laid down.

In *Northern Railway v. Sarvesh Chopra*¹² that the claim for damages will be sustainable post-granting of extensions if the same has been mentioned while granting it. This becomes important in the light of the present dispute as no such communication was initiated and every extension was consented to by the representatives of the Employer. Courts have also held employers' liability in cases when the delay is attributable to them, as in the case of *C.*

⁷ City Inn v. Shepherd Construction Ltd [2010] CSIH 68

⁸ Hing Construction Co Ltd v Boost Investments Ltd [2009] BLR 339

⁹ Essar Projects (India) Ltd. &Ors. vs Gail (India) Ltd ARB.P.No.424 of 2012

¹⁰ Peak Construction (Liverpool)Ltd. v. McKinney Foundations Ltd (1970) 1 B.L.R. 111

¹¹North Midland Building Ltd. v Cyden Homes Ltd [2018] EWCA Civ 1744

¹² Northern Railway v. Sarvesh Chopra (2002) 4 SCC 45

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*Srinivasa Rao v. P. Ramakutty*¹³, when the essential supply of certain drawings was not provided by the employer, the stipulated time could not be maintained by the contractor.

Hence it is noteworthy that the aspect of delay is more important than looking at the grant of extension of time (EOT) and the fixation of responsibility for the delay has to be made on the factual matrix and not on one-sided claims of the Employer.

The variations in course of work are also a subject of consideration in construction contracts. This is due to the nature of work undertaken involving inspection, a stagewise process that involves the discovery⁶ and as estimated might undergo changes due to actual execution and ground analysis of the same. Such variation also becomes an excusable reason for delay and revision of originally agreed time frames.

In the case of *State of U.P. v. Ram Nath International Const. Pvt. Ltd*¹⁴, such a similar point was taken into consideration and extra compensation was granted for the excess work carried out beyond the initially agreed terms.

In *Indian Oil Corporation vs Llyod Steel Industries Ltd*¹⁵, it has been reiterated that a claim for damages has to sustain the test of proving loss or injury and cannot be validated on mere grounds of delay. This aspect is extremely crucial in the present case.

In ascertaining damages, the concept of the breach has to be highlighted as well – whether all the delays in the proposed schedule can be a breach or not. In the case of *Photo Production Ltd v. Securicor Transport Ltd*¹⁶ the expression breach is equated with a situation in which the innocent party had no other option but to put an end to all other obligations that were supposed to be mutually carried on.

In the case of *Wells v. Army & Navy Co-operative Society*¹⁷. It was clearly stated that the employer's contribution to the overall delay of the project served to refute his compensation claims.

¹³ C. Srinivasa Rao v. P. Ramakutty AIR 1999 Mad 317; 2000(1) RAJ 473

¹⁴ State of U.P. v. Ram Nath International Const. Pvt. Ltd AIR 1996 SC 782; (1996)1 SCC 18

¹⁵ Indian Oil Corporation vs Llyod Steel Industries Ltd 2007(4) Arb LR 84; 2008(1) Arb LR 170 (Del)

¹⁶ Photo Production Ltd v. Securicor Transport Ltd (1980) AC 827, UKHL 2

¹⁷ Wells v. Army & Navy Co-operative Society (1902) 86 LT 764

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The discussion in these cases has also highlighted yet another intrinsic aspect – if damages were to be demanded even, it has to be computed from the particular date of breach or a contingency or a last deadline so affixed.

This has been deemed to be the “left at large” principle as evident in the cases of

- *Holme v. Guppy*¹⁸,
- *Peak Construction (Liverpool) Ltd v. McKinney Foundations Ltd*¹⁹
- *The Cape Hatteras*²⁰
- *SMK Cabinets v. Hili Modern Electrics Pty Ltd*²¹

The EPC contract provides for extensions and amendments but abstains to provide a date to limit the same which would serve as the reference point to compute damages. Hence the claim stands refuted from this ground as well.

Another interesting observation is noticed in *Hawlmac Construction Vs Campbell River Co*²²., in which the Court emphasised the need to consider an extension of time application by the contractor and thereby after such a revision the original deadlines are not valid leading to no claims of compensation on the same as well.

In various cases, the right format of application for EOT has been discussed like in the cases of *Anderson Vs Tuapeka County Council*²³; *Murdoch v. Lockie*²⁴; *Dodd Vs Churton*²⁵, and held that the right to seek such extension depends on the happening of the particular causal event and has to be sought then.

The dynamic and complex nature of engineering contracts has drawn some legal reference from the work of Hudson's Building and Engineering Contracts²⁶, whereby it is stated that we're in a contract there is the power to extend delays, in such cases the benefit of the employer gets lost on the original timelines as they cease to exist on grant of extensions.

¹⁸ *Holme v. Guppy* (1831) 3 M & W 387

¹⁹ *Peak Construction (Liverpool) Ltd v. McKinney Foundations Ltd* (1970) 1 BLR 114

²⁰ *The Cape Hatteras* [1982] 1 Lloyd's Rep 518

²¹ *SMK Cabinets v. Hili Modern Electrics Pty Ltd* [1984] VR 391

²² *Hawlmac Construction Vs Campbell River Co*. 13 CILL 57

²³ *Tuapeka County Council* (1900)19 N.Z.L.R. 1

²⁴ *Murdoch Vs Lockie* (1986)15 N.Z.L.R. 296

²⁵ *Dodd Vs Churton* [1897]1 QB 562 C.A

²⁶ 11th Ed., Vol. 2, para10.080, p. 1184

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Hence it is concluded that damages cannot be demanded a breach that never happened in this present contractual obligation.

III. ANOTHER PERSPECTIVE – TIMING THE WORK

In the case of *Swarnam Ramchandran v. Aravacode Chakungal Jayapalan*²⁷, it was held that the essence of time in the contract has to be inferred from the intention and nature of the contract and other surrounding circumstances as well. In the present case, the insistence on deadlines and the deliberate efforts of the employer to ask the contractor to adhere to the same are some instances of time being the most important aspect of this contract.

Even in the case of *Hind Construction v. The State of Maharashtra*²⁸, the essence of time in contracts and the need for completion with respect to deadlines all throw light on the fundamental nature of the obligation being intertwined with time.

Under Sec. 55 of the Indian Contract Act, the promisee is given an option to avoid the contract when the promisor fails to complete his obligation on time, but this is an option left at the discretion of the party choosing or not choosing to use it.

It is settled law from the case of *Anandram Mangtaram Vs Bholaram Tanumal*²⁹, that any forbearance to sue, or refraining from rescission of the contract cannot be an excuse for an extension of time.

The case of *Kesharlal Lallubhai Patel Vs Lalbhai Trikhumlal Mills Ltd*³⁰. had an important issue in place; the forbearance on the part of the buyer to abstain from demanding delivery on a specific date whether gives an inference of a consented extension of time or not depends on the facts of the case and has to be analyzed in the light of the evidence adduced in each case. It was held a valid extension of time would operate only in case the conditions are satisfied on which the extension can be claimed

²⁷SwarnamRamchandran v. AravacodeChakungalJayapalan AIR 2000 Bom 410

²⁸Hind Construction v. State of Maharashtra (1979) 2 SCC 70

²⁹AnandramMangtaram Vs BholaramTanumal AIR 1946 Bom 1: 47 BLR719 (DB)

³⁰KesharlalLallubhai Patel Vs LalbhaiTrikhumlal Mills Ltd AIR 1958 SC 512

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The case of *Hick Vs Raymond and Reid*³¹, specifically categorized that the liability for delay can only be avoided in case there were no negligent acts and that it was beyond the power of the party on whom the obligation was so incumbent.

The case of *Stickney Vs Keeble*³², explained the determining factor of time being the essence of the contractor as in this case, the purchaser kept pressing for the completion and gave repeated notices for the same.

According to the elaborative discussions in *Hudson's Building Contracts*³³, it has been explained that equity considerations will value the essence of time in contracts when one party insists by way of providing notices to complete the work on a definite period of time. Hence any deliberate fixation of time schedules communicates time as the essence in construction contracts as well.

In the case of *Rawal Construction Company v. Union of India*³⁴, it has been highlighted the importance of seeking damages even consenting to extensions in the absence of explicit provisions in the contract.

The case of *N.D.R. Israni v. Delhi Development Authority*³⁵, also highlights the right to seek damages and that it cannot be waived off by any of the extensions and the delay cannot be excused.

In the case of *SNL v. Reliance Communication Ltd*³⁶, analysis of consequences before awarding of damages has to be done.

In *Stickney Vs Keeble*³⁷, the fact that the employer continuously pressed for expeditious completion of the service, and that its early completion is an important aspect for the employer are key determinants to analyse the nature of the contract.

In the present case, the correspondence between the parties with respect to delays has some key elements to be considered –

³¹Hick Vs Raymond and Reid (1893) A.C. 22

³²Stickney Vs Keeble 1915 A.C. 386: 84 L.J. Ch. 259: 112 L.T. 664

³³7th Ed., 353

³⁴Rawal Construction Company v. Union of India 1981 SCC OnLine Del 315: ILR (1982) 1 Del 44

³⁵N.D.R. Israni v. Delhi Development Authority 1989(2) Arb LR 349 (Del)

³⁶SNL v. Reliance Communication Ltd (2011) 1 SCC 394

³⁷*ibid*

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- Revision and Amendment procedures have never been carried out.
- An employer has persisted in early completion and adherence to deadlines
- The employer has lamented undue delays as evident in email correspondences and did not encourage the same.

In the case of *Saga Cruises v. Fincantieri*³⁸, it was held that the benefit cannot be given to the contractor of any delay by the Employer if it had little impact on the already affected delay of the work. Hence the impact analysis of the delay in the present case shows the fault of the contractor.

It was held in the case of *ObrasconHuarte Lain SA v Her Majesty's Attorney General for Gibraltar*³⁹, it is reasonably expected of an experienced contractor to make an assessment of data and accordingly plan the deadlines and not just accept what the employer proposes.

In the case of *Gannon Dunkerley & Co. Ltd. Vs State of U.P.*⁴⁰ a similar issue was analyzed. It was held that where the Government had permitted extension of time to the contractor, it did not deprive it of seeking damages for non-completion of the contract within the stipulated time, just that the time frame of calculating damages would run from a later date.

The decision of *Kamal Krishna Kundu Chowdhury Vs ChatoorbhujDassa*⁴¹, is very significant as it held that a simple extension of time does not kill or denigrate the essence and element of time in the contract. Another important issue in construction contracts is the application of EOT on previously specified grounds to stand valid, which was also held in the case of *Wells Vs Army and Navy Co-operative Society Ltd*⁴².

The fundamental principle on which liquidated damages rests is the aspect of obligation and breach. When the parties agree on a consensus and agree to obey the terms of a contract, an obligation arises, without which there can be no valid contract. In the case of *Sunrise Associates v. Govt. of NCT of Delhi*⁴³- Sec 37 of the Indian Contract Act creates an obligation to abide by contractual clauses and noncompliance with the same is a breach.

³⁸Saga Cruises v. Fincantieri 2016 EWHC 1875 (Comm.)

³⁹ObrasconHuarte Lain SA v Her Majesty's Attorney General for Gibraltar 2014 EWHC 1028 (TCC)

⁴⁰Gannon Dunkerley & Co. Ltd. Vs State of U.P. AIR 1981 NOC 129 (All)(DB)

⁴¹Kamal Krishna Kundu Chowdhury Vs ChatoorbhujDassa AIR 1925 Cal 324:78 IC 962 (DB)

⁴²Wells Vs Army and Navy Co-operative Society Ltd 1902 86 LT 764

⁴³Sunrise Associates v. Govt. of NCT of Delhi AIR 2006 SC 1908

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With regards to extensions and delays, it as held in the case of *Rickards (Charles) Ltd v. Oppenheim*⁴⁴– even after the first deadline was flexibly adjusted but it created an obligation to complete it reasonably and respect the essence of time in the contract.

The factor of the breach is most important to sustain a claim for liquidated damages. In the case of *Maula Bux Vs Union of India*⁴⁵, an analysis of Sec 74 of the Indian Contract Act was carried out and it was held that damages are payable only on the reason of the breach, and the determination of actual loss and injury to the party affected by the party is a secondary analysis to be carried out in the process of adjudication.

The same view was resonated in the case of *Oil and Natural Gas Corporation Ltd., Vs SAW pipes Ltd*⁴⁶ as well.

In the case of *Michel Habib Raji Ayoub Vs Sheikh Suleiman El Taji El Forouquui*⁴⁷, it was stated that liquidated damages when need to be enforced have to be genuine pre-estimate of costs. In the EPC \\contract, the estimate has been agreed upon as per clause 2.2.

In the case of *Falkingham Vs Victorian Railways Comr*⁴⁸, it is held that liquidated damages shall not be payable only in cases when the employer has waived the right to demand so.

Further in the case of *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*⁴⁹, the Singapore High Court had held that in the absence of EOT clauses in the contracts, no liquidated damages can be levied.

⁴⁴Rickards (Charles) Ltd v. Oppenheim 1950

⁴⁵Maula Bux Vs Union of India (1969)2 SCC 554

⁴⁶Oil and Natural Gas Corporation Ltd., Vs SAW pipes Ltd (2003) 5 SCC 705

⁴⁷Michel Habib Raji Ayoub Vs Sheikh Suleiman El Taji El Forouquui AIR 1941 PC 101: 196 IC 823

⁴⁸Falkingham Vs Victorian Railways Comr [1900]AC 452 PC

⁴⁹Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd [2019] SGHC 4

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