Interpretation of Engineering Clauses

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Some of the contractual clauses in various engineering organizations are similar in form and style. These clauses came in for consideration before various High Courts and the Supreme Court. Decisions rendered are given below to serve as a future guideline for those practicing arbitration law or are arbitrators in some matters.

1. Site

Most of the disputes between the parties relate to non-availability of site, for whatever reason. Sometimes, a part of the site is made available to the contractor and that too in broken stretches. Obviously, the contractor cannot plan his work in the most economical manner which he had envisaged at the time of working out his tender i.e. he is asked to work in a manner for which he had not bargained.

At the very outset, the contractor receives a jolt to his programming and planning, when he does not get the site to work on. Per force, he has to keep his resources i.e. men, material and machinery idle and sometimes under-utilised or not gainfully deployed. Herefrom starts differences between the employer and the contractor. With the passage of time, more and more areas of differences crop up.

Regarding 'site', it is usually stipulated in the conditions of contract as follows:

> "The contractor must get acquainted with the proposed site for the works and study specifications and conditions carefully before tendering. The work shall be executed as per programme approved by the Engineer-in-charge. If part of site is not available for any reason or there is some unavoidable delay in supply of materials stipulated by the Department, the programme of construction shall be modified accordingly and the contractor shall have no claim for any extras or compensation on this account."

An analysis of the foregoing stipulation would reveal that:

(i) the contractor must get acquainted with the proposed site of work;
(ii) the contractor must study specifications and conditions before tendering;
(iii) the work shall be executed as per programme approved by the Engineer-in-charge;
(iv) if part of the site is not available *for any reason* the programme of construction shall be modified accordingly;
(v) programme of construction shall be modified in case of *unavoidable* delay in supply of stipulated material; and,
(vi) due to change in programme of construction, the contractor shall have no claim for any extras or compensation.

Merely saying that 'no claim for any extras or compensation' shall be payable does not mean that the contractor would not be entitled to the same. The stipulation aforesaid is subject to certain riders, viz., (i) that part of the site is not available *for any reason*, and (ii) that there is some *unavoidable* delay in supply of stipulated material.

A mere statement by the employer that a part of the site could not be handed over to the contractor would not satisfy the requirement of the aforesaid clause. The employer has to assign some *plausible reason* in support of that. Likewise, if the employer does not supply the stipulated material at the appropriate time, the employer must give reason in support of *'unavoidable delay'*.

The contractor cannot claim anything extra or compensation if part of the site is not made available or there had been unavoidable delay in supply of stipulated material. These stipulations cannot be stretched in a case where agreement is executed, work awarded, but the site where the work has to be executed is not made available and in view of the aforesaid clause the department cannot turn round to take recourse to the stipulation and deny the contractor compensation even though he incurred expenditure on men, material and machinery. Courts cannot give loose interpretation which is not intended by the terms of the agreement between the parties. As for delay in supplying stipulated material, it has to be on account of *"unavoidable delay"*. The use of the word *"unavoidable"* before *"delay"* is not without meaning. (1)

Since there is no mention in the condition aforesaid about the extended date of completion, it is clear that modification of programme is required to be done with end date remaining the same. It is evident that any modification of initial programme on account of time lost in keeping end date the same, would mean additional deployment of resources which would positively mean extra expenses for the contractor. It is these extra expenses or compensation which have not been considered payable to the contractor.(2)

COLLIN L.J. in *Freeman* vs *Hensler* (3) stated:

> "I think the contract clearly involves that the building owner shall be in a position to hand over the whole site to the builder immediately upon the making of the contract. I think that there is an implied undertaking on the part of the building owner, who has contracted for the building to be placed by the plaintiff on his land, that he will hand over the land for the purpose of allowing the plaintiff to do that which he has bound himself to do."

2. Liquidated Damages

Clause 2 of the contract deals with liquidated damages which states:

> "The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be of the essence of the contract on the part of the contractor and shall be reckoned from the tenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one per cent, or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or unfinished, after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound in all cases to complete one-eighth of the whole of the work before one-fourth of the whole time elapsed; three-eighth of the work before half the time has elapsed…. In the event of the contractor failing to comply with the condition, he shall be liable to pay as compensation amount equal to one

> per cent or such smaller amount as the Superintending Engineer, (whose decision in writing shall be final) may decide on the said estimated cost of the whole work for entire amount of compensation to be paid under the provisions of this clause shall not exceed ten per cent on the estimated cost of the work as shown in the tender"

It depends upon the stipulations of the arbitration clause whether it makes decision of the Superintending Engineer final and binding and beyond the scope of adjudication of the arbitrator. If it is made an excepted matter, the only remedy available to the aggrieved party is to file a suit against the department. If it is not an excepted matter, then the contractor may prefer a claim in arbitration.

The question whether a contractor can claim damages on account of prolongation of contract when he has been burdened with the liquidated damages has been answered by the Supreme Court in *Vishwanath Sood* vs *Union of India.*(4) It was held that although the contractor might object to the process of arbitration because it had gone against him, contractors might generally prefer to have the question of such compensation decided by the arbitrator rather than the Superintending Engineer.

In addition to its claim for liquidated damages as provided in the contract, the department cannot stake claim which was not envisaged by the parties at the time of entering into contract. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they at the same time, intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach.(5)

If both parties have defaulted during currency of the contract, it would be unfair on the part of the department to levy liquidated damages on the contractor. In *Hudson's Building and Engineering Contracts,* (6) it had been stated that "unless there is a sufficiently specific clause, it is not open to the employer, when the contract date has ceased to be applicable, to make out a kind of debtor and creditor account allowing so many days or weeks for delay caused by himself, and, after crediting that period to the builder, to seek to charge him with damages at the liquidated rate for the remainder."

Contractors who were bound to pay heavy liquidated damages for failure to complete joinery work within the stipulated time of 4½ months were

prevented from starting work by defendant's other workmen. After the conclusion of the evidence, it was agreed that this had caused a delay of 4 weeks, while claimants were in default for one week. Held that liquidated damages could not be deducted from the claimant's claim for the price of work. (7)

When both the parties are responsible for delay, there is no question of award of liquidated damages. (8) In yet another case decided by Delhi High Court it had been held that when both parties are at fault, there is no question of levying liquidated damages.(9) Grant of extension of time to the contractor itself implies that the department could not have imposed liquidated damages and thus the amount recovered from the bills of the contractor was ordered to be refunded.(10)

Where there is a delay on the part of the employer, liquidated damages cannot be levied and moreso when it was levied 18 months after rescission of the contract.(11) It is neither fair nor justified to levy liquidated damages after the contractor had completed the work.(12) Likewise, when liquidated damages were levied after a lapse of 4 years 9 months from the date of completion of work, and that too without issuing a show cause notice, was held to be against principles of natural justice. (13)

When there is power to extend the time for delay caused by the building owner, and such delays have in fact taken place, but the power to extend the time has not been exercised, either at all or within the time expressly or impliedly limited by the contract, it follows (unless the builder has agreed to complete to time notwithstanding such dealys) that the building owner has lost the benefit of the clause, as the contract time has in such cases ceased to be applicable, there is no date from which penalties can run, and, therefore, no liquidated damages can be recovered.(14)

"Completion" will bring the right to liquidated damages to an end, but it may be difficult to decide as to what is "completion" for this purpose, in particular if the owner enters into possession while the work is partially incomplete, or only retakes possession of part of the work. (15)

In a contract in Alberta worth $20,000, the owner re-entered at a time when minor defects worth $200 were still outstanding, and the Architect was demanding that they be remedied forthwith. Held by BECK J. that the contract had been substantially performed, and liquidated damages ceased to run upon the re-entry.(16)

Matter with regard to liquidated damages is something which the Engineer-in-Charge enforces from time to time. It is not a power to impose a lump sum after the contract was concluded. (17) Liquidated damages cease to be applicable when the employer has waived the right to insist upon them, e.g. where he has failed to deduct or retain them in cases where it is imperative on his part under the contract to do so.(18)

3. Time whether essence of contract

Clause in the contract relating to time reads as under:

> "If the contractor shall desire an extension of time for completion of work on the grounds of his having been unavoidably hindered in its execution or any other ground, he shall apply in writing to the Engineer-in-Charge within 30 days of the date of hindrance on account of which he desires such extension as aforesaid and the Engineer-in-Charge shall, if in his opinion (which shall be final) reasonable grounds be shown thereof, authorize such extension of time, if any, as may, in his opinion be necessary or proper."

Extension of time for completion of the contract cannot be unilateral. The effect of extension of time is to substitute the time originally fixed under the contract by the time extended by the competent authority.

Under section 55 of the Indian Contract Act, the promisee is given the option to avoid the contract where the promisor fails to perform the contract at the time fixed in the contract. It is open to the promisee not to exercise the option or to exercise the option at any time, but the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. Under section 63 of the Contract Act, the promise may make certain concessions to the promisor which are advantageous to the promisor, and one of them is that he may extend the time for such performance. But such an extension of time cannot be a unilateral extension on the part of the promisee.

A question that generally arises is as to when time can be said to be of the essence of the contract. If a building is to be constructed, for example, for a particular purpose for which date has been fixed for the meeting or an occasion, then it has got to be completed by that date since in such a case time is essence of the contract. But if the parties to the contract, foresee postponement of completion date, e.g. by providing clause relating to extension of time and/or levy of liquidated damages in the event of delay in

completion of work, time cannot be said to be of the essence of the contract.

If the contractor seeks extension of time on account of lapses on the part of the employer, and the employer grants extension fo time on those grounds, then the contractor is not precluded from raising claim for damages on account of prolongation of contract period. It had been held by Delhi High Court that the plea that extension of time granted would eliminate claim for damages was not tenable because the employer could not be a judge in its own cause.(19)

A contractor cannot be denied damages on account of prolongation of the contract merely on the ground that extension of time had been granted to the contractor. In *Metro Electric Co. vs Delhi Development Authority,*(20) relied upon the observations in *Hudson's Building and Engineering Contracts*, (21) where it is stated: "Where the cause of delay is due to breach of contract by the employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of the clearest possible language, deprive the contractor of his right to damages for the breach".

Many a time the employer takes the plea that extension of time in explicit terms may not be granted when the department has allowed the contractor to continue to work inasmuch as even the running bills have been paid from time to time. This is not a correct stand. Extension of time has to be grated in clear terms to the contractor as held in *Arosan Enterprises Ltd.* vs *Union of India* (22). It had been held that where time was of the essence of the contract, no question of there being any presumption about extension of time or presumed extension of a renewed date would arise and that extension of time should be in categorical terms.

(4) Intermediate payments and final bill

Clause 7 of the contract relating to payment of intermediate bills and of the final bill states:

> "…. The contractor shall, on submitting the bill be entitled to receive monthly payment….. The final bill shall be submitted by the contractor within one month of the date fixed for completion work or of the date of certificate of completion furnished by the Engineer-in-charge and the payment shall be made within 3 months if the amount of the contract plus that of

> additional terms is up to Rs. 2 lacs and in 6 months if the same exceeds rupees 2 lacs of the submission of such bill….."

Clause 8A inter alia provides that the Engineer-in-charge "shall give reasonable notice to the contractor" "before taking any measurement of any work as has been referred to in clauses 6, 7 and 8 hereof." Lest the Engineer-in-charge takes the plea that the contractor did not turn up on the date fixed by the Engineer-in-charge for recording joint measurements, it is provided as under:

> "If the contractor fails to attend at the measurements, after such notice, or fails to countersign or to record the difference within a week from the date of measurement in the manner required by the Engineer-in-charge or the subordinate deputed by him, as the case may be, shall be final and binding on the contractor and the contractor shall have no right to dispute the same."

It is true that as per clause 7, the contractor is to submit the final bill within one month of the date of the actual completion of the work. It is stated that submission of final bill is possible only after complete and final measurements are recorded as per clause 8 above. The onus is thus on the employer to make available set of measurements to the contractor.

The fact that it is the Engineer-in-charge who has to prepare the bill (and not the contractor) is clear from the provisions contained in clause 25 which *inter alia* states "…. that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the engineer-in-charge that the bill is ready for payment…." It is submitted that all the payments which are received by the contractor are "intermediate payments" which "shall be regarded as payment by way of advance against the final payment only and not as payments for work actually done and completed…." The expression "the bill being ready for payment" connotes the final bill. The words used are "the bill" which can only relate to the final bill as all running payments made to the contractor are "intermediate payments" "by way of advance against the final payment only". Thus the words "the bill" can mean only one specific bill which is final bill and not the running bill. In addition, word 'Bill' is used in a singular form implying a unique bill which can only be the final bill.

In *Continental Construction Co.* vs *National Hydroelectric Power Corporation Ltd.,* (23) it had been held by Delhi High Court that : "It is

common knowledge that in such contract works, payment against running bills is made during the progress of the work and the final bill is submitted after the completion of the work. All such relevant material would be required so that bill could be processed after considering the various details, extent of work, rate, amount item-wise, payment made, extent of material supplied by the employer and account of such materials consumed in the work or otherwise, the details of balance stores, the extent of liability of the contractor for unaccounted stores or for other shortcomings, that may have been noticed during the progress of the work.

5. Deviation limit – Scope and purpose

Clause 12 deals with deviation limit. This limit usually is kept between 20 per cent to 30 per cent. The quantities may increase or decrease. Till the judgment in case of *National Fertilizers* vs *Puran Chand Nangia* (24), it was interpreted by the department that it is the net effect of the increases or decreases which should be within the percentage of deviation limit which is stipulated in the contract. The Supreme Court gave the true effect of the deviation clause to mean “When a contractor bids in a contract, he has to offer reasonable rates for work which are both difficult to perform and other works which are not that difficult to perform. Every contractor tries to balance his rates in such a manner that the employer may consider his offer reasonable. In that process, the contractor tries to get a reasonable margin of profit by balancing the more difficult (and less profitable items) and the less difficult (and more profitable items)”. It was further held that “Plus/minus 25% variation clause in a works contract came in for interpretation before the arbitrator which was held to be a plausible interpretation. The stipulation is applicable to a case where the value of the sum total of the addition and deletions exceeded 25% of the contract value.”

In the aforesaid judgment it was also held that if the employer is permitted in law to make variations, upwards and downwards – even if it be up to a limit beyond which market rates become applicable – then the interpretation of the clause must be one which balances the rights of both the parties. For example, if the plus and minus items go beyond 25% and are made in such a manner increasing the less profitable items and decreasing the more profitable items, and if the net result of the contract is to be the basis, then it may work out that the contractor could be made to perform a substantially new contract on the same contracted rates.

(6) Deduction from bill of contractors

It is a condition of contract that the employer shall make monthly running payments. Obviously, therefore, it is the responsibility of the employer to ensure that payments at regular intervals are made in terms of the contract. But this rarely happens. In order to ensure timely payment, contractors offer rebate if payments are made every month. The department, without bothering to ensure regular payments, makes a deduction of rebate offered by the contractor. While invoking arbitration clause, the contractor *inter alia* seeks refund of rebate in arbitration.

Usually the plea for denial of refund of rebate taken by the department is that as per clause 7 of the agreement the contractor failed to submit monthly bill. This is not correct, particularly so when the Engineer-in-charge did not fix any date for submission of bill in terms of clause 7 of the contract. In *P.C. Sharma* vs *Delhi Dvelopment Authority* (25) it was held by Delhi High Court that to attract provisions of clause which deals with monthly payment, the pre-requisite was that the date on which the contractor was required to submit the running or final bill had to be fixed by the Engineer-in-Charge and having failed to do so, the department could not make a grouse of it.

Sometimes the department makes penal rate recovery on the basis of consumption statement worked out as per quantities of various items of the running bills. It is not unknown that while preparing running bill, the departmental officials skip to record measurements in respect of some items or incomplete items. Where the respondent made some penal recovery during the currency of the work, it was held to be not proper since consumption statement could finally be prepared only on knowing the ultimate quantities of various items of work which was possible only when the work was finally measured up after completion of the work. (26)

Deductions on account of defective work cannot be made before completion of the work. When the contractor seeks completion certificate or approaches the Engineer for taking over the completed work, it is only at that stage that the question of rectification of deductions will arise. If the contractor fails to rectify the defect, it is only then that the department acquires the right to make deduction. (27)

7. Supply of stipulated materials

Clause 10 of the tender documents reads as under:

> "… Provided that the contractor shall not in any case be entitled to compensation or damages on account of any delay in supply or non-supply thereof all or any such materials and stores. Provided further that the contractor shall be bound to execute the entire work if the materials are supplied by the Department within the schedule time for completion of the work plus 50% thereof (Schedule time plus 6 months if time for completion of work exceeds 12 months) but if a part only of the materials has been supplied within the aforesaid period then the contractor shall be bound to do so much of the work as may be possible with the materials and stores in the aforesaid period. For the completion of the rest of the work, the contractor shall be entitled to such extension of time as may be determined by the Engineer-in-charge, whose decision in this regard shall be final."

It would be noticed that the contractor would not be entitled to any compensation if the contractor had been issued the materials for incorporation in the works within six months after the date of completion. However, stores issued after stipulated date of completion but incorporated in the work later on, only extension of time shall be granted. It needs to be noticed that the stipulation does not expressly or impliedly state that the contractor shall be barred from claiming damages on account of prolongation of the contract period.

If a period of 12 months is fixed for completion of work and stipulated material is continued to be issued till the 18th month, a maximum period of 3 months would be considered for incorporation of the same after the 18th month. But if the stipulated materials continue to be issued even thereafter, the contractor would be entitled to compensation. (28)

8. Power to omit work from contract

Clause 13 of the Bid Documents states:-

> "If at any time after commencement of the work the department shall for any reason whatsoever not require the whole thereof as specified in the tender to be carried out, the Engineer-in-Charge shall give notice in writing of the fact to the contractor who shall have no claim to any payment of compensation whatsoever on account of any profit or advantage…."

The above clause can be relied upon by the contractor only if the work has actually been started before the Engineer calls upon the contractor to stop the work for all times to come (29) and shall not be carried out at all. (30) It is also understood that the department would not proceed with the execution of the work at a later stage on the basis of different designs and drawings. There is no scope for the conclusion that the ground of cancellation of the contract does not flow from any of the terms of the contract, it is *de hors* any term of the contract and as such can be the subject-matter of judicial review. (31)

A building contract gave power to order omission from the contract without in any way affecting or making void the contract, and provided that there should be a deduction from the contract price by a fair and reasonable valuation. Held that the word 'omission' contemplated things to be left out of the contract altogether, not such as were taken out of the contract and given to another contractor. (32)

A contract work was originally allotted to the contractor for construction of 18 blocks. Thereafter, the contractor was informed, during the currency of the work, that the work was likely to be curtailed to 14 blocks as there was a stay in respect of the land required for the remaining blocks. In fact, the respondents curtailed the work when there was no stay in force. Held that the action of the respondents was arbitrary, as immediately after curtailing the work of the petitioner to 14 blocks, they invited tenders for the remaining 4 blocks and thus the petitioner was entitled to the award of loss of profit on the unexecuted amount of work. (33)

Though other clauses of the contracts are equally important but this paper is confined to only such clauses which are often a matter of debate before the courts.

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