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# Construction Arbitration Newsletter

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## RAUTRAY & CO.

### Construction Arbitration Law Firm

- **Liquidated Damages - recovery of liquidated damages for delay in respect of work which had not been completed before the contract was terminated - whether the liquidated damages clause ceases to apply or continues to apply up to termination or abandonment or even beyond that date, depend upon the wording of the clause itself - unless the clause in the contract provides otherwise, liquidated damages will apply up to, but not beyond, the date of termination of the contract.**
- **Termination of the contract would not deprive the Employer of the liquidated damages which has already accrued for delays prior to termination - where at the time of termination delay for which liquidated damages are payable has already occurred, there is no reason in law why termination of the contract should deprive the Employer of its right to recover such damages, unless the contract clearly provides for this.**
- **Purpose of liquidated damages clause - first, liquidated damages clause establishes in advance what financial loss delay has caused the Employer the damages payable for such delay and second, such a clause limits the Contractor's exposure to liability of an otherwise unknown and open-ended kind, while at the same time giving the Employer certainty about the amount that it will be entitled to recover as compensation.**
- **General Damages - Employer entitled to general damages for breach of contract beyond the date of termination - parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract.**

*[Triple Point Technology v. PTT Public Company Limited - United Kingdom Supreme Court - Decided on 16.7.2021]*

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- Delay in handing over of site - non-completion of Land Acquisition - handing over of the site is a sine qua non for performance of the contract and it is in the realm of reciprocal promises.
- Delay in possession of site - performance of reciprocal obligations - Section 54 of the Indian Contract Act - it is not possible for the Contractor to commence the work unless the site is handed over without any obstructions - the law does not compel a man to do that which he cannot possibly perform - when the performance of the contract cannot be achieved by law, the same cannot be made possible through contract itself - once the Contractor is not expected to commence the work unless the site is handed over, it amounts to the promisor not performing his initial obligation and therefore, it is incumbent on his part to compensate the other party for any loss which the other party may sustain.
- Principle of waiver and acquiescence - waiver must be conscious and voluntary - party who forbears will be bound by the waiver and cannot setup the original terms of the agreement.
- Section 55 of the Indian Contract Act - it is incumbent on the party accepting performance beyond time, to give notice to the defaulter that he intends to claim compensation for non-performance in time.
- Consequence of acceptance of extension of time (EOT) by the Contractor - mere acceptance of extension of time is not ipso facto indication that the Contractor waived his right to compensation - Employer cannot take advantage of its own delays to deny the claim of the Contractor for compensation.
- Entitlement of the Contractor to rates prevailing during the extended period of work - extension of time granted by Employer - Contractor can claim at the rates prevailing during the extended period and is not bound by the original rates.
- Refusal to grant EOT despite valid reasons - may amount to economic duress unless that Contractor offered to execute the work on old rates.

*[T.A. Choudhary v. State of Andhra Pradesh - Andhra Pradesh High Court - Decided on 1.5.2003]*

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The Court observed that the parties may out of prudence provide for liquidated damages to terminate on completion and acceptance of the works so as to remove any question of their being payable thereafter. But if they do, it would be unrealistic to interpret the clause as meaning that if that event does not occur the contractor is free from all liability for liquidated damages, and that the Employer's accrued right to liquidated damages simply disappears. It is much more probable that they would have intended the provision for liquidated damages to cease on completion and acceptance of the works to stand in addition to and not in substitution for the right to liquidated damages down to termination. The Court rejected the Contractor's contention that it is not liable to pay liquidated damages for the period of delay which occurred between the due dates for delivery of work and the termination of the contract.

**T.A. Choudhary v. State of Andhra Pradesh - Andhra Pradesh High Court -  
Decided on 1.5.2003**

The Contractor was awarded the work for construction of approaches to the R&B in M.18/4 of Guntur-Repalle Road (K.M.06 of Nidubrole-Govada Road) in Ponnur Municipal limits including the formation of the service roads on either side of the overbridge of Nidubrole in lieu of level crossing No. 267 of Vijayawada-Gudur Section in Guntur District. The Contractor, on account of the delay on the part of the Employer in handing over the site and on account of the non-completion of the Land Acquisition proceedings in most of the places, was granted extension of time for completion of the work. The Employer contended that the delays were attributable to the Contractor. The Contractor claimed escalation, loss due to idle labour and machinery, overhead charges, loss of profit etc. When the extension was granted by the Employer, the Contractor at the time of accepting the extension reserved his right to claim for the losses. The Court upheld the arbitral award and concluded that since the extension of time was accepted by the Contractor subject to his right to claim losses, the Employer could have either cancelled or rescinded the contract. Since the Employer allowed the Contractor to complete the work during the extended period, without resorting to cancelling the contract, the Employer is liable to pay prolongation costs to the Contractor.



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