

A Study on the Extension of Time (EoT) Claims and Protocols

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Abstract - The Indian construction industry grows so wide and high each day and so are the disputes revolving around it. The liability for liquidated damages, the compensations, and the extension of time due to delays have been a major issue between the employer and the contractor, during the post-construction period. As the contracts are signed before the initiation of the project, the clauses drafted in the contract document stand as a yardstick to measure the liability for the events. When not given importance to the clauses, the Indian contract law-1987 gives guidance when resolving issues. Yet certain issues are drawn into courts and arbitrations for conclusions. This paper deals with the clauses inspired by various contract laws across the globe that may fetch closure to increasing cases of disputes arising in the extension of time claims in India.

Key Words: Extension of time, Contract law, Delay analysis, FIDIC

1. INTRODUCTION

In a business platform, contracts play a vital role and are a central idol of a company's success. When contracts are drafted fittingly, it gives the privilege of enjoying several benefits, from avoiding a breach of contract and litigation to improved business relationships. According to the Small business Administration, Lawsuits that arise as a result of contract matters can create a variety of difficult challenges for businesses, like causing financial burdensome, financial costs, and placing emotional strain on business owners, which highlights the importance of successful contract drafting. Managing contracts are often complex, challenging, and constraining. Many organizations run into the identical common issue that weighs down the whole contracting process and some issues are (1)Lack of clarity in the contract. (2)Level of involvement of parties while drafting the contract. (3)Failure to engage necessary people /teams in the process. (4)Focus on the terms and risks to avoid after signing. (5) Lack of flexibility. (6) Limited transparency on claims and services.

1.1 Extension of time

An extension of time (EOT) is a provision in most standard forms of contract, for a modification of the scheduled Practical Completion date due to unforeseen circumstances and it is usually requested by the Main Contractor. One of the primary intentions of extension of time clauses in contracts is to conserve the effectiveness of the liquidated damages provisions for the benefit of the employer. A successful claim

for extension of time would not essentially give way to a successful claim for loss and expense. Standard forms of construction contracts contain the extension of time clauses, setting out the criteria on how extensions of time will be granted. A bespoke contract or one, in general, that does not contain any provision relating to the extension of time, would therefore have no mechanism for adjusting the completion date, if delays caused by the employer affect completion and the employer could lose his right to deduct liquidated damages in the event of further delay through the fault of the contractor.

The following steps are to act upon while submitting an extension of time report.

1. Ensure the contract carefully to understand what notices are obligatory and when is it mandatory
2. Read the contract agreement to establish when EOTs will be obtainable.
3. Classify the reason for the delay specifically and determine if you can claim it.
4. Read the contract to find out what you need to prove to determine your prerogative.

1.2 Objective of the study

The objectives of this study are:

- Identification of methods of evaluation of EOT claims.
- Study and compare contract clauses of various nations, related to EOT.
- Recommendation of protocol changes contract clauses in Indian contract laws

2. LITERATURE REVIEW

Comprehensive literature was reviewed to understand the fundamentals of contract management and the events prompting the extension of time in construction projects.

A Sasi Kumar *et al.*^[1] discussed the main causes of the contractor's failure in the Indian construction industry and recommended the critical factors to be taken care of before the commencement of the project i.e. the pre-construction stage. Here, the contract documents have been the key point to be taken care of among all other factors enlisted. Shaikh H.

et al.^[2] expressed that the extension of time has been named the fourth most claimed issue in a construction project. He has also stated the importance of following a contract document before an appeal or a claim and the contractor's right to opt for an EOT if mentioned in the contract document. Thus the basic idea of an EOT claim is established. Nahu Brainmah^[3] identified various delay analysis techniques that have been created to date and also studied the advantages and disadvantages of each method from a wider perspective. ChitarekhaKabreet al.^[4] presented the causes and effects of the extension of time claims in India. The authors also have described a summary of the various methods that are used on-field in Indian scenarios depending upon the project and its selection criteria. Dok Yen D. et al.^[5] stated that out of thirty-five variables contributing to the extension of time for road contracts selected for the study within the Sunyani Metropolis, Ghana. Adverse weather conditions, changes to the original contract scope, and Suspension of work were established to be the three most significant factors contributing to the causes for extension of time in road construction projects.

3. METHODOLOGY

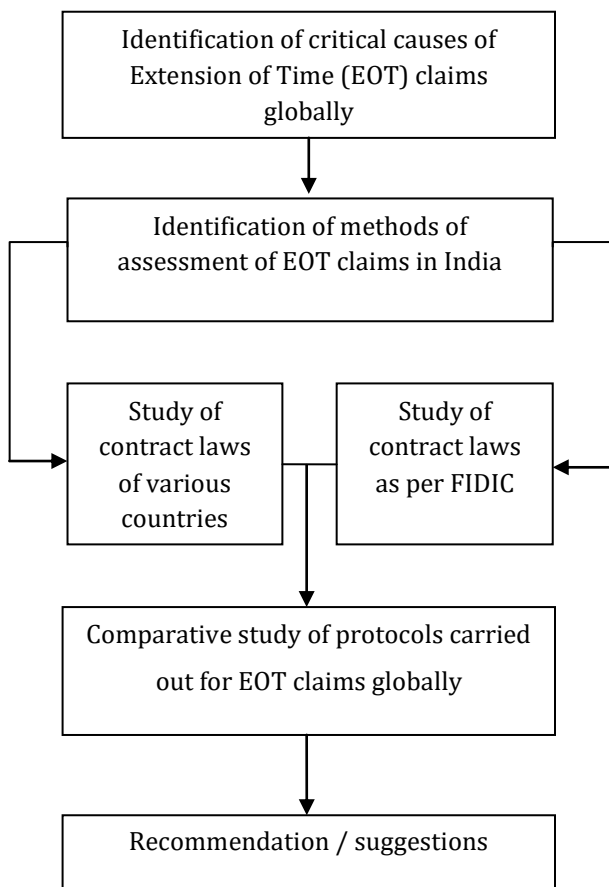


Fig -1: Methodology

4. QUALITATIVE STUDY

The research is a qualitative study and began with the identification of possible factors that pave the way to the extension of time claim on a global scale. Factors are categorized into risk events that cause delay and listed out from various pieces of literature in the table - 4.1

Table -4.1: Categorized Global factors

| Contractor's risk events | Employer's risk events |
|----------------------------|-----------------------------|
| Wrong assumptions | Delayed access to the site |
| Poor planning | Employers interruption |
| Unrealistic activities | Physical conditions |
| Low productivity | Change in scope |
| Lack of manpower | Force majeure |
| Poor quality of work | Late procurement |
| Financial issues | Delay in payment |
| Late delivery of materials | Work suspension |
| | Adverse climatic conditions |

Whenever a delay occurs, a delay notice must be prepared for claims. Hence the contractor or the employer who gives in for an EOT is said to prepare and send for the analysis of the delay. Several delay analysis techniques to assess an EOT claim are invented and the following are predominantly used in the Indian Construction industry:

- As planned Vs As-built
- Impacted as planned
- Collapsed as-built
- Time impact analysis

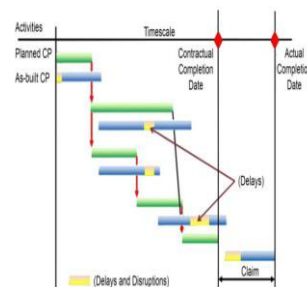


Fig -2: As planned Vs As-built

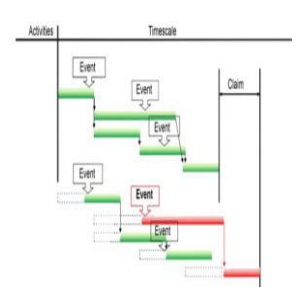


Fig 3: Impacted as planned

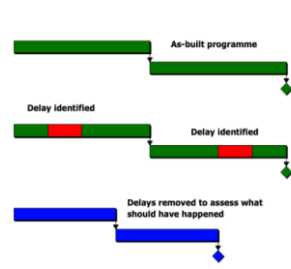


Fig -4: Collapsed As-built

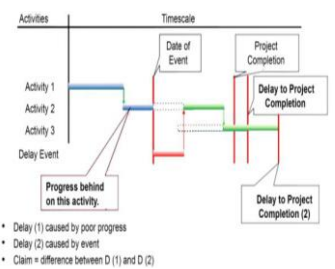


Fig -5: Time impact analysis

The contract laws of various nations excelling in the construction industry are studied and a comparative table on the law for global factors is drawn. Table 4.2 explains the protocols for different countries.

Table -4.2: Protocols of various Countries

| Country | Protocol |
|---------|---|
| India | Time plays a crucial note. If time is essential, the contract is voidable, and if not compensation can be availed, unless agreed on an extension of time. |
| | No separate article on force majeure. But in case of any impossible event, the contract becomes void |
| | No separate section for variation in the project yet recommends drafting a new contract on alterations |
| | Holds explanation on payment within the stipulated time and no provision for work suspension or termination by law. |
| | No separate article on the shortage of goods and services except when the contract becomes void |
| | Extension of time and compensation sanctioned by the owner through the supervision unit. |
| China | No separate article on force majeure. But in case of any, the contract shall be extended. |
| | The quality and standards meet the requirement and have the right to change the work if not acceptable by supervision unit. |
| | The payment to the contractor for the work done doesn't cover the time bound for payment. If the supervision unit fails, compensation is granted to the owner. |
| | The contractor is responsible for men and materials and the employer shall not interfere. The quantity and quality fully fall on the contractor and no compensations are granted. |
| | Rights to extend or cease contract or change contractor falls on the employer. But the former shall be paid fair for his work. |
| UAE | Any event occurring to be unpreventable unless the wrongful of the contractor, he shall not be liable. In case of force majeure, the contract gets ceased and the payment is made for work completed. |
| | For a lump sum contract, the variation is to be done within stipulated budget with a given extension, an else new contract to be drafted |

| | |
|------------------------------|---|
| | Consideration for the materials, equipment, work executed and price hikes to be intimated to the employer through notice, Contractor shall suspend work, if stands unpaid. |
| | The contractor is liable for damage, loss, or shortages |
| Australia / UK / New Zealand | No separate clause for extension of time is yet clearly stated in the standard contract document. |
| | No remedy for force majeure exists in Australian law yet any compensation or extension could be availed if mentioned in the contract when signed. |
| | Variation can be implemented even if it is not signed in the contract if the parties involved agree. |
| | Payment is to be done within 42 days, and rejected payments are set into the notice of dispute in 14 days. |
| | No specific section for shortages of goods but clearly stated in the standard documents by the legislature. |
| | Separate clause for Extension of time pointing all the reasons for which a contractor, employer, and engineers can avail the extension of time and compensations if applicable. |
| FIDIC | Separate clause for force majeure. |
| | Separate clause for variation pointing to the conditions of variations, the period for reporting, cost consequences, and extension of time allowances. |
| | Separate clause for all payments along with the procedure and the period within which it must be done. |
| | The shortage of goods and labor are dealt with either time extensions or compensation made to the employer by the contractor or vice-versa depending on the scenario prevailing |

5. SUMMARY

Initially, the most critical causes for EOT claims were identified globally. The causes which are considered as risk events are categorized into two categories as contractor's risk and employer's risk. When there is any delay recorded and notice is to be sent, the delay is to be analyzed to award the EOT. Hence the delay analysis techniques are identified. The predominantly used techniques used in India are i) As planned Vs as-built ii) Impacted as planned iii) Collapsed as-built iv) Time impact analysis. These techniques are then studied in detail to select the proper method of analysis in different scenarios.

The Contract laws are then identified for some countries that top the construction industry in the world. China has Construction law of the people's republic of china, 1997. UAE follows Civil code-Federal law, 1987. The countries like UK, Australia, and New Zealand follow the construction law stated as per their state legislature. Yet these three countries rule out any disputes through the standard contract forms drafted by the government which is followed throughout the country, irrespective of the value of work.

FIDIC books as known for their contract terms and conditions are also studied. It is identified that the Red, Yellow, and Silver books are adopted to a large size globally. Our India has its Indian contract law 1872. Finally, the clauses are conditions in all the above-said laws are studied, and compared concerning the identified reasons for the Extension of time claim.

6. CONCLUSIONS

From the comparative study made, limitations in the Indian contract law 1872 identified are

- In general, the law looks at the contract from a Generic perspective.
- The law is more vital over business contracts rather than construction contracts.
- A major fallback is that if the Extension of the time clause is not included in the contract, either the contractor or the employee cannot appeal for a time extension or compensation or a penalty without having to undergo arbitration.
- As in FIDIC, there are no brief descriptions of the scenarios that can be counted in as a reason for the delay of work that could fetch an extension of time.
- The climatic conditions, which are a crisis in any construction project are not mentioned in any article. Thus the allowances or compensations or extension period cannot be sanctioned more easily without being raised to dispute resolution unless mentioned in the contract.
- Although the unforeseen events are hereby considered to be "impossible events" unless it is a wrongful act of the promisor, the contract just becomes either void or voidable as per contract law.
- There is no proper clause for Force Majeure and it could not be termed under impossible event.
- No clause is made for the goods and services involved in the work.
- The law enforces to draft a new contract in case of alteration but there is no detailed description or protocol on variations that can be made in the prevailing contract. Hence making the way for arbitrations for most projects.
- The payment transactions are dealt in a debt basis and the protocols are not described in an effective manner
- In general, the contract is either ceased or becomes void in most cases, thus dragging into dispute courts.

The following clauses inspired by the other country's contract laws are recommended to be taken into consideration in the Indian contract act.

- Article 25 (III), 82 (VIII) of Contact law of people's republic of china,1997
- Article 273, 287, 875, 877, 878, 885, 887, 889 of UAE civil code- Federal law,1987
- Clause 4.12, 8.5, 8.7, 8.10, 13.1, 19.1, 19.4,19.6 of FIDIC book.

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