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Construction Arbitration

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RAUTRAY & CO.

Construction Arbitration Law Firm

- **Claim for Loss of Profit - whether profits and overhead expenses were included in the rate of items and therefore, no additional amount for such expenditure and profits was admissible - Contractor had fully mobilized itself in all respects and in every possible manner to execute the works - contract was prolonged for a period of twenty months on account of reasons as attributable to the Employer - Contractor had computed the monthly profits that it would have earned by assuming that the value of the contract included profits to the extent of 10% of the said value, which the Contractor claimed, it would have earned in a period spanning sixteen months - the Contractor then extrapolated the monthly profits to the period of twenty months being the delay in completion of the contract - Contractor did not lead any evidence to establish that it had suffered any loss of profits on account of prolongation of works - Contractor must support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that the Contractor could have earned elsewhere - it is imperative for the Contractor to substantiate the presence of a viable opportunity through compelling evidence.**

- **Claim for additional costs by way of idling and/or under-utilization - clause in the contract providing that Contractor's element of 15% on cost of materials and labour to cover all overheads and profits for extra items, quantities or substituted items - prolongation costs claims were based on the delay caused by the Employer in the execution of the work - the mark-up of 15% of overheads and profits has no relevance to the Contractor's claim for compensation for additional costs and expenses incurred on account of the prolongation of work.**

- **Claim for loss of profits during prolongation of the works - not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work - Contractor should establish in such a situation is that, had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit - unless such a plea is raised and established, claim for loss of profits cannot be granted - in the absence of any evidence, the arbitral tribunal cannot allow the claim.**

- **Usage of formulae for claim of loss of profit - Hudson's, Emden's, or Eichleay's formulae - three formulae deal with theoretical mathematical equations, but are based on factual assumptions, and therefore, can produce three different and unrelated compensation / damages.**

- **Hudson's formula - for the computation of damages the Hudson's formula takes the head office and profit percentage as a proportion of the contract value - formula assumes that the profit judged by the builder / Contractor is in fact capable of being earned by her/him elsewhere had the builder / Contractor been free to leave the contract at the proper time - this formula is couched on three assumptions - first, that the Contractor is not habitually or otherwise underestimating the cost when pricing; secondly the profit element was realistic at that time; and lastly, there was no fluctuation in the market conditions and the work of the same general level of profitability would be available to her/him at the end of the contract period.**

- **Evidence to support claim for loss of profit - when the completion of a contract is delayed and the Contractor claims that s/he has suffered a loss arising from depletion of her/his income from the job and hence turnover of her/his business, and also for the overheads in the form of workforce expenses which could have been deployed in other contracts, the claims to bear any persuasion before the arbitrator or a court of law, the builder / Contractor has to prove that there was other work available that he would have secured if not for the delay, by producing invitations to tender which was declined due to insufficient capacity to undertake other work - the same may also be proven from the books of accounts to demonstrate a drop in turnover and establish that this result is from the particular delay rather than from extraneous causes - if loss of turnover resulting from delay is not established, it is merely a delay in receipt of money, and as such, the builder / Contractor is only entitled to interest on the capital employed and not the profit, which should be paid.**

- **Emden's formula - is dependent on various assumptions which are not always present and which, if not present, will not justify the use of a formula - must also be established that the Contractor was unable to deploy resources elsewhere and had no possibility of recovering cost of the overheads from other sources, e.g. from an increased volume of the work.**

- **Eichleay formula - it requires the builder / Contractor to itemise and quantify the total fixed overheads during the contract period - it takes into consideration all the contracts of the Contractor / builder during the contract period with those of the individually delayed contract to determine the proportionate faction of the total fixed overheads - in both Hudson's and Eichleay's formulae, the amount to be recovered is determined weekly or monthly, which the delay in the contract completion is expected to earn.**

[Union of India v. Ahluwalia Contracts (India) Ltd. - Delhi High Court - Decided on 9.5.2025]

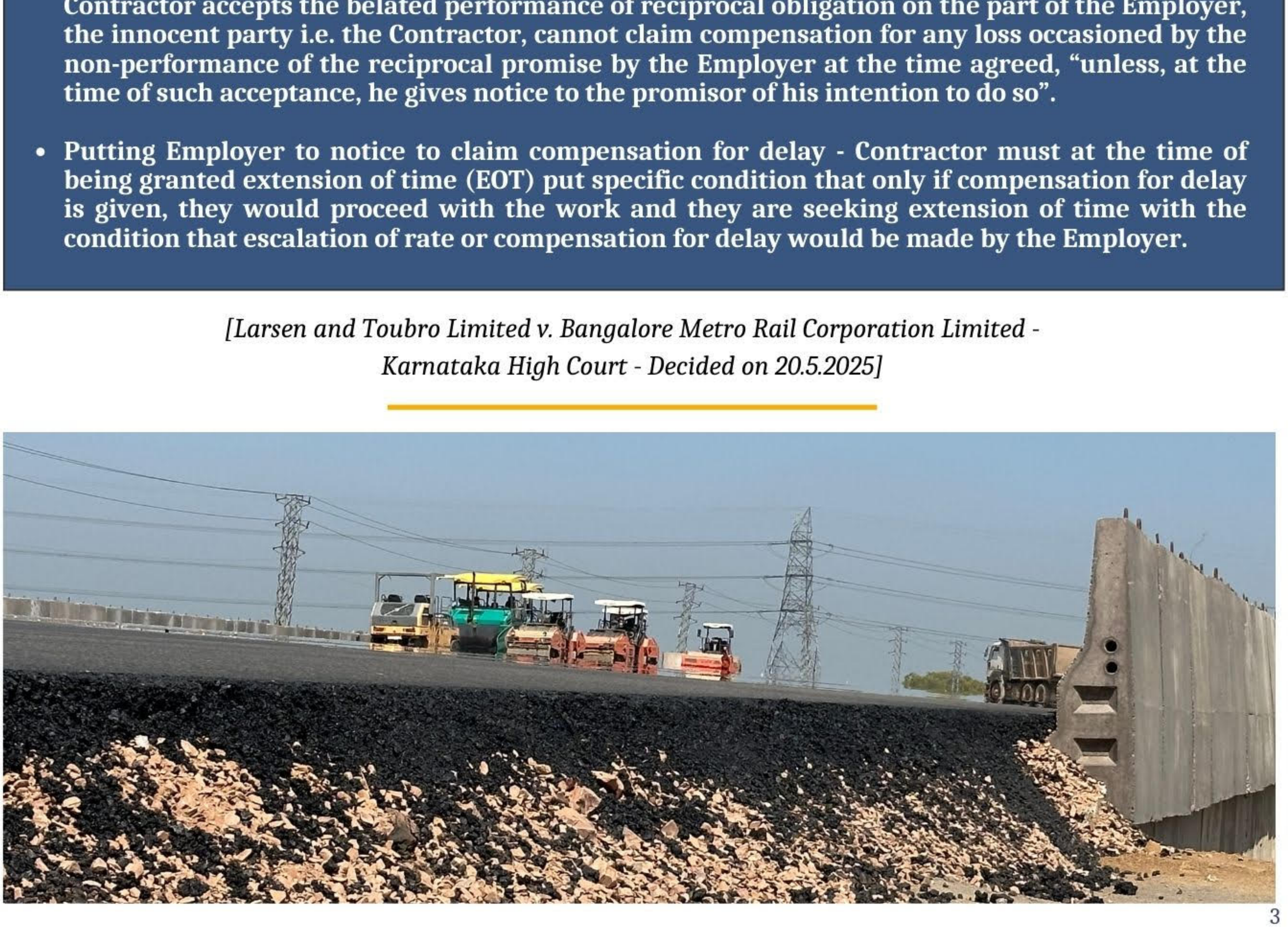
- **Contract barring claim for compensation - no damage clause - whether the clause is contrary to public policy and void - clause providing that the Contractor is entitled for only extension of time for executing the work in certain situations like delay in handing over of the site, etc., by the Employer, but no compensation shall be payable - when there are specific clauses in the agreement which barred consideration of extra claims, then the award overlooking the claims to that extent stands vitiated - no damage clause for the delay are binding clauses of the contract and not a mere statement - subsequent to allowing the extension of time, the Contractor in further communications, sought additional cost / compensation - such communications cannot be constituted as notice to claim compensation at the time of accepting extension of time.**

- **Price escalation on account of an extension of time for the completion of work - both parties had committed breach of the terms of the contract - apportionment of delay - the engineer determined that both parties were equally responsible for the delay - if a party accepts the belated performance of a reciprocal obligation, the other would be entitled to make a claim for damages and if the former party is found to be in breach - the prohibitory or no damage clauses in the contract for its benefit may be legitimately interpreted by the arbitrator to lose their applicability during the extended period of the work - if the arbitrator, on his appreciation of the circumstances leading to the extension of the period of completion of the work, finds the Employer to be in breach which results in the work not being completed on time, the arbitrator's finding that the prohibitory clauses would not apply to the extended period would not be outlandish or per se perverse.**

- **Time, if of the essence - if time is of the essence of the contract, failure of the Employer to perform a mutual obligation would enable the Contractor to avoid the contract as the contract becomes voidable at his option - a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ('a breach going to the root of the contract') depriving the innocent party of the benefit of the contract ('damages for loss of the whole transaction') - if instead of avoiding the contract, the Contractor accepts the belated performance of reciprocal obligation on the part of the Employer, the innocent party i.e. the Contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the Employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so".**

- **Putting Employer to notice to claim compensation for delay - Contractor must at the time of being granted extension of time (EOT) put specific condition that only if compensation for delay is given, they would proceed with the work and they are seeking extension of time with the condition that escalation of rate or compensation for delay would be made by the Employer.**

[Larsen and Toubro Limited v. Bangalore Metro Rail Corporation Limited - Karnataka High Court - Decided on 20.5.2025]



Union of India v. Ahluwalia Contracts (India) Ltd. - Delhi High Court - Decided on 9.5.2025

The Contractor was awarded the work for package-III electrical services at AIIMS. The Contractor claimed that due to prolongation of the work for the reasons attributable to the Employer, additional expenditure was incurred by the Contractor in mobilizing its men, material and resources beyond the date of completion; maintaining the site office; staff in the head office; and on security establishment. The Employer argued that since the delay was on the part of another contractor, grant of EOT was the only admissible relief that could be granted. The disputes between the parties were referred to arbitration. The arbitral tribunal found that time was the essence of the contract and that the delay involved in completion of the works due to non-availability of sites was not attributable to the Contractor. However, the arbitral tribunal rejected certain claims made by the Contractor, amongst others, on account of the expenditure incurred on establishment of the site office during the extended period of the contract and loss of profits. It held that the profits and overhead expenses were included in the rate of items and therefore, no additional amount for such expenditure and profits was admissible. The Court concluded that the 15% covering all overheads and profits were meant for the 'extra item of work' that may be awarded to the Contractor during the course of the execution of the work and not applicable to Contractor's claims in the nature of damages / prolongation cost based on the delay caused by the Employer in the execution of the work. The finding of the arbitral tribunal that the Contractor's claim for prolongation cost was already compensated was set aside. The finding of the arbitral tribunal of Contractor's claim for loss of profit on the ground that it is not supported by any provision under the contract and is hypothetical and unreal, was also set aside. However, the Contractor did not lead any evidence to establish that it had suffered any loss of profits on account of prolongation of works. It merely imputed the monthly profits that it would have earned from the contract in question and assumed that it would have earned similar monthly profits during the period for which the contract was performed. It is imperative for the Contractor to substantiate the presence of a viable opportunity through compelling evidence.

Larsen and Toubro Limited v. Bangalore Metro Rail Corporation Limited - Karnataka High Court - Decided on 20.5.2025

The contract related to construction of three elevated Metro Stations at Yeshwanthpur, Soap Factory and Mahalaxmi Stations. The land was also to be given progressively depending on the issues of demolition of structures. It was also a contractual condition that, not all drawings would be issued at once and that it would be issued depending upon the actual progress of work at site well in time before commencement of the activity. Five extensions of time were granted by the Employer. The disputes between the parties were referred to arbitration. The arbitral tribunal held that the Contractor had issued a notice with regard to its entitlement for compensation on account of delays and therefore, the Contractor is entitled to claim for compensation despite the contractual provisions barring compensation. Further, under Indian law, in spite of there being a contract between the parties whereunder the Contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the Employer, still a claim would be entertained in one of the following situations (i) if the Contractor repudiates the contract exercising his right to do so under section 55 of the Contract Act, (ii) the Employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the Contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the Employer and the Employer accepts performance by the contractor in spite of delay and such notice by the Contractor putting the Employer on terms. The District Court held that a 'no damage clause' for the delay are binding clauses of the contract and not a mere statement. The High Court upheld the finding of the District Court. A contract barring claim for damages at the time of extension of time, if work is delayed for whatever reasons and including delay attributable to the Employer, the Contractor will not be entitled to any compensation or damages and will be entitled to extension of time only and that, the finding of the arbitral tribunal awarding compensation in violation of the bar contained in the contract is beyond its jurisdiction. The decision of the Supreme Court in *Sarvesh Chopra* case will not entitle the Contractor to claim compensation in violation of specific terms of the contract prohibiting such claim for compensation. The Contractor accepted the extension of time without compensation / damages. The Contractor acted upon the extension of time and having acted on the extension of time, could not have submitted request for damages / compensation on a subsequent date. Further notice, which is contemplated is the notice for extension of time and not a notice after accepting the extension of time. This is for the simple reason, the Employer must know on what grounds the extension is being sought. The extensions having been granted without compensation/damages, any subsequent request for compensation/damages was not maintainable. In none of the letters granting extension of time, the Employer had agreed to pay the compensation. The Contractor had accepted the no damage clauses of the GCC without any demur and executed and contract. Therefore, the clauses cannot be declared as void.

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