

**WORDS, PHRASES AND THEIR LEGAL CONCEPTS OF  
CONSTRUCTION LAW**

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### **Construction Law:**

It is conglomerate of Contract, Torts, Real Estate Laws, Environmental Law, Professional Liability and host of rules and regulations related to Labour Welfare, Royalties, Excise, Customs and similar Laws. While many laws apply to different aspects of construction administration and industry, it is the **Contract Law** as applicable and interpreted for Construction Contract that forms large bulk of Construction Law, It is the role of court, who interprets law. Differences and dispute need be adjudicated through the court or alternative dispute resolution like Arbitration, Conciliation, Dispute Review Boards. Statutes do not undergo changes often. However, the law, which is essentially the interpretation of above statutes pronounced by courts, so often changes and particularly for construction law. In this context, it is necessary to understand certain special **Words and Phrases** related to construction law. In dispute resolutions, Study of Limitation, Evidence Arbitration Laws are required to be appreciated. In this context, acquaintance with certain words, phrases and concepts are important.

### **Terms, Conditions, Representations, Provisions,:**

- Terms mean statements governing performance of Bargain
- Conditions mean situations which make Bargain executable
- Breach of Term may result in compensation – Liability
- Breach of Conditions may result in abortion or failure of performance
- Terms go with adjectives like ‘Cardinal’, ‘Fundamentals’, ‘Essential’, etc.
- Conditions go with suffix ‘Precedent’, ‘Concurrent’, and ‘Subsequent’
- In any case Breach of Terms and Conditions would amount to “Breach of Contract” and consequence is compensation (Sec. 73 of Contract Act)
- Failure of conditions lead to frustration and failure of contract itself. Handing over of site, issue of drawings, compliances of reciprocal obligations is a part of the job as contracted, are conditions of the contract and not terms of bargain.

- Breach of cardinal condition abruptly stops performance whereas breach of contract Term is compensable.
- Failure of Terms affects the capacity of performance whereas failure of condition aborts performance itself.

### **Material and Fundamental Terms:**

This includes subject matter, payment terms, warranty, quality, time of performance. If the contract is not reasonably certain of its material terms, the contract should be avoided.

### **Breach of Fundamental of Terms:**

There are some fundamental terms in contract, whose performances can't be subject to Exclusion clause. The breach of such fundamental terms will hit the root of the contract. This will enable Contractor to repudiate the contract i.e. stop further performance unless it is affirmed by expression or conduct.

### **Implied Terms**

These are not used because they are just reasonable but for the reason that party must have missed out. **Implied Terms** are sometime called gap fillers. They have force received from standard terms and usage. These terms also form binding part but can't substitute or contradict express terms.

### **Representation:**

It is statement in contract representing the site description; characteristics of soil, facilities at site, environment and statutory clearances, etc. are the representation made in the contract. **Misrepresentation** may result in voidability of contract, depending upon how material is the representation.

### **Provision:**

In contract there are provisions governing different activities related to performance of contract like processing of bills, recording of measurements, approval of drawings, arbitration of dispute resolutions, etc.

*Thus, the **terms, conditions, representations and provisions** are completely different categories and appear to be overlapping in some areas, requiring expert analysis based on facts.*

### **Possession and Commencement:**

#### **Possession of Site:**

Allowing access and entry to site for performance is not possession in legal term and means license to enter only. Contractor can be expelled from site after due care and forthwith on termination.

#### **Commencement:**

A contract having clear provision of notice to commence may or may not include the period of mobilization with reference to date of award. It is a simple statement of fact as agreed between the parties.

### **Site Inspection and Site Investigation:**

**Site inspection** means gross acquaintance with physical apparent conditions and surrounding parameters of the site including access facilities, climatic condition, and distance/lead of construction materials and availability of labour. **Site investigation** may cover soil investigation without having the liability of geotechnical consultants interpreting the investigation of site and its data related to sub-strata. Liability of investigation except when expressly provided lies with Employer.

### **Executability and Warranty:**

A Contractor undertakes to execute the construction job. However, the conceptual feasibility and functional requirement as well as structural issues and compliances with statutory requirements are warranted by the design team of Employer (**Spearin** Doctrine – 1918 USA).

### **Dues and Damages:**

- Parties to a contract have for entitlement to dues and damages as the case may be for the claims made. *Any extra or unpaid payments related to scope of work are called Dues. Damages are compensable amounts resulting from breach of contract.*
- Dues result from extra items, not duly recognized, change orders, substituted items, variations, additions and alterations.
- Damages occur due to failure of obligations under the terms and conditions of the contract and including time overrun, acceleration, Liquidated Damages, promises and denial of bonus as required to be compensated under the law.
- **Disputes about Dues** arise from failure of contracted promises in respect of quality, quantity and nature of work. Damages are demanded as substitutional relief for losses occurred or failure of expectations due to breach of contract.
- While Dues are mostly decided by the Engineer-in-Charge and arise from deficiency of bills of quantities or specifications, **Damages** result from failure of obligations of the other party.

### **Change Orders / Variation Orders:**

If change order originates from the Employer for convenience or due to change in drawings, change in designs, change in user's need or change in statutes and regulations, the Change order/Variation order is to be evaluated for Cost, Time or both. However, if the same is originating from contractor for his convenience and facilities of acceleration, it is not compensable.

### **Variation in Quantities:**

Strictly variation in quality is compensable. Variation in quantities is a term introduced for equitable performance viz. neither party should be able to take advantage of abnormally high rate or abnormally low rate. Thus, the variation limits usually  $\pm 15$  to  $\pm 25$  would not attract any change. If quoted rates are abnormal in the sense that they are higher or lower by 15% of reasonably good estimate, they need to be re-structured at market rate for excess of quantities and in case of reduction, the theory of deprivation of estimated profitability need be applied.

### **Contract Drawings, Good for Construction (GFC) Drawings and As-built Drawings:**

#### **Contract Drawings:**

These are only conceptual drawings, which can give fair idea of scope of work to the bidder without inviting any obligation. For *specification*, one must refer to specification accepted for the contract and for description of contract, bill of quantities will take precedence. *Quantities in Bill of Quantities (BOQ)* are approximate and would be governed by variation in quantity clause. Contract Drawings are 'Representations' as to *nature* of work and nothing more.

#### **Good for Construction Drawings:**

These are issued by the Design Consultants. Often for further details, shop drawings are prepared by the Contractor. These are the drawings, on which the performance of contract is to be based;. Only gross changes in GFC drawings vis-à-vis Contract drawings will be entertained for issue of Change order (CO) or Variation Order (VO).

#### **As-built Drawings:**

It is contractor's obligations to place on record the details of job as executed and represented through the drawings. These show all the features as finally built. Indirectly, it is the record of work actually executed.

### **Reduced Rates and Part Rates :**

If any part of work or an item is not executed to acceptable and expected standard as contracted but is functionally acceptable the same may be paid at a **Reduced Rate**. This is a sort of compensation for the acceptance of sub-standard work. Reduction in rate is measure of such compensation and is usually the cost required for bringing it to the acceptable and expectable level. The imposition of **Reduced Rate** is usually final and binding.

### **Part Rate**

This is payable to a contractor for the part of work completed when the work is being executed. The balance is paid on total completion of that task. Part rate is a sort of interim advance and hence, wholly recoverable, if item is not completed. Courts differ on '**Quantum-meruit**' payment for incomplete jobs.

### **Patent Defect and Latent Defect:**

Deficiency on face of document in contract, with respect to the specification or drawings, resulting in inconsistency in obligations and performance, is a **Patent Defect**. It can be noticed by observation or examination. **Latent Defect** is manifested in the process of use and may not be apparent or obvious at the point of acceptance of work. **Patent Defect** may be eliminated during the progress of work. **Latent Defect** may give cause of action, when noticed. The concept of warranty for the price received is an obligation in respect of **Latent Defect** required to be rectified or compensated for at a later date. The concept of Defect Liability period is no defense for Latent Defect.

### **Warranty and Guarantee:**

An affirmation of quality and performance made by the Contractor to the Employer is an implied part of the contract and constitute a warranty. If the same is found deficient, the Contractor has to make good at his cost and risk. The defense of warranty can be only negligence in the use by Employer or deficiency of specification and design by the Consultants.

**Guarantee:**

It is promise to ensure compliance with obligation of performance. In other words, it is a Contract or Undertaking to give a substitutional relief in terms of money for default or breach of a contract by the Contractor (**Principal Debtor**). Such guarantee is issued by the third party (**Surety**) through Guarantee Bond, which is treated as an independent and separate contract. The Employer is called '**Creditor**'. Like any contract, such guarantee becomes voidable only on account of fraud or misrepresentation. The guarantee, in fact, is a protection by the third party, institution and usually a bank as it involves monetary relief. It is a Contract of indemnity limited to named amount.

**Completion, Virtual Completion and Closure of Contracts:**

**Completion:**

It is completion of all obligations or performances, notwithstanding any difference or dispute required to be resolved.

**Virtual Completion:**

This is a stage of completion, when most of the work is completed and can be taken over for further use or occupation of the subject job if desired. The gross liabilities like Performance clause usually comes to an end when virtual completion is recorded. Often bonus is linked to date of virtual completion and Defect Liability starts for the components so taken over from such a date. Liquidated Damages clause stops to operate with declaration of Virtual Completion. Performance Guarantee or Bond can be discharged.

### **Closure of Contract**

It is the total expiry of contract recorded on completion of Defect Liability period and all obligations having been discharged by both the sides. What survives the closure is expressed warranties till specified time and dispute resolution mechanism till the period of statutory limitation.

### **Sub-Contractors and Nominated Sub-Contractors:**

It is a trade practice widely acknowledged that the principal contractor awards the work to sub-contractor with specialized expertise or for the sake of accelerating performance through sub-contractors. Law imposes undiluted obligations for performance and warranty on Principal Contractor. Approval of sub-contractors does not release principal contractor from all its contractual obligations and claims of sub-contractors do not exist separately from those of principal contractor. It creates no privity of contract.

### **Nominated Sub-Contractors**

These are agencies Employer chooses and testifies for their technical competence and activity. However, the commercial dealing is left to the principal contractor for finalization with nominated sub-contractors. Having provided with the list of nominated sub-contractors in a manner of having pre-qualified, the Employer by implication warrants the performance capability without inviting obligations of ensuring quality. Only the principal contractor must comply with quality standards. These are often Electrical, Plumbing and HVAC, MEP sub-contractors. Though there is no privity of contract, implied approval cannot be ignored in judging performance of nominated sub-contractors.

Sometime, there are nominated vendors, who create a cartel making the performance of contract by Principal Contractor difficult. Contractor may approach Employer for wider selection and to defeat monopolistic situation. The

international Construction Law mostly approves claims of nominated contractors to be contested through principal contractor and an independent clause “*pay when paid*” is legally accepted as proper consideration.

### **Foreclosure, Rescission, Termination, Repudiation and Abandonment:**

#### **Foreclosure of Contract**

It is sometime required by reason of Force Majeure or similar circumstances where both the parties agree not to proceed with the contract. In such an event, a contract is foreclosed on negotiated settlement basis where each party may dilute the rights and water down the expectation of the contractor or may work out settlement as provided in the contract.

#### **Rescission of Contract**

This is to nullify the contract as if it did not exist anymore as enforceable. Usually voidable contract on discovery of vitiating element is rescinded. On rescission, any advantage derived by either of the parties is to be returned back to the other party as if the contract is not performed. In fact, on rescission the international law does not permit any compensation to be sought except restitution of damages incurred before rescission, and no damage attributable to the expectation of performance, is considered.

#### **Termination of Contract:**

Construction contract is terminated either for deficiency of performance default of contractor or convenience of Employer. Sometime there is a provision of right to terminate by the contractor for certain failures of Employer. Usually, long suspension and non-payment may be the cause in favour of contractor, terminating a contract. In termination, it is essential that *the procedure laid down in the contract is accurately followed; failing which consequence of improper or illegal termination will have to be borne by the party terminating the contract.* Termination should be the last resort.

**Repudiation and Abandonment:**

Repudiation of contract is refusal of a party to go through with further performance of contract. It is a legal right they may justify Repudiation. However if such right does not exist it is called Abandonment which is, a sort of Cardinal Breach of Contract.

**Estoppel, Waiver, Election**

**Estoppel:**

It is one of the three prohibitions arising out of contract by conduct. If a Contractor or Employer by declaration, act, omission, representation or by any means of conduct may induce other party to change his position, the first party is *estopped* from reversing the position that may cause detriment to the party relying upon. This is the principle of Estoppel.

**Waiver:**

When a right under a contract occurs to a party and the party knowingly does not exercise its right, the same at a later date is not available to the party, who is deemed to have waived the right. In case of contract, which is voidable as well as which spells out the rights like termination or Liquidated Damages, Waiver acts as bar to action of relief unless another occasion giving fresh right occurs and notice of intention not to waive it is given.

**Election:**

It is a conduct or expression of a party to a contract for making a choice of one of two or more alternative reliefs available for response. Having chosen by free will of the elected remedy, it cannot it be given up for choosing the second as was available. This is corollary to estoppel. In fact, all the three are words of caution to contracting parties during the performance.

**Question of Fact or Law or Both:**

Facts can be gathered from the documents, which cannot be controverted through oral evidence. Only missing facts can be supplied through witness. Matter of fact is to be decided by the Adjudicator. There are issues like Limitation. Question of Law has to be decided by applying substantive Law and can be decided by courts or Arbitrators. Question of issue like Limitation, Arbitrability are a mixed issues of Law and facts.

**Order of Precedence:**

Construction contract contains several parts and sections including drawings and specifications made by reference even to the documents. Any inconsistency has to be resolved by reference made to order of precedence mentioned in the contract unless it produces inconsistent result.

**Doctrine of Notice**

This is an important provision in the Construction Law. The period indicated in notice clause is of fundamental importance. If not mentioned, it has to be reasonable. Without notice, no jeopardy can be caused to the other party. It should be addressed to the authorities named in the contract to be effective. No retrospective effect can be given to the intention of the Notice. It should be signed by the authorized person named in the contract. In short, Notice saves and protects the opposite party from all surprised acts. It also triggers mitigation of loss, which is fundamental obligation of parties suffering damages. Notices must be contemporaneous with events.

**Constructive Notice:**

In contrast to express notice, constructive notice results from evidence of knowledge imputed to the party supposed to have such Notice, and no protest or objection to the change is registered.

**Quantum Meruit:**

No asset created could be owned gratis by a party to a Contract i.e. without consideration. Where price is not agreed it must be valued for its fair price at market rate. This is called “Quantum Meruit” a Latin Phrase which means “As much as he deserved”.

### **Exclusion Clause and Exemption Clause :**

These clauses seek to restrict the liability of the drafter. Such exemption clauses are interpreted very narrowly as they are not illegal unless are against the public policy. A clause such as “**No damage for delay whatsoever**” is not unconscionable, but ‘**whatsoever**’ cannot include ‘**negligence**’. It cannot be drafted to seek immunity against liability under Law. In contract of adhesion like Construction Contract, Employer often inserts, **Exclusion clause** limiting its liabilities and reciprocal obligations. However, freedom to contract empowers the drafter to limit liabilities and, therefore, Exclusion is enforceable giving it as narrow meaning as possible to the excluding situation.

### **Dragnet Clause:**

A clause when drafted takes in its stride, spelt and unspelt obligation whether implied or otherwise to encompass all possible acts of omission by Employer is called **Dragnet clause**. Typical one carries phrase like “anything excluded or omitted is deemed to be included to complete the intention of Employer in securing the work to his satisfaction”. Courts differ on enforceability of such wide ambit Dragnet clause.

### **Liquidated Damage:**

When a job is to be performed in stipulated time which is agreed to be essence, is delayed, the Employer provides for recovery of pre-estimated compensation on the basis of period of delay, limiting to total recovery of named amount or percentage of contract price. The word **Liquidated** means equivalent to pre-ascertained and recovery of fixed amount. Such amount has to be reasonable.

### **Extension of Time:**

When contract is to be performed in stipulated Time and further time is required to be granted to have the performance of the contract completed, it is called Extension of Time (EOT). It may be required for the default of Employer or Contractor. Extension of Time due to default of Employer resulting in extra cost to the Contractor, the same is recoverable as compensation for delay damages. In event of cause of extension of time attributable to the Contractor he has liability of payment of Liquidated damages. For Employer's fault, the Liquidated Damages will be watered down proportionately. In any event, compensation arises from breach of contract and must be established to the satisfaction of Courts or Arbitrators, and reasonableness of compensation need be established.

### **Procedural Rules of Interpretation**

**Objective** – To find out intent of parties

**Tools** – Supplementary contract, if any including Parole Evidence Rule, Documents cited referred in the contract and Conduct.

### **Standard of Interpretation:**

When a meaning is to be chosen from various possible meanings of a provision of contract, following standards are applied to interpretations

- Reasonable interpretation against unreasonable one
- Equitable interpretation against inequitable
- Liberal against strict interpretation
- Interpretation that endorses legality
- One that lends validity, promotes good faith, fair dealing
- One that helps performance over one that causes hindrances

### **Maxims of Interpretation:**

- ***Plain meaning*** : Words are to be understood in their plain meaning.
- ***Ut res magis valeat quam pereat*** : If words can have two meanings, one which will make the statement valid must be chosen in preference one that makes it void and ineffective.
- ***Ex ante-cedentibus et consequentibus fit optima interpretation*** : An agreement must receive the meaning, its language will give, which will ensure intention of the parties. (Meaning will have to be collected from whole of the contract.)
- ***Expressio unius*** : If the description of an item contains certain obligations for some sub-works, it is deemed excluded, if it is omitted for similar item. For example, item of Excavation in scope of work may include free lead or dewatering and the same is excluded in description of some other Excavation item. In that case, dewatering and lead has to be paid separately for that item where it is excluded.
- ***Contra proferentum*** : Words of written documents are to be construed against the drafter and in favour of the contractor, if two meanings can be attached or uncertainty is created. For example, specification indicating **either or**, the choice of the contractor will have precedence over that of the Employer.
- ***Ejusdem Generis***: The word like ‘etc’ or ‘similar’ must be construed narrow to genus of similar job. For example, “External Works” like Roads, drainage, compound Wall etc. does not include Club House or Swimming Pool in scope of work of cluster of buildings by interpreting “etc.”

- **Patent Ambiguity** is a conflict, which is obvious on the face of documents and **Latent Ambiguity** has apparently clear language where ambiguity surfaces in course of dealing (Ship Peerless – 1864).

## **Major Areas of Construction Claims.**

### **Delay Damage Claims:**

When a construction project has time over run it is said to be delayed. This results in extra expenditure to the Contractor and denial of returns on investment to the Employer. How delay is to be apportioned is result of analysis of various facts. It is required to be analyzed under Excusable and Non Excusable delay, Concurrent delay and Critical and Non Critical delay. Tools of analysis are various CPMs, Time Impact Analysis, and effect of Productivity factors. Formula like Hudson, Emden, and Eichleay can be used. Study of applicable cost component has to be made.

### **Differing Site Conditions Claims:**

If Site investigation done by the Employer and represented through the contractual obligations differ either by description or bore data or defies assumptions of prudent contractor, it is said to be differing site condition. Further there are two types of D.S.C. claims viz. D.S.C. I and D.S.C. II. The former is apparent distortion of actual condition being different from condition represented. The latter is an assumption of prudent contractor being not held valid due to unexpected behaviour of the site. Both these claims are compensable in terms of time and cost.

### **Acceleration Claims:**

A construction contract may be completed before stipulated time or projected time. This is achieved by compromise with optimum productivity. Hence it

results in fall in profitability. Accelerations are of three types- **Ordered Acceleration, Constructive Acceleration and Volunteered Acceleration.**

When Engineer orders compression of programme to have early completion, it affects planned productivity resulting in extra expenditure which is compensable. If Contractor accelerates to avoid L.D. it is called Constructive Acceleration. If Contractor accelerates for availing other opportunity it is volunteered acceleration. Both these types of accelerations are non-compensable.

**General Note on Claims:**

Preparation, Computation and Presentation of Claims and their defense is subject matter of **Applied Construction Law**. For each of above concepts and many more, lot of research is done and is on way, aided by *mathematical models, computerized programme and Artificial Intelligence* backed by few thousands of court decided cases.

***Disclaimer:***

The above meanings and interpretations of the words, phrases and legal concepts are meant for acquaintance with Construction Law and not to be considered as accurate expression of law.

**KIRTY DAVE**