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A Critique on the Doctrine: Time is of Essence of a Construction Contract in the Context of International Commercial Arbitration

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ABSTRACT

The Real estate industry in India is growing and emerging with new trends, making it one of the most prominent areas for commercial transactions. It also leads to instances under which contracts are entered into time and again to carry out projects that stem from the policy making wing of our country for better infrastructure.

The nature of these contracts are not merely for the performance of duties and responsibilities by the parties but also deal with clauses for arbitration as a mechanism to settle disputes that may arise during the course of the contract. This clause is present to ensure that the parties maintain their relations for professional future prospects.

The recent trends indicate the growing need for ensuring a proper legal mechanism for the parties who bear the loss as a result of non adherence to the terms and conditions of the contract. This loss is mainly incurred when there exists a non performance of the work stipulated in the contract or failure of adherence of time in the contract.

This paper analyses the several instances of disputes in construction contracts that fall under International commercial arbitration and time limitations in passing of the arbitral award for upholding the element of time being of essence in the contract..

I. INTRODUCTION

International commercial arbitration is a consensual, contractual process.[2] The right or duty to arbitrate normally arises from an agreement to arbitrate future disputes or an agreement for the submission of an existing controversy to arbitration.[3] The arbitration agreement determines and limits the issues to be decided.[4] Arbitration is matter of contract and a party cannot be required to submit to arbitration any dispute which party has not agreed to submit.

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[2] Hoellering, International Arbitration Agreement : A look Behind the Scenes, 53 Disp. Resol. J. 64,64(Nov. 1998).
[3] *AT &T Technologies, Inc v. Communications Workers of America*, 475 U.S. 643, 106 S. Ct 1415, 89 L. Ed. 2d 648.
[4] *PaineWebber Inc v. Chase Manhattan Private Bank (Switzerland)* 260 F. 3d 453 (5th Cir. 2001).

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The mechanism of International Commercial Arbitration is a transnational dispute mechanism which refers to the legal relationship that must be considered commercial, where either of the parties is a foreign national or resident, or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands. The term commercial should be construed broadly as having regard to the manifold activities which are an integral part of international trade.[5]

The parties have the power to set their own time limitations in their arbitration agreement.[6] Questions involving contractual time limitations are for the arbitrators to decide, since they usually require a construction of the agreement.[7] According to Rule 2 of the SIAC Rules, 2016 the notice and calculation of period of time is mentioned.

Whether a short or long time period is desired will depend upon a party's situation. For example, a buyer may wish a clause providing for a brief time period to resolve the dispute. [8]

In order to increase the enforceability of the existing agreements, the law sees relevance. The aspect of time being of essence is of the contract is a fundamental factor in the context of international commercial contracts. It is often given more importance and vantage when the parties to a contract state and agreed upon the terms by highlighting the importance of 'time' factor. The aspect of time being the essense of contruction contracts is analysed in the substance of the paper in the context of international commercial arbitration.

II. ANALYSIS

According to the Halsbury laws of England, which reads as follows: "… where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken."

It is observed that "When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of

[5] *R.M. Investments & Trading Co. Pvt. Ltd. v. Boeing Co.,* AIR 1994 SC 1136.
[6] Friedland, Arbitration Clauses for International Contracts, 87-89 (2d ed.2007) ; Smit, Class Actions and Their Waiver in Arbitration, 15 Am Rev. Int'l Arb. 199 (2004); Dunham, The Arbitration Clause as Class Action Shield, 16 Franchise L.J. 141 (1997).
[7] *Snap- on – Tools Corp v. Vetter*, 839, F. Supp. 468 (D mont. 1993).
[8] McLaughlin and Scanlon, Updated: A master Checklist for drafting Contract Clauses in Transnational Matters, 27 Alternatives 97,97 (2009).

the essence of the contract"

The courts have taken various interpretations to determine whether time is essence of the contract. Whether or not time is the essence of a contract depends on the facts and circumstances of each case.

The Calcutta High court observed whether or not time is the essence of a contract depends on the facts and circumstances of each case having regard to the provisions of section 25 of the Indian Contract Act. It is well established that the intention of the parties together with the circumstances has got to be looked into to ascertain whether the parties intended in that agreement for sale in question in a given case the time would be essence of the contract.

The general presumption for sale of immovable property is that time is not the essence. The contract dealt with the sale of land and the Assam and Nagaland High Court declared that time is not the essence in such contracts. The relevant portion of the judgement is as follows:

> *"8. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to take time of the essence of the contract. Since the agreement is for sale of land and more particularly in view of the stipulations regarding time of executing the contract as found in Ext. 1 and quoted above, I am clearly of the opinion that in the instant case time was not of the essence of the contract. I therefore hold that the finding of the learned Subordinate Judge to the effect that time was of the essence of the contract in the instant case is erroneous.*
>
> *9. Even though time was not originally of the essence of the contract, the Defendant Appellant could by notice served upon the Plaintiff Respondent call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the requisition, the contract would be treated as cancelled. No such notice was issued by the Defendant to the Plaintiff."*

As held in the case of Kailash Nath Associates v. Delhi Development Authority & subsequently reaffirmed in the case of Kailash Nath Associates v. Delhi Development Authority dealt with the aspect of Waiver of clause that 'time was of essence' by the conduct of the parties. This could be interpreted to mean that when the conduct of the parties itself indicate a waiver of the clause that time was of essence, the arbitrator cannot be pointed out to have fault or error in acknowledging the same.

However, the award cannot be set aside if the interpretation of terms in the contract has not been done in favour of the parties interpretation. It was observed by the Supreme Court that under Section 34, the courts should not set aside an arbitral award merely because they do not

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agree with interpretation of the agreement given by the arbitrator, rather it has to be shown that tribunal's findings were based on no evidence or irrelevant evidence or was perverse. Thus, the setting aside of the arbitral award requires that the ground of fact finding and evidence was absent in declaring the award by the arbitrator.

According to the Supreme Court of India, it was held that where time has not been made the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed.

When parties fail to perform their part of the bargin, it amounts to hardship for which a variation can be requested in order to perform the work diligently. There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished and

i. the events occur or become known to the disadvantaged party after the conclusion of the contract;

ii. the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

iii. the events are beyond the control of the disadvantaged party; and

iv. the risk of the events was not assumed by the disadvantaged party"

Variation as a concept has been incorporated under the UNDROIT principles 2016 in terms of 'hardship', which is defined under Article 6.2.2 as, ", and it is pertinent to note that a hardship occurs only when there are events which fundamentally alters the equilibrium of the contract, provided that those events meet the requirements which are laid down in Article 6.2.2. The failure to estimate the scope of work in the start cannot allow them to claim it as a variation later. To substantiate the same, reliance can be placed on the case of Walker v Randwick Municipal Council, wherein the court held that, "The contract is not to perform the work set out in any plan; all work necessarily required for the construction must be done whether set out in the plan or not."

In another case of La Cie de Construction et de Bois de Ste-Agathe v. Dame Lambert, it was held that the errors in calculation by the contractor do not justify any increase in the contract price. It is an established principle that a contractor who seeks an extension of time because of an excusable delay has the burden of establishing the existence of an excusable cause of delay

and also of establishing the precise number of days by which the excusable cause actually delayed him. This imposes upon the contractor the task of demonstrating that the excusable delay adversely affected the work on the critical path of construction and that he had exercised all reasonable efforts to overcome or dilute the damaging effects of those delays.

When variation is awarded to the requesting party, the grant for extension of time can be awarded as seen in the case of Henry Boot Construction Ltd. v. Malmaison Hotel Ltd., it was held that only if the employer considers the cause of the delay to be fair and reasonable, he is required to grant an extension of time.

III. CONCLUSION

When time is the essence of a contract the mehanisms available to resolve the same include the remedy for extention of time and variation. Another resort available is fot the party to add a counter claim. It is under Rule 20 of the SIAC Rules 2016 that a counter claim may be filed by a party and the procedure for the same has been followed. Rule 20.5 of the SIAC Rules provides that a claim or counterclaim may be amended in such a manner that the amended claim or counterclaim falls within the scope of the arbitration agreement. Clause 12 of the contract containing the arbitration agreement provides that all disputes arising out of the contract shall be before an arbitral tribunal and thus the breach of clause 15 of the contract falls within its scope. The amendment must seek to invoke a claim that falls within the scope of the arbitration agreement.

Where specific rules on the admissibility of counterclaims are lacking, arbitral tribunals are required to render a respective decision by using their power of discretion. When doing so, arbitral tribunals should always bear in mind the pitfalls which may affect the effectiveness of their arbitral awards. The ICDR, SCC, SIAC, and UNCITRAL Rules uniformly provide that a party may make an amendment unless the tribunal finds that the delay in making the claim or defense will prejudice the other party or the amended claim falls outside the jurisdiction of the tribunal.[9] Keeping in mind the essence or Rule 41.2 of the SIAC Rules, 2016, which talks about fair, expeditious and economical conclusion of arbitration, in the present instance, by not allowing the counterclaim, the tribunal's decision would lead to multiplicity of proceedings which would not be in the interest of justice. Therefore the remedy is in furtherance of justice and the claim to decided falls squarely within the ambit of the arbitration agreement.

[9] ICDR Rules, Art. 9; SCC Rules, Art. 30; SIAC Rules, Rule 20.5; UNCITRAL Rules, Art. 22. For commentary on Art. 22 of the 2010 UNCITRAL Rules, see DAVID D. CARON & amp; LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES, A COMMENTARY (2d ed., Oxford University Press 2013), 468-489.

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It is thus concluded that in arbitral proceedings arising out of construction contracts are primarily due to the factors of costs, time, completion and reputation. In view of the same it is essential that the award be delivered in a timely manner which is generally dependent on elements as to when the arbitration notice is sent, how efficiently the arbitrators are appointed, evidence on record, etc.

However, it can be safely concluded to state that in more cases than one, the arbitrators have acknowledged that time is of the essence of the contract and delivered the award appropriately.

Construction contracts thus seek relevance in the field of international commercial arbitration.

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