

## Conditions Precedents & Damages in Infrastructure Contracts

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In most of the Build operate Transfer types of contracts (BOT), we normally see a chapter called conditions Precedent. These conditions precedents impose certain obligations on both the parties which are to be fulfilled or waived off for the starting of the project work by fixing the appointed date. Many a times arbitral tribunals get confused in differentiating the conditions precedents from the other contract terms and conditions. Conditions precedent are the conditions which are to be full filled by the parties to the contract before starting the main contracts. That means, the main contract comes into force only when the parties either fulfill all the conditions precedents or waive them off. Let us examine in this article the scope and law relating to conditions precedents in the light of Indian Contract Act.

We are all aware that an offer of a party should be accepted unconditionally by the other party to the contract to achieve a concluded contract. In case if the accepting party accepts the offer with a condition then the said conditional acceptance does not result in a concluded contract, it becomes a counter offer. Only if the other party accepts the counter offer without any condition then it becomes a concluded contract. But at the same time Indian Contract Act expressly recognizes contingent contracts.

Indian contract Act S.31 defines contingent contracts as follows:

The said section makes it clear that the said contract gets the status of a concluded / enforceable contract only after the said conditions are fulfilled. If the conditions precedent is neither fulfilled nor waived by the parties, the said second part of the contract will never have any force or ability to get enforced. But the arbitrator or the Judge where ever contract expressly categorize the conditions as conditions precedent, should evaluate the provisions of the contract and decide whether those conditions are conditions precedent or

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conditions subsequent. Conditions subsequent are the conditions which are to be fulfilled only after the starting of the contract.

In such contracts, if the contracts get terminated or pre-closed prior to appointed date/ prior to fulfilling the conditions precedent by the parties, the parties to the contracts do not get the right to claim damages. In T.V. Kochuvareed case<sup>2</sup> Travancore – Cochin High Court held as follows:

*“The next aspect to be considered is whether the plaintiff is entitled to get any amount by way of damages in this case. Here again the question of damages can arise only when there is a subsisting contract. We have definitely found that the agreement under Ex.D was only a contingent contract and that on account of the failure of the contingency resulting in the contract becoming impossible of performance, the whole contract fell through. Thus it cannot be said that there has been any breach of contract on the part of defendant 1, with the consequent liability for payment of damages. “*

Hence, if the contingency mentioned in the contract is not fulfilled the contract becomes impossible of performance and hence there can be no breach from that contract and hence there can be no damages also.

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<sup>2</sup> In T.V. Kochuvareed and another Vs P Mariappa Gounder and others 1953 SCC Online Ker 130