The Prevention Principle, Time at Large and Extension of Time Clauses

Most construction and engineering contracts require the contractor to complete the works by a specified date failing which the employer will be entitled to recover liquidated damages for delay at the rate stated in the contract. The contractor will only be relieved of its obligation to complete by the contractual deadline if an event occurs for which the contractor is entitled to an extension of time, but difficulties can arise if the employer (or the engineer/architect on its behalf) causes delay to the completion of the works and the contract does not include a term providing for the award of an extension of time. Such a delay caused by the employer is often referred to as an 'act of prevention'.

The prevention principle and time at large

The 'prevention principle' is a long established principle under English law whereby a party may not enforce a contractual obligation against the other party where it has prevented the other party from performing that obligation. The prevention principle is closely aligned to the principle that no party may benefit from its own breach of contract.

In construction contracts, an employer's act of prevention could be either a breach of contract (such as a failure to give access to site or a delay in issuing drawings or approvals), or a valid action (for example instructing the contractor to perform additional works, or to suspend the works). In either case, if the contract does not provide for how the delay is to be dealt with, the employer will not be entitled to require the contractor to complete the works by the original contractual deadline and there will be no means in the contract for fixing a revised date. In such circumstances the original contractual deadline falls away and time becomes 'at large'.

If time is at large, the contractor is only required to complete the works within a reasonable period of time. However, this does not mean that the contractor has as much time as he wants to complete the works. The question of what will be a reasonable time for completion will be a matter of fact to be decided at the time the question arises and in light of all the circumstances. While the extension of time provisions in the contract, which will by that time be defunct, may well serve as guidance, there will invariably be a dispute between the employer and the contractor as to what is a reasonable time for completion.

Where time is at large, there will no longer be a fixed date from which liquidated damages can run and therefore the employer will lose its right to claim liquidated damages. This does not mean that the contractor is then relieved of all liability for delay; the employer will still be entitled to claim general damages if the contractor fails to complete the works within a reasonable time.

A claim for general damages could cause difficulties for both parties. The employer will only be able to recover its actual, proven, losses arising as a result of the contractor's delays. While it is thought that an employer's claim for general damages cannot exceed the level of liquidated damages specified in the contract, as of yet there has been no authority on this issue and therefore remains arguable.

1 Shawton Engineering Ltd v DGP International Ltd (2005)
Extension of time clauses

Given the complexity of construction projects, it is easy to see that without an extension of time clause an employer would almost invariably commit an act of prevention at some point during the contract.

Most standard forms of contract provide that the contractor will be entitled to an extension of time in the event of instructed variations or changes, suspensions, force majeure and changes in law. Depending on the type of project, and the parties' respective bargaining power, the contractor may also succeed in adding certain other neutral events to the list of events giving rise to an extension of time.

In addition, a provision such as that at Clause 8.4 (c) of the FIDIC Silver Book should be included in the list of events giving rise to an extension of time to avoid the risk of time being set at large because of the employer's acts of prevention:

"any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site".

Wording such as "or any other event beyond the contractor's control" is unlikely to be adequate as it has been held that it will not cover delays caused by the employer giving late possession or late information\(^2\) and therefore will not protect against all acts of prevention.

Conclusion

If time becomes at large under a construction contract as a result of an employer's act of prevention, this is likely to cause problems for the contractor as well as the employer. A well-drafted extension of time clause will benefit both parties by:

- Maintaining a contractual time for completion;
- Preserving the employer's right to liquidated damages (and therefore giving the contractor certainty as to its financial exposure in the event of delays); and
- Giving the contractor relief from its strict duty to complete the works on time in the event that delays are caused by specified neutral events.

In next month's Construction Dispute Avoidance Newsletter we will look at whether a contractor can rely on the prevention principle to avoid paying liquidated damages where it has lost the right to claim an extension of time by failing to comply with the contractual notice requirements.

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\(^2\) Wells v Army & Navy Co-operative Society (1902)