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# Delay and Damages in Construction Contracts: A Report from the 4th SCL-CIArb-India International Conference on Construction Law & Arbitration

Ashish Virmani · Tuesday, February 18th, 2020

A 3-day International Conference on Construction Law & Arbitration was held in December 2019 in New Delhi, co-hosted by the Society of Construction Law-India and the Chartered Institute of Arbitrators-India. During the course of their presentations, the panelists discussed various topics ranging from trends in construction law in the context of arbitration across global jurisdictions to approaches to cross-examination and the role of quantum experts in construction arbitration.

Considering that almost 68% of all construction law disputes pertain to delay, this post focuses on the panel discussion addressing the issue of delays in construction contracts, its treatment by arbitrators, and courts entertaining challenges from arbitral awards. This panel was chaired by Hon'ble Dr. Justice S. Muralidhar, Judge, Delhi High Court and also consisted of Mr. David Brynmor Thomas QC, Mr. Anirudh Krishnan, Mr. Sundra Rajoo, Mr. Mohan Pillay, Mr. Philip Lane Bruner.

**Concurrent Delays and Consequences**

Mr. David Brynmor Thomas QC focused his presentation on the vexed issue of 'concurrent delays' in construction contracts and its treatment across various jurisdictions. The different approaches followed by arbitrators and courts across different jurisdictions are as under:

i. **Malmaison approach:** In the context of an appeal against an interim arbitration award, the Technology and Construction Court (TCC), United Kingdom (UK) in *Henry Boot Construction Ltd. v. Malmaison Hotel*, [1999] 70 Con LR 32 adopted this approach. This approach holds that if there are two concurrent causes of delay, one of which is a relevant event beyond the control of the contractor (say extremely inclement weather), and the other is not (say shortage of labour of the contractor), then the contractor is entitled to an extension of time for the period of delay caused by the relevant event, notwithstanding the concurrent effect of the other event; but is not entitled to recover any time-related costs. According to Mr. Brynmore, this principle is also followed under Swiss law and is reflected in Article 44 of the Code of Obligations of the Swiss Civil Code.

ii. **Apportionment approach:** The Scottish Courts in *City Inn v. Shepherd Construction Ltd.*, [2010] CSIH 68 declined to follow the *Malmaison* approach, and laid down the apportionment

approach. Under this approach, where there are two competing causes of delay, neither of which is dominant, the delay should be apportioned between the contractor and the employer, based on the relative culpability of each of the factors in causing delays. This approach is also followed in other jurisdictions, such as in Hong Kong and the United Arab Emirates ("UAE"). In Hong Kong, the High Court in *Hing Construction Co Ltd v Boost Investments Ltd*., [2009] BLR 339 expressly approved and followed the *City Inn* judgment of the Scottish Courts. Similarly, Articles 287, 290 and 291 of the UAE Civil Code embody the principle that the liability for the delay ought to be apportioned between the parties in accordance with their respective degrees of fault.

It is noteworthy that while the *Malmaison* approach has been consistently upheld by English courts, yet there have been various decisions of the English courts factually distinguishing this approach. One of the examples in which the English courts have chosen to distinguish the *Malmaison* approach is *Saga Cruises v. Fincantieri*, [2016] EWHC 1875 (Comm.) (English High Court). In *Saga Cruises*, it was held that a contractor should not be entitled to the benefit of an employer's delay event if it was already in delay and the employer's event had no actual impact on the completion date.

It may thus be concluded that while various jurisdictions view concurrent delays differently, arbitrators/courts in the same jurisdiction may still apply settled principles of law differently, depending on the facts and wording of each particular extension of time ("EOT") clause.

**Powers ?f Arbitrators to Read in Exceptions to 'Exclusionary Clauses' – An Indian Law Perspective**

The presentation of Mr. Anirudh Krishnan has to be viewed against the backdrop that Indian government contracts provide the Government with an upper hand to set the terms of a contract while dealing with contractors. This results in widely-worded exclusionary clauses, *i.e.* even if there is delay attributable to the employer, no liability for damages can be affixed on the contractor. Thus, it was imperative that the courts empower arbitrators to carve out exceptions to such clauses in order to avoid undue advantage to the employer on account of its own delay. These exceptions were broadly laid down in the following judgments:

i. *General Manager, Northern Railways v. Sarvesh Chopra,* AIR 2002 SC 1272 (Supreme Court of India (SC)): A contractor (the non-defaulting party) would be entitled to claim damages provided that at the time of acceptance of 'extension of time' for performance of the contract, the contractor gives notice of his intention to claim damages for the delay.

ii. *N. Sathyapalan v. State Of Kerala,* (2007) 13 SCC 43 (SC): If a delay is attributable solely to the employer, and is also significant, then a contractor would be entitled to damages, notwithstanding an exclusionary clause.

iii. *Asian Techs Ltd. v. Union of India,* (2009) 10 SCC 354 (SC): Exclusionary clauses would not be binding on any judicial authority, and would only prohibit the employer from entertaining any claim made by the contractor.

iv. *Simplex Concrete Piles v. Union of India,* CS(OS) No. 614A/2002, judgment dated 23.02.2010 (Delhi High Court): Any exclusionary clause itself is contrary to law and the public policy of India, and therefore, any such clause would be void *ab-initio*.

Moreover, under section 54 of the Indian Contract Act, 1872, if a defaulting party has derived `any advantage under a contract, the party in breach cannot retain the benefit and would have to compensate the non-defaulting party.

**It is relevant to note that the Supreme Court of India in** *Central Inland Water Transport Corporation v. Brojo Nath Ganguly*, AIR 1986 SC 1571 **had held that** the courts will not enforce and will strike down an unfair and unreasonable contract/clause entered into between parties who are not equal in bargaining power (followed in *Pioneer Urban Land & Infrastructure Ltd. v. Govindan Raghavan*, Civil Appeal No. 12238 of 2018, judgment dated 02.04.2019).

Mr. Philip Lane Bruner, Esq. also echoed the sentiments of Mr. Krishnan and shared his experience that courts seeking justice would not ordinarily permit an employer to get away without compensating the contractor on account of its delay.

**Time is of the ?ssence in Construction Contracts**

While there is no gainsaying in stating that time is of the essence in construction contracts, Mr. Sundra Rajoo shed light on the practice in the UK to have standard contractual terms in construction contracts requiring the work to be carried out 'regularly and diligently'. In such cases, an obligation is cast upon the contractor to proceed with the works continuously with appropriate physical resources in accordance with the contractual requirements as to time, sequence and quality of work. Any delay in progress may also entitle either party to suspend or terminate the contract. However, if there are certain clauses in the contract which make issuance of a notice as a pre-condition to invoking claims related to adherence of time schedule (as is the case with various clauses in the FIDIC standard contract), such clauses would be read to be mandatory, before any claim may be made qua the breach of the term. Failure to strictly abide by the notice clauses may result in the employer being completely discharged from his liability. It may, however, be noted that this principle is not universal in nature and different jurisdictions treat notice requirements differently.

**Foreseeability of 'Ground Conditions'**

Mr. Mohan Pillay thereafter focused his presentation on the foreseeability of ground conditions by a contractor, and the expected due diligence/ independent assessment to be carried out by such contractor at the time of bidding to be able to assess the nature and scope of work, failing which the contractor would not be entitled to damages. To buttress his submissions, Mr. Pillay relied upon the judgment of the English TCC in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*, [2014] EWHC 1028 (TCC). In *Obrascon*, it was held that an experienced contractor must make its own assessment of all available data and come to its own conclusions, rather than to 'slavishly' accept the information from the employer. Failure to carry out an independent assessment of grounds conditions would disentitle a contractor from claiming damages, and would entitle the employer to terminate the contract for delay on the part of the contractor attributable to ground conditions.

**Consequences of Delay – Nature of the Types of Claims**

Subsequently, Mr. Bruner highlighted that loss may be claimed by the employer/contractor under the following non-exhaustive heads on account of delay:

i. Employers: Damages for extended financing and project administration costs, extended use of facilities by contractor, loss of profits;

ii. Contractors: Additional cost of labour and field supervision, extended equipment and tool financing costs, extended overheads, lost profits on the contract & on other contracts.

However, the grant of damages is actually dependent on the fulfillment of the twin test of 'beyond control of the party' and 'unforeseeable' factors leading up to delays. In an American case *Mundy v. New York*, 27 N.Y.S. 469 (1894), it was held that while a flood was outside the control of the party, the flood delay was inexcusable because similar flooding had occurred previously and was thus foreseeable. These principles also form the basis of the UNIDROIT principles and are thus, universally accepted.

**Conclusion**

While on a normative level, it may appear that there is a disparity in the approaches of various jurisdictions on issues pertaining to construction contracts, a closer examination would reveal that the niche rules applicable to them are in principle uniformly applied by courts/arbitrators across jurisdictions**.**

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