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Delays and Disruptions in Construction – Useful tips for contractors on getting exemptions from delay-related liabilities

In this second article of our four-part series, we discuss the dilemmas and risks that contractors most frequently have to face in connection with delays, and we address the issue of when the performance of a service is considered complete and what role contract modification and disruptions can have in excusing a contractor's delay. Finally, we list the conditions that must be met so that exemption can be sought successfully.

Identifying and modifying deadlines

[1] Deadline or schedule: In terms of late performance penalties and liability for damages, there is a key difference between contractual deadlines and schedules. If a construction contract includes a schedule and interim deadlines, late performance penalties will be related to the contractor's failure to meet interim deadlines through a fault for which it is liable; if the parties also want to use penalties to secure compliance with the schedule, they must agree on this expressly in writing. (BH2010. 276.)

With this difference in mind, it is advisable to make a clear distinction between the schedule (which basically serves information purposes only) and deadlines that are subject to penalties. For the same reason, deadlines that are harder to keep should be stated as schedule deadlines rather than contractual (interim) deadlines.

It is important note, however, that the failure to meet a schedule will not necessarily be free from sanctions. The schedule stated by the contractor will be used by the developer to organises its own activities and the activities of other contractors. If the contractor fails to keep the schedule and the contractor has to rearrange its own

activities and the activities of other contractors as a result, it may seek to recover its related expenses from the contractor as damages.

[2] **The form and consequences of deadline modifications:** Under Section 6:191 of the Civil Code, the parties to a contract can modify the contract terms with mutual agreement. Just as a construction contract itself, its modification must also be reduced to writing. Having a contract or its modification in written form is usually not a problem, but the signatures can often be wrong in that they are not given by the persons who are authorised to sign on the given party's behalf, or only one person signs when joint signing is required, etc. This can lead to validity problems, which can usually be managed by later acknowledging the signatures as valid. However, there will always be some risk involved, and therefore it is advisable to pay attention to signing properly.

Contractors should be aware that when a deadline is modified, problems that existed before the modification and were known to disrupt performance may not be used as defence after the modification – the general rule says that this is so even if the contractor could not fully assess or in fact underestimated the delaying effect of the disruption before it signed the modification.

Courts generally presume that the contractor agreed to the new deadline in the knowledge of the relevant disruptions and believed that it could meet the deadline even with the existence of the disruption. This practically means that "in order to be exempted from liability for its delayed performance, the contractor may not rely on disruptions that arose before the modification of the contract if the contractor proposed a final deadline for the performance of the contract in the knowledge of such disruptions" (standard-setting judgment No. 14/2014).

Identifying the date of performance

[3] Completing, or refusing completion of, technical handover: A contractor will be considered to perform the work within deadline if the handover starts within the performance deadline stated in the contract. The takeover may not be refused due to a defect where the defect itself or its repair does not prevent the building from being used for the purpose intended. Additionally, if the developer does not complete the handover procedure, the legal consequences of performance will apply from the date when it takes possession of the building. This has particular importance because the days of delay are reckoned from the date of performance.

Consequently, if the developer, citing flaws and defects, refuses to complete the handover after the contractor's report of practical completion, the key matter that will have to be examined is whether such flaws and defects make the building unfit for use, and if so, to what extent and with regard to what particular parts.

If the flaws and defects do not make the building unfit for use, it is advisable to report practical completion even if there is a dispute with the developer. If the developer refuses to cooperate despite the building being fit for purpose, this will create a delay on its part, which in turn means that the contractor cannot be in delay. Additionally, if the contractor is in fact right that the building is at a level of completion that makes it fit for purpose, the date of performance will probably be the day when the handover procedure could be started on the basis of the contractor's report.

If the developer flat-out refuses to complete the handover procedure but takes possession of the building anyway, the date of performance will be determined on the

basis of the date when the developer takes possession, plus the developer's omission (refusal to take over without a legitimate reason) will also be held against it.

[4] **Divisibility and indivisibility:** The primary relevance of the question of whether the work performed by the contractor can be divided into parts is in the potential for reducing a penalty.
The general rule is that the work performed under a construction contract is indivisible. This will not apply if the parties allow for partial handover procedures in their contract, where the performance can be divided on the basis of the parts that are subject to partial handover. **It is important to note that a service will only be considered divisible if the contract not only includes interim deadlines but it also has express provisions concerning partial handovers.** Another potential argument in favour of divisibility can be if the contract does not include such an express provision but the parties do in fact carry out several partial handover procedures. However, the option of issuing partial invoices or the fact that the construction work can only be performed in several distinct phases will not make the service divisible (BH1987.4.133, BH1997. 493, BH1983. 454).
Where the work is divisible, the penalty payable for a delay will be calculated on the basis of the fee payable for the relevant part rather than the full contract fee. If the parties did not agree on partial fees for each particular phase, the penalty calculated on the basis of full contract fee can be reduced (BDT2015. 3415.).

Disruptions

[5] **Disruptions caused by the developer (or a contributor):** If the developer (or one of its other contractors) fails to take actions or make declarations that are necessary so that the contractor can perform its contractual obligations properly, the developer will be considered to be in delay, which means that the contractor cannot be. Typical cases of delays by developers include the failure to deliver permission plans or the work site (BDT2004. 983.). Additionally, a developer can be in delay if it does not make a declaration that is necessary to start or continue the work.
In order for the contractor to be able to excuse its own delay successfully by citing the developer's delay, it will have to inform the developer about the disruption and the actions necessary in response as soon as possible.

[6] **Causes beyond the contractor's control (vis maior):** In the absence of an express contractual provision, additional cases where a contractor can be excused for its delay include those where the delay is due to a circumstance that is beyond the contractor's control, could not be foreseen when the contract was signed, and the contractor cannot be reasonably expected to avoid the circumstance or to avert the damage.
Such circumstances include unforeseeable events that are humanly not possible to avoid and can render performance temporarily impossible, such as:

- extreme weather and natural disasters, such as floods, fires, earthquakes, epidemics, frost damage, high winds and lightning strikes. It is important to note that inclement weather will not in itself serve as grounds for the contractor to be excused, because it has to anticipate such weather conditions to some degree. For example, if it performed the work in the autumn and it cannot prove that there were unusual weather conditions, it will not be able to successfully cite high levels of precipitation as a valid excuse for its delay (BDT2011. 2578).

- certain political events, such as wars and disruptions of shipping routes;
- certain government measures, such as measures introduced in response to an epidemic, import or export bans and foreign exchange restrictions;
- material service outages (such as a long-term power grid outage);
- radical changes in the market (such as drastic price increases or hyperinflation) might, in exceptional cases, serve as grounds for the contractor to be excused (although this is disputed by some).

Limitation of liability in the contracting phase

[7] As the discussion above shows, a contractor has very limited opportunities to obtain exemption from its liability for a delay, and therefore it is advisable to review what options are available for the limitation of liability for damages.

[8] **Options for limiting liability for damages**: a contractor can limit its liability
- in terms of its amount – by stating a maximum amount for damages (e.g. the total contract fee);
- by stating a daily limit (lump sum damages);
- by stating that recovery of consequential damage and/or
- lost profits may not be sought.

[9] **Vis maior clause:** A vis maior clause is also a good solution for managing liability for damages and penalties. If the parties include a vis maior clause in their contract, it should list all qualifying events and circumstances. There are cases where a more detailed description is needed and simply identifying the vis maior event ("flood") is not enough; all relevant circumstances and intensities must also be stated.
In the case of the weather, it is not sufficient to list "inclement weather", because this is not precise enough, and it always the contractor that is exposed to risks associated with uncertainties. The parameters that qualify an event as a vis maior event should be identified – such as the quantity or annual frequency of rain (e.g. rainfall levels every three years), or the particular speed levels in the case of high winds.
It is important to note that vis maior events that are known at a given time (such as the COVID epidemic or Russa's invasion of Ukraine) or any unexpected turn of events associated with them cannot be used later as grounds for an exemption in the absence of an express contractual provision. **Therefore, a vis maior clause should include a provision stating that any unexpected turn of events in, or any unexpected negative consequences of, existing and known vis maior circumstances also qualify as vis maior causes.**

[10] **Specification and timing of the developer's services:** The ability to prove the developer's delay (disruption) will be greatly aided if the contract clearly states what the developer is expected to provide (declarations, services, measures) in order that the contractor can perform the works and when it is expected to provide them. The expected timing of the developer's services can also be stated in the contractor's schedule.

Conditions of successful exemption

[11] **Reporting disruptions and proposed response measures:** In the performance of claim management tasks, it is advisable to keep in mind at all times that the developer is usually has an advantage over the contractor due to the easier burden of proof. This is particularly true of disputes associated with delays. As the failure to meet a deadline *ab ovo* qualifies as a breach of contract regardless of any other circumstances, the developer only has to demonstrate two simple facts: the contractual deadline and the actual date of performance. The time between the two dates is the delay, and the contractor is required to pay a penalty or damages with regard to it, unless it can prove that it has a valid excuse.
In order to be excused from the liability for the delay, it will have to prove (Civil Code, Section 6:142) that the breach of contract was due to a circumstance that was beyond its control, could not be foreseen when the contract was signed, and the contractor could not be reasonably expected to avoid the circumstance or to avert the damage.

[12] **Key principles applicable to exemption from liability:** In order to obtain exemption, the contractor will firstly have to prove that it was hindered in its performance by the developer or by a vis maior event, and then identify the days on which its performance was hindered and to what extent; however, delays that could have been overcome with minor reorganisation of its work processes will not qualify for an exemption.
Consistent judicial practice holds that extensions of time can only be requested with regard to days when the disruption would have existed despite proper organisation of work processes, and disruptions that exist simultaneously are not cumulative. This means that the period of events that hindered the contractor's performance will not be added up automatically, and any period when the contractor was allegedly hindered will only count once, regardless of the number of qualifying events or circumstances that may have existed at the same time (BH2015. 63. and BDT2009/10/173.). A contractor may not obtain exemption for its delay and, consequently may not seek to enforce any claim on the basis of the prolongation of the construction, if it did not act as it could be reasonably expected when it prepared for its performance of the works or when the disruption arose (standard-setting judgment No. 14/2014). It should also be noted that under the general rule, difficulties in procurement and in the organisation of work processes are not considered grounds for an exemption (Budapest Board of Appeals, Gf.40414/2018/9).

[13] **Informing the developer:** The chances of obtaining exemption successfully are greatly enhanced if the developer is informed as promptly and as accurately as possible. Therefore, it is a good idea to involve the developer in the identification of the best solution to problems caused by a disruption and in the related discussions, because this can help avoid disputes and risks concerning the chosen method of damage mitigation.

[14] **Defining and presenting critical path, preparing alternative schedules:** It follows from the above principles of exemption that the contractor has to demonstrate where and what kind of processes have been held up by the disruption, and what work processes can be reorganised in order to reduce the delay. The best way to do

this is with alternative schedules and with diagrams depicting the critical path of construction.
From a legal perspective, the critical path of construction can be defined as a series of work items and activities that represent the longest "path" within the project where the total execution timeframe can no longer be reasonably reduced, and therefore any disruption affecting the same will inevitably mean a delay equal in length to the existence of the disruption.
In order that the critical path can be properly demonstrated, it is advisable to have detailed a schedule and a timetable for the contractor's services even before work on the construction starts.

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