Time at Large and Extension of Time Principles
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A construction contract between an Employer and a Contractor, by nature, defines the conditions of execution of construction works, timely completion and delivery of which invariably being central in the agreement. In the common law context shared by many international contracts, it is often said that 'time is of the essence', meaning it is at the grounds of the agreement. However, the time can become 'at large', at term which describes the situation where there is no identified date for completion, either unclear or unenforceable. If time is at large it is then argued that liquidated damages cannot be applied, because there is no date fixed for their calculation.

Time at large

Time is said to be at large because the time or date for completion is not fixed before carrying out the work, but determined after the work has been completed. This derives from the fact that clauses (such as extension of times) are not a legal entitlement but strictly a contractual allowance; in other words, there is no absolute right to vary a contract except as stated in the contract. Falling short of clauses giving a right to vary or applying those leaves the Employer and Contractor either in a situation of breach or in a void, which condition entails disputes unless amicable renegotiation can occur.

Although not a legal term, neither subject to a strict test directing its application nor to definite authority, 'time at large' is a very familiar argument in contractors' claims, with a large body of case law to refer to. Time can be alleged to turn at large under two sets of distinct circumstances, originating from

(i) lack of clarity or outside events, or
(ii) events created by one of the parties, and
(iii) that the contract does not allow the time allowance to be extended.

Delivery conditions are not specified, unclear or cease to apply

When no time or date is fixed by the terms of the contract by which performance must take place or be completed, a term will be implied that the Contractor's obligation is to complete within a reasonable time.

An alternative can be that the programme for the works is contractually to be developed, submitted and accepted for it to be enforceable. When this fails to be implemented, then an argument can be raised towards time at large.

Although not often omitted, schedule conditions can be misled, leading to those circumstances:

1. **In Bruno Zornow v Beechcroft Developments**, a delivery date was clearly set for the works, but those works later on developed (decayed) as an option, without the subsequent agreement providing for an alteration of the original delivery date. His Honor Judge John Davies QC considered whether time for completion was to be left at large subject only to the implication that the works should be finished within a reasonable time. The alternative was to presume as necessary for business efficacy that the parties must have intended that it should continue to have a fixed date for completion. Some events that cause delay are not under the control of either party, such as weather or local disturbances. They are neutral events, but may drag the project behind contract dates, and sometimes cause damages that may lead to contractual time consideration to cease to apply and time let at large for completion.

2. **The scope of work has been impacted by 'acts of prevention'**

The most common events in the construction industry are so-called 'acts of prevention': an event at the cause of which stands the Employer (in case the Contractor is at the origin of an act of prevention, the impact stays into the Contractor responsibility and only affect its own performance against the contract and possibly bring him into a position to pay Liquidated Damages). The act of prevention may be an omission or failure by the Employer or acts of hindrance or interference in breach of contract, or the order of extra work.

3. This is based on the prevention principle, by which it would be inequitable for the employer to enforce the contractor's failure to meet the completion date when this was caused by reasons for which the employer was responsible.

4. The essence of the prevention principle in a construction contract was that a Employer could not insist upon the performance of an obligation which he had prevented the Contractor from performing.

5. **No will or possibility to extend contractual schedule**

One obvious but mandatory prerequisite for time to become at large is the inability of the contract or of the parties to extend the contractual schedule or agree to new dates to cater for the events or changes. This can take many forms, listed hereunder:

- A waiver of the obligation of completion given by the employer
- The contract does not allow for an extension of time to be issued
- The contract does allow for extensions of time but the contractual machinery is in failure (no timely submission, answer, appointment, inoperability of the clause, etc.)

6. **How the provisions of contracts improve the situation**

The term Time at Large is usually used in construction contracts in the situation where liquidated damages are an issue. If time is at large then it is argued liquidated damages cannot be applied, because there is no date fixed for their calculation. Late delivery cannot then be sanctioned by Liquidated Damages; instead the Employer is faced with the problem of having to prove the damages he may want to claim, in addition to the...
larger issue of not being delivered on time. Although thought as a good negotiating bargain by Contractors, releasing them from the Liquidated Damages clause, time being put at large also leaves them facing uncertainty as to the level of resources to implement and the monetary recovery for the extended works duration, as well as claims from the Employer, that could end up more expensive than capped Liquidated Damages. For those reason it is widely accepted that Time being at large is against the interests of both parties, raising more costly disputes than any other grounds.

Over time, many contractual clauses have been written to qualify and protect the application of the schedule constraint, some becoming pretty standard for administering the potential delay issues between Employer and Contractor. The rights and remedies of the parties depend upon the apportionment of liability for the delay and the express terms of the contract which may limit the remedies otherwise available. Case law is also extremely abundant in defending the time aspect of the contract, which is often leading to disputes. Those disputes and their resolution has led and accompanied the drafting of contract clauses over the years. Two interesting statements can be relied upon:

- "There are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default."
- "Liquidated damages and extension of time clauses in printed forms of contract must be construed strictly contra proferentem, and if an Employer wishes to recover liquidated damages for failure by Contractors to complete on time despite the fact that some of the delay was due to the Employer's own fault, the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the Employer."

Undoubtedly, time being at large is a situation that parties try to contractually circumvent, and for that purpose, the extension of time clause must be wide enough to deal with all risk events whose consequences on the completion date are intended under the contract to be covered, and definite enough to render it easily operative, at the benefit of both parties.

**Standard Extension of Time process**

In the JCT contract suite (revised in 2011), the applicable clauses encompass a system to try and ensure that all ‘relevant events’ give a right to Extension of time (entitled in contract clauses ‘adjustment of completion date’) in a timely and ordained manner. Those events are exhaustively listed, to try and avoid giving raise to disputes. In the same vein, the FIDIC rainbow contract suite gives raise in clause 8.4 to a broadly similar mechanism.

Those tested international suites set the test to avoid time becoming at large, and companies wanting to write bespoke contracts for their own ventures are often following a very similar and safe wording.

It is however interesting to note that other options exist, as the one developed in NEC ECC3 contract, which does not provide for extension of time per se - it deals with this issue under the larger Compensation Event procedure.

**Employer’s delay**

Most of the Extensions pursued by Contractors come from alleged Employers impacts (see 1ii. above). The question of the Employer's delay is focused on the relevant events analysis (to follow JCT terminology), which can be split in two broad categories: failure to give access (deferment of possession), and acts of prevention (variations, compliance with employer’s instructions, and impediment prevention or default by the Employer). Employer's instruction may of course be covered, and definite enough to render it easily operative, at the benefit of both parties.

A positive aspect of this approach is that events that fall within the relevant list are directly and clearly opening the way to the extension of time process, thus keeping them under contractual control.

On the other hand, any event not listed does not trigger the clause, and leaves the contract blank open to time being set at large. Avoiding this is the reason of the standard inclusion of a very broad relevant event ‘impediment, prevention or default by the Employer’, meant to cover cases not clearly defined, in a will to ensure most, if not all, circumstances to initiate an time extension process. It also avoids carrying on with the exhaustive but limited list of relevant events, which was previously carried in some contracts forms.

It is notable that most disputes raised to court or arbitration on this subject are put to the test of those mechanism, whether contractual, or only in terms of logic of dispute resolution.

**Concurrent delay**

One very obvious and frequent issue of delay and extension of time in construction contract is the one of concurrent delay, when several causes impact the practical completion date, some of which may qualify as Relevant Events and others not. However, Case Law very much sets the test, and contract terms can be construed entirely in favour of the attribution of extension of time in cases of concurrent delay, when at least one Relevant Event causes the delay. In City Inn Ltd v Shepherd Construction, the view of ‘clear from older authority that the fact that delay has been caused by matters for which the Contractor is responsible will not deprive the Contractor of his right to claim an extension of time for delay caused by a relevant event’.

The remaining area of dispute in occurrence of concurrent delay is for the Employer and Contractor to unravel the finite impact of each event by nature intertwined to create a delay. This point also has been defended many times, one recent statement by Mr Justice Akenhead being that ‘where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time’ and further, ‘there was a straight contractual interpretation of clause 25 which pointed very strongly in favour of the view that, provided that the Relevant Events could be shown to have delayed the works, the Contractor would be entitled to an extension of time for the whole period of delay caused by the Relevant Events in question’.

The general outcome is against apportionment of the delay but an analysis in terms of causation.

**Conclusion**

The wording of the new contract suites will serve the purpose of better covering the interest of both parties by avoiding disputes having to be escalated to arbitration or court. Parties choosing not to use standard contract forms are advised to be cautious of the treatment of time in their contract.