

Projects (Engineering and Construction)

Time Bar and Benefitting from One's Own Wrong- Perspectives from Common Law and Chinese Law

Introduction

Picture a common scenario. A project is delayed. The Contract provides for the deduction of liquidated damages, which the Employer decides to impose. The Contractor argues that the Employer should grant an extension of time and should be liable for extra costs. In reply, the Employer relies on the Contract which required the Contractor to give notice within a specific period, failing which the Contractor would be deprived of its entitlement to extra time and costs. Given that the Contractor had failed to give the requisite notice, the Employer states that the Contractor's claim is "time barred". However, this may mean that the Employer profits as a result of its own breach of the Contract.

This article compares the judicial attitude in Common Law jurisdictions as well as in the PRC regarding the above issue. Practical tips will be given at the end of this article.

Benefiting from One's Own Wrong and other Related Concepts

Most modern construction contracts contain an extension of time clause. The reason behind these provisions may be illustrated by an old English case known as *Holme v Guppy* (1838) 3 M & W 387. In that case, a Contractor undertook to carry out carpentry works in the construction of a brewery in 4.5 months. Liquidated damages would be payable if the works were not completed within that time. The Contract did not contain any extension of time clause. As it turned out, the Employer caused delay to the Project (delay in allowing the Contractor to enter the site). The Court decided that the Contractor was not liable for any liquidated damages. The Court's reasons were as follows:

"it appears that [the Contractor] were disabled by the act of [the Employer] from the performance of that contract; and 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 The plaintiffs were excused from performing the agreement contained in the original contract the plaintiff were therefore left at large; and consequently they are not to forfeit anything for the delay"

The above decision is consistent with the following legal concepts in many Common Law jurisdictions:

- Prevention principle, ie a party cannot insist upon the performance of a condition where that party is the cause of that non-performance, or put simply, a person cannot benefit from his own wrong
- Time at large, ie if the prevention principle is successfully engaged, time is "at large", in which case (1) the contractual completion date ceases to be binding, (2) the works must be completed within a reasonable time (rather than a fixed time) to be determined by the Court or the Arbitral Tribunal, (3) the Employer can no longer claim liquidated damages (given that liquidated damages is a contractual mechanism which depends on the contractual completion date), and (4) the Employer can claim general damages (ie actual damages suffered by the Employer as a result of the delay), which damages will be assessed by the Court or the Arbitral Tribunal

As can be seen above, if time is at large, the completion date of the contract becomes uncertain (reasonable time as determined by the Court or Arbitral Tribunal), and the damages receivable by the

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Employer becomes uncertain (general damages to be assessed, rather than liquidated damages).

In order to reduce the uncertainty, most modern construction contracts would include delays caused by the Employer as a ground for extension of time. For example, Clause 8.4 of the FIDIC Contract provided that if there is "*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*", an extension of time may be granted.

Time Bar

As construction contracts become more sophisticated, the trend is to impose time bar clauses against the Contractor whereby the Contractor is required to give notice of any relevant delay. The notice may operate as a condition precedent, ie if the Contractor fails to give the requisite notice, the Contractor would be deprived of its entitlement to any extension of time and/or costs.

For example, Clause 20.1 of the FIDIC Contract provided that the Contractor should give notice not later than 28 days "*after the Contractor became aware, or should become aware*" of an event or circumstance resulting in delays. If the Contractor fails to do so, "*the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim*".

However, there are learned authors who took the view that where the event or circumstance resulting in delays was caused by the Employer (eg failure by the Employer to give possession of the site, the imposition of change in the works, failure by the Employer or its representatives to give instructions), there are conceptual difficulties to allow the Employer to "benefit from his own wrong" by imposing liquidated damages against the Contractor, even if the Contractor failed to give the requisite notice. Cases decided by Common Law Courts such as the Australian case of *Gaymark Investments Pty Ltd v*

Walter Construction Group Ltd (1999) BCL 449 supported such view. However, Courts in other jurisdictions such as England, South Africa and Hong Kong did not support such view (see for example the comments in the decision by the English Court in *Multiplex Construction (UK) Ltd v Honeywell Control System (No. 2)* [2007] BLR 195).

Generally Chinese Courts recognise and would be prepared to enforce time bar clauses. An example of which can be found in the following case:

Henan Luozhoujie Highway Limited Company
v
Beijing Urban Construction No. 2 Construction Engineering Limited Company

(Case No. [2008] Yu Fa Min Yi Zhong Zi No. 19)

(in Chinese:河南省漯周界高速公路有限责任公司与北京市市政二建设工程有限公司建设工程合同纠纷案, [2008]豫法民一终字第 19 号)

In March 2001 the Employer and the Contractor entered into a contract for the construction of a highway. The Contract provided that the Contractor should submit its claims to the Employer within 21 days from the date of the incident, failing which the Contractor would not be entitled to payment of the claim. In the course of the works, the Contractor incurred additional costs due to variation ordered by the Employer resulting in additional work. However, the Contractor did not submit its claims within the requisite 21 days period, and submitted its claims after completion of the project.

The Higher People's Court of the Henan Province held that the contract provisions were valid and binding on the parties. Given that the Contractor failed to submit the claims within the requisite 21 days, the Court held that the Contractor did not meet the procedural requirements provided by the Contract. The Court also found that the Contractor failed to keep the original claim materials or copy the same to the Employer as required under the Contract, and thus substantially failed to give further evidence to support its claims. Accordingly the Court dismissed the Contractor's claims for payment.

As can be seen in the case above, although the delay was caused by the Employer (who gave variation orders resulting in additional work), the Court nevertheless enforced the time bar clause against the Contractor.

However, in the case below, while the delay was also caused by the Employer, the Court did not enforce the time bar clause against the Contractor.

Puyang Highway Administration Bureau
v
China Xinxing Construction and Development Company

(Case No. [2008] Yu Fa Min Yi Zhong Zi No. 151)

(in Chinese: 濮阳市公路管理局与中国新兴建设开发总公司建设工程施工合同纠纷上诉案, [2008]豫法民一终字第 151 号)

In June 2004 the Employer and the Contractor entered into a Contract for the construction of a highway. The Contract provided that the Contractor should submit its claims to the Employer within 21 days from the date of the incident, failing which the Contractor shall not be entitled to payment. Commencement of the works by the Contractor was delayed due to delays in land acquisition, demolition works and removal of obstacles (which were the Employer's responsibilities), and the project was suspended several times. The Contractor incurred additional costs as a result. However, the Contractor did not submit its claims within the requisite 21 days period, and submitted its claims after completion of the project.

According to the Higher People's Court of the Henan Province, given that the delays were the Employer's responsibilities, the Employer should be responsible for the additional costs incurred by the Contractor. The Court held that the reason why the Contractor did not submit its claims within the requisite 21 days was caused by uncertainty of the commencement date as well as suspension of the project several times, which according to the Court was the responsibilities and thus the default of the Employer. The Contractor committed no fault and thus the Employer should be responsible.

Practical Tips

Whether you are operating within the PRC or other Common Law jurisdictions, it would be prudent to ensure that all contractual provisions are complied with. Thus if you are a Contractor, you should ensure that all time bar requirements have been complied with. You may need to incur time to read and understand the Contract, and to undertake measures to ensure that deadlines are not missed. Nonetheless, depending on the wordings of the Contract, relatively short and simple notice of claims can be prepared without incurring too much time and costs. The Contract may only require you to describe the event or circumstance, without the need to give details of the amount of the claim. There is no need to give a notice of claims in a hostile manner.

If you are an Employer, receiving a notice of claims from your Contractor at an early stage will assist you in being aware of the progress of the works, and implementing appropriate action to manage and prevent additional cost and delay. Particular care must be exercised to ensure that these provisions are effective.

We have prepared and will prepare a series of articles on the following issues, focusing on various areas of the law by comparing PRC and non-PRC concepts. All the articles are designed to present you with the whole picture so that you will be best equipped to deal with a whole spectrum of critical business and legal issues.

1. Expect the Unexpected: Frustration, Changed Circumstances, and Force Majeure
2. Guarantee Contract and Principal Contract: Conflicts in Jurisdiction
3. Time Bar and Benefitting from One's Own Wrong
4. Liquidated Damages

We value your feedback. Please provide us with suggested topics for articles, as well as any comments, thoughts and ideas.

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