

**IBA CONFERENCE – MADRID 2009**  
**SERIL – INTERNATIONAL CONSTRUCTION PROJECTS COMMITTEE**

**TIME AND ACCELERATION ISSUES AFFECTING INTERNATIONAL  
CONSTRUCTION CONTRACTS**  
**Wednesday 7 October 2009, 10:00 to 13:00**

**DELAY IN CIVIL LAW – THE SWISS EXAMPLE**  
**Relevant Events and Basic Principles**

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**1. BASIC FEATURES**

In civil law systems, the codes regulate the time of performance in the absence of contrary regulation by the parties. In Switzerland the Code of Obligations (CO) does so in Articles 75 to 82. Failure of a party to perform on time gives rise to the legal sanctions, in particular damages (Article 97 CO). The sanctions normally become available only when the debtor of the obligation is in default. When performance at a specific time had been agreed, default occurs if the debtor does not perform at the agreed time. Otherwise, the creditor must put the debtor on notice before default occurs.

If the debtor in delay establishes that the delay occurred through no fault of his own, he is excused from damages (Article 97). Similarly, in bilateral contracts, the debtor can rely on the creditor's default if the creditor must perform first certain acts and has failed to do so (Article 82). By reference to the Roman law origin of the rule it is described as the *Exception non adimpleti contractus*, the defence of debtor's duty to perform first. If such excuses are temporary, the time for performance is deferred. In construction contracts, the programme is adjusted according to the duration of the events providing the excuse.<sup>2</sup>

In the case of creditor's default, there is, however, an important difference between obligations of which the other party may claim performance and acts which are the prerequisite for the other party's performance but which are not an obligation. For instance, if the buyer must make full or partial payment before the seller is obliged to deliver, the seller may pursue his right to payment. If on the other hand, the employer in a construction contract must deliver the land before she can claim performance of the work, the contractor has the right to refuse commencement of the work but he may

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<sup>2</sup> See for instance: P. GAUCH, *Der Werkvertrag*, 4th ed. N682.

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not seek performance of the delivery of the land nor may he, as a matter of principle, claim damages for the failure to deliver.

In other words, the performances which the employer in a construction contract may have to make in order to claim performance by the contractor are not the subject of full fledged obligations but are described by the German term of “Obliegenheiten”, which may be translated by incumbencies. In modern construction contracts the full application of this approach often would lead to unjust results. In Switzerland, as in other civil law countries where the concept is known, it is now accepted that the contractor is entitled to a treatment which comes very close to the claims for breach of contract. The concept will be discussed in further detail below.

According to the organisation adopted for the session, the present author has been requested to provide, before discussing these principles further, an overview of some of the situations in which delay may occur.

## **2. EVENTS THAT AFFECT PROGRESS AND COMPLETION**

When considering legal principles and contract provisions relating to time and delay, three principal types of events must be distinguished, according to their origin: delay events attributed to the Employer (or, in American terminology, the Owner), delay attributed to the Contractor and delay attributed to neither of them, including force majeure and similar events.

### **2.1 Events related to the Employer’s Contributions**

The Employer contributes to a construction project in a number of different manners, by what is described in Swiss law as Mitwirkungshandlungen.<sup>3</sup> Normally these acts by which the employer contributes to the contractor’s work are incumbencies. The nature and scope of the contributions vary from one project to another; so do the methods and the precision with which these contributions are defined.

The construction by which the law deals with the situation may be described as follows: the employer’s failure to make these contributions in time is a case of creditor’s default and justifies any delay of the contractor caused by such failure. It also entitles the contractor to withhold its own performance accordingly. As a result the time for completion is adjusted to make allowance for the time during which the contractor was prevented from performing due to the employer’s failure or entitled to withhold his own performance. Unless the contract contains the necessary rules for making such adjustment the basis for it is found in a reference to what is called the “hypothetical will of the parties”.<sup>4</sup>

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<sup>3</sup> See U. ZELTNER, Die Mitwirkung des Bauherrn bei Erstellung des Bauwerkes, Diss. Fribourg, 1993.; R. HÜRLIMANN; Ansprüche des Unternehmers aus Bauablaufstörungen des Bauherrn, Gauch’s Welt – Recht, Vertragsrecht und Baurecht, Festschrift für Peter Gauch zum 65. Geburtstag, 815 – 840.

<sup>4</sup> Hypothetischer Parteiwille; see e.g. GAUCH, op.cit. N682.

In other words, the contractor is relieved of the obligation to complete the work by the agreed date and substitutes that date by the later date resulting from the programme adjustment. Since, as a result of the adjustment, the contractor is no longer in delay, the employer may not claim damages for delay, liquidated or not; subject always to contrary contractual provisions in the contract. In other words situations which entitle the contractor for an extension of time by the same token also relieve him, for the time of the extension, of the risk of claims for damages from the employer.

Some examples may illustrate the diversity in the types of contributions from the employer and the possible impact on the performance of the work:

2.1.1 The site: In the vast majority of construction contracts, it is the employer who contributes the land on which the construction project is implemented. This contribution is indeed a distinctive feature of a construction contract and is at the origin of some of the rules specific to this type of contract which is defined as the performance of the work by one party on the land of another. In many legal systems this leads to the loss of property rights by incorporation of objects belonging to the contractor or subcontractors incorporated into the land of the employer, compensated by preferential rights in the form of liens or mortgages acquired by the contractor on the land of the employer.<sup>5</sup>

Because of the predominant feature of this contribution, legal issues of employer's delay are generally treated by reference to delay of the employer in providing access to the land; court cases and legal writers normally relate to this contribution and generally do so in its simplest form: the employer gives access to the land in one act.

In international construction projects, site access often are far more complex: Access to the site may be given in stages. This is the case for instance in projects for the construction of a road, a pipeline or other works performed over a certain distance. These projects often require long preparations on the employer's side, in particular with respect to the acquisition of the land or rights relating to it, temporary or permanent removal of utilities on the land or underground and other preparatory work.

Example: In a case concerning the construction of a water pipeline, one of the owners of the land over which the pipeline was planned to pass refused access to the contractor. He had been in dispute with the local authority in charge of obtaining the rights of passage but, since he was a locally influential person, felt that he was owed a special treatment. When the contractor's works approached his land, he threatened the contractor and his workers; faced with the threat of the use of force, the contractor stopped work and resumed only after an arrangement had been found with the landowner in question. In the arbitration, the contractor presented the event as a case of force majeure. The tribunal saw it differently and treated the issue as related to the employer's obligation of providing access to the site.

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<sup>5</sup> In Swiss law these rights are described as Bauhandwerkerpfandrecht, in German, and, hypothèque légale, in French.

In such cases the question often arises whether the contractor can or must reorganise the sequence of its work, starting at different ends or moving to a different sections of the site. In many cases this may be possible for the contractor but may cause additional costs and may not fully absorb the delay. As a matter of principle, the contractor is not required, of his own initiative, to accelerate the work in order to reduce the delay caused by the employer; but the ordinary duties of mitigation apply.

Even in cases where the site consists of a single plot of land to which the Employer gives access in one operation, complications may arise, for instances when the Employer gives access to several contractors at the same time which must coordinate their works. The question then arises who must coordinate the presence of these several contractors and how each of them must contribute to the coordination by (a) specifying the time (or times) when he needs access to which part of the site and (b) the adjustments he must make to accommodate changes in the work of the others.

Other events related to the site, which may and often do give rise to delay, are unforeseen ground conditions, obstacles caused by utilities and archaeological finds. It is in particular unforeseen site conditions which give rise to disputes. These disputes concern the principle and scope of either party's responsibility, as it may be regulated in the contract or the applicable law; but also the definition of the conditions which the contractor had to expect and the measures that have to be taken to address the situation.

Example: the Contractor is provided with a soil study based on a very limited number of bore holes. The ground conditions in this study do not indicate the presence of rock. The Bill of Quantities has a single rate for excavation. The contractor does encounter rock and argues that a new rate has to be created for excavation in rock and that excavation has to be measured by allowing overbreak to an extent that did not have to be foreseen when weaker material was assumed. The case is still pending. One of the questions that have to be determined is whether the Contractor could base itself merely on the data resulting from the soil study. Since both the Contractor and the Employer were aware of the insufficiency of the study, did the Contractor have to make allowance for the risk resulting from that insufficiency?

Where the contract differentiates in the treatment of ground conditions and other exterior circumstances the differentiation may give rise to disputes:

Example: A dredging contract provided that the Contractor was entitled to extra time and money in case of unforeseen ground conditions but not in case of inclement weather. The Contractor claimed that the waves which it encountered during certain periods of the works were higher than expected, disrupted his work and caused delay. It attributed the waves to the configuration of the sea bed and characterised the disruption as caused by the ground conditions. The claim on this basis was dismissed.

2.1.2 Permits and authorisations: Depending on the nature of the work a variety of permits and other authorisations may be required. The permit to construct the works and to operate them normally must be obtained by the employer. This may also apply with respect to certain construction operations such as blasting, use of certain materials or construction equipment and the removal of certain types of obstacles.

Example: For tunnelling work in connection with a hydro-power station, the contractor must use explosives. An insurgency occurs in the area where the works are performed and the Government restricts the use of explosives. The works are delayed. The Employer invokes force majeure.

Example: On a large road construction site, the contractor intends to use mobile telecommunications. War breaks out in the country of the works and the license for operating the telecommunications is delayed by a long time. The contractor claims that the absence of telecommunications on the site render the work more complicated and time consuming and claims for additional time and money.

Example: the connection of an off-shore marine installation requires the authorisation of the port authorities. The Contractor books the ship performing this work for specified dates and informs the Employer of these dates. The Employer does not obtain the permit by the indicated time. The ship is booked for other activities and leaves the shore. By the time the authorisation is obtained, the Contractor must book another ship which has to be moved to the site to perform the work.

2.1.3 Drawings and other design information: In many construction contracts the works are designed by architects, engineers or other professionals engaged by the employer. In other contracts it is the contractor which provides the design. In almost all cases the contractor provides at least some design, for instance in the form of execution drawings, choices of materials or other decisions affecting the design of the works. In such cases the employer generally has a right of approval of the Contractor's design decisions.

Delay may occur in the employer's approval of the contractor's design decisions. This is one of the areas where particularly complex and difficult problems arise: some contracts provide time limits within which the employer must provide the approval (the "turnaround time"). If the employer fails to comply with these time limits, the contractor may be entitled to claim for extra time or the approval may be deemed to have been given. However, the failure of the employer to give her approval may be justified by defects in the design or, instead of returning the approved design, the employer may request corrections. If the design is indeed defective, the request would seem justified, but the employer may have taken too long to raise the objection. Moreover, on many construction projects there are large numbers of drawings and other design decisions to be approved, some of these decisions may be critical others not. If delay to completion occurred, determining which of the parties is responsible and in what proportion is a particular difficult and time consuming process.

2.1.4 Materials provided by the employer: In some cases the Employer provides some of the construction materials. These materials, sometimes referred to as “free issue deliveries” or similar terms, are particularly important in contracts (more often sub-contracts) for the erection of the works. Normally, the timing of these deliveries is set out in the contract or an agreed schedule. However, the timing may be fixed only in general terms or by reference to the progress of the works. In addition, the erection contractor often has a certain degree of flexibility in the sequence of the work and by prefabricating components before they are erected.

When delay in the deliveries occurs, the difference that arises often is not just whether the deliveries were in line with the programme but also whether the contractor has had “enough material” to pursue the erection work, even if this is in sequences different from those in the programme.

2.1.4 Payments: The principal contribution of the employer, if it can be called a “contribution”, is the payment of the price. Conceptually, the price is paid when the work has been completed and delivered to the Employer. However, in works of any importance, advance payments must be made at the beginning of the work and as the work progresses. Delays in the payment of such advances do not cause directly delay in the performance of the work; but they may entitle the contractor to suspend work and thereby cause delay indirectly.

2.1.5 Other contributions or interferences by the employer: Among other contributions of the employer one may mention transport: in a number of countries, Government contracts provide that materials imported must be transported by national carriers.

The situation in this respect is comparable to what in some contracts is described as Nominated Subcontractors. The difficulties that arise in this context often result from the fact that the Nominated Subcontractor must enter a contractual relationship with the Main Contractor at terms which the Main Contractor cannot freely negotiate. This may have a bearing on the consequences of delay caused in the performance of the Nominated Subcontractor or by the negotiation of its terms.

Example: the contract for civil engineering works provides that certain items of equipment are contracted directly by the Employer and that the Contractor must conclude a subcontract with the supplier of the equipment so chosen. The Employer selects the supplier of the equipment in tender proceedings and then invites the Main Contractor to conclude a subcontract with the nominee. The Main Contractor proposes a subcontract on the basis of the FIDIC Civil Conditions (red book) applicable to the Main Contract. The subcontractor refers to the tender conditions which make reference to the FIDIC E&M Conditions (yellow book) and claims a price increase for accepting the Civil Conditions. The protracted negotiations on the terms of the sub-contract cause delay to the project. The Main Contractor claims for an extension of time.

Apart from delay caused by late contributions of the employer delay may also be attributed to the employer on other grounds, especially some forms of interference.

Example: a construction project is performed in a country with a restricted labour market. The Employer, directly or through other Government entities and enterprises, performs a vast construction programme. As a result the Contractor's possibilities of recruiting the necessary manpower are substantially reduced and the Contractor suffers delay. The Contractor claims time and money, arguing that other causes for which the Employer was responsible caused the recruitment to occur in this period of a dried up labour market.

Example: similar situation but affecting transport facilities, e.g. port congestion.

## **2.2 Events attributable to the Contractor**

Basically, the Contractor is responsible for the performance of the work and must face all events for which he is not exempted from responsibility. In other words, the delay causing events attributable to the contractor are numerous and divers.

Events in the contractor's sphere which may cause delay relate to the adequacy of resources, manpower, equipment and materials; they may relate to the contractor's planning; or they may relate to events for which it accepted responsibility.

## **2.3 Events not attributed to either party or of doubtful attribution**

Most construction contracts contain force majeure or similar clauses which regulate the effect of events outside the control of either party and for which the party affected by it has not assumed the risk. Sometimes the events covered by such clauses are defined in generic terms; more often, under Anglo-American drafting practice, international construction contracts include long lists of events described in meticulous detail (including for instance the speed of the aircraft causing the event).

Although contracts often seek to clearly allocate responsibilities for certain types of events to one or the other party, situations of doubt arise in practice. Some examples have been given above, e.g. with respect to ground conditions, nominated subcontractors, labour market, transportation.

## **3. LEGAL PRINCIPLES ON TIME, PROGRESS AND PROGRAMMING AND DAMAGES FOR DELAY**

Since the paper of Tony Marshall provides a detailed list of standard contract provisions on the subject, the present note is limited to setting out the legal principles applying under Swiss law. In many respects these principles can be taken as representative for the approaches taken in civil law countries.

The codes applicable to contracts in civil law countries normally contain a general part, which regulates principles applicable to all or several contracts, and a special part which regulates specific types of contracts.

The construction contract is regulated in Swiss law in Title Eleven of the Code of Obligations (CO), consisting of Articles 363 to 373 under the heading of Contract for Work and Labour or, in the Swiss official languages, “Werkvertrag”, “Contrat d’entreprise” and “Appalto”. The legal definition in Article 363 CO can be translated as follows:

“The contract for work and labour is a contract whereby the contractor undertakes to execute a work for a price which the employer undertakes to pay.”<sup>6</sup>

The provisions of the Title Eleven apply to all types of contracts for work and labour, but contain some special provisions on construction contracts. The decisive criterion for the contract of works and labour is that the contractor must perform work and owes the result (“das Werk”, “l’ouvrage”, “l’opera”, which need not be set to music). This means that the principal obligation is the completion of the work and its “delivery” to the employer.<sup>7</sup>

The Code does not contain express provisions on the determination of the delivery date. The matter is regulated by the provisions of the general par discussed above. In contract practice, in Switzerland as elsewhere, the delivery date normally is agreed by the parties. If that has not been done and cannot be determined by reference to the implied intentions of the parties, legal practice in Switzerland refers to the “hypothetical intention”, i.e. the intention which the parties can be expected to have had in the circumstances if they had considered the matter.<sup>8</sup> The determination must be made by taking account of the specific nature of the project and a just balance of the parties’ interests.

Failure to meet the delivery date gives rise to the ordinary rights in case of non-performance. The Employer may rely on the contract and claim performance (despite the delay) or damages for failure to perform. These damages often take the form of penalties which are both a sanction and compensation; but they are not necessarily limitative to the employer’s claim for delay. Alternatively to performance and damages for failure to perform the employer may rescind the contract and claim compensation for the damage resulting from the fact that it entered into the contract. The former type of damages seeks compensation for what is called the “positive interest”, the latter claims the “negative interest” or reliance damages.<sup>9</sup>

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<sup>6</sup> “Le contrat d’entreprise est un contrat par lequel une des parties (l’entrepreneur) s’oblige à exécuter un ouvrage, moyennant un prix que l’autre partie (le maître) s’engage à lui payer.” [add German and Italian text]

<sup>7</sup> For the concepts of “completion” and “delivery” see J-C WERZ, *Delay in Construction Contracts*, 1994, N143 et seq. with further references.

<sup>8</sup> For details see Werz, N205 35 seq.

<sup>9</sup> Also referred to as Vertrauensschaden.

However, the Employer need not await the delivery date, but has an earlier remedy. Where delay is apparent, the Employer may, pursuant to Article 366 (1) CO, terminate without awaiting the delivery date:

“If the contractor does not commence the work on time, or if he delays performance contrary to the contract terms, or if, in the absence of fault of the employer, he is so far behind schedule that timely completion can no longer be expected,<sup>10</sup> the employer may rescind the contract without awaiting the delivery date.”

On the contractor’s side the situation is more complex. The origin of the difficulty stems from the nature of employer’s role in the construction contract, as understood in Swiss law and a number of other civil law systems. The starting assumption is that the contractor delivers the work against the payment of the price. The contributions of the employer are conceived as “incumbencies” (“Obliegenheiten”) which the employer has to provide as a prerequisite for claiming performance from the contractor. If the employer fails to provide his contributions, he may not require performance from the contractor. The situation is described as “creditor’s default”. It exempts the debtor, here the contractor, from having to perform his own obligation. However, since the contribution by the employer is only an incumbency and not an obligation, the employer’s failure, in this approach does not give rise to a claim for breach of contract and damages. This approach can be found in other civil law countries, as well.

In modern construction contracts this approach is obviously unrealistic and does not satisfy the needs as they arise in complex projects. The solution can be found by stipulating the contributions as true obligations. For instance, the Swiss Standard 118 clearly provides that both the Contractor and the Employer are liable for the loss resulting from delays they have caused.<sup>11</sup> More generally, Swiss legal doctrine has developed the approach and now admits that the contributions of the employer can be sanctioned in a manner akin to a contractual obligation by damages or additional compensation and by the right to terminate.<sup>12</sup> The principle has just been confirmed by an ICC Award applying Swiss law to a project in the Middle East.

The methods for quantifying the extension to which a contractor may be entitled are not treated by the code and there are few legal writings on the subject, Where the measure for the extension is addressed at all, this is done general terms. For instance in the SIA Standard 118, the standard conditions widely used in Switzerland the an “appropriate” extension is required.<sup>13</sup> The conditions of the Swiss Association of General Contractors provides in their Clause 25.5 that, in case of delay not attributable to the fault of the General Contractor, the latter is entitled to an adaptation of the programme of the works and to a deferral of the agreed completion dates.<sup>14</sup>

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<sup>10</sup> In this respect there is a slight difference in the German and the French text: “die rechtzeitige Vollendung nicht mehr vorauszusehen” and “l’entrepreneur ne puisse plus l’achever pour l’époque fixée”.

<sup>11</sup> Article 97 (1) “Bauherr und Unternehmer haften gegenseitig für Schäden aus Fristüberschreitungen, die sie verursacht haben.”

<sup>12</sup> For details see R. HÜRLIMANN, with references at FN 16.

<sup>13</sup> E.g. the leading Swiss Standard Contract Form, the SIA Standard 118 in its art. 96: “angemessene”.

<sup>14</sup> Clause 23.5, Association Suisse des Entrepreneurs Généraux, Contrat d’entreprise générale, Conditions générale, ed. 1992,

Similarly general terms are used in the ECE Conditions 188 speak of “such extension of the completion period as is reasonable having regard to all the circumstances of them.”<sup>15</sup>

The provisions of the German VOB is more specific: Section 6 of the VOB Part B describes the criteria to be used for calculating the extension. These include (i) the duration of the time during which the contractor was subject to the obstruction, (ii) an addition for the time need for a new mobilisation and (iii) a possible move into a more difficult period.<sup>16</sup>

In an Article dedicated to Professor Peter GAUCH, the authority on Swiss construction law, one of the leading practitioners notes questions of extension of time and their calculation as an area which, contrary to the situation in England and Germany, has received very little attention in Switzerland. He attributes this to the cursory treatment in the standard building contract.<sup>17</sup> But other reasons may also have played a role in this respect. He also shows that the relevant principles can be developed by reference to general principles of the Swiss law and those that have been developed in Germany and in the Anglo-American practice.

For instance, in a recent award applying Swiss law, the Arbitral Tribunal discusses the use of float without any reference to Swiss authorities and holds that neither party has the right to use float to its sole benefit. Different opinions have been expressed by WERZ<sup>18</sup> and HÜRLIMANN;<sup>19</sup> however, these views seem to overlook the duty of the contractor to mitigate losses.

Finally, with respect to notice requirements and the forfeiture effect provided in many of such clauses, WERZ argues that they are binding in Swiss law, but refers to principles of implied waiver and good faith application of such provisions.<sup>20</sup>

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<sup>15</sup> Clause 20.2 of the General Conditions for the Supply and Erection of Plant and Machinery for Import and Export (188 A) prepared by the United Nations Economic Commission for Europe (UN ECE), March 1957. The conditions continue to be widely international contracts. The ORGALIMIE and other national or international organisations recommend these conditions.

<sup>16</sup> Verdingungsordnung für Bauleistungen, Teil B, widely used both by public and private employers.

<sup>17</sup> R. HÜRLIMANN, loc. cit. p. 822.

<sup>18</sup> Op.cit. N 746.

<sup>19</sup> Loc.cit. p. 823.

<sup>20</sup> op.cit. N231