CONSTRUCTION CONTRACT ARBITRATION AND ADR

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Extension of Time Claims and Declaratory Relief in International Construction Arbitration

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Introduction

The reality in the construction industry is that disruptions and delays are unavoidable and form an inherent part of any construction project. This is largely due to the complexity of the projects, which stems, *inter alia*, from the multiple parties involved and the impossibility to standardize the process. As a remedy, in order to ensure a smooth process, construction contracts generally contain certain mechanisms for dealing with disruptions and delays. The contract parties must be prepared to constantly amend the planning and manage the interfaces. Still, disruptions and delays are a frequent source of disputes as a timely completion is often crucial for the owner who is making a significant investment. One of the reasons for this is that proving a disruption and/or delay can be difficult and time consuming.

In a practical case, an ICC arbitration, which concerned the ongoing construction of crude oil storage tanks in a Middle Eastern country and in which the author has been involved, the claimant claimed, *inter alia*, for a declaration that it was entitled to an extension of time to complete the project, and reserved its right to revise its extension of time claim. It argued that it was entitled to the extension of time (EoT) because the works had been suspended and prolonged for reasons outside of its control.

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Contractual EoT Provisions

The statutory laws of most jurisdictions are silent on a contractor's entitlement to an EoT. There are statutory provisions on the right to suspend the work and retain the performance; however these do not expressly shift the contractually agreed completion date. For this reason, construction contracts typically contain EoT clauses, whereby the contractor is entitled to a reasonable EoT on the occurrence of particular events, and provided the progress of the works or the time for completion is delayed as a consequence of such events. Examples can be found in many standard terms of contract, such as Clause 8.4 of the FIDIC Red Book and § 6(2)(1) of the German VOB/B. EoT provisions require clear drafting as they are often interpreted strictly by national courts.

EoT clauses fulfil several functions. They are beneficial to both contractor and employer as they (i) ensures a new agreed date for completion of works, (ii) provide time certainty as they prevent the time for completion from becoming "at large", (iii) relieve the contractor of any liability for delay and obligation to pay liquidated damages or penalties (at least partially), and (iv) preserve the employer's right to deduct liquidated damages in the event of a future delay.[1]

When is a contractor entitled to an EoT? The causes for delay can be multiple: they can be attributable to the employer (or its agents) or to the contractor. There can be so-called "concurrent delay" or a "neutral" event such as *force majeure* or adverse climatic conditions. In brief, a contractor is generally entitled to an EoT when the delay is not or at least not principally attributable to it, *i.e.* where the employer has assumed the risk and responsibility.

Procedure for Granting EoT

[1] See also the Society of Construction Law Delay and Disruption Protocol (2002).

The procedure for granting an EoT pre-dispute, i.e. for ascertaining the appropriate contractual entitled to an EoT, is as follows: the contractor makes an application for an EoT as close in time as possible to the delay event giving rise to the application. The employer reviews the application and approves the EoT within a reasonable time. Some contracts provide that in case the application remains without response, an extension is deemed to have been approved. In practice, the parties negotiate the extension and sometimes also the contractor's entitlement to be reimbursed for its prolongation costs (e.g. overheads incurred).

Typical "Employer Risk Events"

Some of the typical "Employer Risk Events" are the delay in making the site available to the contractor, the late provision of design and drawings or frequent revisions, changes or variations to original contract scope or project specification, a delay in payment, an impediment or prevention caused by employer's personnel or the employer's other contractors on the site, and unforeseeable and exceptionally adverse weather conditions.

Elements for Contractor to demonstrate

For a successful EoT claim, the contractor must demonstrate and prove certain elements. These are: (i) the event or circumstances giving rise to delay, (ii) the liability for the event (this generally implies a time impact and/or critical path analysis), (iii) the cause and effect relationship, (iv) the contractual entitlement (e.g. Clause 8.4 of the FIDIC Red Book), (v) contractual compliance (in particular with delay notice requirements), and (vi) the mitigation of the impact of the delay (mitigation does not mean that the contractor is required to add additional resources or to work outside its planned working hours, but rather to take reasonable steps to minimize its loss and not to take unreasonable steps that increase the loss). All needs to be

substantiated through, if possible, contemporaneous documentary evidence.

EoT claim in a construction arbitration

When bringing an EoT claim in a construction arbitration, the contractor will argue and must demonstrate that the delay in the completion of the project cannot be attributed to it and was outside its control. The controversies typically arising in such context turn around the proper delay analysis (critical path, concurrent delay, float ownership?) and the compliance with the contractual requirements (did the contractor file the notice of delay in a timely manner?). In order to obtain an EoT from the arbitral tribunal, the contractor must seek declaratory relief.

Declaratory Relief

Declaratory relief is a common remedy in international arbitration as it is generally recognized that arbitral tribunals have declaratory power and as declaratory awards create legal certainty. However, depending on the relevant jurisdictions(s), some uncertainty remains as to the circumstances in which arbitral tribunals should or should not grant declaratory relief. Are there similar restrictions as in state court proceedings? Is a certain legal interest necessary to obtain a judicial ruling on a situation of law?

Modern arbitral tribunals take a "functional" approach, whereby declaratory relief should meet three basic criteria: (a) the legal position of a party to arbitration must be in dispute, (b) the requested declaration is suitable to resolve the dispute, and (c) the declaratory award will serve a practical purpose.[2]

[2] See *Leimgruber*, Declaratory Relief in International Commercial Arbitration, ASA Bull. 3/2014, pp. 467-489.

Conclusion

By means of conclusion, a few "Do's & Don'ts". The claiming contractor's counsel should consider seeking declaratory relief, in particular if the construction project is still ongoing, and take particular care to demonstrate and prove the above-mentioned basic elements of an EoT claim. He or she should also remember to amend or update the relief sought as time progresses. Arbitral tribunal should be mindful of whether the relief sought is sufficiently specific for a declaration, whether the three above-mentioned basic criteria (controversy, declaration suitable to resolve dispute, and serves a practical purpose), and whether there are any further requirements under the applicable substantive or procedural law that must be given before an EoT can be declared in the award.