

PROJECT CONDITIONS JUSTIFYING TIME-AT-LARGE CLAIMS

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The time for completion on a construction project is of great importance and is sometimes referred to as being of the essence. Having a known completion date that the contractor shall be willing to commit to carries both advantages and implications. That is, if the contractor inexcusably overruns this completion date, he becomes liable for delay damages which usually take the form of liquidated damages (LD). During the course of construction, several circumstances may surface which have the effect of the time for completion to be said to have become at large, a situation that can hinder the triggering of the LD clause by employers. This paper aims to explain the concept of time at large and its reasons and implications, while viewing its applicability under both the common and civil law systems. It highlights the conditions whose prevalence justifies the time on the construction contract to be called to have become at large. The work represents the foundation for constructing a method that can aid in systematically testing if such a calling can be viewed as justifiable.

Keywords: Construction, Contract, Disputes, Extension, Law, Common, Civil.

1 INTRODUCTION

Delays are known to be a major source of disputes on construction projects. As such, there has been an increased attention and awareness in the construction industry towards the employment of suitable mechanisms for dealing with delays-related issues. Nevertheless, the circumstances encountered during the course of construction and the actions by the parties to the construction contract could hinder the proper tracking of delays and, subsequently, the effective administration of the construction time schedule.

2 LITERATURE REVIEW

Where time is stated under a contract to be of the essence, the non-breaching party is said to be entitled to treat the contract as being at an end if the other party fails to fulfill its obligation by the date specified (O'Connor and Laudan 2011). In addition, time being of the essence is reported to mean that one or more stipulations as to time are viewed as conditions, the breach of which discharges the other party from the obligation to continue to perform any of his own promises (Oon 2003). It has been suggested that the presence of liquidated damages and extension of time provisions in a construction contract imply that the parties do not consider time to be of the essence, since they contemplate the remedy for lateness to be damages, rather than termination of the contract (O'Connor and Laudan 2011). To this effect, if the time schedule is not met, most owners would normally prefer compensation over the difficulty of finding a replacement

contractor, unless it becomes evident that the contractor is unsuitable or unlikely to complete the works at all.

In the case where the contractor has caused delay to the completion of the project, it can be difficult and expensive on the part of the employer/owner to establish the precise amount of damages suffered as a result of a particular delay (Tuuli *et al.* 2007). That is why the parties to a contract may agree in advance to having liquidated damages paid by the contractor in case of culpable delay (Brown 2012). Any such liquidated-damages amount must be (a) in agreement with the paradigmatic theory of compensable damages and (b) represent a reasonable approximation of damages that place the non-breaching party in the same position had a breach not transpired (Jensen *et al.* 1997). The liquidated-damages clause and, inherently, the specified recovery rate are said to save the time of courts and reduce the expense of litigation (Aibinu 2009).

On the other hand, the time on a contract may be at large by the virtue of not having a completion date specified in it. Alternatively, it may be put at large by events, usually the result of actions by the owner or its agent, which delay the contractor's work. More specifically, the time for completion is placed at large, as proclaimed by the contractor, when the fixed completion date is lost by an intervening event not of his making, and a new obligation then arises to complete the works within such a time that is reasonable under all circumstances (O'Connor and Laudan 2011, McNair 2011).

3 RESEARCH SCOPE AND METHODOLOGY

The focus of the research reported on in this paper is on pinpointing the situations leading to the time on the construction contract being set at large. The followed methodology involved (a) the examination of the issue from the perspectives of both the common and civil law systems and (b) the identification of the implications resulting from the prevalence of time-at-large situations.

4 TIME AT LARGE CALLINGS AND IMPLICATIONS

This section briefly discusses the research findings concerning the applicability of time being called at large from the common and civil law perspectives. It further explains the implications of such callings on the operability of schedule-related conditions.

4.1 Applicability Under Common Law

The “time at large” concept has initially emanated under common law. Its application is essentially in connection with the prevention principle, with the underlying reasoning being that no person can take advantage of the non-fulfillment of a condition the performance of which has been hindered by him. In other words, “a party cannot benefit from its own wrong” (Lal 2002). To this effect, the interrelated conditions/properties justifying calling the time for completion on a construction project to have become at large under common law can be described through the following:

- *Prevention by the employer:* This is a condition where an owner impedes a contractor from meeting the completion date; as a result the completion date becomes suspended; and time then becomes at large, yet coupled with an obligation on the contractor's part to complete the works within a reasonable time (O'Connor and Laudan 2011).
- *Failure of the time-extension mechanism:* A delay caused by an employer could render a time-at-large situation if either there was no provision within the contract to award the

contractor an extension of time, or such a provision had not operated in the circumstances so as to expunge the delay effect of the prevention (Tweeddale 2006).

- *Waiver by the employer of the contractor's obligation to complete by a definite completion date:* If the employer, in the aftermath of an excusable delay, fails to set a new completion date for the project before the original completion date passes, the employer is deemed to have waived his right to receive, and conversely the contractor's obligation to complete, the project by a specific date. Consequently, and in the absence of a definite completion date, time for completion of the project is considered to be at large (Astea Ltd. Vs Timegroup Ltd. 2003).

It is worthwhile noting that a well-established hindrance to the rightful application of the prevention principle is the non-fulfillment of notice requirements by the contractor, wherein the fulfillment of the same is deemed to be a condition precedent to the triggering of a time-extension determination on behalf of the owner.

4.2 Applicability Under Civil Law

The position of the time at large concept under civil law is not as contextually clear as that under common law. That is, while the latter has relied on commercial fairness and previous cases to shape the definition of time at large in its current form, the former does not explicitly state such a remedy. Firstly, precedence does not carry the same weight as in common law, unless preceding decisions have clearly established a consensus on what constitutes customary practices. Secondly, while common law jurisdictions may be receptive to the argument being pursued in the usual way, it is necessary in civil law jurisdictions to determine whether there are any relevant *legal principles* on which the argument can be based and by which similar legal conclusions can be reached. These principles will obviously vary between different civil codes throughout the world, but their essence often exists in all civil codes though it may be under different names (Bellhouse and Cowan 2007). The following three legal principles are reported to potentially prove useful in sustaining a time-at-large argument under civil law jurisdictions (MacLean 1982):

- *The doctrine of abuse of right:* This doctrine is of long-standing in many civil law countries and condemns not only the exercise of a right but the abusive use of it in such a way as to damage another person;
- *The principle of unjust enrichment:* This is based upon the rule that no one ought to enrich himself at the expense of another; and
- *The principle of equity:* This is based on natural law, on reason, and on the idea that one should not do unto others that which he would not wish others to do unto him.

A critical issue with civil law jurisdictions, in connection with the changing social, economic, political, and cultural circumstances, place the contemporary judge in situations where there is in the law no express disposition to guide. That being said, the acceptance – in principle – of the necessity of exercising or benefiting from discretion is an important step towards establishing a viable argument for the declaration of time to be at large under civil law systems (MacLean 1982). Figure 1 illustrates proposed associations between the principles relied upon under the two judicial systems in relation to justifying the calling of time to be at large.

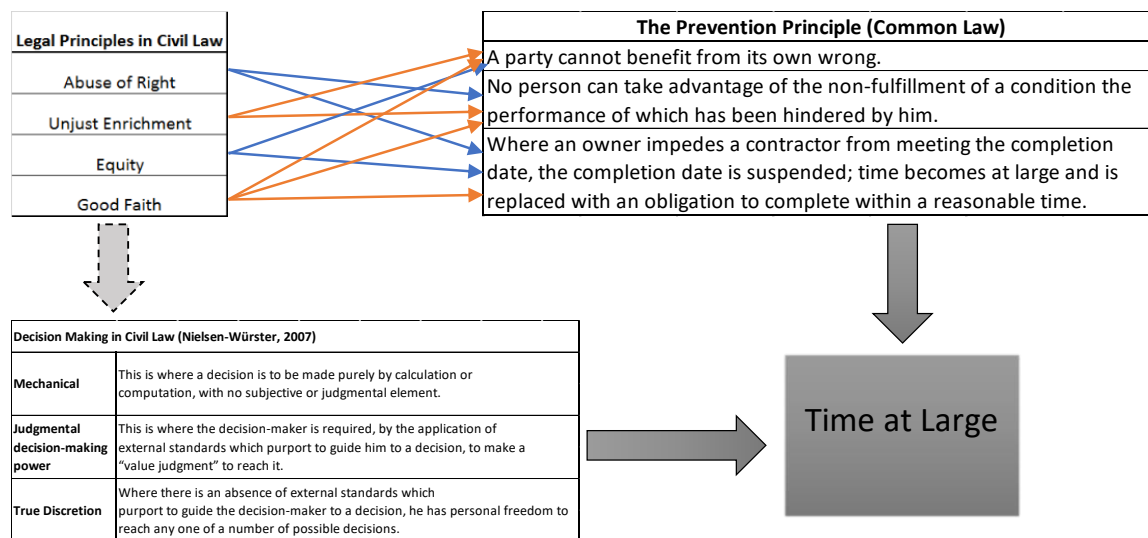


Figure 1. Possible associations between time-at-large related principles.

4.3 Implications of Time Being at Large

Once time for completion on a project is declared at large, the contractor is no longer bound by the contractual completion date and the consequent liquidated damages for delay that take effect after that date passes. Since liquidated damages are dependent only on time, by using the contractual completion date as reference, the act of dismissing that date will render any liquidated damages clause inoperable because, in the absence of an identifiable completion date, there is no fixed date from which liquidated damages can be calculated (Oon 2003 and O'Neill 2008). However, there remains a liability to pay general damages as the employer may prove (Furst 2010). That is, the employer will have to prove the damages first and will be entitled to recover general damages up to the limit of liability identified by the liquidated damages (Fawzy and El-Adaway 2013). Despite the fact that liquidated damages cease to be applicable, all is not lost for the employer. In other words, since the purpose of liquidated damages is to spare the employer the burden of proving delay damages suffered, the inoperability of the liquidated damages mechanism of recovery does not mean that the employer's right is forfeited. The employer can still recover under the general damages tag, subject to proof, if the contractor completes the project beyond a reasonable time.

When the contractor declares time to have become at large, he thereby denounces the existing completion date and claims additional time that is not subject to delay damages to finish the remaining works. This does not imply that the contractor can drag the completion of the works for as long as he wishes; in fact the contractor is expected to finish his work in the shortest period that is reasonably possible given the existing circumstances. As it can be seen from Figure 2, the original completion time may firstly get extended through the proper operation of the time-extension mechanism. Secondly, events justifying calling the time to be at large would, under regular operation of the time-extension mechanism, warrant a virtual – yet fair – extension of time. Thirdly, any further excusable delays, in respect of which a further (virtual) time extension would be justified, would be accounted for in deriving the overall completion time that may be deemed as reasonable under all the circumstances. The difference between the actual completion time and the overall reasonable time would then be the seed for attempting the justification and recovery of general damages by the owner.

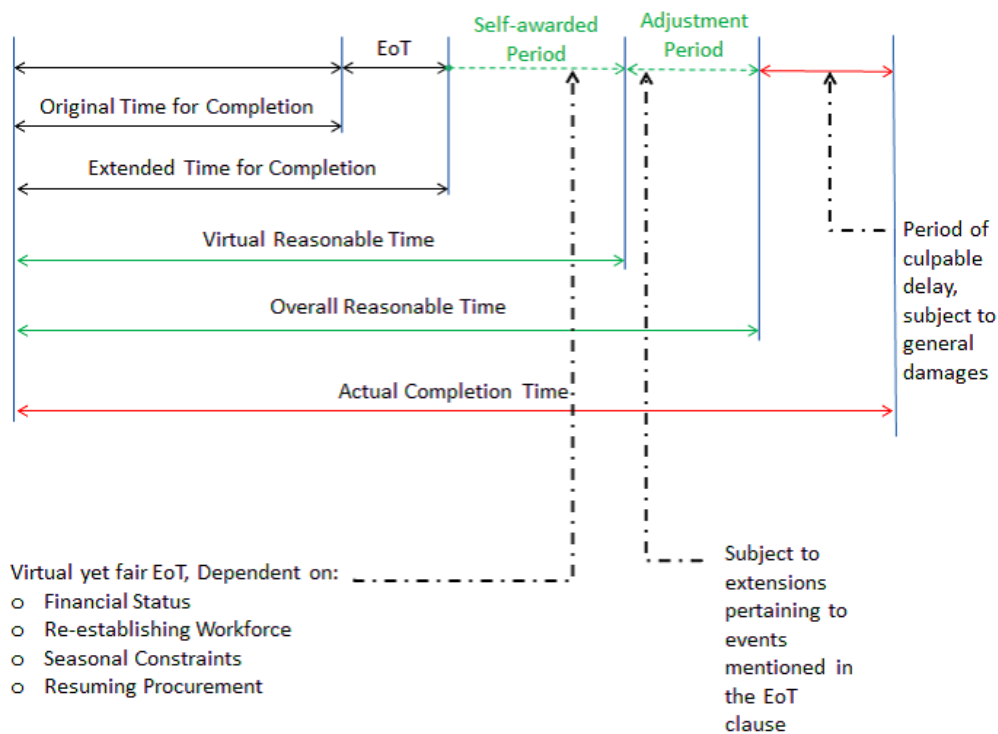


Figure 2. Timeline showing the possible periods of time during a “time at large” scenario.

4 CONCLUSION

As a remedy, the act of calling time to be at large aims to protect the contractor from being liable to unjust delay damages if he is not responsible of the delay in delivering the project. Such a remedy renders any liquidated damages clause inoperable, disregards the existing completion date and replaces it with an obligation to complete the work in a reasonable time. Yet, the contractor should be expected to remain under the obligation of having to provide a program of work that clearly shows the targeted/expected date of completion. Although this schedule may be viewed as not serving the concerned contract requirements as they are otherwise (originally) meant to represent, it must still reflect a serious attempt by the contractor to finish the remaining works within such an overall timeframe as it may be deemed reasonable under all the circumstances. Subject to proof, the employer/owner can still claim/sue, for general damages in case the contractor was unreasonably late in delivering his work after declaring time to have become at large. More research work is warranted with the primary aim of investigating the determinants of what can be regarded as the *reasonable time for completion*. Furthermore, the minimum due diligence in handling the time-schedule contract administration requirements shall be revisited in view of time being called at large, and its effect on the relationship between the owner (or the engineer/architect on his behalf) and the contractor and the level of cooperation needed between both sides under such a condition.

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