Application of the Time “at large” Principle to Standard Forms of Contract

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ABSTRACT

The contractor has an obligation to complete the works within the time for completion, and the employer should not impede the contractor in performing its obligations under the contract. To this end, if the contractor is prevented from completing by the date for completion by an act of prevention by the employer and there is no corresponding right to extend time for completion as a result of such act, or the time for completion is not properly extended, time becomes ‘at large’. Accordingly, the contractor is not under the obligation to complete the works within the original time for completion and he should complete within a reasonable time.

This paper used a two-step research methodology where the time ‘at large’ principle is explained within the context of the common law legal system and is consequently applied to various standard forms of contract. The standard forms of contract examined in this paper include the Joint Contracts Tribunal (JCT) Design and Build Contract of 2011, the World Bank Conditions of Contract (WB Contract) included in the Standard Bidding Documents for Procurement of Works (SBDW), the Federation of Consulting Engineers (FIDIC) Conditions of Contract for Construction issued in 1999, and the American Institute of Architects (AIA) Conditions of contract for Construction (A201) of 2007. The authors highlighted the provisions related to delays and extension of time and mapped to them the principle of time ‘at large’ to conclude when time could become ‘at large’ under the subject contracts. This study helps employers and contractors - entering into projects using any of these standard forms of contract within a common law legal system - to avoid conflicts, claims, and disputes associated with and/or resulting from the time ‘at large’ principle. This should support effective and efficient contract administration of construction projects.

INTRODUCTION

Delay and disruption is generally acknowledged as the most common, costly, complex and risky problem encountered in construction projects (Ahmed et al 2002). The construction industry has been facing many negative impacts as a result of delays and time overruns. These impacts have even compounded with the increase in complex large scale-construction projects. As quoted in Menesi (2007), for 1627 projects completed worldwide between 1974 and 1988, the completion time overrun varied between 50% and 80%. Also, as quoted in Ren et al. (2001), 83% of U.K. contractors requested at least one extension during the course of their projects. Thus,
construction contracts are written to identify potential delay situations in advance and to define the associated procedures, rights, and obligations in these cases.

Delay analysis is used to determine the cause(s) of the delay in order to ascertain whether an extension of time should be awarded. However, the delay analysis framework is completely different if for reasons within the employer’s control, the contractor is prevented from completing by the date for completion, and there is no right to extend time for performance or it is not properly extended (Pickavance 2006). In such cases, time is said to be ‘at large’ where the employer can no longer insist upon the completion date, there is no enforceable date for completion of the works, and the project should be completed within what-so-called a reasonable time (Pickavance 2006).

GOALS AND OBJECTIVES

This paper aims to explain the time ‘at large’ principle within the context of the common law legal system. To this end, the authors would highlight the provisions related to delays and extension of time under various standard forms of contract to conclude when time could become ‘at large’ under the subject contracts.

BACKGROUND INFORMATION

Under the common law, and pursuant to Chappell (2007), the contractor’s obligation to complete the works within the time for completion is removed, if the works are delayed by a reason for which the employer is responsible “see Dodd v. Churton (1897) 1 QB 562”. Also, Lord Fraser of Tullybelton stated in Percy Bilton Ltd v. Greater London Council (1982) 20 BLR 1, the following:

“The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer . . . That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by completion date . . . These general rules may be amended by the express terms of the contract”.

Time is said to be ‘at large’ as a result of the effect of what is known as the ‘prevention principle’ that is no person can take advantage of the non-fulfillment of a condition, the performance of which has been hindered by himself “as per Vaughan Williams L.J. in Barque Quilpe Ltd v Brown [1904] 2 K.B.264 at 274”. In such event, the contractor is not obliged to complete within the time for completion and there is no date from which the liquidated damages can be calculated “see Wells v Army & Navy Co-operative Society Ltd (1902) 86 LT 764; Rapid Building v Ealing (1984) 29 BLR 5”.

The cause of delay by the employer is often referred to as an ‘act of prevention’. It is important to note that acts of prevention by the employer could be a breach of contract by the employer e.g. delay in giving the contractor necessary instructions or a perfectly legitimate action which causes a delay beyond the time for completion, e.g. instructed additional work or other variations “see Dodd v Churton (1897) 1 QB 562; Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447 (TCC)”. 
To this end, if and when time becomes ‘at large’, the employer will not be able to deduct liquidated damages. That is because the employer is not entitled to rely on a liquidated damages clause where the reason for late completion was an act of prevention by the employer “see Peak Construction (Liverpool) Ltd v McKinney Foundations (Ltd) [1970] 1 BLR 114”.

Acts of prevention by the employer do not set time ‘at large’, if the contract allows for extension of time in respect of such events “see Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447 (TCC)”. Most building contracts include extension of time clauses, if the works were delayed for reasons beyond the contractor’s responsibility. Hence, the extension of time clauses are for the benefit of both the contractor and the employer. They allow the contractor more time to complete the works and, thus, reduce or remove their liability for liquidated damages. As for the employer, in the absence of extension of time provisions, he would not be entitled to claim liquidated damages if the works were delayed by a reason for which he is responsible (MacRoberts 2008).

It should be noted that, nowadays, it is difficult for the contractors to pursue the argument of time at large successfully. That is because most modern standard forms of contracts include adequate extension of time procedures, which was not the case in some of the older cases which established such principle (Bellhouse and Cowan 2008).

METHODOLOGY

After explaining the time ‘at large’ principle within the context of the common law legal systems, the authors would consequently apply it to various standard forms of contract. The list includes the Joint Contracts Tribunal (JCT) Design and Build Contract of 2011, the World Bank Conditions of Contract included in the Standard Bidding Documents for Procurement, the Federation of Consulting Engineers (FIDIC) Conditions of Contract for Construction issued in 1999, and the American Institute of Architects (AIA) Conditions of contract for Construction (A201) of 2007.

RESULTS AND ANALYSIS

The Joint Contracts Tribunal (JCT) Design and Build Contract of 2011

The first contract to be studied is the JCT Design and Build Contract of 2011 (hereinafter referred to as JCT DB 2011), which is designed for construction projects where the contractor carries out both the design and the construction work (Joint Contracts Tribunal 2011).

Provisions for delay and extension of time

The JCT DB 2011 provides a mechanism for extending the date for completion. Clause 2.24 requires the contractor to notify the employer if the works are being or are likely to be delayed, including the cause of the delay. If the contractor fails to give written notice of the delay, this would constitute a breach of contract under JCT 63 and the employer is entitled to take such breach into account when considering an extension of time “see London Borough of Merton v. Stanley
Hugh Leach Ltd (1985) 32 B.L.R. 51”. It is thought that this decision applies to JCT DB 2011, as well. In addition, the contractor is under the obligation to identify in the notice any event, which in his opinion is a ‘Relevant Event’. Relevant events are the grounds which entitle the contractor to an extension of time (Chappell 2007).

According to clause 2.25 of JCT DB 2011, the employer is under the obligation to give an extension of time, if the contractor states that the cause of the event is a Relevant Event and the completion of the works is likely to be delayed. It is worth noting that regardless of whether or not the employer grants an extension of time, he shall be under the obligation to notify the contractor of his decision in respect of any notice by the contractor under clause 2.24, as soon as is reasonably practicable and in any event within 12 weeks of the receipt of the required particulars. However, if the period from the receipt of the notice to the Completion Date is less than 12 weeks, the employer shall endeavor to do so prior to the Completion Date. The employer should state the extension of time apportioned to each Relevant Event and any reduction in time attributed to each Relevant Omission, with the restrictions provided in clause 2.25.

In addition, clause 2.26 provides a list of the Relevant Events which entitle the contractor to extension of time. The Relevant Events comprise two categories; events attributable to the employer and events attributable to neither the employer nor the contractor. The events attributable to the employer or his agent, which represent acts of prevention by the employer, comprise, inter alia, the following: Changes, Employer’s instructions:

deerment of the giving of possession of the site and any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer’s persons, except to the extent caused or contributed to by any default, whether by act or omission of the Contractor or of any of the Contractor’s Persons.

If the contractor fails to achieve completion by the relevant completion date, clause 2.28 requires the employer to issue a Non-Completion Notice. In such event, the employer shall be entitled to deduct liquidated damages in accordance with clause 2.29.2, provided that the employer has issued a Non-Completion Notice and has notified the contractor that he may require payment, or may withhold or deduct, liquidated damages, before the due date for the final payment “JCT DB 2011 clause 2.29.1”. If the contractor is then granted an extension of time, the Non-Completion Notice shall be cancelled “see Bell (A) & Son (Paddington) Ltd v. CBF Residential Care & Housing Association (1989) 46 BLR 102” and the liquidated damages related to the period of extension shall be repaid “JCT DB 2011 clause 2.29.2.3”.

Time “at large” applied

Primarily, the JCT DB 2011 has eliminated the case of time becoming ‘at large’ as a result of the contract not including a specified time for completion, by specifying such time in accordance with the ‘Completion Date’ in clause 1.1. Also, the general rule of Percy Bilton Ltd v. Greater London Council (1982) 20 BLR stating that: “the contractor is bound to complete the work by the date for completion and if
the employer prevents him from doing so, the employer will not be entitled to liquidated damages”, has been amended by the express terms of the JCT DB 2011 which provides for an extension of time mechanism in case of an act of prevention by the employer. Furthermore, clause 2.26.6 provides one of the Relevant Events as follows:

“any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer’s Persons, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or of any of the Contractor’s Persons”.

The above provision is a ‘catch-all’ provision for any events which are the responsibility of the employer (Chappell 2007). The aim of such provision is to avoid any possibility of time becoming at large due to an act of prevention on the part of the employer (Chappell et al. 2005).

The mechanism of the Contract also protects the contractor from being liable for deduction of liquidated damages, unless the contractor has failed to achieve completion by the relevant completion date, the employer has issued a Non-Completion Notice “JCT DB 2011 clause 2.28” and has notified the contractor of the deduction before the due date for the final payment. Furthermore, it was held in Token Construction Co Ltd v. Charlton Estates Ltd (1973) 1 BLR 48 that the architect was not entitled to deduct liquidated damages, until he had first adjudicated upon all the contractor’s applications for extensions of time. The wording of the relevant clauses in this case was similar to JCT 63 provisions (Chappell et al. 2005). It is thought that the decision holds good for JCT DB 2011, as well. Accordingly, one of the strengths of the JCT DB 2011 mechanism is that the employer would not have the right to deduct liquidated damages until he had decided upon all of the contractor’s applications for extension of time. Thus, encouraging the employer to respond to the contractor’s notices and decide upon applications for extension of time.

The World Bank Conditions of Contract (WB Contract) included in the Standard Bidding Documents for Procurement of Works (SBDW) and the Federation of Consulting Engineers (FIDIC) conditions of contract for construction issued in 1999

Projects funded in whole or in part by the World Bank are managed through the Standard Bidding Documents for Procurement of Works (hereinafter referred to as SBDW). The SBDW are based on the Master Bidding Documents for Procurement of Works and User’s Guide adopted by the Multilateral Development Banks (MDBs) and International Financing Institutions (World Bank 2007). The World Bank Conditions of Contract included in the SBDW (hereinafter referred to as WB Contract) are based extensively on the Conditions of Contract for Construction (i.e. Red Book) published by the International Federation of Consulting Engineers in 1999 (hereinafter referred to as FIDIC 99). These two contracts are for use in building and engineering contracts, designed by or on behalf of the employer (FIDIC 1999).
Provisions for delay and extension of time

Sub-clause 8.4 of the WB Contract sets out the delay events which could possibly raise entitlement to extension of time under the WB Contract. Such events comprise the following:

a) a Variation (unless an adjustment to the Time for Completion has been agreed under sub-clause 13.3 [Variation Procedure]) or other substantial change in the quantity of an item of work included in the Contract,
b) a cause of delay giving an entitlement to extension of time under a sub-clause of these Conditions,
c) exceptionally adverse climatic conditions,
d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or
e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors”.

The procedures that the contractor should follow to claim for extension of time under the WB Contract is provided for in sub-clause 20.1 [Contractor's Claims], which states the following: “If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance ... Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed ...”.

Sub-clause 20.1 provides the time period for the Engineer to make a determination with respect to extension of time. The sub-clause states the following: “Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within the above defined time period”. In addition, sub-clause 20.1 states that the engineer’s determination shall be made pursuant to sub-clause 3.5 as follows: “Within the above defined period of 42 days, the Engineer shall proceed in accordance with sub-clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with sub-clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract”.

Time “at large” applied

The WB Contract and the FIDIC 99 have eliminated the case of time becoming ‘at large’ as a result of the contract not including a specified time for
completion, by specifying such time in accordance with the ‘Time for Completion’ defined in sub-clause 1.1.3.3. Again, the general rule that, the contractor is bound to complete the work by the time for completion and if the employer prevents him from doing so, the employer will not be entitled to liquidated damages “see Percy Bilton Ltd v. Greater London Council (1982) 20 BLR 1” has been amended by the express terms of the WB Contract and the FIDIC 99, which provides for an extension of time mechanism in case of an act of prevention by the employer.

In addition, sub-clause 8.4 sets out as one of the events giving the Contractor entitlement to extension of time the following: “(e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer’s Personnel, or the Employer’s other contractors”. Similar to the JCT DB 2011, the above provision is a ‘catch-all’ provision for any events which are the responsibility of the employer. The aim of such provision is to avoid any possibility of time becoming at large due to an act of prevention on the part of the employer.

However, one important case which should be noted under the WB Contract and the FIDIC 99 that if the Engineer fails to determine extensions of time in accordance with the provisions of the contract, “(a) there would thereafter be no “Time for Completion” [time is said to be “at large]; (b) the Contract would be construed accordingly [sub-clause 8.6 may be inapplicable, for example]; and (c) the Contractor’s obligation would be to complete within a time which was reasonable in all circumstances” (Booen 2000). Item (b) entails that the employer may lose his entitlement to delay damages under the contract. Although Booen (2000) was discussing the provisions of the FIDIC 99, the authors contend that the same would apply to the WB Contract, as there is no deviation between the WB and the FIDIC 99 in this respect (Fawzy and El-adaway 2012).

The American Institute of Architects (AIA) Conditions of Contract for Construction (A201) of 2007

The most known Conditions of Contract for Construction in the United States is the AIA’s A201, first issued in 1911 and starting 1987 has followed a ten year revision intervals. Its latest edition was released in 2007 (AIA2007).

Provisions for delays and extension of time

Article 8.3.1 of the A201 sets out the delay events which could possibly raise entitlement to extension of time under the AIA Contract. Such events comprise the following: “If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor’s control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay ...”. It is noted that under the A201, the Contract Time shall be extended by Change Order.

The procedures that the contractor should follow to claim for extension of time under the AIA Contract is provided for in Article 15, which requires the contractor to send a written notice to the owner and to the Initial Decision Maker with
a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. According to Article 15.2.1, the Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Article 15.1.2 provides a time period for submitting the claim to be within 21 days after occurrence of the event giving rise to such claim or within 21 days after the claimant (in such case, the contractor) first recognizes the condition giving rise to the claim, whichever is later. Under Article 15.1.5.1, if the Contractor wishes to make a claim for extension of time, the claim should include an estimate of cost and of probable effect of delay on progress of the work. In the case of a continuing delay, only one claim is necessary under the A201. According to Article 15.2.2, the Initial Decision Maker will review claims and respond within ten days of the receipt of a claim.

**Time ‘at large’ applied**

The AIA Contract has eliminated the case of time becoming ‘at large’ as a result of the contract not including a specified time for completion, by specifying such time in accordance with the Contract Time defined in Article 8.1.1. Again, the general rule that, the contractor is bound to complete the work by the time for completion and if the owner prevents him from doing so, the owner will not be entitled to liquidated damages “see Percy Bilton Ltd v. Greater London Council (1982) 20 BLR 1” has been amended by the express terms of the A201, which provides for an extension of time mechanism in case of an act of prevention by the owner.

In addition, sub-clause 8.4 sets out among the events giving the contractor entitlement to extension of time the following: “If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work”. This provision is a ‘catch-all’ provision for any events which are the responsibility of the owner. The aim of such provision is to avoid any possibility of time becoming at large due to an act of prevention on the part of the owner.

However, similar to the WB Contract and the FIDIC 99, if the Initial Decision Maker fails to determine extensions of time in accordance with the provisions of the contract, this would render time ‘at large’.

**CONCLUSION**

The time for completion can only be extended in accordance with the contract provisions. To avoid the risk of time becoming “at large” within the common law legal systems, the construction contract should include a well drafted extension of time clause. In addition, it is important to include all possible causes of delay by or on behalf of the employer in the extension of time clause. All standard forms of contract have clauses allowing for extension of time.

In this paper, the authors studied the possibility of time becoming ‘at large’ in construction projects using the JCT DB 2011, the WB Contract, FIDIC 99, and A201. The four contracts have eliminated the case of time becoming ‘at large’ as a result of the contract not including a specified time for completion, by specifying such time in the contract.
The general rule that, the contractor is under the obligation to complete the work by the time for completion and if the employer prevents him from doing so, the employer will not be entitled to liquidated damages “see Percy Bilton Ltd v. Greater London Council (1982) 20 BLR 1” has been amended by the express terms of the four contracts, which provide for an extension of time mechanism in case of an act of prevention by the employer.

The four contracts include a ‘catch-all’ provision for events of delay which is the responsibility of the employer. Matters falling within this provision will include matters such as delay in receipt of instructions from the employer, delay by persons employed on behalf of the Employer to do other work associated with the contractor’s works, delay caused by the late supply of materials and goods which the employer has undertaken to supply, …etc. The aim of such provision is to avoid any possibility of time becoming ‘at large’ due to an act of prevention on the part of the employer.

The four contracts include time periods for the employer or engineer to decide upon the contractor’s application for extension of time. It is often said that such time is merely directory and not mandatory. Accordingly, an extension of time granted outside such period is still valid. This could discourage the employer to assess the claims by the contractor promptly and would thus affect his plan for the progress of the works.

To avoid time becoming ‘at large’, it is crucial for the employer/engineer to comply with the time periods provided for in the contract to respond to the contractor’s application for extension of time. The authors recommend that later editions of the four contracts include an express provision that such time periods are mandatory and a condition precedent for the employer to maintain his entitlement for liquidated damages for delay.

Based on the above, this research would help employers and contractors avoid conflicts, claims, and disputes associated with and/or resulting from the time ‘at large’ principle. This should support effective and efficient contract administration of construction projects.

LIST OF CASES
- Barque Quilpe Ltd v Brown [1904] 2 K.B.264
- Bell (A) & Son (Paddington) Ltd v. CBF Residential Care & Housing Association (1989) 46 BLR 102
- Dodd v Churton (1897) 1 QB 562
- Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447 (TCC)
- Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 BLR 111
- Percy Bilton Ltd v. Greater London Council (1982) 20 BLR 1
- Wells v Army & Navy Co-operative Society Ltd (1902) 86 LT 764
REFERENCES


Joint Contracts Tribunal (2011), Design and Build Contract, Sweet & Maxwell, Andover, United Kingdom.


