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Disruption evaluation – differences between Civil and Common Law approaches under FIDIC Red Book Conditions

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Structure

- Introduction and context
- Practical relevance to delay/disruption in international cases: example from actual Arbitration Award
- Differences in treatment of claims for time and money in civil and common law jurisdictions
- Discussion of FIDIC clauses applicable to delay/disruption
- Does FIDIC Red Book 1999 need any additional provisions?

How must the Claimant evidence its losses? Legal requirements (1)

Applicable law: if construction contract does not provide legal grounds, applicable law will do so; typical requirements:

- a matter for which the employer is responsible
- a causal link between the matter and the delay/disruption
- a notice by the contractor to the employer
- a loss and a causal link between the delay/disruption and the loss

How must the Claimant evidence its losses? Legal requirements (2)

Legal requirements for calculation and proof:

- Issues of calculation appear to be issues of pure logic and factual analysis but in fact there is “law” to consider
- If construction contract does not determine these issues, as it is usually the case, then applicable law will govern this area
- Are there material differences between Civil and Common Law approaches then?

Practical relevance to delay/disruption in international cases: example from actual Arbitration Award

- Turkish infrastructure project, based on FIDIC Red Book 1987
- Contractor (consortium) claim for 30 months Extension of Time (EOT) and €25 million for prolongation costs
- The applicable law was Turkish law, but Tribunal also reviewed:
  - Swiss law (Turkish Civil Code (CC) of 1926 = complete translation of Swiss CC of 1912) and
  - German law (German CC of 1900 was role model for Swiss CC).

  However, no proper discussion of international private law.

Practical relevance to delay/disruption in international cases: example from actual Arbitration Award:

- Tribunal awards 30 months EOT, but zero for prolongation costs:
  - Contractor had calculated the alleged prolongation costs based on the allowances for general expenses in its own unit prices analysis:
    - 25% of the total price of the project (€200 million) consisted of time-related overheads, i.e., €50 million
    - Planned construction period: 60 months
  - Given these figures (€50 million time-related expenses for 60 months), consortium calculated €25 million of expenses for the EOT of 30 months
  - Consortium did not state any actual losses

German Law requirements for calculation and proof of EOT and L&E (1):

Assessment of EOT: ‘actual time’ versus ‘calculated time’:

- German Civil Code (BGB) is silent. Through its ‘good faith’ obligation (Section 242 of BGB), the standard form VOB/B can be applied indirectly.
  - Clause 6(4) of VOB/B: EOT will be calculated according to the <u>(actual) time of the disruption</u> plus allowances for re-start of works and, if applicable, the postponement of works into less favorable time of year.
  - Clause 6(4) of VOB/B refers to ‘disruptions’. Are variations covered by that clause? Or should EOT due to a variation be calculated according to the <u>‘calculated time’</u>? (Application of Clause 2(5) and (6) of VOB/B analogue?) The legal situation is unclear.
- What other rules govern the calculation and proof of EOT?
  - Here, the German law has been formed by the Federal Court of Justice (BGH).

German Law requirements for calculation and proof of EOT and L&E (2):

Assessment of Loss & Expense (L&E): ‘actual costs’ versus ‘calculated costs’:

- Section 642 of the BGB: compensation based on the ‘calculations of contractor’ (German: Entgeltcharakter, BGH NJW 2009, 3717, para 28).
- If delay was caused by reasons other than a variation (such as in BGH VII ZR 225/03): Clause 6(6) VOB/B applies. This clause refers to the ‘actual costs’ for calculation of L&E.
- If delay was caused by a variation: For calculation of L&E, Clause 2(5) and (6) VOB/B refer to the ‘calculations of contractor’ (as at the time when the contract was concluded).
- What other rules govern the calculation and proof of L&E?
  - Here too, the German law has been formed by the Federal Court of Justice (BGH).

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German Law requirements for calculation and proof of EOT and L&E (3):

BGH VII ZR 225/03 of 2005: Construction of a residential park, Turnkey contract:

- Delay caused by employer by, allegedly, genuine disruption events (late delivery of drawings, etc.) other than a variation
- Judgement of BGH sets out the legal requirements:
  - Contractor must prove – in detail (!) the actual periods of delay arising out of each single delay event (§ 286 ZPO applies).
  - However, there is no need to prove the exact amount of additional time. § 287 ZPO applies: court makes estimation. For this estimation, the contractor must provide a 'plausible basis'.
  - Similarly, there is no need to prove the exact amount of losses (§ 287 ZPO applies: court makes estimation).

Coming back to the Turkish arbitration award:

Tribunal awarded no prolongation costs

Tribunal: Contractor held to have failed to prove "concrete", i.e., actual losses

- Contractor had based its calculation on the contract's allowances for time-related costs
- From a German perspective the decision was correct
  - the Contractor did not provide enough evidence regarding its actual losses.
  - There was no basis on which the court/tribunal could have made an estimation of the actual losses.

English Common Law requirements for calculation and proof of EOT and L&E (1):

Two recent TCC cases, per Akenhead, J, restate and clarify aspects of English common law approach:

- Cleveland Bridge UK Ltd v. Severfield – Rowen Structures Ltd. [2012] EWHC 3652 (TCC) ["CBUK v. SRS"]
- Walter Lilly & Company Limited v. Giles Patrick Cyril Mackay and DMW Developments Limited, [2012] EWHC 1773 (TCC) ["WLC v. McKay"]

English Common Law requirements for calculation and proof of EOT and L&E (2):

Arguable from CBUK v. SRS and WLC v. McKay that:

- Stricter requirements for proof of delay or disruption in detail than for quantum
- Once fact of delay/disruption established, and fact of financial loss established, then Tribunal will be more prepared to estimate loss from best evidence available

English Common Law requirements for calculation and proof of EOT and L&E (3):

- Per Akenhead J, in CBUK v. SRS § 98:

"**CBUK** has chosen not to try to prove any such delay in this way but simply to **rely upon assertions** that variations were issued, that information was provided somewhat later than… appropriate [etc.] and **ultimately upon an inference that it must have been delayed** by these factors. That, in my judgment, is **simply not anywhere near enough**. In all these delay cases, it is **necessary to show that the claiming party was actually delayed** by the factors of which it complains; it simply does not follow as a matter of logic, let alone practice, on a construction or fabrication project, that, simply because a variation is issued or that information is provided later than programmed or that free issue materials are issued later in the programme than envisaged originally, the claimant is delayed."

English Common Law requirements for calculation and proof of EOT and L&E (4):

- Per Akenhead J, in CBUK v. SRS § 156:

"…It would be wrong… to base any assessment of the probable disruption cost on this balance by reason of the absence of detailed evidence attributing a lack of production or productivity to CBUK's breaches of contract. What the Court can and should do in circumstances where it is satisfied on a balance of probabilities that some (more than *de minimis*) disruption must have occurred as a result of CBUK's breaches is to **make a reasoned assessment albeit based on the minimum probably so attributable**…"

English Common Law requirements for calculation and proof of EOT and L&E (5):

- No lesser burden of proof for claimant Contractor than exists before Civil Law tribunal. Must prove:
  - cause and effect
  - <u>fact</u> of financial loss
- "There is nothing in principle 'wrong' with a 'total' or 'global' cost claim" (WLC v. McKay)
- Inability to disentangle causes because of complex factual matrix is not fatal to claimant
- Need to apportion loss between different causes, some recoverable and others not, is equally not fatal

English Common Law requirements for calculation and proof of EOT and L&E (6):

- Provided that:
  - sufficient proof of cause and effect
  - fact of financial loss
- Tribunal will attempt to ascertain or assess extent of loss:
  - doing the best it can with the available evidence unless:
  - it is so poorly presented as to make any such assessment entirely speculative

English Common Law requirements for calculation and proof of EOT and L&E (7):

In extremis Tribunal may look at original bargain, e.g., *per* Akenhead J in WLC v. McKay, §467, re. contract requirement (there) for "such details…as are reasonably necessary" for ascertainment of loss: "…there could be fulfilment of the condition precedent if the details of the expense relating to such preliminaries were defined by reference to the prices in the contract between the parties for such items. It is legitimate to bear in mind that the Architect and the Quantity surveyor are not strangers to the project in considering what needs to be provided…"

Discussion of FIDIC clauses applicable to delay/disruption

Clauses relevant for EOT/financial claims

Principle: entitlement under contract for EOT and financial claims

- "EOT for Completion": Clause 8.4 – provision for usual causes, including:
  - Variations – unless already agreed via Cl.13.3
  - Substantial "change" in quantities
  - Usual weather issues, shortages "caused by epidemic or governmental actions"
  - Acts of prevention, etc., by Employer or those for whom Employer is responsible
  - Plus catch-all (brings in cl. 1.9, 2.1, 4.7, 19.4, etc.)
- Most give rise to entitlement to recover money

Calculation and proof of EOT: Clause 8.4

Clause 8.4 says: "The Contractor shall be entitled … to an extension of Time for Completion if and to the extent that completion … is or will be delayed by …"

What does that mean? The clause refers to the actual time needed, as can be derived from paragraph 5 (a) to (c) of Clause 20.1 FIDIC. But is the assessment prospective or retrospective?

Per Ellis Baker *et al*. (2009): FIDIC Contracts: Law and Practice, para 8.260 *et seq*.: interpretation of this clause:

- The question of whether completion "will be" delayed requires a prospective assessment – i.e.: of the actual time!
- The question of whether completion "is" delayed imports an assessment of actual, past events – i.e.: of the actual time!
- Contract Administrator can only review the initial prospective assessment if Contractor submits a further claim

Calculation and proof of EOT: Clause 8.4

- It follows from Clause 20.1 para 5 (c) FIDIC that an extension of time due to a delay event will only be prospectively assessed in interim determinations. By contrast, after the end of the delay event, the Engineer will issue a final determination which will always be based on the actual time (i.e. retrospective assessment).
- However, there may be room for a prospective assessment if several delay events occur (each of them: EOT retrospectively assessed) leading to one overall EOT which may be prospectively assessed (as an estimate based on the actual delays of the several delay events):
  - "Pro" such a prospective assessment: The use of the singular ("the event") in Clause 20.1 para 5 (c) FIDIC indicates that the actual time is only relevant for the assessment of single delay events, not for the assessment of the overall EOT in case of several delay events. The Clause says "the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance [singular!] …". Such a prospective assessment of the overall EOT would be similar to the German approach (§ 287 ZPO).
  - "Contra" such a prospective assessment: The use of the plural in the same sentence ("the effects") indicates that all effects (including joint effects of several delay events!) have to be considered if there are several delay events. See Clause 20.5 para 5 (c) FIDIC: "… the Contractor shall send a final claim within 28 days after the end of the effects [plural!] resulting from the event or circumstance …". From that standpoint, also the assessment of the overall EOT must be assessed retrospectively (i.e. based on the actual delays of all delay events).

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Calculation and proof of financial claims

- Most entitlements refer to term "Cost" which is defined at Clause 1.1.4.3:

  "all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit."
- Exception: Clause 12.3 FIDIC: Method of valuation: prices according to contract rates & prices, i.e., according to original contract calculations, varied if quantities change
  - If no relevant contract rates, reasonable cost

Example of the difference between “actual time required” and “allowed time”

Case: Construction contract:

- Contractor calculated 4 weeks for purchase of plasterboard plus 4 weeks for actual construction (together: 8 weeks). However, in fact, Contractor should have allowed 8 plus 8 (=16) weeks.
- Before Contractor purchases plasterboard, Employer orders different material. Realistically, Contractor still needs 16 weeks.
- Can Contractor claim for EOT? If so, how long?
  - If calculation of EOT based on time actually allowed in programme: 8 weeks?
  - If based on difference in actual time needed: 0 weeks?
- Consider situation where Contractor allowed 24 weeks – i.e., 8 weeks float, and variation requires full 24 weeks – i.e., absorbing float. What happens? EOT 8 weeks or zero?

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Relevant FIDIC Clauses: 20.1

- Requirement for notices as condition precedent
- 28 days from reasonable knowledge
- Régime for regularly updating claims
- Right of Employer to audit
- Consider Prevention Principle: will common law tribunal treat a condition precedent for notices as to time (as opposed to quantum) differently from a civil law tribunal?

Consider prospective solutions?

- Liquidated sums in contract for prolongation costs – similar to applying rate derived from preliminaries
- SCL Protocol – once agreed, no provision for revision; inequality of arms: employer may not know what concurrent delays are in the pipeline
- NEC 3 – contemporaneous estimation also, no provision for revision; same issues may apply
- Do contemporaneous estimates of possible loss lead to unduly cautious (from Contractor's point of view) or generous (from Employer's point of view) assessments of time and cost for Compensation Events?

Conclusions & ideas to take home (1)

- Civil Law and Common Law are surprisingly similar in their approach to the calculation and proof of EOT and L&E
- Since FIDIC contracts do not contain clear rules on calculation and proof of EOT, the applicable law may need to decide upon relevant – particular – requirements
- In order to avoid adventurous journeys through different jurisdictions, the Parties should agree on these requirements (Particular Conditions)

Conclusions & ideas to take home (2)

Does FIDIC Red need any additional provisions?

- Is Clause 8.4 sufficient for the calculation and proof of EOT in cases of delay/disruption!?
  - It contains rules which are in line with English and German approaches
  - However, if the applicable law requires, for example, full proof of every delay, will Clause 8.4 be clear enough to overwrite the applicable law? (Question of material and/or procedural law!?)
- In case of variations, should both EOT claims and L&E claims better be calculated based on the Contractor's original time and financial allowances?
  - Regarding financial aspects, Yes (Clause 12.3)
  - Regarding time: possibly; clarification needed?

Thank you for your attention!

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