

THE IMPORTANCE OF DELAY CLAUSES IN CONSTRUCTION CONTRACTS

It is not uncommon for participants in the construction industry to operate under the assumption that claims for extensions of time or additional compensation related to delays cannot be made, if a construction contract does not contain express provisions addressing delays in the performance of the work. This is a misconception because the principles of contract law may still allow such claims, and this article highlights why including clear delay clauses in construction contracts is in the best interest of both owners and contractors.

There is a well-established principle in contract law, in the context of construction contracts, that, where a contract specifies the time within which the contractor must perform the work, the contractor is not only required to complete the work within the limited time but is also entitled to have that time to perform the work.¹ Correspondingly, courts have recognized that, absent any contrary provision in the contract, a construction contract imposes an implied obligation on the owner to permit the contractor to proceed in a reasonable manner and without undue delay with the performance of the work.² This implied obligation includes refraining from any interference which may cause delay or extra cost in completion of the work by the

contractor.³ The owner may be found in breach of this obligation for various reasons, including failure to provide the contractor with timely access to the site or delay in addressing change orders.⁴

Based on these principles, courts have held that, where a delay in the contractor's performance is attributable to the owner, or to a party for whom the owner is responsible, the owner cannot insist that the contractor complete the work by the original completion date and "in substance cannot refuse to extend the time for completion".⁵ Further, the owner may be found liable for the contractor's damages, resulting from such delay, unless expressly excluded by the contract.⁶ However, even where delay is caused by the owner, the contractor remains required to complete the work within a reasonable time or within the extended period granted by the owner.⁷ If the owner is responsible for the delay, the owner cannot rely on its own fault to advance a claim against the contractor, or defend against a contractor's claim, arising from the failure to complete on time.⁸ This reflects another fundamental principle of contract law, that "no person can take advantage of the non-fulfillment of a

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condition the performance of which has been hindered by himself.⁹

In the absence of contractual provisions permitting the extension of time, the parties may extend the time by agreement through an amendment to the contract. This presumes that both parties to the contract must agree to the extension. If a party is the cause of the delay, it will generally be in that party's interest to extend the contract time since, once the time is extended, the breach of contract by the party that caused the delay no longer operates. This presupposes that the innocent party may want to insist on compensation in return for its agreement to extend the time. If the innocent party refuses to agree to an extension of time, it may instead pursue damages for breach of contract.¹⁰ A contractual provision permitting the extension of time in certain circumstances, including when the delay is caused by the owner, helps to avoid disputes of this nature.

To avoid the application of the unwanted consequences of the contract law principles described above, it is advisable that the parties include in their construction contracts delay and *force majeure* clauses. Such clauses address the impact of delays on the contract time and the compensation for losses sustained by the parties due to such delays. Delay and *force majeure* clauses require the thoughtful allocation of risks associated with the occurrence of certain events that impact performance of the contract. Such allocation usually occurs during contract negotiations. For example, an owner will typically assume the risks of *force majeure*, design-related issues, unforeseen site conditions, delays in providing access to the site or necessary

information for the performance of the work, changes in legislation, and obtaining permits and approvals. On the other hand, the contractor usually assumes the risks related to quality of work, site safety, subcontractor issues, construction-related issues, and defects.

In the absence of express provisions addressing delays, the principles of contract law will govern the parties' rights and obligations. While these principles provide a framework, they are not the most effective means of dealing with extensions of time or recovery of resulting costs. By addressing the impact of delays at the outset of the contract, the parties can establish a clear process for extensions of time and allocate the risks associated with delay in a manner that strikes a fair balance between the parties. Well-drafted delay and force majeure clauses enable the parties to achieve this balance, reduce uncertainty, and minimize the potential for disputes.

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- 1 *Pervidic Contracting Co. v International Nickel Co. of Canada Ltd.*, [1976] 1 SCR 267 (SCC) citing *Hudson's Building and Engineering Contracts*, 10th ed. (1970)
- 2 *Smith v Johnson Brothers Co.*, [1954] 1 DLR 392 (ONSC)
- 3 *Supra* note 2 [*Smith*]
- 4 *Convert-A-Wall Ltd. v Brampton Hydro-Electric Commission* (1986), 20 CLR 93 (ONSC)
- 5 *HB Construction v Potash Corporation et al*, 2020 NBQB 180 (NBQB) citing *Twin Cities Mechanical & Electrical Inc. v Progress Homes Inc.*, 2005 NLTD 134 citing *Goldsmith on Canadian Contracts*
- 6 *Supra* note 5 [*HB Construction*]
- 7 *Supra* note 5 [*HB Construction*]
- 8 *Boon v R*, [1934] 3 DLR 161 (SCC) and *Kei-Ron Holdings Ltd. v Coquihalla Motor Inn Ltd.*, [1996] BCJ No. 1237 (BCSC)
- 9 *Supra* note 8 [*Boon*] citing *Roberts v Bury Improvement Commissioners* (1870), 39 LJCP 129
- 10 *Wells v Army and Navy Co-Operative Society* (1902), 86 LT 764



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