

Reasonably Foreseeable Uncertainty

One of the many ways in which MTR Corporation Limited's current Conditions of Contract for Civil Engineering and Building Works Construction (the MTR Conditions) differ from other conditions of contract for civil engineer works in Hong Kong concerns the existence of an express qualification of the Contractor's right to an extension of time (EOT) for preventative acts or omissions of the Employer or the Engineer, by reference to the reasonable foreseeability of the resulting delay (the unforecastability wording).

This article examines the approach of the MTR Conditions in this respect, in light of salient principles of Hong Kong law, through a series of five points that culminate with a prediction as to how an Engineer might not approach the exercise of his power to extend the time for achieving the Completion Obligation having regard to the uncertain efficacy of the unforecastability wording.

The requirement for 'Reasonable Foreseeability'

Reasonable foreseeability is relevant to the fifteen incidents of Employer prevention that are scattered throughout the MTR Conditions, and summarized herein at Figure 1. It is relevant in this sense: if the relevant delay is 'greater than that which the Contractor could reasonably have foreseen at the date of the Letter of Clarification' then the Engineer must 'take such delay into account in determining any extension of time to which the Contractor is entitled under Clause 68.1'. Figure 2 contains an extract of Clause 68.1.

Clause 79.2 (Ordered Variation of Change to be in writing) offers a convenient example of the way the unforecastability wording is being employed. It reads (so far as relevant):

'... to the extent that any Variation causes the Contractor to suffer delay greater than that which the Contractor could reasonably have foreseen at the date of the Letter of Clarification the Engineer shall take such delay into account in determining any extension of time to which the Contractor is entitled under Clause 68.1.'

One may be forgiven for inferring from this wording, and from that of the other fourteen similar provisions, that there can be no EOT under Clause 68.1 if (and not merely to the extent) 'the Contractor could reasonably have foreseen' the relevant delay - although that is less than clear. On the force of this language, could it really be construed as a condition precedent?

Whatever intention would be attributed to these provisions, the first concrete point that may be made about the unforecastability wording is that it is unusual. The notoriously allusive concept of reasonable foresight has for decades been a feature of EOT provisions concerned with 'adverse physical conditions', and the 'forces of nature'; however, outside Hong Kong, perhaps for good reason, it remains an uncommon element in an EOT clauses concerned with Employer prevention. Rather, the criterion of 'reasonable foreseeability' is more commonly used in connection with a right to an adjustment of the contract price on account of additional costs occasioned by certain 'compensable events'.

The question confronting this requirement

Secondly, if the intention to be imputed to these provisions really is to create a condition precedent to an EOT then this very real question arises: Is the Employer free to hold the Contractor to the relevant Completion Obligation if an act or omission of the Employer (or Engineer) has prevented the Contractor from achieving that Completion Obligation, just because the delay was reasonably foreseeable?

This is open to question because provisions imposing liquidated damages

for delayed completion are susceptible to a doctrine of law known (among other tags) as the 'doctrine of prevention', the existence and operation of which has been recognized in a handful of decisions of the Court of First Instance, and the awards of arbitral tribunals applying Hong Kong law. More recently, the Court of Final Appeal in the Ying Ho Company Limited & Ors. v. The Secretary for Justice case took the opportunity to confirm the existence and scope of the doctrine.

The doctrine of prevention in Hong Kong

In the leading judgment of the Court, Mr Justice Ribeiro PJ defined this common law doctrine, in so far as it has a role in Hong Kong, in the following terms:

'where a contract does not have a mechanism for certified extensions of time, the contract, construed contra proferentem against the employer, cannot, in the absence of clear words, be taken to mean that the employer is entitled to charge the contractor with liquidated damages accruing on a daily or periodic basis when it is the employer's own conduct which has resulted in part of the relevant delay...' (emphasis supplied)

The reference in this passage to 'a mechanism for certified extensions of time' leads to a third point, suggested in the above quotation - namely, that employer's prevention will not disable a liquidated damages provision if the contract provides for an EOT in respect of those events.

Are the MTR Conditions clear about this?

Does the reference to delay in excess of what was reasonably foreseeable at the date of the Letter of Clarification - if it is indeed a condition precedent - clearly evince a common intention - the 'clear words' referred to in the above passage - that the employer will be entitled to charge the contractor with liquidated damages notwithstanding that it is the employer's own conduct which has resulted in at least part of the relevant delay?

In relation to the requirement of clarity in this very context, in the well known decision of the English Court of Appeal in *Dodd v. Churton*, The Right Honourable Lord Justice Chitty observed that:

'It would require very clear language to show that a man had undertaken a responsibility which very few men would undertake with their eyes open.'

Beyond pronouncements of this sort, there is limited, if any, authoritative guidance as to the permissible forms which such 'clear words' may take. Arguably, the overseas cases that uphold the strict efficacy of other forms of express conditions precedent - ie, notice provisions - in circumstances of employer prevention, are confined to a situation where the Contractor has failed to take a step necessary to activate the EOT mechanism. Moreover, these cases should be viewed in a wider policy setting that increasingly views strict notice provisions as legitimate.

Fifthly, even as a matter of modern contractual interpretation, it may be hard to mount an argument that there is sufficient clarity in the language of the MTR Conditions on this point to warrant a deprivation of the right under Clause 68.1 to an EOT nor of access to the doctrine of prevention. This is particularly so given the existence of the Engineer's power under Clause 68.4 to finally review all the relevant events which may have occurred and of which particulars shall have been given to him, upon the issue of a Certificate of Completion, and to 'grant and certify to the Contractor such further extension of time (if any) for the achievement of the relevant Completion Obligation or Obligations as in the opinion of the Engineer may be justified.' Arguably this 'final determination power' is not touched by the unforecastability wording.

Conclusion

Having regard to the foregoing remarks, it remains to be seen whether the wording of the unforecastability condition satisfies the traditional degree of clarity necessary to curtail the Contractor's right to an EOT or reasonable time for the achievement of the Completion Obligation. As such, and in the meantime, it should perhaps come as no surprise if an Engineer appointed under the MTR Conditions feels a profound sense of reluctance to invoke the unforecastability wording.

Figure 1 - Relevant events of Employer's prevention

An Engineer's instruction to resolve an ambiguity and/or discrepancy in the documents forming the Contract, or requiring the Contractor to put forward proposals for Approval whereby they may be resolved, which causes the Contractor to suffer delay (Clause 6.2) [Engineer to Explain Ambiguities].

- A failure or inability of the Engineer to issue at a time reasonable in all the circumstances drawings, specifications or instructions requested by the Contract and considered necessary by the Engineer in accordance with Clause 7.3 (and which it is not the responsibility of the Contractor to provide pursuant to Clause 10), which causes the Contractor to suffer delay (Clause 7.4 [Delay in Information]).
- An unreasonable delay in the Engineer's Approval or in any other acts to be performed by the Engineer pursuant to the Design Approval Process (Clause 9.7 [Delay in Approval of Design Data]).
- An unreasonable delay in the Engineer's consent to the proposed methods of manufacture, construction or installation, in consequence of which the Contractor suffer delay (Clause 16.4 [Late Consent: Delay/Cost]).
- Requirements of the Engineer pursuant to Clause 16.2 could not reasonably have been foreseen by the Contractor at the date of the Letter of Clarification, in consequence of which the Contractor suffer delay (Clause 16.4 [Late Consent: Delay/Cost]).
- A withdrawal of consent to a method of construction or installation to which consent has previously been given, followed by the taking of steps by the Contractor as may be necessary to obtain the Engineer's consent to a changed method of construction or installation, in consequence of which the Contractor suffers delay (Clause 16.5 [Changes in Methods of Construction: Delay/Cost]).
- A requirement of the Engineer that the Contractor permit the use of Site of his Contractor's Equipment and labour by utility companies, Government Departments and other contractors employed by the Employer and their respective workmen and the workmen of the Employer who may be engaged in the execution on or near the Site of any work ancillary to the Works but not included in the Contract, as a result of the compliance with which, the Contractor suffers delay (Clause 37.2 [Use of Contractor's Equipment and Labour]).
- The activities of any Designated Contractor or Interfacing Contractor are such that the Contractor is unable to proceed with the Execution of the Works with due dispatch in accordance with the Master Programme, the ABWF Programme and/or the Co-ordinated Installation Programme, because of which the Contractor suffers delay (Clause 46.7 [Designated and Other Contractors: Delay]).
- The Contractor's affording of all reasonable opportunities for carrying out their work to utility companies, Government Departments, any other contractors employed by the Employer and their workmen, any workmen of the Employer who may be engaged in the execution on or near the Site of any work ancillary to the Works but not included in the Contract, in accordance with the requirements of the Engineer, which involves the Contractor in delay (Clause 46.7 [Designated and Other Contractors: Delay]).
- The Contractor's co-ordination of his own work under the Contract with that of Designated Contractors and Interfacing Contractors under the respective contracts with the Employer and with that of the Employer's own workmen at the times stated in the Specification or at such other times, in accordance with the requirements of the Engineer, which involves the Contractor in delay (Clause 46.7 [Designated and Other Contractors: Delay]).
- The Contractor's taking of reasonable steps to ensure that the Execution of the Works in co-ordinated and integrated with the works of Designated and Interfacing Contractors, and compliance with any directions which the Engineer has given for the integration and/or co-ordination of the Execution of the works with the execution of the works of any Designated or Interfacing Contractor, which involves the Contractor in delay (Clause 46.7 [Designated and Other Contractors: Delay]).
- A failure on the part of the Employer to give possession in accordance with the terms of Clause 65.1, as a result of which the Contractor suffers delay (Clause 65.2 [Delay to Contractor]).

- A written order of the Engineer to suspend the progress of the Works or any part or Section thereof which is (a) not otherwise provided for in the Contract, (b) not necessary for the proper Execution of the Works or by reason of weather conditions unavoidably affecting the safety or quality of the Works or by reason of some default on the part of the Contractor, and (c) not necessary for the safety of the Works or any part thereof, and which causes the Contractor to suffer delay (Clause 72.2 [Suspension of Works]).
- A written requirement of the Engineer for the Contractor to search for the cause of any defect, imperfection or fault (for which the Contractor is not liable under the Contract) under the direction of the Engineer, in the undertaking of which the Contractor suffers delay (Clause 77.1 [Contractors to Search for Defects]).
- A Variation which causes the Contractor to suffer delay (Clause 79.2 [Ordered Variation or Change to be in writing]).

Figure 2 - Clause 68.1 [Alteration of time for Completion]

If the Contractor is or is likely to be delayed in achieving a Completion Obligation by reason of:

- (a) delay by the Employer or the Engineer in providing information or giving Approval at the times agreed under any programme Approved pursuant to Clause 15, or in providing the Contractor with parts of the Site in accordance with Clause 65.1; or
- (b) any Variation under Clause 79; or
- (c) delay by the Engineer in providing drawings or specifications or instructions pursuant to Clause 7.4; or
- (d) delay by, or any unreasonable requirement of, the Engineer in giving consent or withdrawing consent previously given to the Contractor's proposed methods of manufacture, construction or installation as referred to in Clause 16; or
- (e) delay resulting from any Excepted Risk, as referred to in Clause 22.6; or
- (f) encountering physical conditions or artificial obstructions as provided in Clause 38.3; or
- (g) delay of a kind referred to in Clauses 6.2, 9.7, 19.2, 37.2, 46.7, 46.8, 51.2, 57.12, 60.3, 65.2, 74.4, 74.6, 77.1 or 99.1; or
- (h) any delay occasioned by a suspension ordered under Clause 72 unless the suspension order was the result of a breach of Contract or other default of the Contractor or those for whom the Contractor is responsible under the Contract; or
- (i) delay caused by the hoisting of a typhoon signal of number 8 or above but not for other weather conditions or circumstances arising from weather conditions; or
- (j) any disturbance to the progress of the Works for which the Employer or the Engineer is responsible other than disturbances of the kinds mentioned in (a) to (i) above

And whether such delay occurs before or after the time or extended time fixed for achieving such Completion Obligations then as soon as is reasonable after receipt by the Engineer of particulars in accordance with Clause 68.3, and subject to Clause 68.4 and to the Clause 69, either prospectively or retrospectively the time for achieving such Completion Obligation shall be extended by such period as in the opinion of the Engineer may be justified and the date set out in the Contract for achieving such Completion Obligation shall be amended accordingly by the Engineer who shall notify the Contractor in writing of the amended date.

(source: Pinsent Masons LLP 2010)

Should you have any questions please contact Nicholas Brown (nicholas.brown@pinsentmasons.com). This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.