

Construction contracts: “No damage for delay” clause enforced

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In a recent case, the Federal Court of Australia confirmed that it will enforce a “no damage for delay” clause, including when delay occurs as a result of a variation under a contract.

Damages for Delay

As a general proposition, if a contractor or employer breaches a construction contract such that it causes delay to the Project, the other party may claim damages for its loss due to the delay. A “no damage for delay”¹ clause, however, precludes a party from claiming such damages.

In the case discussed below, the court considered the proper construction of a clause preventing the contractor from claiming damages for delay or disruption in the event of employer-culpable delay or disruption. The court considered this clause in the context of a claim for damages or “time-related costs” as a consequence of variations under the contract.

Lucas Earthmovers Pty Limited v Anglogold Ashanti Australia Limited [2019] FCA 1049

Lucas (the “Contractor”) contracted with AGA (the “Owner”) to construct an access road to a remote mine site. The project subsequently fell into delay, and the Contractor incurred additional costs in completing the project. The Contractor brought several claims against the Owner, including for (i) payment of time-related costs it incurred for the additional work; (ii) payment for variations under the contract; and (iii) other consequences of the additional time taken and the additional work.

The contract included a “no damage for delay” clause. Clause 18.8 of the contract provided:

“Notwithstanding any other provision of this Contract, the Contractor will not be entitled to claim any Liabilities resulting from any delay or disruption (even if caused by an act, default or omission of the Company or the Company’s Personnel (not being employed by the Contractor)) and a claim for the extension of time under Clause 18.3 will be the Contractor’s sole remedy in respect of any delay or disruption and the Contractor will not be entitled to make any other claim”

One of the questions before the court was whether this clause should be interpreted to prevent the Contractor from being awarded time-related costs, in circumstances where the delay to the Completion Date was as a result of a variation under the contract.

¹ Also sometimes referred to as a “no damages for delay” clause.

The Owner submitted that:

- Clause 18.8 overrode any other provision in the contract, including any inconsistent provision. It said that the effect of this clause was to preclude the Contractor from recovering any losses resulting from delay or disruption, even if the delay or disruption was caused by the Owner;
- Properly characterised, the Contractor's claim for time-related costs with respect to additional work was a claim for loss resulting from "delay or disruption" and therefore subject to clause 18.8; and
- The contract provided that in the event of a "Qualifying Cause of Delay" the Contractor would be entitled to an extension of time for Practical Completion under clause 18.3 of the contract. A variation under the contract constituted a Qualifying Cause of Delay. Clause 18.8 therefore had the effect of limiting the Contractor's remedy to an extension of time, in the event of delay or disruption.

The Contractor submitted that clause 18.8 did not apply to time-related costs for variation work, nor to a claim for remuneration for work performed. It sought to characterise its claims as being for those matters, as opposed to a claim for losses, costs or expenses resulting from delay or disruption, which were caught by clause 18.8.

The Federal Court's Decision

The court held that clause 18.8 prevented the Contractor from making a distinct claim for prolongation costs, including time-related costs in relation to a variation under the contract. The court held that the applicable rates in the contract for variation work included time-related costs, so, by application of these rates in valuing variations, the Contractor would receive payment for the prolongation of its works. The court went on to say that if there were no applicable rates in the contract for variation work, the valuation of the variation could include a reasonable amount for time-related costs.

However, aside from these situations, the Contractor had no ability to recover prolongation costs, because the plain wording of clause 18.8 precluded any such recovery.

Comment

"No damage for delay" clauses are relatively uncommon in construction and engineering projects, at least those outside of the United States. There is sometimes uncertainty as to whether the courts will enforce such clauses, given their exclusionary nature. But, this Australian case provides an indication of their enforceability, and indeed there are examples of enforcement from other jurisdictions, including Hong Kong and Singapore. In the United States itself, "no damage for delay" clauses are often enforceable, save where the delay in question was caused by bad faith or malicious intent on the part of the employer.

Although it is unlikely that "no damage for delay" clauses will become a feature of international construction and engineering contracting, where used, such clauses require contractors to contemplate the impact on their pricing due to the acceptance of risk for delay, howsoever caused. At least where contracting parties are of similar bargaining power, the starting inclination of a court may well be to uphold and enforce a "no damage for delay" clause, on the basis that it represents the bargain struck by the parties.

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