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Common Law "Time at Large" Arguments in a Civil Law Context

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Introduction

This article examines the potential range of "time at large" arguments available to Contractors and, in particular, how they may be advanced in a civil law context in addition to more traditional English/ Commonwealth common law settings in which the concept has developed.

Background

During 2006, the authors acted for a main contractor as claimant in an international arbitration, culminating in a month-long trial in Miami, United States.[1] The case involved a number of interesting legal issues (notably in relation to delay) of general application for construction disputes across different jurisdictions.

To put the issues in context:

- The project was for the construction of the civil engineering works on a major infrastructure facility in a remote region of South America.
- The contract was a revised version of the International Federation of Consulting Engineers (FIDIC) "Red Book" Conditions of Contract for Works of Civil Engineering Construction (4th edn, 1987).
- The substantive law governing the contract was the local law of the country in question. This was a civil law jurisdiction, unlike the English common law which provided the basis for the Institution of Civil Engineers (ICE) contract, from which the FIDIC contract was derived.

In relation to the matters in dispute, the project had been the subject of major delays, resulting in the doubling of the initial construction programme. This delay was caused by a range of different events (from major ground risks and variation instructions, through to significant incidents of civil unrest in and around the project area). Unsurprisingly, the factual and legal questions relating to the delays on the project were key areas in dispute in the arbitration.

Within the parties' arguments about delay (which included disputes over the appropriate baseline programme, the relevance of resource planning and the ownership/use of float

and time contingency), one significant area related to the operability/operation of the contractual time procedures. In other words, in English construction practice terms, there was a major "time at large" issue.

The concept of "time at large"

''Time at large" is a very familiar argument in contractor claims, at least in English practice. As recently described in a useful discussion on the subject,[2] it is a common law principle in which the fixed contractual completion date (typically attended by liquidated damages in most standard and bespoke forms of contract) is rendered ineffective. In general terms, this is based on the so-called "prevention principle", by which it would be inequitable for the employer to enforce the contractor's failure to meet the completion date when this was caused by reasons for which the employer was responsible (an "act of prevention") *and* where the contract either has no mechanism for extending the completion date, or that mechanism has become inoperable. In these circumstances, the contractor is relieved of his obligation to complete the works by the specified completion date. Instead, his obligation is to complete the works within a "reasonable time". At the same time, the employer is no longer entitled to claim or deduct the contractual liquidated damages.

Whilst this argument is frequently raised by contractors in their claims, it is difficult to pursue this argument successfully. This is because most standard forms and bespoke forms of construction contract now contain adequate extension of time procedures (which was not the case in some of the older cases that established the principle). It is also because the effect of the argument is so significant as to displace the contractual completion date, that courts and Tribunals are naturally slow to accept this conclusion in the absence of a strong factual and legal basis for doing so. This typically requires extreme circumstances rather than the usual basic dispute between employers/contractors about the responsibility for delays and the length of the appropriate extensions of time.

In the Miami arbitration, there was such an extreme set of circumstances that it was possible to argue on the contractor's behalf that time had become "at large" on multiple factual/legal bases, as described below.

The legal context

Before pursuing "time at large" type arguments in international arbitration, it is obviously necessary to consider the substantive law which is applicable to the contract in question. Whilst common law jurisdictions may be receptive to the argument being pursued in the usual way, in civil law jurisdictions, it is necessary to determine whether there are any relevant legal principles on which the argument can be based and by which similar legal conclusions can be reached.

These will obviously vary between different civil codes throughout the world. However, general legal principles in civil law jurisdictions sometimes permit the court or tribunal a broad discretion to adjust the recoverability of damages or to vary the standards of performance under the contract where it is generally equitable to do so.

For example, Art.147 of the French Civil Code provides (in translation):

> *"A debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part."*[3]

The "external cause" exception can be applied (inter alia) to provide relief from damages to a contractor who has been delayed by an act of the employer ("*fait du maître de l'ouvrage*"), such as breach of contract or the instruction of additional works. This is analogous with the concept of an "act of prevention" by the employer under English law.

A different example of this type of provision is seen in Art. 1346 of the Peruvian Civil Code (in translation):

> *"Judicial reduction of the penalty*
>
> *At the debtor's request, the judge may reduce equitably the penalty when it is evidently excessive or when the principal obligation had been partially or irregularly fulfilled."*[4]

These are just two examples of provisions from the codes of Civil Law jurisdictions which might be used. Whilst the formulation of the relevant legal principles will vary from state to state, the basic issues and arguments are fundamentally similar and, ultimately, they will all be likely to depend on the same underlying concepts of equity and fairness.

Examples of "time at large" arguments in action

The circumstances of the Miami arbitration provided a useful demonstration of many of the different potential components of a "time at large" claim.

(i) The deficiencies of the contractual completion obligations/liquidated damages

Even before any work has been started on site, or any delay events have actually occurred, the contractual time and liquidated damages provisions themselves may be so badly drafted as to be inherently uncertain/unworkable.

There have been examples of this in earlier English and Commonwealth case law. For instance, *Bramall & Ogden Limited v Sheffield City Council*[5] involved a contractor being engaged by a local authority to construct a number of dwelling houses, under the terms of JCT Standard Form of Building Contract (1963 edn). No provisions for sectional completion were used. Accordingly, the contract provided for a single completion date for the works. However, the contract appendix defined the rate of liquidated damages as based on the number of houses which remained uncompleted. It was held that the sectional basis of the liquidated damages was inconsistent with the non-sectional definition of the Works and the completion date. On this basis, and guided by the principle that liquidated damages provisions should be construed strictly and *contra proferentem,*[6] H.H. Judge Hawser Q.C. held that this inconsistency between the relevant contractual provisions had the effect of preventing the employer from enforcing his rights to liquidated damages against the contractor.

Another example of such inherent contractual problems was provided in *Arnhold & Co Ltd v Attorney-General of Hong Kong.*[7] In this case, the contract provided for liquidated damages to be paid for every day of delay, at the rate specified in another clause of the contract. The problem was that the other clause defining the liquidated damages was extremely unclear and, in essence, stated that the rate of liquidated damages could range from a minimum of US$400 to a maximum of US$2,700. However, it was found that the contract did not indicate any principle or basis which governed how this sliding scale of liquidated damages was to be fixed. As a result of this, it was held that the liquidated damages provision was void for uncertainty. In doing so, Sears J. emphasized the importance of clarity and certainty for the contractor:

> "… as a matter of common sense, the object of a liquidated damages clause is to enable an easily ascertained figure to be known as the damages which the contractor pays if he does delay. The clause specifically envisages a sum payable for each day. This contract appears to me to defeat the object of such a liquidated damages clause and is in reality the antithesis of such a clause."

In the Miami arbitration, the contractual provisions were also inconsistent, to such an extent that it was difficult to see how they could be operated. The contract provided for sectional completion, with 16 separately defined key dates. However, the liquidated damages provisions only defined damages in respect of 11 sections of work and, worse still, the definitions of these sections did not match the descriptions of work covered by the 16 key dates. Consequently, it was virtually impossible for the contractor to assess with any certainty what his potential liability would be for failure to complete the works by the respective key dates. The contractor could thus argue that this offended the basic principles of clarity and certainty that were emphasized strongly in the *Arnhold* case, described above.

Even before considering any of the delay problems which may occur during the course of a construction project, it is clear that the inherent problems within the contractual provisions and procedures can be so severe as to render the time obligations and/or liquidated damages provisions incapable of legal enforcement.

(ii) The failure properly to operate the extension of time procedures

As mentioned above, the older "time at large" case law (such as the *Peak Construction* case, see footnote 6) involved contracts,which contained no extension of time mechanisms at all. In those circumstances, it was manifestly unfair for the employer to insist on the original fixed completion date where the contractor had been delayed by circumstances for which the employer was responsible. This was the classic application of the "prevention principle".

Most modern contracts now contain extension of time provisions. However, "time at large" arguments may conceivably remain open in circumstances where there has been some serious failure in the administration of the contractual extension of time mechanisms or, whilst an extension of time clause exists, it cannot be operated in the particular circumstances of the case. It is these situations which now provide the most common scenarios for "time at large" arguments in contractors' claims.

The argument about failure properly to administer the contractual procedures for extensions of time was recognised (albeit obiter) by Salmon LJ. in the *Peak Construction* case:

> *"In any event, it is clear that, even if clause 23 had provided for an extension of time on account of the delay caused by the contractor [sic], the failure in this case of the architect to extend the time would be fatal to the claim for liquidated damages."*[8]

The "time at large" effect of the failure of the contract administrator properly to exercise his power to award extensions of time has also been seen in other English and Commonwealth case law. In the Canadian case of *Hawl-Mac Construction Limited v Campbell River,*[9] the contractor was delayed by events for which he was not responsible and an extension of time claim was submitted. Despite being required to deal with the extension of time claim as and when received from the contractor, the engineer did not grant an extension of time until much later, by which time the original contractual completion date had already come and gone. The employer retained liquidated damages for delayed completion.

In his judgment, Wallace J. held that it was a key requirement that the contractor should have been able to know in advance what his completion obligations were (i.e. for the engineer to make his decision and to provide details of the extended completion date):

> *"The requirement that the engineer consider the claim upon receiving it and at that time fix the appropriate extension period for completion would, if implemented, enable the contractor to know the new date within which it must complete the contract. The contractor would then be in a position to add the additional resources in men and equipment, if it saw fit to do so, in order to complete within the extended period and avoid exposure to claims for liquidated damages for delay."*

In emphasizing this key requirement of the contractor to have some prospective certainty of his time obligations, Wallace J. cited the following dicta of Williams J. (New Zealand Court of Appeal) in *Anderson v Tuapeka County Council:*[10]

> *"If no date is specified within which the works are to be completed, how is it possible for the contractor to complete the works by a specified date? Or how can he have broken a contract to complete on a specified date if he did not know beforehand what the date was on which he was under an obligation to complete? A proviso which was intended to preserve to the contractee the right to recover penalties in any event which, had it not been for the proviso, would have deprived him of that right, should be expressed in clear and unambiguous terms. If it had been intended to allow the Engineer to decide ex post facto whether there was a breach of contract to complete, it should have been very plainly stated."*

On the basis of the need for the contractor to have prospective certainty of the extended completion date, Wallace J. held that the engineer's failure to issue his decision on the extension of time before the expiry of the original completion date meant that time had been left at large and that no liquidated damages could provided for an extension be claimed by the employer:

> *"The extension clause in the present contract (clause 9) provides that the time for completion shall be extended for the time lost due to the owner-caused delays and that the engineer, upon receipt of an application for an extension of time, shall fully and fairly consider it and fix the time of the extension. Having failed to perform this obligation before the original time for the completion of the contract period, it is my opinion there was no longer a specified date within which the contract was to be completed or from which penalties could be imposed.*
>
> *The original completion date was no longer applicable since the contractor was entitled to have the time for completion extended by reason of owner-caused delays and a new completion date had not been substituted for the original in accordance with the procedure contemplated by the extension clause."*

The position might be somewhat different in relation to a form of contract which permits the retroactive adjustment of the contractual completion date.[11] However, absent such express provision, the contractor is legitimately entitled to know in advance the dates by which he must finish the works and to obtain a decision on his extension of time claim within a reasonable time (or the contractually required time period for the decision). Following the case law cited above, together with older English and Australian authorities,[12] the employer may be deprived of his rights to recover liquidated damages if this is not the case.

Against this, however, is the judgment of Denning L.J. in *Amalgamated Building Contractors Ltd v. Waltham Holy Cross UDC*.[13] This case featured an extension of time issued by the architect (under the old Royal Institute of British Architects (RIBA) form of contract) after the completion date had passed. It was held that the architect *was* entitled to issue the extension of time retroactively. Some Australian authority has also suggested that the decision on whether to grant the extension of time does not actually have to be granted at all, provided the contract offers "capacity for relief" (i.e. the contract contains the necessary extension of time powers, even if they are not exercised during the course of the project).[14]

How can these cases be rationalised? Whilst the law remains rather unclear, the answer may lie in identifying the nature of the delay. In the *Hawl-Mac, Anderson* and *Miller* cases, the Employer had been directly responsible for the delays to the contractor and, as a result, the "prevention principle" was clearly a driving factor. However, in the *Amalgamated Building Contractors* case, the extension of time related to delays caused by general labour/materials difficulties, for which the employer was not himself responsible (even if he had agreed to take the contractual risk for this). Denning L.J. expressly acknowledged this distinction.[15] It is natural to regard the contractor as being in a stronger position where the employer himself has been directly responsible for the delays.[16] Also, the presence or absence of a contractual time limit for the decision will also be important. However, from the rather disparate case law in this area, this issue remains far from settled and much is likely to depend on the particular facts and the drafting of the extension of time clause in question.[17]

There is also an additional factor which has been raised in respect of whether the contract administrator's inadequate operation of the extension of clause can leave "time at large". In his recent article,[18] Keith Pickavance suggested that even a perversely inadequate exercise of the contractual extension of time procedures may not render "time at large" and prevent the enforcement of liquidated damages if the contract contains a power for the court or tribunal to "*open up, review and revise*" any decision. It is argued that this provides an alternative contractual means by which the contractor's true entitlement to extensions of time can be assessed, in order to provide any necessary corrections to the initial perverse decision of the contract administrator.

In other words, this fall-back mechanism enables the employer to argue that the existence of the tribunal's power to review the matter afresh preserves the operability of the extension of time procedures and thereby preserves the employer's ability to recover

liquidated damages. In terms of the basic logic of this argument, it is similar to the "capacity of relief" view that was expressed in the *Costain* case, noted above; i.e. it is sufficient if the contract is capable of providing the appropriate extension of time, even if it is not granted by the contract administrator.[19]

However, it may be questioned whether the authority that is cited in support of this proposition (*Panamena Europea Navigation v. Frederick Leyland & Co Ltd*[20]) supports this argument. The case dealt with a dispute over payment certification (and whether the wrongful non-issuance of a payment certificate meant that it could no longer be relied upon as a condition precedent to payment). It did not deal with the contractor's time obligations, the need for prospective certainty and/or "time at large" arguments. It is submitted that the issues relating to contractual payment certificates are materially different and should be distinguished from those relating to strict contractual completion dates and the imposition of liquidated damages.

Furthermore, by the time the tribunal finally steps in to "*open up, review or revise*" the extension of time decision, it is very likely that the contractual completion dates will have expired, leaving the contractor without the prospective certainty of his time obligations that was emphasized so strongly in the *Hawl-Mac* and *Anderson* cases, referred to above.

It is also apparent from other English case law that the existence of an "*open up, review and revise*" provision may not prevent the conclusion that the contractual mechanisms have broken down. This was the conclusion of H.H. Judge LLoyd Q.C. in *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd*,[21] in respect of a trade contract which contained such a clause. Nonetheless, he concluded that the contractual extension of time mechanism had broken down, due to the failure of the construction manager properly to respond to the contractor's extension of time claim in a timely manner. In relation to the general principles relating to the breakdown of the contractual machinery, Judge LLoyd Q.C. made the following comments:

> *"A breakdown of the contractual machinery occurs when without material default or interference by a party to the contract, the machinery is not followed by the person appointed to administer and operate it and, as a result, its purpose is not achieved and is either no longer capable of being achieved or is not likely to be achieved. It can for most practical purposes be equated to interference by a contracting party in the process whereby the other is deprived of a right or benefit, e.g. the failure of an employer to re-appoint an administrator or certifier on the resignation of a previously appointed person: see Panaema. Non-compliance with the machinery by the administrator is not in itself sufficient: the effect must be that either or both of the parties to the contract do not in consequence of the breakdown truly know their position or cannot or are unlikely to know it. Either is then free to have its position established by the appropriate means available: litigation or arbitration (preceded, if the contract so requires, by recourse to adjudication or the like). If the true position is or can be established by other contractual means then the breakdown is likely to be immaterial even where the result of the breakdown is that one party does not obtain the contractual right or benefit which would or might otherwise have been established by the machinery, e.g. the issue of a certificate, provided that the true position can be restored by the operation of other contractual machinery."*

It is clear from this that Judge LLoyd Q.C. did accept that the existence of other contractual machinery *could* be applied to prevent the breakdown of the contractual process. However, that only applies where it allows the party to establish his true position which, in respect of extensions of time, is required to be known within a reasonable time of the contractor's application. Judge LLoyd Q.C.'s decision in this case was that this was not saved by the operation of the "*open up, review and revise*" clause, or any other alternative contractual mechanisms.

The question then arises as to what other contractual machinery might be applied in order to prevent time from being set "*at large*". Whilst there appears to be no definitive authority on this point, one possibility is the existence of a short adjudication process (such as the English statutory procedure, or possibly the operation of a contractual dispute review board/dispute adjudication board[22]). With this, in the face of a non-decision or perverse decision from the contract administrator, the contractor may be able to obtain confirmation of

his true position and within a sufficiently short time-period to permit him to plan/resequence his works accordingly. It is quite conceivable that the rapidity of this alternative mechanism could be used to prevent time being set "*at large*".

In any event, it is submitted that employers and their contract administrators should not confidently rely upon the review jurisdiction of the tribunal (or an intermediate level adjudication procedure) to deal with the inadequate operation of the extension of time procedures, rather than making their own determination as the contract generally expects. By the time this jurisdiction can be finally exercised by the tribunal, the contractor will have lost any ability prospectively to assess the time by which the works should be completed, or to have had any chance of re-planning/accelerating his works accordingly. The contractor is entitled to ask whether it is reasonable that he may have to wait until the end of the arbitration process to have any certainty of his time obligations, in the face of a perverse, late or even non-existent decision from the contract administrator about the extension of time and still face the risk of liquidated damages being deducted.

However, this is not to say that the contract administrator should have to issue a decision which is completely correct and requires no adjustment by a subsequent court or tribunal, in order to prevent time from being set "*at large*". There are always disputes over the correct assessment of extensions of time and the Tribunal may well have the benefit of a sophisticated delay analysis which the contract administrator inevitably will not have had during the course of the works. Accordingly, it is submitted that it should be sufficient for the contract administrator to determine a bona fide and reasonable extension of time (based on the information available to him at the time, and within a reasonable time, or the contractually-required time of the contractor's application) and to leave the parties subsequently to contest responsibility for the remaining delays before the court or tribunal. In this event, the contract administrator will have complied with his obligations reasonably to assess the appropriate extension of time and in due time. This will give the contractor a reasonable opportunity to plan his works based on this provisional determination of his time obligations and, as a result, the employer's rights to recover liquidated damages should not be prejudiced (even if the tribunal later decides that the contractor is entitled to a greater extension of time). If the contract administrator neglects to do so (either in a timely manner, or at all), there is a body of case law that will support the contractor's claim that time has been left "*at large*".

(iii) The inoperability of the extension of time procedures

''Time at large" arguments may also exist where the contract contains a valid extension of time clause, but where the contract and/or other circumstances combine to prevent it from being properly administered.

A classic example of this was seen in the Miami arbitration. In one of the employer's amendments to the standard FIDIC Conditions of Contract, it was expressly stated that the engineer had to obtain the employer's approval before any extension of time could be granted. One of the other clauses required any necessary approvals "not to be unreasonably withheld or delayed".

In the circumstances of the case, despite events which clearly required an extension of time to be granted (e.g. the employer instructing suspensions of significant parts of the works), the engineer was prevented from granting any extensions of time, as the employer never gave any approvals for doing so. The effect of this was completely to emasculate the engineer's ability to carry out his function as contract administrator, in which he is required to discharge his discretion fairly and impartially.[23]

This is a clear example of a situation in which the time obligations can be strongly argued to have been left at large (and the employer relieved of his rights to liquidated damages) due to the contractual extension of time machinery having been rendered inoperable.

Another common example of circumstances in which the extension of time power has been argued to have become inoperable is where the contractor is under strict notification obligations, expressed as conditions precedent to his right to obtain an extension of time. Where the employer has directly caused delay to the contractor, but no extension is granted because the contractor did not submit his notification in due time, it has been argued that the

"prevention principle" could operate to debar the employer from recovering liquidated damages and leave "time at large".

The Australian case of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd*[24] appeared to support this proposition, to the effect that the strict enforcement of the contractor's notification obligation would "*result in an entirely unmeritorious award of liquidated damages*" for delays of the employer's own making.

However, more recently, in the Scottish case of *City Inn Ltd v. Shepherd Construction Ltd*,[25] it was held by the Inner House of the Court of Session (Lord MacFadyen) that the contractor's failure to notify in due time in accordance with the condition precedent *did* prevent him from obtaining an extension of time, but that this did *not* render the liquidated damages obligation as an enforceable penalty, nor leave "time at large". He held that:

"The fact that the Contractor is laid under an obligation to comply with clause 13.8.1, rather than merely given an option to do so, does not in my opinion deprive compliance with clause 13.8.1 of the character of a condition precedent to entitlement to an extension of time. Non-compliance with a condition precedent may in many situations result in a party to a contract losing a benefit, which he would otherwise have gained, or incurring a liability, which he would otherwise have avoided. The benefit lost or the liability incurred may not be in any way commensurate with any loss inflicted on the other party by the failure to comply with the condition. The law does not, on that account, regard the loss or liability as a penalty for the failure to comply with the condition. In my opinion, it would be wrong to regard the 'liquidated damages' to which the Defendants remained liable because they failed to comply with cl. 13.8.1 and thus lost their entitlement to an extension of time, as being a penalty for that failure."

The clear message from this case was that freedom of contract should be respected. If the parties agreed to a condition precedent to the contractor's rights to claim an extension of time, then legal effect should be given to this by the courts or tribunal. On this basis, various commentators have suggested that *City Inn* represents the correct approach.[26] Jackson J. has also recently questioned the *Gaymark* decision.[27] Perhaps the most powerful argument in favour of the *City Inn* approach is that the alternative would be to leave the employer in a prejudiced position (i.e. unable to enforce liquidated damages) as a result of the default of the contractor in filing his extension of time claim in accordance with the terms of the contract. It is difficult to see why the contractor should be placed in a *better* position by his own failure to notify his claim for an extension of time in accordance with express terms of the contract.

(iv) Failure to follow the contractual programming obligations

In addition to the contractual extension of time provisions themselves, the other relevant provisions in respect of the assessment of extensions of time and potential "time at large" arguments are those relating to the submission of programmes.[28] This does not always apply, as not all forms of contract require the submission/agreement of programmes (e.g. the JCT standard forms of contract).

In the Miami arbitration, an updated programme for the works had been specifically agreed by the parties as part of a separate side-agreement to the main contract. In addition to this, the contractor periodically submitted updated programmes to the engineer for approval (notably after significant delay events occurred, shortly after the side-agreement had been signed). Despite this and principally due to the express requirement of the engineer to obtain approvals from the employer, none of the updated programmes were accepted by the engineer. The consequence of this was that the contractor was left to try to plan his own works, without any ability to coordinate the sequence and timing of the works with the engineer's anticipated release of design information or to receive any coordination from the engineer with the works of other contractors on other parts of the project.

Such a breakdown of the contractual provisions on programming is unlikely in itself, to be sufficient to render "time at large". This is because of the fact that the engineer is still capable of assessing and granting extensions of time (albeit with more difficulty without an adequate updated baseline programme). However, taken alongside the contractor's clear interest in being able to plan his works effectively (as

emphasised in the cases referred to above) in order to try to meet the contractual completion dates, an obstructive approach from the employer and/or contract administrator in respect of the programmes will provide further support for the contractor who wishes to raise "time at large" arguments, as it compounds his difficulties in planning his works in order to comply with his completion obligations.

However, outside the particular circumstances of the Miami arbitration, the status of/extent of programmes provided by the contractor may also have a negative effect on the contractor's ability to claim extensions of time. Where the contract contains provisions for the submission of updated programmes, these are normally to be provided by the contractor (as he is normally in the best position to assess the state of the works and the intended sequence of works though to completion). However, it is often the case that the contractor does not do so.

Whilst, under most forms of contract, the failure to submit updated programmes is not fatal to the contractor's rights to claim extensions of time (unlike notification conditions precedent, as discussed above), it can be prejudicial to the contractor's position. This is because: (a) it creates inevitable disputes about what baseline programme should be used for assessing the delays and (b) what the as-built state of the works was when the delay events occurred. This point was made by Dr Nael Bunni in the context of the FIDIC contracts[29]:

> *"The Fourth Edition of the Red Book does not provide any sanction for a failure on the part of the contractor to submit the programme within the timescale required by the contract. This leaves the engineer in a dilemma when the programme is not produced on time and may prejudice any future extension of time claim the contractor may have. To have credibility the contractor must usually be able to show that programme and progress times and/or sequence have been affected by the matter giving rise to the claimed entitlement to an extension of time. In practice, the absence of a proper programme leads to difficulties experienced by the contractor in establishing his claimed entitlement and the engineer is likely to question the reliability of a programme that is provided late or a programme produced retrospectively."*

Conclusion

The legal concepts relating to when a contractor's contractual time obligations may be set "at large" are relatively well-established in English and Commonwealth jurisdictions. Whilst the case law is sometimes difficult to unscramble on certain points, the contractor will normally be able to pursue this argument where the contractual completion dates/liquidated damages provisions are inherently defective, where the extension of time mechanisms have been seriously mal-administered, or where the extension of time procedures have become incapable of being operated.

The authors' recent experience suggests that a similar position may also likely to be available to the contractor outside the traditional common law context, where construction contracts are being construed in civil law jurisdictions. The particular legal formulation of the arguments may well differ from the classic "time at large" common law concepts and language. However, civil law codes often contain broad equitably-based powers and discretions which can be used in order to provide relief to the contractor where this is appropriate. This is entirely consistent with the fundamental basis of the "time at large"/"prevention principle" concepts: namely, to recognise that there are circumstances where it has become unfair and unconscionable to allow the employer to enforce the contractor's compliance with fixed completion dates and to recover liquidated damages due to default and/or preventative acts by the employer and/or the contract administrator. If anything, the general civil law notions of good faith and unconscionability (which do not exist as such in English law) may actually make "time at large" arguments easier to pursue in civil law jurisdictions and may even permit additional legal arguments beyond the normal range permitted under common law principles.[30]

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The information in this article is for educational purposes only; it should not be construed as legal advice.

1 As much information as possible has been given within the constraints of confidentiality; as is normal in arbitration, the identity of the parties and the exact subject-matter of the dispute cannot be disclosed.
2 Keith Pickavance, "Calculation of a reasonable time to complete when time is at large" [2006] I.C.L.R. 167.
3 "Le débiteur est condamné, s'il ya lieu, au paiement de dommages et intérêst soit à raison de l'inexécution de l'obligation, soit à raison du retard dans l'exécution, toutes les fois gu'il ne justifie pas que l'inexécution provident d'une cause étrangere qui ne peut lui être imputee, encore qu'il n'y ait aucune mauvaise foi de sa part."
4 "Reducción judicial de la pena El juez, a solicitud del deudor, puede reducer equitativamente la pena cuando sea manifiestamente exesiva o cuando la obligación principal hubiese sido en parte o irregularmete cumplida".
5 (1983) 29 B.L.R. 76.
6 Following Salmon L.J. in the leading case of *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) I B.L.R. 111 at 121.
7 (1989) 47 B.L.R. 129.
8 (1970) 1 B.L.R. 122.
9 Supreme Court of British Columbia, 60 B.C.L.R. 57, (1984-5) 1 Const. L.J. 370.
10 (1900) 19 N.Z.L.R. 1.
11 For example, a power to review the position after practical completion is granted to the architect in Cl. 25.3.31 of the CT 1998 Standard Form of Contract (cl.2.28.5 of the JCT 2005 Standard Form), as reviewed in *Balfour Beatty Building Ltd v Chestermount Properties Ltd* [1993] 62 B.L.R. 1. However, this does not alter the fact that the Architect is still required to have responded to the contractor's extension of time notice within 12 weeks of its receipt (cl. 25.3.1.4 of the JCT 1998 Standard Form and cl. 2.28.2 of the JCT 2005 Standard Form).
12 Notably *Miller v London County Council* (1934) 50 T.L.R. 479 and *MacMahon Constructin Pty Ltd v Crestwood Estates* [1971] W.A.R. 162 (Supreme Court of Western Australia, in which the extension of time had not been granted within a reasonable time as required by the contract); per Burt J., *"if, upon the proper construction of the power to extend, it should appear that the power must be exercised within a period of time either fixed or reasonable, then a purported exercise outside that time is ineffective and there then being no date from which liquidated dates can run, the building owner loses the benefit of that provision."*
13 [1952] 2 All E.R. 452.
14 See *Commissioners of the State Savings Bank of Victoria v Costain Australia Ltd* (1983) 2 A.C.L.R. 1, as discussed by Matthew Bell in "Scaling the peak: the prevention principle in Australian Construction Contracting" [2006] I.C.L.R. 318.
15 [1952] 2 All E.R. 455.
16 This is also the view of the editors of *Keating on Construction Contracts,* 8th edn, 2006, Sweet and Maxwell, paras 9-020 and 9-026.
17 See also the discussion of the role of the contract administrator in the operation of the prevention principle in Baker, Bremen and Lavers, "The development of the prevention principle in English and Australian jurisdictions" [2005] I.C.L.R. 197.
18 See above, fn.2, 169, and also in Mr Pickavance's textbook *Delay and Disruption in Construction Contracts,* 3rd edn, 2005, Informa Business Publishing at para. 6.86. We would also like to express our gratitude to Mr Pickavance for his assistance in debating this issue with us.
19 See above, fn.14.
20 [1947] A.C. 428.
21 [1998] All E.R. 249.
22 Such as the International Chamber of Commerce's (ICC) Dispute Board rules.
23 As expressly provided in cl.2.6 of the FIDIC "Red Book" Conditions, 4th edn, and reiterated under general English common law principles (the authorities on which were usefully summarised by Jackson J. in the recent case of *Scheldebouw BV v St. James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC)).
24 (1999) N.T.S.C. 143.
25 [2003] B.L.R. 468.
26 See the late Professor Ian Duncan Wallace Q.C., "Prevention and liquidated damages: a theory too far" (2002) 18 *Building and Construction Law* 82, Hamish Lal, "Extensions of time: the conflict between the prevention principle and notice requirements as a condition precedent", Society of Construction Law paper, April 2002 and his updated paper "The Rise and Rise of Time —Bar Clauses for Contractors" Claims Issues for Construction Arbitrators" Society of Construction Law, September 2007. For a different view see also Tim Elliott Q.C's article "Gaymark: The Story Continues" Building Magazine, September 14, 2007.
27 Multiplex Constructions (UK) v Honeywell Control Systems [2007] 1 BLR 195, in which Jackson J. commented as follows, obiter (at 213):
"Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that Gaymark represents the law of England. Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. If Gaymark is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large."
28 For example, cl.14 of the FIDIC Conditions and the ICE Conditions (7th edn).
29 *The FIDIC Forms of Contract,* 3rd edn, 2005, Blackwell Publishing at pp. 354 – 355.
30 For example, it is possible in some civil law jurisdictions to seek a reduction in the liquidated damages that are recoverable by the employer where it can be shown that these exceed the actual loss that he has suffered as a result of the delay to completion: e.g. Art, 1152 of the French Civil Code, which permits the reduction of liquidated damages where they are "obviously excessive" in comparison with the actual loss suffered.