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Construction Arbitration Newsletter

Construction Arbitration Law Firm

"No Damage for Delay" – Clause

Interpretation

A "no damage for delay" clause is inserted into the contract by the Employer to prevent the Contractor from claiming compensation for delays caused by the Employer or for reasons not attributable to the Employer. The clause operates as a prohibition in the contract for the Contractor to raise claims for award of compensation or for loss suffered by the Contractor during the delay period and may include claims for idling of plants and machineries, increased costs of overheads, loss of profits and other expenses.

The sole remedy for the Contractor, in a contract where such clause is found, is to apply for extension of time for completion of the works. The premise of operation of a "no damage for delay clause", is the acceptance of the risk by the Contractor not to claim compensation for delays caused by the Employer.

Exceptions to the clause

A "no damage for delay" clause will not apply in circumstances where the Contractor is able to establish continuing prevention or interference during the period of delay in question, fraud, bad faith, negligence or misrepresentation by the Employer. These exceptions will also apply to the acts of the Employer's agents, if such acts are within the knowledge of the Employer at the time when the events of delay cause an impact on the work progress, leading to the delay in the project.

In addition to the aforesaid exceptions, a "no damage for delay clause" has the following exceptions:

(i) delays not contemplated by the parties at the time of entering into the contract.

(ii) delays caused due to prevention by the Employer.

(iii) delays which unreasonably prolong the contract execution period.

(iv) parties agree to waive the clause either by an express agreement or by conduct.

(v) delays not covered by the clause itself.

(vi) breach of a fundamental obligation under the contract.

A 'no damage for delay' clause is enforceable by the courts in India. Claims which fall within the ambit of a 'no damage for delay' clause will not be awarded by the Arbitral Tribunal. A claim by the Contractor, that because of the delays caused by the Employer which had extended the work period beyond the contract completion date, he is entitled to claim overheads for the number of days' of delay, is not maintainable even though the Employer was responsible for the delays. [see: Judgments of the US Court in *Corinno Civetta Const. Corp. v. City of New York*, 67 N.Y.2d 297 (1986) and *Westcounty Construction v. Nova Scotia*, 16 C.L.R. 73 (N.S.S.C.) (1985)].

The Federal Court of Australia in *Lucas Earthmovers Pty Limited v. Anglogold Ashanti Australia Limited,* [2019] FCA 1049, held that the Contractor is not entitled to recover prolongation costs.

Clause excluding "Indirect or Consequential loss"

Interpretation

A clause in the contract excluding "indirect or consequential loss" is enforceable in law. Waller LJ, in *British Sugar v. Projects Limited*, (1997) 87 BLR 42, rejected the argument that the expression 'consequential loss' includes 'loss of profits'.

Waller LJ observed that:

"Once a phrase has been authoritatively construed by a court in a very similar context to that which exists in the case in point, it seems to me that a reasonable businessman must more naturally be taken to be having the intention that the phrase should bear that same meaning as construed in the case in point. It would again take very clear words to allow a court to construe the phrase differently."

The Court in *British Sugar* case held that the clause excluding "consequential loss" shall not apply to increased cost of production or loss of profits resulting from the breakdown of a defective machinery.

A clause excluding 'Consequential damages' will not exclude liability for damages occurring naturally or directly (*Millar's Machinery Co Ltd v. David Way*, [1935] 40 Comm Cas 204). In *Saint Line Limited v. Richardsons Westgarth & Co Limited*, [1940] 2 KB 99, Atkinson J, observed as follows:

"What does one mean by 'direct damage'? Direct damage is that which flows naturally from the breach without other intervening causes and independently of special circumstances, while indirect damage does not so flow. The breach certainly has brought it about, but only because of some supervening event or some special circumstances. . . In my judgment the words 'indirect or consequential' do not exclude liability for damages which are the direct and natural result of breaches complained of."

The Court of Appeal in *Deepak Fertilisers Ltd v. ICI Chemicals and Polymers Ltd*, [1999] Lloyd's LR 387, held that a clause excluding liability for "indirect and consequential loss" would not exclude a claim for loss of profits, cost of rebuilding the plant and wasted overheads.

Whether a loss is "consequential" or "direct" is to be determined from the circumstances of the parties, including the terms of the particular contract, and what the parties are taken to have foreseen as being the likely consequences of a breach of the contract. (see: Julian Bailey, 3rd Edition, Volume II, para 13.39)

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