

How to calculate the amount of contractual delay penalty for late performance

In its recent judgement, the Curia (the Supreme Court of Hungary) interpreted and analysed in detail the method of calculating the contractual delay penalty, which serves as a valuable guide for contractual parties regarding the management of risks and prepares employers and contractors alike for the possible legal disputes that may arise in connection with late performance.

Although late performance is one of the most common causes of legal action, in most cases the parties are unable to clearly identify who is responsible for the delay and to what extent. This uncertainty usually leads either to unnecessary litigation being initiated or to the non-enforcement of rightful claims. Often, misunderstandings relating to the legal and factual situation surrounding the delay are also the reason why claims or defences are rejected which actually could have stood up to legal scrutiny in court had they been argued in line with judicial practice.

The main principle underlying the decision is that the amount of the contractual penalty must be calculated on the basis of the real (objective) delay. However, the contractor is only required to pay a delay penalty for the extent of the delay attributable to it (subjective delay). Consequently, the objective delay first has to be calculated and then the number of days by which the construction time was prolonged due to circumstances not attributable to the contractor is deducted. The objective delay is equal to the num-

ber of days that have elapsed after the deadline until actual completion of the contractual works.

Accordingly, employers need only prove the date of (late) performance in order to lodge a claim for payment of a delay penalty, whereas the burden of proof for showing that the delay was not attributable rests on the contractor. Pursuant to previous judicial practice, there are three main categories of circumstances under which a contractor can be released from liability for any delay: (i) impediment to construction works, (ii) omissions made by an employer, and (iii) changes.

The contractor is not liable for the delay caused by impediments that arose outside the control of the parties. As per judicial practice, it has to be considered whether the impediments that hindered construction were foreseeable and calculable at the time of the conclusion of the contract and whether the contractor has shown reasonable diligence in order to avoid them. It is irrelevant in this regard whether the relevant circumstances were attributable to the employer. It is enough to prove that the delay was the necessary consequence of these impediments.

Contractors are also not liable for a delay caused by omissions made by the employer. Pursuant to local case law, if the employer fails to fulfil its obligations that would have been necessary to ensure performance by the contractor, the delay caused by the employer is regarded as being sufficient to exclude the contractor's liability.

The contractor is not liable for the delay arising from changes proposed by the employer. The contractor is released from liability for the delay if the construction period is prolonged due to extra works ordered by the employer.



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Based on the above, employers need only prove the existence of an objective delay, whereas contractors bear the burden of proof in connection with the circumstances based on which they can be released from liability. The contractor has to prove that the stated circumstances (impediment, omissions made by the employer, extra works) unavoidably hindered construction and that the period of obstruction was directly caused by this. The days of construction time hindered by the impediments, omissions or extra works can be added up cumulatively only if they prolonged the construction time subsequently and not in a simultaneous manner.

The total amount of such days of obstruction has to be deducted from the objective delay. The remaining days after the deduction qualify as a subjective delay for which the contractor is liable. In accordance with the recent decision of the Curia, a delay penalty can only be calculated

on the basis of the number of days of subjective delay.

In light of the above, it is highly recommended that both employers and contractors take note of the facts on an ongoing basis and collect evidence concerning the delay in the course of the construction works in line with the categories laid down by judicial practice. It must also be taken into account that in most cases the circumstances under which the contractor can be released from liability must also be supported by an expert opinion.

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