COMINDIS

RECHTSANWÄLTE

A COMINDIS Feature: Top 10 Project risks in Plant Engineering and Infrastructure Projects

Top 4: Extension of time & delay LD's / liability, costs of prolongation and inefficiencies due to disturbances and variations[1]

Top 1	Unclear scope of works.
Top 2	Miscalculation and cost overrun.
Top 3	Design problems & defective works.
Top 4	Extension of time & delay LD´s / liability, costs of prolongation and inefficiencies due to disturbances and variations.
Top 5	Deficiencies in commercial contract implementation (weak contract management, lack of notifications, and lack of collecting evidence).
Top 6	Lack of experiences and resources (technical and staffing).
Top 7	Contractual ambiguities (gaps, different interpretation of clauses, new clauses).
Top 8	Difficulties in enforcing claims (absence of a neutral court, long and costly proceedings).
Top 9	Relying on co-operation with weak third parties (e.g., planner, sub-contractor, or consortium partner).
Top10	Compliance, unknown markets, customers & contractors.

[1] Please be aware that this publication shall not be taken as a legal advice. Any project requires intensive legal review and negotiations with the contractual partner.

Extension of time (EoT) & delay LD´s / liability, costs of prolongation and inefficiencies due to disturbances and variations belong to the most important risks in (EPC / turnkey) plant engineering. In plant construction projects delays arise quite often. As a result, from these delays, there are ways for both parties to assert claims:

The client requires delay damages, more specifically "liquidated damages" that have been agreed upon in the contract, whereas the contractor, on the other hand, can fall back to require an extension of time, costs of prolongation and inefficiencies due to disturbances / variations.

Very often disputes upon EoT, LD's, prolongations costs and inefficiencies rank on evidential (not directly legal) problems. Such issues can be avoided if from the beginning a professional claims and contract management is installed. This is in the interest of both the client and the contractor, to avoid costly and long-lasting arbitration or litigation.

Example

There is a major plant construction project in the energy industry (e.g. a WtE or HRSG project). The parties have agreed that the contractor shall complete its scope by 1 January 2021 (PAC). However, due to several circumstances (e.g. inaccessibility to the site, delay of granted permits, lack of stuff at site, impacted storage areas, interruption due to an accident at site and due to bad weather conditions) there is a considerable delay. The project cannot be implemented as foreseen and suffers a delay of six months. The client as well as the contractor have considerable losses and both want to know, how they can assert their claims.

Depending on the contractual allocation of causal events for the delay there might be a pro rata sharing of the delay, or even the issue of a concurrency (i.e. overlapping responsibilities of both parties).

In such cases there are several methods to determine the delay and the critical path. The typical delay analysis methodologies conducted by experts comprise:

- Impacted-as-planned analysis
- Time impact analysis
- Time slice windows analysis
- As planned vs. as built-windows analysis
- Longest path analysis
- Collapsed as-built analysis.

Whereas a few of these methods determine the critical path and the delay impact *prospectively*, others take a *retrospective* view on the events at site. It is important to choose the correct methodology accepted under the applicable law and contract (e.g. NEC) and appropriate for the project, which is also depending on available data sources.

Extension of time & delay LD´s / liability

Especially in international plant construction, it is common to implement a LD clause. The LD's (*Schadenspauschalierung*) must be separated from penalty clauses (*Vertragsstrafe*), which are often unenforceable, e.g. under English Law. However, under German law, a contractual penalty is allowed and often what the parties meant to agree on. This instrument is used to secure deadlines and to prevent contractual breaches. In contrast, LD's are precalculated before entering into the contract and must be a genuine pre-estimate of damages.

Sole Remedy

Often, the contractor wants to ensure that other damages besides the liquidated damages are excluded – the parties can agree upon a "sole and exclusive remedy" clause.

Maximum caps

The maximum total amount of the LD's (i.e. the cap) is most often set as a percentage to the contract price (e.g. 10%)[2]. If there is a delay, the sum of the damages must be paid in proportion to the daily rate (e.g. 0.1% per day). The caps might relate to several stages, e.g. there might be a separate cap for interim milestones for the engineering part (e.g. 0.01% per day). Furthermore, if agreed interim milestones were failed, it is important to stipulate what happens if the final deadlines were met at the end.

Costs of prolongation and inefficiencies due to disturbances and variations

The other side of the coin concerns the costs of prolongation and inefficiencies due to disturbances and variations that arise for the contractor. Under many jurisdictions there are still high prerequisites for such claims. A contractor asking for compensation based on a disruption in its construction progress must specify each single event for the disruption and its detailed effect ("*konkrete bauablaufbezogene Darstellung*"). The disruption must occur through the fault of the client. The description of these disruptions must include the specific breach of duty by the client (not just a global claim based on unsubstantiated allegations about certain circumstances).

Consequently, the pursuit of an appropriate claims and contract management is the key to preserve the evidence for any factual circumstances in connection with a disruption. Particularly in international plant construction projects, it is therefore

[2] If total caps and the daily rates are foreseen in General Terms & Conditions (GTC) there might be the risk of an invalidity under applicable Law. Especially in Construction Law cases the German Federal Court holds a cap of max. 5% as acceptable. However, whether this award is applicable also in Plant Engineering cases, is disputed in legal literature. To be on the safe side, individual agreements should be negotiated and documented.

indispensable to pursue a solid claims management in advance. Otherwise, claims are very often not enforceable at court.

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