

James Brown in UK Construction Excellence: The Challenges in the Construction of Energy Projects

December 11, 2018 James Brown

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Perhaps the most critical issue in all energy construction projects is the need for the completion of the project by a specified date.

The contractual documents will accordingly impose on the party that is to undertake the relevant works a binding deadline for their completion, and will typically contain other associated contractual provisions that are concerned with this end-date for completion. The legal consequences of late performance can be very significant indeed. Hence issues concerning time and whether works have been completed within the required is probably the ripest area for disputes in respect of energy construction projects.

In the first instance, a failure to perform on time may initially give rise to an obligation on the party in default to pay compensation to the innocent party. It is a very common feature of contracts concerning the construction of energy projects for the contractor in certain circumstances – usually late performance – to have to pay “liquidated damages.” English law does not permit clauses that penalise late performance (or indeed any other failure to perform as required) but provided the clause in question is not a penalty, then such a clause would typically be upheld by the English courts. Although these clauses impose an obligation on the party that is “late” in its performance to pay compensation to the other, such clauses can be regarded commercially as for the benefit of both parties (ie: both the paying party and the recipient) because they provide greater certainty as to the consequences of a specified failure to perform than would otherwise be the case (since otherwise the “innocent party” would have to establish a breach of contract by the late performing party, that it had suffered loss caused by the breach and that it had taken steps to minimise the loss suffered by it – ie: to mitigate it). Even in the absence of a liquidated damages clause, a failure to perform on time may well give rise to damages at common law.

Instances of delayed performance, however, may give rise to even more significant rights than an entitlement to damages (whether liquidated or not). So for example, many contracts will provide for an express contractual right to terminate the contract upon some specific period of delay and/or such a right may arise at common law. ...

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