

# Time-related obligations in key jurisdictions: an update Bolivia

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### 1. Introduction

The notion of the concurrent delay (i.e. project is being delayed as a result of an event attributable to an employer and another event attributable to the contractor occurring at the same time) and how it is treated by courts or the parties in a dispute in the Plurinational State of Bolivia (Bolivia) is still in an infant stage as the country has only recently seen an influx in execution of large scale projects after a significant period of stagnation due to not so distant nationalization process.

This paper first looks at the possible application of the provisions of the Bolivian Civil Code (BCC)<sup>1</sup>. Then the paper continues with examination of how the concept of the concurrent delay presently is treated in the context of the contracts concluded between a governmental body and the contracts executed between two private parties. Moreover, some of the recent cases that demonstrate how courts treat claims between governmental bodies and private entities are discussed. Finally, this paper conclude with analysis of particularities of conducting business in Bolivia and the common causes for a delay in execution of a project that international companies often fail to consider prior to commencement of works in Bolivia.

### 2. Treatment of Concurrent Delay

#### 2.1 BCC treatment of concurrent delay

The concurrent delay is not directly addressed by BCC; however, the event of delay itself can be considered as non-compliance with contractual obligations by a party. In such case, BCC provides in Article 339 that if a party can't meet its obligations then that party must redress the damage unless the said party can prove that the failure or delay in performance of contractual obligations is attributable to impossibility of performance of the contract for a cause that is not attributable to that party. Compensation for damage associated with or arises as a result of breach of the obligations or delay shall correspond to the loss suffered by the other party and the gain that the said party has been deprived of<sup>2</sup>. The compensation shall only cover the intended damage or foreseeable damage, if the breach or delay is not due to fraud of the other party<sup>3</sup>. Moreover, the loss suffered by a party shall be shown as immediate and direct consequence of breach of the other party<sup>4</sup>. In the case of concurrent non-compliance of obligations by parties the compensation due to one party is reduced in proportion to the

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<sup>1</sup> Decree Law N° 12760, dated 06.08.1975

<sup>2</sup> Article 344, BCC

<sup>3</sup> Article 345, BCC

<sup>4</sup> Article 346, BCC

seriousness of the contributing act of that party and the importance of the consequences of such act.<sup>5</sup>

Accordingly, even though the BCC does not specifically defines treatment for the concurrent delay, by analogy, the instance of occurrence of the said event can be dealt through application of the articles discussed above.

## 2.2 Oil and Gas sector: contractual treatment of the concurrent delay

In the context of the oil and gas sector, it is important to make a distinction between the contracts signed amongst a governmental entity and a private entity and the contracts signed by two private entities. For the purpose of this paper, the analysis is based on EPSC<sup>6</sup> or maintenance type of contracts used in the oil and gas sector for the provision of services in the cases of design, construction and maintenance of the gas production facilities and pipelines.

The contracts between a private entity and a governmental entity are made generally in accordance with the following principles:

- a) Must be made in accordance with the laws of Bolivia
- b) Standard form of the contract is used
- c) **Limited room for negotiation of the terms and conditions during the bidding process:**
  - a. proposed amendments/modifications to the terms and conditions shall be submitted in the forms of queries generally politely requesting the governmental entity to consider proposed modifications
  - b. the answers to the queries distributed by the governmental entity to all participants to the bid; thus a participant who did not submitted any contractual qualifications still can have benefit from the qualifications submitted by another participant
- d) The concept of limitation of liability is difficult to introduce/explain
- e) Arbitration or any other type of dispute resolution (as applicable) must be in Bolivia
- f) Force Majeure is defined as circumstances that are reasonably outside of the control of the party or impossible to prevent such as but not limited to: riots, wars (declared or not), insurgencies, rebellion, terrorism, riots and natural phenomena of extraordinary character. Excluded: financial, commercial or tax difficulties; delay of delivery of material or equipment and delay in performance of sub-contractors or providers unless it is attributable to force majeure event.

As was mentioned previously, Bolivia has gone through a nationalization process of the oil and gas operating companies in not so distant past. As a result, some of the governmental companies operate as governmental entities and some still operate as commercial entities. The importance of this aspect is that when a governmental entity signs an EPSC contract it is considered as administrative contract and is governed by Law N°1178 and when governmental commercial entity signs the same EPSC contract it is considered as civil contract.

It is important to highlight that the Law N°1178 gives right to the Bolivian Government to determine whether or not in a case of a breach of the contractual obligations that particular breach constituted or caused damaged to the State and accordingly to seek an action against the entity in default<sup>7</sup>.

In particular, there has been a tendency by the Bolivian Government to rely on the above-mentioned legislation in the cases of delay of execution of its obligations by the contractor in the energy and road construction sectors. With respect to the road construction projects the Bolivian Government has also deployed a technique that construction completion of a particular road segment could become a politically driven issue and the contractor can find itself all of sudden with the completion date that is difficult or impossible to achieve.

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<sup>5</sup> Article 348, BCC

<sup>6</sup> Engineering, Procurement, Supply and Commissioning

<sup>7</sup> Law N°1178, Article 47

Usually, the standard contracts issued by YPFB<sup>8</sup> Corporation or its subsidiaries (YPFB) only consider the extension of time to complete contractual obligations in the following circumstances:

- a) change order mechanism
- b) case of the force majeure
- c) case of or specifically defined unforeseeable circumstances

These contracts also provide that if any part of the work is not executed in accordance with the work schedule then YPFB has the right to request the contractor to accelerate execution of the works. However, there are no specific provisions addressing the possibility of a concurrent delay occurring. One interesting aspect that needs to be highlighted is that typically these standard contracts include a provision stating that the contracting governmental body has **the right to suspend the performance of the contract at its convenience due to the interests of the State**, thus this provision can be used by the governmental body as a solution in the case of an event causing delay in performance of contractual obligations of the said governmental body. If a governmental body suspends the contract in virtue of this provision then it will only be obliged to compensate the contractor for the stand-by expenses occurred after a lapse of a certain period of time defined in the contract. These standard contracts also provide that in the case of a dispute or arbitration the contractor still **must continue with execution of its obligations**. Thus, the standard contracts in use by YPFB are rather one-sided in nature with the risks largely to be assumed by the contractor.

With respect to the contracts signed between two private entities the parties normally chose the contract to be governed by laws of England and Wales, France or Spain – depending on the origin of the headquarters of the company conducting the exploration and exploitation activities.

Overall, these contracts also do not address the possibility of occurrence of concurrent delay, however, they do contain a number of mechanisms that allow dealing with a situation of the concurrent delay, should it occur:

1. Time obligations (number of days) with respect to provision of documentations and/o review of the documentation
2. Time obligations to provide Company/Client Items in accordance with predefined schedule or at a time as required by the contractor in accordance with the progress of works being performed
3. Time is of the essence and the completion of the contract by the completion date is an essential condition of the contract
4. Occurrence of the events allowing both the contractor and the client to issue change orders (time extension, change of scope, events affecting the schedule of the contract)

To contrast with the force majeure in the standard contracts issued by YPFB, the said is typically defined as: an outside the control of the party which invokes it, and which renders said party unable to comply totally or partially with its obligations under the contract. Provided the foregoing criteria are met altogether, force majeure includes acts of god (such as epidemic, tidal wave, lightning, earthquake, hurricane), hostilities or acts of war (whether declared or not), acts of terrorism, sabotage, riots (other than among employees of either company or contractor or subcontractors), civil or military disturbances, national or regional strikes (excluding strikes, lock-outs and other industrial disputes or actions by, between or originated among employees of either company or contractor or subcontractors) and acts of any government or public authority or any representative thereof whether or not legally valid. force majeure does not include events such as insolvency of any party.<sup>9</sup>

What should be noted is that the standard contracts issued by YPFB do not normally provide specific procedures for emission of change orders and are rather vague in such respect – the contract provisions simply state that a party can issue a change order with authorization of YPFB. On the other hand, the typical form of contracts used by the private oil and gas companies do include specific procedures for issue of change orders and corresponding approval cycle.

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<sup>8</sup> Yacimientos Petrolíferos Fiscales Bolivianos is the state-owned oil and gas company of Bolivia

<sup>9</sup> Under French Law

However, what can be noted that more often than not contractors fail to issue a change order within the specific time limit of occurrence of an event that allow to issue a change order and to claim for time extension or cost increment.

#### 2.2.1 Specific treatment for allocation of time and costs during concurrent delay

The standard form of the contract used by YPFB does not provide any specific treatment or mechanism for allocation of time and costs in the event of the concurrent delay event. In the case of a delay attributable to the contractor, the contract will provide for specific penalties expressed as a percentage of the total amount of the contract. And in the case that YPFB takes a decision to suspend the contract for convenience it will only provide compensation to the contractor after a lapse of a certain period of time specified in the contract (between 15 to 30 days).

With respect to the contracts between two private entities the possible penalties in the case of delay will depend on the form of the contract used and the law applicable to the contract. Most commonly, in the case of the delay attributable to the client, the contractor can ask for the extension of time but at the same time if the contractor is also delayed, the client can request for the contractor to implement measures in order to ensure adherence to the schedule. The resolution of occurrence of concurrent delay will depend on which parts of project are affected and whether the critical path of the projects is actually affected.

#### 2.2.2 Burden of proof and notice obligations

In the oil and gas industry, with respect to occurrence of an event that allows a contractor to claim for the extension of time, irrespectively of whether it is a force majeure event or unforeseeable event affecting the work to be executed, and the time requirement to notify the client (irrespectively whether it is a governmental body or a private entity) is very strict and limited by a contract to a certain number of days (3-5 days) or depending on the circumstances described in the contract could even be "immediate notification". Commonly in the contracts with the governmental entities, the contractor would require also to present with the notification a certification from a third party certifying the occurrence of the said event.

In the case of the contracts between the private parties, the proof of an event can be for example the daily progress activity sheet signed by representatives of each party. However, in such case a care should be exercised in drafting of the contract in order to avoid that the contractor claims that signature of the daily activity sheet can be considered as a timely **notification** in virtue of the contract to the client of occurrence of an event that delayed execution of the work.

#### 2.2.3 Accepted methods for calculation of delay

In Bolivia, in the oil and gas industry, there is no preferred methodology for the calculation of delay nor there is a specific methodology is described in the contracts. Effectively, it will depend on the type and criticality of the activity as well as the float included in the project schedule and whether the contractor can recuperate lost time as well as the cause of the delay.

For example, in the case of the blockage cause by a local community that prevents contractor accessing the work site the client will generally examine:

1. What caused the blockage:
  - a. These are employees of the contractor demanding payment or
  - b. The community does not have link with the project and is protesting for a political reason
2. The duration of the blockage:
  - a. Hours or
  - b. Days
3. How the contractor was affected by the blockage:
  - a. Number of people on stand-by

However, it is for the contractor in the change order presented to the client corresponding to the above event to justify the time lost and the corresponding cost.

It is also important to consider that the projects executed by the operating companies are executed under the service contracts with the government. Thus, the preference of the companies is to avoid entering into arbitration with the contractors in case of disputes with respect to timely execution of the contracts in order to minimise the risk of the Bolivian Government attempting to claim for inadequate performance of service contracts.

### **3. Dispute resolution**

Dealing with governmental entities in Bolivia can be quite sensible at times, therefore in the case of a dispute private parties opt to negotiate and to reach a particular agreement rather than seeking a corresponding court ruling. It is also necessary to note that the court system in Bolivia is rather corrupt and very slow, thus normally parties choose arbitration as a forum for the dispute resolution.

With respect to the two private entities there is also a tendency to choose arbitration as the forum for the dispute resolution, however such tendency is driven by the costs associated with arbitration, speed of resolution of the dispute, the arbitration decision is defined as final resolution of the dispute by the contract and the protection of the image of the companies. However, normally, before a party will come to the point of submitting a claim to the arbitration panel, the contract would provide that the higher level of the management of each party should try to come to an agreement with respect to a particular dispute.

#### **3.1 Recent cases**

In Bolivia, unfortunately, there has not been consistency with respect to judicial decisions regarding disputes between a governmental entity and a private entity. Such inconsistency can be demonstrated by the following two cases:

1. ABC<sup>10</sup> being unsatisfied with the judicial decision in the case of annulment of arbitration process with Empresa Ingenieros Consultores Asociados and the subsequent protection claim (demanda de amparo) thus claiming against the judges who decided in the favour of Empresa Ingenieros Consultores Asociados that these have committed anomalies that affect economically State and the Bolivian population. In that case, ABC has launched criminal and disciplinary actions against the judges involved in the original case for the breach of trust with the Public Ministry and the Judicial Council<sup>11</sup>.
2. The Supreme Court of Bolivia has declared unproved the claim for damage to the State submitted by ABC in the case of termination of two contract with Joint Venture ALFA and the Court has actually determined that the claim presented by ABC was confusing, lacking substance and imprecise. The contributing factor to the Court decision were the facts that during the execution of these contracts ABC has modified countlessly thus resulting in almost impossibility to interpret what is the scope and obligations of the parties<sup>12</sup>.

### **4. “Wildcard”**

As Bolivia is still developing country it is necessary to consider the following causes of a delay:

- A. Contracts with a Governmental Entity:
  - a. Limited room for negotiation of the terms and conditions of the standard contract
  - b. Some conditions are virtually impossible to achieve, for example – in the case of a construction machinery break down replacement within 24 hours –

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<sup>10</sup> Administradora Boliviana de Carreteras – Bolivian Administrator of the Roads

<sup>11</sup> <http://hoybolivia.com/Noticia.php?IdNoticia=154775>

<sup>12</sup> <http://tribunalsupremo.organojudicial.gob.bo/Autos%20Supremos/plena/RS2014/rs201401203.html>

- impossible to achieve in the cases where a given construction project located in the remote area and the access is difficult due to condition of the roads, flooding, bridges collapse, strikes etc.
  - c. Limited options for recourse in the case Government decides to modify the schedule of a project due to political reasons
  - d. Limited qualified local resources available
- B. Contracts between to private entities – what a foreign company normally does not properly takes into account when doing business in Bolivia are the following:
  - a. Customs clearance of the temporary imported equipment required for the construction projects
  - b. Adherence to the environmental legislation – there is no centralized system in place in order to search and obtain all the relevant laws for a project in a given area. The applicable environmental laws and obligations are found in the Constitution, laws and decrees issued by central Government, ministerial resolutions, administrative resolutions, laws and decrees issued by the departmental government and laws and resolutions issued by the municipal government. All these entities have their own way and format of publishing information and in majority cases this is only available in paper format.
  - c. Frequent strikes by local communities or particular unions.
  - d. Adverse weather conditions
  - e. Lack of technically qualified personnel and restriction that foreigners can only constitute 15% of total number of personnel employed
  - f. Unclear procedures in the contracts with respect to change orders and notifications of an event that gives right to issue a change order
  - g. Errors in the FEED/Basic Engineering that were not identified by the client or addressed early enough

Out of the above listed different cause for the delayed performance the most common time related claims that has been presented by contractors during recent projects executed are the following:

- a. Unreliable data with respect to rainfall – disturbs the established schedule for the projects
- b. Strikes by local communities claiming monetary compensation – delays in the order of few hours to weeks at a given time – depending on the reason for strike can be difficult to resolve. In about 95% these strikes are related to the employment disputes as the contractors are required to hire personnel from local communities even though these do not have required set of skills
- c. Strikes of general population against government that create complicated road blocks and prevents access to the sites – can prevent access to the site for between a day to weeks at a given time
- d. Custom clearance of the equipment hindered by the expectation of “extra” payments – can create delay in the order of a month
- e. General road/bridges conditions that are not suited for the transportation of heavy/large equipment – unforeseen expenditure with regard to the reinforcement of road/bridge or alternative longer routes must be used or alternative routes/means of transportation must be used due to road/bridge collapse – can affect the schedule between day and months
- f. Environmental licensing – complex process that is hindered by the entities responsible for the administration lack of technical knowledge required in analysis of the documentation presented.

What it has been a trend with the contractors that even though these risks for the delay when executing project in Bolivia are generally known within the sector, the contractors still fail to include in their proposals specific provisions for the developing good relations with local communities in order to minimise to occurrence of the strikes in the zone where a project takes place. Also contractors generally have not been diligent during the pre-project site surveys, thus reducing the risk of delays due to routes that would be required to use to transport equipment and materials as well as minimizing the disputes with adjacent land owners with respect to use of right of way and easements.

Effectively a contractor entering Bolivian market or who will be executing a project in Bolivia would need to take specifically into consideration:

- a. Exercise great care and diligence during site survey
- b. Obtain as much a possible historical weather data and base the schedule on the analysis of the data over large time period rather on only last few years
- c. Hire consultants that specialise in the community relations
- d. Ensure that the schedule allows enough float for the delays with importation and strikes
- e. Hire specialised lawyers with respect to labour law and environmental law – the legislation in these two areas is complicated and confusing due to lack of availability of information in electronic format and from a single source, thus increasing the risk for non-compliance and exposure to fines from corresponding governmental authorities. With respect to this point it is important that the labour lawyers conduct audits of not only the compliance of the contractor with the labour obligations and payments of corresponding various contributions but also of these of the sub-contractors. In a case of labour dispute an employee can ask for a judicial order to freeze account of the company and this order will be issued without due investigation of the claim.

It is also necessary to take into consideration the commercial aspects of working in Bolivia, the costs of mobilization and demobilization are quite high as Bolivia does not have direct access to the sea. Overall, above-mentioned risk can be mitigated however this risk mitigation translates into higher project execution cost.