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The powers of arbitrators when used properly



- Marius Teodorescu -
Senior lawyer & Deputy Manager
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Practitioners of law and economic actors alike have constantly sought ways and means to best deal with situations when conservatory and/or interim measures were required against a party. Thus, there is frequently the need for an enforceable order to a party to do or to refrain from something as a matter of urgency. While courts in common law jurisdictions have been more open to emergency injunction procedures, the courts in civil law jurisdictions have been stricter in the application of the *ordonnance de référé*. Thus, in countries with civil law legal systems, particularly in Romania, it has been rather difficult to request and obtain conservatory and interim measures in court. Cumbersome procedures, congested courts and lack of flexibility have obstructed and restricted such procedures.

Under these circumstances, where

arbitration agreements had been concluded, parties seeking conservatory and interim measures have turned to arbitrators for a more flexible and expeditious approach for the resolution of such matters.

The authority of arbitrators to order enforceable conservatory and interim measures is expressly stipulated under the Romanian Civil Procedure Code and has been enshrined in the rules of arbitration of a number of international courts of arbitration. For instance, Article 28 of the ICC Rules of Arbitration and Article 33 of the Rules of Arbitration of the Vienna International Arbitral Centre both give authority to arbitrators to order conservatory and interim measures.

Article 28 of the ICC Rules does not stipulate any conditions or restrictions of the Tribunal's power to order conservatory and interim measures. The broad ambit of this article allows for a wide array of such measures, as the Tribunal "deems appropriate". In practice, such measures are aimed at preserving the factual and legal situation for the duration of the arbitral proceedings, maintaining the status quo between the parties. Although not expressly provided under Article 28 of the Rules, in practice it has been considered that, besides the interim nature of the conservatory measure, the measure should not pre-judge the merits of the case.



Arbitrators have ordered conservatory and interim measures in respect of a variety of matters pertaining to the subject matter of the arbitration case. However, requests pertaining to disputes that were not part of or related to the respective arbitration cases have been rejected.

A particular application of the above is of relevance in respect of a contractors' attempts to stay abusive calls on their performance securities by employers. Romanian courts have been reluctant to stay calls on first demand guarantees via injunction procedures. Arbitrators however, have been more flexible in their approach to such matters.

Thus, once the arbitral tribunal has been constituted in accordance with the applicable rules of the arbitration, the contractor may file a request for a conservatory and interim measure, seeking an order in respect of staying the calling of its performance security guarantee until the final award has been issued in the respective case. An essential condition for the admissibility of such a

request would be that the calling of the performance security guarantee should be related to the underlying dispute between the parties that had been referred to arbitration. Hence, one arbitrator has found that *"preserving the status quo of the subject matter of the arbitration is the main justification for ordering a stay of any claim for payment under the Performance Security"* and granted the requested conservatory and interim measure in order to avoid *"the aggravation of the dispute and the substantial harm, which would result from a call on the performance security"*.

Under the Romanian Civil Procedure Code, conservatory and interim measures ordered by arbitral tribunals under the parties' arbitration agreements and in accordance with the applicable rules of arbitration are enforceable through the courts, if the respective party does not comply with the respective order. However, in practice, Romanian employers have complied with orders issued by arbitral tribunals for the staying of the call on contractors' performance security guarantees and have refrained from any demand for payment

under such guarantees following until the issuance of the final award in the respective cases, if so ordered by the arbitral tribunal. Such voluntary compliance has taken into account that arbitrators have frequently considered that *"the consequences of the parties' respective conduct during the arbitration proceedings may be taken into consideration by the arbitrators in the final award"*, thus discouraging any non-compliance with the orders issued by the arbitral tribunal.

In light of the above, contractors should wisely make use of the arbitrators' powers to order conservatory and interim measures in respect of the staying of abusive demands for payment under performance security guarantees by employers. Contractors should not wait until the demand is actually issued by the employer. A mere threat of calling would be enough to justify the staying of the calling via a procedural order issued by the arbitral tribunal, as long as the calling would be related to the disputed subject matter of a pending arbitration and would ultimately affect the status quo between the parties.





Determination of Head Office Overheads in the context of construction projects for a project Tendered by a Joint Venture



- Liliana Dumitriu -
Unit Chief Quantity Surveyor

I. Introduction

We may have all heard at some point of and used the term HOOH denoting "head office overhead" in the UK and "home-office overheads" or "unabsorbed overheads" in the US.

From all the formula which may be applied in construction projects when using a formulaic approach for the determination of head office overheads, the three most used formulae to ascertain this head of claims are the Hudson, Emden and Eichleay, which will be discussed in turn in the following.

The scope of this article is to explain in a clear and straightforward manner the differences between these formulae and their correct application taking into account a real case relevant to a project tendered by a Joint Venture (JV) and its particularities.

The assumptions considered in order to highlight the application of the different formulae for the determination of head office overhead for the above delayed project are the following:

- the project has been tendered by a Joint Venture; and
- the date of analysis is considered to be before the end of the Original Time for Completion.

II. Brief on Head Office Overhead

HOOH is well known as the actual cost which is an essential part of the cost of doing business by many contractors and is generally described as a company cost incurred to support all projects in progress during the analyzed period.

Therefore, the corporate expenses for all the projects in progress in a certain period of time (one or more years) are quantified together. We may say that, except the costs incurred by the contractor to support a single project or a group of projects, the other costs are recorded in the same cost pool.

Generally the contractor should decide its percentages for SOH (Site Overheads), HOOH and profit which should be applied to each item of work in the Contract. Thus, when a contractor carries out a part of the works and applies for payment for it (by way of an Interim Payment Application) and after that part of the works has been certified (by way of an Interim Payment Certificate) and paid for by the employer, the contractor recovers the cost of the works and also the overheads (SOH plus HOOH) and the profit associated with these works.

Under the above, the allowances for overhead and profit became part of the contractor's accounting system of the project.

In order to complete the financial transaction, the contractor should transfer part of the amount received and recorded in the project's accounting system to the corporate



HOOH costs. This is usually accomplished by moving funds from project costs to corporate overheads.

Whole of the above becomes much complicated when a Joint Venture (JV) has tendered for the project. In these circumstances, the expenses and the overhead recovery on the project should be divided between the JV members in accordance with the association agreement or according to their internal agreement considering the actual participation in the project works by each.

When the original completion date of the project is delayed by excusable Employer's Risk Events (ERE), the contractor incurs costs which may not be recovered other than the amounts of compensation which may be claimed within a contractor's interim detailed compendium of claims for an Extension of Time for Completion ('EOT') and related financial compensations thereof.

In the hypothesis in which the total delay of the project was caused in part by the employer and in part by the contractor, the contractor's claimed amount for actual damage should be limited to the critical extended period (due solely to the EREs).

The amounts awarded through the contractor's compendium of claims for EOT should be also split between the JV members in accordance with the association agreement or according to their internal agreement considering the participation to the works with only one exception related to the amounts due for the additional head office overheads.

The claimed amount due in respect of the additional head office overheads costs incurred for a disrupted and/or delayed project may be calculated / estimated with one of the nine formulas available to date. In this paper, only three of the most used formulae will be discussed further, namely Hudson, Emden and Eichleay.



As specified in a paper named Compensation for Contractor's Home Office Overhead: A Synthesis of Highway Practice (Federal Highway Administration, Transportation Research Board, Washington, D.C., 2003) the "Compensation sought by the contractor for unabsorbed home office overhead can be one of the more contentious issues faced on ... projects.", when the Hudson formula is employed for the determination of the amount due in respect of the additional head office overhead incurred by the contractor in a project tendered by a JV, the claimed amounts will be split between the JV members proportionally, according to the percentages of participation/recovery agreed between the JV members and also shown in the project audited accounting system.



Due to the fact that the Emden and Eichley formulae are based on the corporate overhead and turnover, the particularity of the application of these formulae is that it may not be applied to the whole accepted contract amount in the situation when the tenderer is a JV. When one of these formula are employed for the determination of the amount due for the additional head office overhead incurred by the contractor in a project tendered by a JV, the claimed amounts would be preferable to be calculated always separately for each partner of the JV in function of their respective corporation overhead and turnover, by allocating for each member the assigned portion of the project value proportionally with the percentages of participation/recovery agreed between the JV members, as extracted from the project audited accounting system. Therefore, the claimed amount in respect of the additional head office overheads due to each member of the JV will reveal the real loss or damage suffered by each corporation forming the JV and thus will not be directly proportional with the participation rates agreed between the parties for the project. Further, the individual results will be cumulated in order to determine the total claimed amount.

In the Oak Environmental Consultants, Inc. v. U.S., 77 Fed. Cl. 688; 2007 U.S. Claims LEXIS 252, August 7, 2007 was stated that "There is no exact method to determine the amount of

of home office expenses to be allocated to any particular contract or part of a contract. It is not necessary to prove a specific amount of home office expenses, but only to determine a fair allocation for the purpose of compensating a contractor for delay". (Emphasis added)

As specified in the publication "Calculating Construction Damages", by William Schwartzkopf and John J. McNamara, "it is well-established that home office overhead costs are recoverable element of delay damage" (Emphasis added).

The methodologies of calculation for the additional head office overheads and their particularities will be presented in the second part of this article.

III. Brief on the Hudson Formula

This formula was created by the United Kingdom (UK) court considering that the HOOH daily rate should be constant through the life of the project.

The advantage of the Hudson formula is that it uses both:

- the relevant data with reference to the Accepted Contract Amount, the Initial Contract Time for Completion and the percentage of the head office overheads

included in the Accepted Contract Amount during the Tender phase; and

- also calculates the amount of overheads for each day of delay during the performance of the works.

The publication "Calculating Construction Damages", by William Schwartzkopf and John J. McNamara, promotes the use of the Hudson formula, which is commonly used in the UK (see J.F. Finnegan Ltd. V. Sheffield City Council, 43 Build. L.R. 124 (Q.B. 1989).

An excerpt from the above mentioned study is presented hereinafter. "The basic assumption of the Hudson formula is that if a project is extended, the gross margin as originally estimated should be increased by the same percentage that the time on the contract is extended".

In the same mentioned study we may found that "The Hudson formula has been allowed in Canadian decisions. In Ellis-Don Ltd. V. Parking Authority of Toronto, (28 Builder L. Rep. 98_1978) the Contractor was awarded delay damages based upon the originally estimated margin, divided by the originally estimated weeks of contract performance. This is another way to express the Hudson formula".

The Hudson formula in its initial form is:

$\frac{\text{Home Office Overhead / Profit Percentage}}{100} \times \frac{\text{Contract Sum}}{\text{Contract Period (in weeks)}} \times \text{Period of Delay (in weeks)} = \text{HOOH \& Profit related to Compensable EOT period}$

For the determination of the head office overhead costs related to compensable EOT period, it is advisable for the above formula, to be appropriately adjusted to exclude the Profit, as follows:

$\frac{\% \text{ Head Office Overhead in Contract}}{100} \times \frac{\text{Accepted Contract Amount}}{\text{Original Time for Completion (in days)}} \times \text{Number of Compensable Days of Delay (Critical Extended Period)} = \text{Head Office Overhead related to Compensable EOT period}$

V. Brief on the Emden Formula

The Emden method is an internationally recognized method, created by the Canadian courts, used for establishing the daily head office overheads allocated to the project based on the corporation overhead and revenue (turnover) during the contract period. This data should be extracted from the corporate's accounting system (from audited accounts).

As in the Hudson the Emden formulae, calculates the amount of overheads for each day of delay during the performance of works.

The Emden formula in its initial form is:

$\frac{(\text{Total Overhead \& Profit / Total Company Turnover})}{100} \times \frac{\text{Gross Contract Sum}}{\text{Planned Contract Period (in days)}} \times \text{Owner-Caused Delay Period (in days)} = \text{HOOH \& Profit related to Compensable EOT period}$
--

For the determination of the head office overhead costs related to compensable EOT period, the above formula, should be appropriately adjusted to exclude the profit, as follows:

$\frac{\text{Total Overhead / Total Company Turnover}}{100} \times \frac{\text{Accepted Contract Amount}}{\text{Original Time for Completion (in days)}} \times \text{Number of Compensable Days of Delay (Critical Extended Period)} = \text{Head Office Overhead related to Compensable EOT period}$
--

Due to the fact that the Emden formula is based on the daily average corporate overhead during the contract period, the particularity of the application of this formula, as previously explained, is that it may not be applied to the whole amount of the contract in the case in which the tenderer was a JV.

In this specific case the split of the contract between each member of the JV has to be carried out in accordance with the association agreement or according to their internal agreement considering the participation in the works, which may be viewed also in the project contractor's accounting system.



Therefore, the Emden formula in the case of a JV should be applied separately for each member of the JV, for the assigned portion of the project and the individual results will be cumulated in order to determine the due claimed amount.

V. Brief on the Eichleay Formula

The Eichleay method is an internationally recognized method, created by Eichleay Corporation in 1960 during a famous court trial, based on the corporation overhead and revenue and extracted from the audited corporate's accounting system.

Standard Eichleay formula

The Eichleay formula in its initial form, as approved by the ASBCA in *Eichleay Corp.*, is as follows:

$\frac{\text{Total Contract Billings}}{\text{Total Company Billings for Contract Period}} \times \frac{\text{Home Office Overhead for Actual Contract Period}}{\text{Actual Days of Contract Performance}} \times \text{Number of Days of Delay} = \text{Extended Home Office Overhead}$
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As it may be noted above and as stated in the *Oak Environmental Consultants, Inc. v. U.S.*, 77 Fed. Cl. 688; 2007 U.S. Claims LEXIS 252, August 7, 2007 “The Eichleay formula calculates allocable overheads costs as the ration of billings of the subject contract to total firm billings during the contract period, multiplied by the total overhead incurred, divided by the actual days of performance, times the number of days the contractor was delayed. The basic formula is outlined as **an allocation of the total recorded main office expense to the contract in the ratio of contract billings to total billings for the period of performance. The resulting determination of a contract allocation is divided into a daily rate, which is multiplied by the number of days of delay to arrive at the amount of the claim**”. (Emphasis added)

Eichleay Modified formula – Society of Construction Law ('SCL')

It is worthy of note that the “Society of Construction Law Delay and Disruption Protocol”, promotes the use of Emden and Eichleay formulae.

The Eichleay formula promoted by the SCL Protocol is presented as follows:

1st step: $E1/E2 * E3 = E4$ [HO Overhead attributable to contract], where:

- E1 = Final contract valuation (excluding HO overhead & profit claim);
- E2 = Claimant's total turnover for actual period of performance (extrapolated from audited accounts); and
- E3 = Total HO overhead for actual period of performance (extrapolated from audited a/cs).

2nd step: $E4/E5 * E6 = E7$ [Recoverable HO overhead], where:

- E4 = HO Overhead attributable to contract;
- E5 = Actual period of performance (including delay); and
- E6 = Period of delay (in days).

$\frac{\text{Final contract valuation (excluding HO overhead \& profit claim)}}{\text{Claimant's total turnover for actual period of performance (extrapolated from audited a/cs)}} \times \frac{\text{Total HO overhead for actual period of performance (extrapolated from audited a/cs)}}{\text{Actual period of performance (including delay)}} \times \text{Period of delay (in days)} = \text{Recoverable HO overhead}$

The principle is the same as previously explained with the difference that the final contract valuation contains also the claims (yet excluding the head office overhead and profit claim).



VI. Bibliography

- The article "Don't Let Overhead Be Over Your Head" by W. Scott Tidemann;
- The paper "Recovery of Home Office Overhead When Delays Occur", undertaken by William F. Drewry;
- The publication "Calculating Construction Damages", undertaken by William Schwartzkopf and John J. McNamara;
- The paper "Calculation and Recovery of Home/Head Office Overhead", undertaken by James G. Zack, Jr.;
- Article "Techniques for Calculation Unabsorbed Overhead";
- Article "Using the Eichleay formula to recover Unabsorbed Overhead"; and
- The "Practical Problems with Pricing Delay Using Eichleay" by James G. Zack, Jr. and David W. Halligan (Navigant Consulting Inc. publication).



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Techno Engineering & Associates is pleased with its involvement with the DRBF Regional Conference & Workshop Istanbul, Turkey

Techno Engineering & Associates was delighted with its recent involvement in the Dispute Resolution Board Foundation ('DRBF') Regional Conference & Workshop that was held in Istanbul, Turkey, between 19th and 20th of November 2015. According to Yasemin Çetinel, the Conference Chair and DRBF Country Representative, the event received many worthy comments of appreciation with participation from many sectors within Turkey as well as the wider surrounding region including, Qatar, Georgia, Romania, Kazakhstan, and even further afield from continental Europe, UK, Africa and North America.

Dispute Boards (DB) are recognized worldwide for their effectiveness in the real time avoidance and resolution of disputes on

major infrastructure projects. Embraced by government agencies, private owners, and multilateral development banks, DBs ensure project success through significant decreases in costs and time overruns. International experience shows that the vast majority of projects with DBs involvement, settle disputes without the need for litigation or arbitration.

Some of the topics that were discussed during the conference include:

- Dispute avoidance with DBs;
- Legislative developments and overcoming legal challenges in the region;
- Project Profile: Clearing the way for successful transportation projects in Africa;
- Implementing DBs on various contract models (EPC, PPP and Oil & Gas);

- The new ICC DB Rules;
- The owner's experience with DBs;

Several key DRBF members gave papers at the conference including our President & Senior Partner, Mr. Giovanni Di Folco on the topic: "Dispute Boards (DBs), the EPC Project Delivery System & the FIDIC Silver Book Experience in Civil Engineering Projects". For more details on this topic, you can check our PowerPoint Presentation on our website.

Techno Engineering & Associates was delighted to have the opportunity to promote and to be involved in this event that covered regional legislative developments and the perspective of overcoming legal challenges in the region.





**Techno Engineering & Associates is wishing you
blessed and wonderful Christmas Holidays !**