

Annual Meeting

European Society for Construction Law

Amsterdam, 15 October 2010

Theme 11:

Risk Allocation: Highway A90

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General:

Assessment of a contract:

- technical and commercial aspects prevail
- legal matters/risks:

calculable risk	incalculable risk
negotiate, alternatively, make risk allowance	negotiate, risk allowance hardly possible
impact on price	potential deal breaker

Force Majeure („FM“)

- Definition of FM comprises typical but final enumeration of FM events
- Other FM events pursuant to „international best practice“ are not listed
=> Regarding FM events DBMF 2.0 takes rather narrow approach
- Consequences in terms of benefit/relief more generous:
 - Considerable reimbursement of financial disadvantage comparable to „Compensation Event“ (i.e. lost profits) and not limited to e.g. „unavoidable fixed costs“ (i.e. debt service, wage costs)
 - no reference to insurance coverage;
 - remarkable: „Disruption of the Financial Market“ as FM event

Generally speaking, FM regime appears to be acceptable

Damages due to activities of Third Parties/Incidents

- Treatment as Compensation Event, hence full risk of Contracting Authority (CA)
- Feature: No influence of either party
- „German“ approach (so called „A-Modell“) „risk sharing“:
 - No CA involvement in case of insurance coverage or claims against third parties
 - „risk sharing“ within thresholds
 - Contractor liable for damage recovery for an amount of up to € 5 Mio. per incident/max. 15 Mio. during the term of the contract
 - Responsibility of CA limited to costs for damage recovery
 - No further compensation such as loss of revenue etc.

Treatment of Third Parties activities / incidents is acceptable.

Discrepancy between RWS information and actual situation

- CA warranty for all of the information given unrealistic
- Main characteristic of PPP: Contractor's own initiative
- „International best practice“: Contractor is required to familiarize himself with the conditions of the site, etc.
- Generally, Contractor to deal with existing conditions best possible (through competition best approach can be adopted)
- Exceptions: discrepancy could not reasonably have been discovered despite Contractor acting diligently. Typically:
 - ground conditions
 - Archaeological artefacts/pollution/on-registered cables/pipelines

Probably not a deal breaker, but a risk with corresponding impact on the price

Relevant Change in Law

- „International best practice“ in accordance with DBFM 2.0: risk of „Discriminatory/Specific Changes in Law“ allocated to CA
- „General Change in Law“ under DBFM 2.0 relevant if associated with costs
- „German A-Models“ and „international best practice“ more restrictive:
 - compensation only if „Change in Law“ refers to „operation & maintenance“,
 - occurs during operation period
 - compensation often limited to Capex (not Opex) and subject to thresholds („risk sharing“)
- DBFM 2.0 approach rather generous (subject to deeper understanding of „writing-off“ criteria)

Risk appears to be calculable but will require risk allowance

Permits/Planological Procedures

- General: Construction of a federal motorway affects various entities/bodies, therefore the „overall admissibility“ of the project must be CA responsibility
- Procedure:
 - The Netherlands: „Transport Infrastructur (Planning Procedures Decree) Road Improvement Decree“ (?)
 - Germany: „Planfeststellungsverfahren“
- Uncompleteness of the above should be Compensation Event
- Application and obtaining of remaining permits rather „day-to-day“ business, therefore Contractor's risk

Assuming that outstanding permits can be reasonable assessed by contractor and therefore risk appears to be calculable.

Growth of traffic beyond thresholds

- Difficulty to forecast traffic development over a long period
- „International best practice“: „compensation event“ (i.e. CA risk) rather unusual
- Private sector expertise concerning traffic forecast (i.e traffic advisor) and establishment of operation & maintenance concept available
- Reasons to believe that also after „Listed Risk“ procedure risk remains with the Contractor
- Risk sharing mechanism also conceivable

Acceptable that contractor takes that risk.

Summary

- Risk allocation according to “Listed Risk procedure”
- Arguments for Permits/Traffic growth remaining at Contractor’s risk
- Depending on circumstances unexpected geological condition should be CA risk
- Remaining (pre-determined) risk allocation:
- Tendency to treat Contractor generous, i.e.
 - FM compensation
 - Third Party Damage etc.
- Practice would have to show whether this approach works for both parties
- Room for optimisation from the perspective of the CA is conceivable

Questions ?