A Practical Framework for Delay Claims in the UAE
What are the key topics that a legal practitioner should be aware of?

الإطار العملي لدعاوى التأخير في دولة الإمارات العربية المتحدة
ما هي المواضيع المحورية التي يجب على الممارس القانوني الإحاطة بها؟

by

AHMED EL SAYED

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Abstract

Undoubtedly, construction disputes could be considered as one of the most complicated disputes in the legal community. It includes tremendous arguments from both technical and legal perspectives. Such complexity leads to extending the time of the dispute which means more costs on both employers and contractors, and definitely more loss to one of them.

In 2017, it was reported[1] that the main causes of the construction disputes in the Middle East, relate primarily to delay. The report also shows how long the disputes averaged in 2017. Which makes *delay* in construction one of the most desirable-key topics to be addressed and covered within both construction and legal communities.

Generally, delay disputes should be dealt with high-level of knowledge of the different technical aspects of the construction industry in order to shorten the time of the dispute as much as it would be possible. As such, legal practitioners who are directly involving in delay disputes should be fully aware of the legal framework of such kind of disputes in order to know how to win such complex kind of legal battles.

The research will cover the practical legal framework of delay disputes in the UAE, including particular comparative topics compared with the practice under the common law system.

[1] ARCADIA, *Global Construction Disputes Report 2018*: *Does the construction industry learn from its mistakes?*, (2018).

الملخص

مما لا شك فيه أن المنازعات المتعلقة بالإنشاءات تعد من أكثر المنازعات تعقيداً في المجتمع القانوني. حيث انها تحتوى على العديد من الحجج المتعلقة بكلاً من الناحية الفنية وكذلك القانونية. هذا التعقيد بدوره يؤدي إلى إطالة أمد النزاع، مما يعني المزيد من التكاليف على عاتق كلاً من أرباب الأعمال والمقاولين، وهذا بالتأكيد يعني المزيد من الخسارة لأحدهما.

في عام 2017، أظهرت إحدى التقارير أن أحد الأسباب الرئيسية لمنازعات الإنشاءات في الشرق الأوسط، تعود بشكلٍ رئيسي للتأخير. يتضمن هذا التقرير كذلك المعدل الزمني لتلك المنازعات في عام 2017. كل هذا من شأنه أن يجعل التأخير في مجال الإنشاءات أحد أكثر المواضيع المحورية التي يجب تغطيتها ومعالجتها في كلاً من المجتمع القانوني والإنشائي.

في الإجمال، يجب أن تدار منازعات التأخير بمستوى عالٍ من الدراية لمختلف النواحي الفنية في مجال الإنشاءات حتى يتم تقليل أمد النزاع على قدر المستطاع. لذلك، فإن ممارس القانون الذي ينخرط بصورة مباشرة في نزاعات التأخير يجب أن يكون على دراية كاملة بالإطار القانوني لمثل تلك المنازعات حتي يستطيع الفوز بها.

هذا البحث سيغطي الإطار القانوني العملي لمنازعات التأخير في دولة الإمارات العربية ويتضمن كذلك على نحوٍ محدد المقارنة بين مواضيع معينة يتم ممارستها تحت نظام القانون العام.

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List of abbreviations

UAE: United Arab Emirates

DIFC: Dubai International Financial Centre

AED: Arab Emarati Dirham

CPC: Civil Procedures Code No 11 of 1992 as reformed by virtue of the Cabinet Resolution No 57 of 2018

FIC: First Instance Court

CA: Appeal Court

CAE: Court-appointed Expert

CC: Civil Transactions Code No 5 of 1985 and its amendments, often referred to as the UAE Civil Code

CTC: Commercial Transactions Code No 18 of 1993 and its amendments, often referred to as the UAE Commercial Code

NCR: Non-conformance or Non-conformity Report

TOC: Taking-over Certificate

PTOC: Partial Taking-Over Certificate

EOT: Extension of Time

DAT: Delay Analysis Techniques

CPM: Critical Path Method

CPA: Critical Path Analysis

WSA: Windows Schedule Analysis

CHAPTER ONE

INTRODUCTION

1.1 Background of the research

Undoubtedly, construction disputes could be considered as one of the most complicated disputes in the legal community. The level of the complexity of any conflict and/or dispute that might arise between the contract parties is approportionate with the complexity of the intended project. The more the intended project is complex, the more the potential dispute becomes complex. Such complexity puts the legal participants[2] in the face of one of the most complicated legal battles. This is because, firstly, it requires the legal team to manage claims and arguments in such organized professional submissions to win the relief sought, and secondly, the tribunal[3] will find itself in a mandate to solve such multiplex factors on the way to award final, fact-based, and reasonable decision.

Such complexity requires the involving legal practitioners to be aware of tremendous construction technical aspects. The legal practitioner who been instructed to lead a construction dispute, besides the necessity of the reliance on accurate, sufficient database and/or informative assistance from the client, should have the proper construction knowledge-background to succeed in drawing the guidelines precisely to the tribunal or other decision makers[4]. Furthermore, The legal practitioner should be fully aware of various construction terminologies, roles, and responsibilities of each participant, the necessary

[2] Legal Participants in the context of the research are those individuals who have the authority of being involved in the dispute whether being any party's representative or the engineers with a legal background with an authority to represent the case before the judicial bodies and also, the in-house lawyers who work on the preparation of the legal submissions.

[3] In the context of the research, Judicial Body is the legal authority that has the power to judge and/or any other decision with legal nature e.g Local Courts, Artbitral Tribunals.

[4] A decision maker is the party in charge to give directins, recommendations such as Court-appointed Experts, Ad hoc-appointed Experts, Adjudication Boards etc.

information relating to the workflow and the technicality of the construction different phases, and all other technical support information.

Construction technical knowledge is a key element for a legal practitioner who seeks to lead the construction disputes in the most appropriate manner. Such technical awareness rewards the practitioner with the enhancement of the ability in presenting the client's legal position in the best manner in the dispute. Furthermore, such a professional presentation boosts the credibility of the arguments that would be included in the submissions. Lastly, such strong knowledge gives the practitioner the ability to handle the difficulties that would come across throughout the phases of the dispute.

1.2 The scope of the research

Giving the fact that the biggest portion in the construction disputes is to, or at the very least relating to, the delay claims and/or arguments, which makes delay topics being constant controversial within the legal and construction communities. As such, the scope of the research is confined to cover the legal-practical framework of delay in the UAE and how the UAE law addresses delay in the construction industry.

The key questions to be addressed in the research will be within the horizon of *What are the key effective elements that a legal practitioner should take into consideration in dealing with delay claims?* W*hat are the main factors that could lead to winning construction arguments relating to delay?*

1.3 The intent of the research

Practically, presentation of construction claims and its relevant arguments is not such an easy task as it would appear. It is a very complicated legal task to be achieved. It depends on different kind of documentation with pure technical features e.g schedules, drawings, and programmes. Therefore,

normally, pleadings and submissions in construction disputes include a unique mixture of technical and legal aspects. As such, legal practitioners will be in a constant challenge to produce such presentations in the most simple forms to the tribunal and/or other decision-makers.

The research intends to provide a practical legal guide to the legal practitioner working on a delay claim in the UAE, through locating a comprehensive summary in relation to delay in construction claims from the legal perspective, through the simplification of the various methods of delays and the key factors and main elements of delay in construction projects.

1.4 The objective of the Research

The objective of the research is to provide the construction legal practitioners with a legal-practical framework for delay claims in the UAE. The result of the research is to make it easier for those practitioners to lead successful delay disputes and/or to raise effective arguments defending delay claims in the UAE through the compilation of the key factors of delay claims and the main elements of its presentation before the local courts.

As such, the objective of the research includes some key topics as follows

- Understanding of the full legal background of the delay such as definition, types, factors, and other relevant key elements;
- What is the core subject of delay disputes?
- Identification of the essential technical elements relate to the investigating the delay in the project i.e delay analysis techniques and methods, and the role of each method; and
- What is the role of the contract documentation in delay disputes?

1.5 Methodology

As a consequence that the completion of the research required collection and coverage of tremendous information which required the review of many literates to reach the aim of the research, therefore, the methodology adopted in the research is the doctrinal method 'black-letter law'.

In the UAE, sources of law can be easily found in-laws/codes and precedents of the high courts' judgments. Nonetheless, the rules in codes, in itself, do not guarantee to afford clear and complete position of the law in particular legal situations. Therefore, the existence of the legal doctrine makes the selection of the applicable rules on particular legal situations much easier, and that is why this doctrinal method has been selected as it mainly focuses on the formulation of legal doctrines through the analysis of legal rules and depends also on the study of different relevant legal texts.

Giving the fact that the researcher working as a Legal Associate in construction and infrastructure in an international law firm, the adopted method will be supported by in-depth study of relevant legal texts such as journal and articles and, more importantly, studying ongoing legal disputes in order to identify the position of the law and/or what the tribunal requires to decide on particular legal topics in delay disputes. The revision of the literates was followed by investigating professionals' opinion through concluding discussions with legal practitioners with both civil and common law backgrounds in order to allocate the difficulties that the legal practitioner might face in leading a delay dispute and/or the best methods in solving those difficulties in the practical field. As such, the research is concerned with the evolvement and development of the legal doctrine for delay disputes under the UAE law and particular principles under the common law.

1.6 The intended readers

In light of the previous introduction, the research intended to be designed to compile some of the essential elements relate to the proper presentation of delay disputes in the UAE, as such, the research's intended readers would be mainly the legal practitioners who have direct involvement in construction disputes, such as construction solicitors and in-house legal teams, who may are unfamiliar with delay claims and the mechanisms of leading such complex disputes in the UAE.

Furthermore, the research, through having particular comparative points of views between the position of the common law and the UAE law from particular areas, could be a useful practical tool for legal practitioners with common law background to outline the differences between the application of some applicable common law principle and the UAE position.

1.7 Structure of the research

In light of the foregoing, the structure of the research will be in the way of including the fundamental steps that the legal practitioners should follow in order to present a reasonable delay claim.

As such, the research will be structured on:

Chapter two will address the background of the jurisdictional and applicable law on the construction industry in the UAE in which the chapter shall cover the litigating and arbitration jurisdiction in the UAE. Chapter three will cover the general background of the delay disputes in which it will address the legal perspective of the delay in construction. Chapter four will cover the main subject of the delay dispute i.e what exactly the subject of the delay dispute should relate to. Chapter Five will cover types of delay. Chapter six will deal with the contract documents and its effective role in the dispute. Chapter Seven will

identify some of the effective delay analysis techniques that the legal practitioner could rely on in dealing with delay dispute. Chapter eight will include the conclusion of the research.

CHAPTER TWO

JURISDICTIONAL AND APPLICABLE LAW BACKGROUND

As outlined earlier, the research focuses mainly on the delay claim under the UAE law. However, the research shall include also certain comparative references between some common law principles and its position under the UAE law.

2.1 The litigating and arbitration system in the UAE[5]

2.1.1 The Litigation Path

The litigating system in the UAE is subject to two kinds of courts:

a) the onshore courts, known as the *Local Courts*, which are subject to the local federal laws; and
b) the offshore courts that are found in the offshore free zones, such as *Dubai International Financial Centre* (DIFC) having its independent courts known as DIFC Courts, which been modeled on the English System, apply the English common law.

It is worth noting that the research focusing only on the practice of delay claims before the local courts. Which means that all the legal topics included in the context of this research, only relate to the local courts' system.

[5] Structure of the Judicial System, Government.ae, The Official Portal of the UAE Government,< https://www.government.ae/en/about-the-uae/the-uae-government/the-federal-judiciary>

In relation to the governing law of the litigation in the UAE, generally speaking, the law that governing the litigation proceedings is the *Civil Procedures Code No 11 of 1992* as reformed by virtue of the *Cabinet Resolution No 57 of 2018* (the CPC)[6].

In relation to the formation of the litigation system in the UAE, it is subject to three tiers proceedings, being:

a) the *First Instance Court* (FICs);

b) the *Second Instance Courts*, known as *Courts of Appeal* (CA); and

c) the *Second Appeal Courts*, known as the *Higher Courts* being the *Court of Cassation* and the *Supreme Court.*

In relation to the role of each instance, it is worth mentioning that only the FICs and the CA have a notable inquisitorial role whereby they have the power to investigate the merits of the matter in question, while the Higher Courts only have the authority to supervise the lower courts (i.e FICs and CA) in the application of the law and/or to interpret issues of law without any ability to conduct any further queries to the merits, which means that, unlike the CAs, the Higher Courts proceedings will not rehear the factual issues raised before the FICs and/or CAs.

Unsimilarily to the common law system, the UAE litigating system does not recognise the Case-law precedents doctrine. Nevertheless, the higher court's judgment precedents have a significant persuasive impact on the lower courts throughout the proceedings.

[6] Taiba Al Safar, 'Amendments to the UAE Civil Procedures Law' (December 2014-January 2015), <https://www.tamimi.com/law-update-articles/amendments-to-the-uae-civil-procedures-law/>

Therefore, from the technical perspective, it is worth noting the authorities and powers of each court level, as following.

2.1.1.1 Proceedings before the FICs

With regard to the commencement of the proceedings, normally, the claim will be initiated by filing a memorandum by the Claimant, practically known as the Claim Memorandum or Statement of Claim.

Throughout the proceedings before the FICs, as the proceedings progressing, the FIC will grant each party to prove his position, which means that usually there will be further exchanges of memorandums between the parties.

Once the judge is satisfied that the parties have sufficiently presented their respective cases and/or arguments, the judge will reserve the case for judgment. At that stage, one of two scenarios will take place; a) the judge would either make directly a declaration on the matter, or b) appoint a Court-appointed Expert (CAE) to opine the facts (the proceedings before the CAE will be addressed below in detail).

Subject to the first scenario, or once the FIC receives the report from the CAE in the second scenario, the FIC will fix a date to pass its judgment. This judgment is not final nor enforceable[7].

The FIC's judgment will be subject to a 30 day period to be challenged by the concerned party who must lodge the appeal against the passed judgment.

In relation to the internal classification of the FICs, it is important to note that based on the quantification of the claim value, the FICs could be broken down into two circuits:

[7] The judgment of the FIC shall be final and enforceable if only none of the parties has filed Appeal challenging the judgment.

a) Partial circuits; which deal with claims subject to a value capped at AED 1,000,000; and
b) Major circuits, which handle the cases that do not fall under the jurisdiction of the minor circuits i.e the claim value exceed AED 1,000,000[8].

2.1.1.2 Proceedings before the CA

The CA proceedings adopt a similar process as the FIC whereby both parties will get the opportunity to submit memoranda and evidence. Before the CA, parties have the opportunity to re-engage all the arguments and evidence that been raised to the FIC. Furthermore, if the FIC has appointed a CAE and either party dissatisfied the expert's report, that party can request the CA to re-engage the CAE, or even to appoint a new CAE, to opine on particular issues in the dispute.

If the judge is satisfied that the parties have no further new grounds and/or evidence to keep the matter ongoing, the judge will fix a date to pass his judgment. The same two potential scenarios before the FIC will apply before the CA, whereby the CA either will directly issue a judgment or will revert the case back to the same CAE, or a new CAE, to address particular necessary points of research in the case.

Worth noting in that regard that despite the CA judgment is still challengable before the competent Higher court, this judgment is final and enforceable[9].

[8] Article 25 of the CPC gives guidelines in relation to the assessment of the claim value. However, Paragraph 10 of the article states that *"If the lawsuit relates to a claim that cannot be assessed as per the foregoing rules, its value shall be deemed more that one million dirhams"*.

[9] In the circumstances where the winning party (creditor of the judgment) initiated the enforcement proceedings, the other party (the debtor of the judgment) have the right to request a permission from the higher court to suspend the enforcement proceedings.

2.1.1.3 Proceedings before the Higher Courts

As mentioned earlier, the role of the Higher Courts is to interpret issues of law without rehearing the facts of the matter. Which means that the parties will not have the opportunity to deploy any argument or evidence that relating mainly to a factual aspect.

Once the higher court satisfies with the parties respective submissions, the judge will fix the hearing for issuing the judgment. The higher court judgment will be either:

- a direct confirmation judgment; where the court will decide affirmation for the lower courts judgment;
- a direct amendment judgment; where the court disagrees with the lower courts judgment, nevertheless, it will decide on the dispute and fix the areas erroring the appealed judgment; or
- lastly, the court could revert the dispute back to the concerned lower court; this is the event where the higher court disagrees with the appealed judgment and decides to revert it back to the CA to revise certain defects erroring the judgment.

2.1.1.4 Proceedings before the CAE

Article 69 of the *Federal Law No 10 of 1992* concerning Evidence in Civil and Commercial Transactions (the Evidence Code) gives the judge, whenever the nature of the dispute requires and/or the judge deems fit, to delegate one or more CAE, subject to the particular defined mandate, to opine on the factual-technical matters that are necessary for the judge to decide the case. As such, as construction disputes most often are fully relating to technical matters, usually, judges refer construction disputes to CAE[10].

[10] CAE would be, subject to the nature and the size of the project, and/or the complexity of the dispute, one engineer or most often a panel of three members. It is quite often that, in complex claims, the court appoint a panel of experts consists of three experts in which one at least has accounting background in order to opine in the quantaficaton of the ultimate value of the encountered reliefs.

In relation to the CAE's mandate, normally, judges issue a judgment known as the *Preliminary Judgment*[11] in which the judge draws precisely the guidelines of the CAE's mandate and the key disputable matters in which the judge requires further clarification necessary for the preparation of the judgment.

Throughout the expertise proceedings, the CAE will be restricted to perform his mandate strictly in the view of the wording of the preliminary judgment. Nevertheless, giving thought to his background experience, CAE has the right to lead his mandate in the manner he deems more fit to reach the furthest clarification of the dispute[12]. Worth noting in this regard that the CAE is, generally, incompetent to decide, or at least to give any direction, on any legal aspect encountered or would be deployed by either litigant[13]. In such circumstances, all what the CAE is capable of is to refer the deployed legal argument to the court to decide on it.

Following to the completion of the expertise proceedings, the CAE shall provide the court with his expected report that shall include all the debatable key points between the litigants and the final conclusion of the CAE in light of the study and the revision of the case documents. In that context, receipt of the report by the judge will lead to one of two potential scenarios:

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11 *Preliminary Judgments* are those judgments passed by the court while the prime matter is still ongoing before the court i.e they are judgments without a judicial nature and do not lead to the end of the prime matter. As per Article 151 of the CPC, these judgments are *unchallengable* judgments. However, Article 151 includes *limited* exceptions and states that *"preliminary judgments in relation to interim decisions, summary decisions, suspension decisions, enforceable decisions, non-jurisdictional decisions, and jurisdictional decisions (if the court is incompetent to review the case), are challengable decisions"* i.e the litigant who been affected by any of these decisions can separately challenge it while the main claim still ongoing. See, for example, *Dubai Cassation Court, Case No 217/1996.*

12 See *Dubai Cassation Court, Case No 397/2016* & *348/2012;* the court held that the CAE is not bound to perform his mandate in a certain manner. He *has* the discretion to achieve his mandate with the manner he deems fit for that purpose.

Before the CAE, the litigants will get more opportunities to raise all the technical aspects of the dispute such as the consultancy technical reports, prgrammes, drawings, schedules, and/or other relevant documents that could ease the CAE's mandate.

13 See *Dubai Cassation Court, Case No 298/2012*, the court held that *"…. It is established by this court that in the circumstances when the court appoints an expert, either voluterily or based on either party's request, to opine the technical-facts of the matter that the court views it would be hard to decide on, the mandate declared by the judge should not have any legal aspects to be subject to the expert's openion. These legal aspects are within the court's core responsibilities. If the court has breached this concept, its judgment shall be considered null".* See also *Dubai Cassation Court, Consolidated Case No 367/2009&15/2010*, and *Dubai Cassation Court, Case No 212/2009.*

a) If the CAE's findings and conclusion are clear and sufficient for the judge. Based on that report, the judge, taking into account the CAE's conclusion and technical analysis, shall decide on the case, either by
   - affirming the CAE's findings without replying to the comments and objections of the litigants[14]; or
   - amending the CAE's findings either based on his personal discretion/view or based on comments and objections of either litigant[15].

b) If the CAE's findings are unclear and/or insufficient for the judge. The judge has the right to revert the matter back to the CAE to re-analyse those unclear issues and resubmit the report[16].

2.1.2 The Arbitration Path

Undoubtedly, arbitration jurisdiction became one of the dominant jurisdictions in the legal community, in which it is recently notable that most of the construction parties to the contracts agree to make the jurisdiction and governing law of their contracts subject to arbitration.

Before, June 2018, the arbitration practice in the UAE used to be governed by the provisions of the Civil Code, Articles from 203 to 218, which used to be known amongst the practitioners as the Arbitration Chapter.

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14 See *Dubai Cassation Court, Case No 5/2015 & Case No317/2013 & 397/2016*.

15 See *Dubai Cassation Court, Case No 70/2011*, the Court declared that, *generally*, the judge has the right to give his decision on contrast to, either total or parts of, the CAE's conclusion and findings,

16 See, for example, *Dubai Cassation Court, Case No 2/2013*, the court declared that *"……it is established by this court that in the circumstances where the CAE in his report has ignored or failed to analyse any of the disputable facts of the case, and the concerned litigant has requested the court to revert the case back to the CAE or to appoint another CAE, the court has to approve the request"*.

After a long-awaited period, on 15 May 2018, the new arbitration law was published, the Federal Arbitration Law No. 6 of 2018[17] which became into effect on June 2018.

In relation to the scope of its application, Article 2 of the law introduces that the law will apply to:

a) Arbitration seated in the UAE, unless the parties agreed to apply another arbitration law as long as the agreed law does not contradict with the UAE public policy and morality;
b) Arbitrations taking place outside the UAE but the parties agreed to apply the UAE new law; and
c) Any arbitration arising from a dispute on a contractual or non-contractual legal relationship organised by the UAE applicable laws unless whatever excluded by a special provision.

Which means that, generally, the law will apply unless the parties have agreed to apply another arbitration law[18].

2.2 **The governing law for the construction industry in the UAE**

Despite the fact that the construction industry is one of the key legal subjects in the legal arena, however, there is no particular legislation or code defined particularly to the construction practice. Nevertheless, the construction and engineering industry in the eyes of the UAE law is subject to a main specific Federal Law which is the *Civil Transactions Code No 5 of 1985 and its amendments*, often referred to as the UAE *Civil Code* (the CC).

[17] The law was published in the Federal Official Gazette No. 630 of 15 May 2018.

[18] Essam Al Tamimi & Sara Koleilat-Aranjo, 'Commentary on the UAE's New Arbitration Law', (June – July 2018) <https://www.tamimi.com/law-update-articles/commentary-on-the-uaes-new-arbitration-law/>

Furthermore, there are various *Administrative Decrees* and *Ministerial Decisions* that are relevant to the construction practice and engineering activities in the UAE[19]. As a result, when the parties agree to establish their contract subject to the jurisdiction of the UAE domestic laws, they should be aware that by their selection they have selected the governing law to be the CC collectively with other applicable relevant decrees or local regulations.

By taking an overview on the legal framework of the construction and engineering industries in the UAE, we can illustrate that, in relation to the technical aspects and each party's responsibilities and liabilities in relation to the underlying construction contract, such aspects are governed by a number of 25 Articles, being from *Article* [872] to *Article* [896] of the CC, which is known amongst practitioners as the *Muqawla Chapter* and the construction contract sometimes referred to as the *Muqawla Contract*. Additionally, in relation to the main and general applicable legal concepts, there are other provisions of the CC that draw the guidelines for the contractual parties for various contractual general concepts that they must be aware of and adhere to, such as but not limited to, the general provisions that governing the bilateral contracts and the others that govern the performance of the contracts.

Supplementary to the CC, in terms of the relief sought and subject to the characterisation of the construction disputes as being *commercial*, and taking into consideration the fact that the parties of the construction contracts characterised as *Traders* practicing commercial activities, construction disputes

[19] Michael Kerr, Dean Ryburn, Beau McLaren and Zehra Or, 'Construction and projects in the United Arab Emirates: Overview', <http://www.practicallaw.com/1-519-3663>

in the UAE are subject to the provisions of the *Commercial Transactions Code No 18 of 1993 and its amendments*, often referred to as the UAE *Commercial Code* (the CTC). that mainly apply to traders and all commercial activities.

As to the stage of establishing the contract, generally speaking, the UAE law recognises the freedom of the contract doctrine, whereby the parties are free to establish their contract, having regard to their commercial interests and their capabilities to fulfill their obligations under the contract. Nevertheless, parties should mindful that such freedom is restricted with some rigid rules, in which they will find themselves bound and it is impermissible to be changed. There are two key general concepts governing the establishment of any contract. Firstly, pursuant to Articles 126, 129, 205/2, 206, and 207 of the CC, and established by the high courts, the contract must not be established contrary to public orders and morals unless the contract shall be deemed null[20]; and secondly, the parties are not permitted to include in their contract any provision in contrast to any mandatory provision in the law[21].

With regards to entering into construction contracts, apart from public orders and/or mandatory provisions, parties are free to agree otherwise contrary to any of the provisions of the Muqawla chapter. However, in addition to the earlier note regarding the two rigid principles, there is a further mandatory

[20] See, for example, *Dubai Cassation Court, 15 October 2014, Consolidated Cases No 606 & 629/2013-Commercial*, see also *Dubai Cassation Court, 22 December 2013, Consolidated Cases No 291 & 346/2013-Real estate.*

[21] See for example *Dubai Cassation Court, 30 June 2016, Cassation No 20/2016-Civil*, the court held that *"in the circumstances where the provision of the law indicates that the legislature intends to regulate a particular legal position or relationship it is not permitted to deviate from that intention, and it must be the applicable rule even if it is against the interest of the party, such provision is a mandatory provision"*

provision in which the parties are unpermitted to agree otherwise. This provision relates to the *Decennial Liability*[22] whereby Article 882 states expressly that:

> *"Any agreement the purport of which is to exempt the contractor or the architect from liability, or to limit such liability, shall be void"*

[22] As explained earlier, it is clear that Article 882 is an express mandatory provision whereby the legislature intends to regulate and/or protect the right of the employer, therefore, it will be void to agree otherwise the article even if the parties agreed in their contract to exempt the contractor from the liability.

CHAPTER THREE

GENERAL BACKGROUND OF THE DELAY DISPUTE

Although the fact that delay claims would be considered as the most common legal topics within the construction practitioners and the legal community. Nevertheless, due to the existence of many interactive and influencing factors, it would be, at certain circumstances, hard to even highlight a clear identification of the delay claim. Practically, in certain complex construction claims and due to unawareness of proper construction knowledge, legal practitioners would suffer in presenting their claims or in deploying arguments in relation to delay, leading ultimately to the loss of the dispute. Therefore, it is significantly important for practitioners to be aware of the accurate definition and the essential elements of delay, in addition to the legal elements that would be acceptable to be subject to delay claim and those are not.

3.1 What is the delay?

The definition of the delay has been addressed by several types of researchs and articles. However, there is no specified fixed definition should be adopted. However, it can be defined in its simplest way as the

> *"Failure of completing the intended work within the specified agreed completion time or during the reasonable term to complete"*[23].

It also can be defined as

[23] Andrew D. Ness, 'The Law of Construction Delay, Acceleration & Disruption', <https://www.ncbar.org/media/560842/the-law-of-construction-delay.pdf>

"Time overrun or extension of time to complete the project. delay is a situation when the actual progress of a construction project is slower than the planned schedule or late completion of the projects"[24]

In view of the aforesaid definition, seemingly, there are some of the key areas that need to be addressed initially in order to paint a clearer picture of the main elements of the delay dispute, such as the proper identification of the completion time and its relevant processes; what does it mean to complete the work within a reasonable time and what are the cases of permitting the contractor to rely on such an alternative completion mechanism? Lastly, What is the Commencement Date and what is the basis of counting it?

3.1.1 The Completion Time

3.1.1.1 Introduction

As outlined earlier, any delay claim has a direct link to the stipulated completion time of the works, which means that in order to outline the proper definition of the delay claim it is more important, at the first place, to know what is the *Completion Time* of the project that burdens the contractor, in order to exclude the instances of occurrence of an acceptable delay in completing the project.

So what is meant by the completion time of the project?

[24] N. Hamzah, M.A.Khiry, I. Arshad, N. M. Tawil, A.I Che Ani, 'Cause of Construction Delay – Theoretical Framework' (Procedia Engineering, Volume 20, 2011, Pages 490-495)
<https://reader.elsevier.com/reader/sd/pii/S1877705811030013?token=7AED15158E7529CBAA1A56E266E3A0D9BCB4743FE52E40779FD6E74A5DAD3374AA94752627BC719B246C77424D6DC547>

In simple words, the project completion time can be described as the contractual date for performance, is that specified term in which the parties have agreed for the intended project to be completed, and whereby the contractor will be obliged to complete the scope of the works within[25].

In relation to the wording of the completion time clause, the parties are free to agree upon the context or the narrative of the anticipated completion term. It would be identified through a calendar date, particular milestone, or a certain event.

The most often instances is that the contract includes a provision that expressly outlines the anticipated completion date of the project. In that instance cases, the contractor will be burdened to complete the work within the specified period for completion and shall be held liable to compensate the employer for the liquidated damages suffered or estimated to be suffered because of any delay, if occurred.

Nevertheless, it may happen that the contract is silent in terms of the completion time or being nebulous in identifying precisely the anticipated completion term e.g the contract may replace the contractor's obligation to complete the project at a certain time by stating that the contractor is obliged to deliver the works as soon as possible or to do the fullest endeavors to complete the project on a certain date.

If that is the case, then, what will be the legal position of the contract and the parties?

Firstly, it is worth noting in this regard that in such cases if the contractor failed to meet that date, shall not be held liable for the damages that the employer may suffer if succeeded in producing the evidence for the reasonable endeavors to deliver the works on time[26]. Similarly, in the event where the parties

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25 Defining completion of construction works, RICD Practice Standard, UK, 1st edition, guidance note <https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/construction/black-book/defining-completion-of-construction-works-1st-edition-rics.pdf>

26 *HSM Offshore BV v Aker Offshore Partner Ltd* [2017] EWHC 2979 (TCC); 175 Con. L.R. 155, per Coulson J

agree that the contractor is to complete the work by a target date or period without guaranteeing the full completion by that date or period[27].

Under the common law, lack of express term as of the timing of the contract has no link with the validity of the contract. Nonetheless, this does not mean that the contractor can pursue completion of the project anytime. In such circumstances, the law will interfere and direct that the work should have been completed in a reasonable time[28].

Similarly to the situation under the common law, in the UAE it has been established by the higher courts that the identification of the term of the anticipated completion time of the project is subject to the court's discretion based on the circumstances of the contract in question[29].

Generally, the court in assessing the reasonable time of completion must take into account all the circumstances of the project such as the complexity and the nature of the works and/or the other relevant elements. Furthermore, the court also shall evaluate whether or not the contractor has had performed the contract terms at the best of its ability to complete the work on time.

3.1.1.2 Time at large

It is a common law principle whereby in the circumstances where it will be hard for the contractor, due to reasons beyond its control or generally do not relate to its conduct, to execute the works within the

[27] *Aries Powerplant Ltd v ECE Systems Ltd* (1995) 45 Con LR 111 at 117, per HHJ LLoyed QC

[28] *EQ Projects Ltd v Javid Alavi* [2005] EWHC 3057 (TCC) at (36) per Peter Coulson J;

[29] *Dubai Cassation Court, consolidated Cases No 184/2008 & 187/2008-Commercial,* see also *Dubai Cassation Court, Case No* 10/2010-Civil

completion time and there is no contractual mechanism for granting an EOT then the anticipated completion will be referred to be at large[30].

If the completion time became *at large*, this means that the agreed anticipated completion time became defunct, which means that from the contractual perspective, the contractor will not be bound to deliver the works pursuant to any arrangement with the employer, but only within a reasonable time depending on the nature of the rest of the works and on the surrounding circumstances of the project[31].

Notwithstanding the foregoing, this does not mean that the contractor will be free to deliver the works anytime relying on the time at large concept. This issue triggers the question of what exactly the reasonable time for completion means or what is the criteria of determining the reasonable timing?

Determination of the reasonable timing will be always a matter of fact differing from one case to another during the rise of the case i.e not subject to fixed standard similar conditions and circumstances, taking into consideration the complexity and nature of the rest of the works and the circumstances that the contractor is working within such as the site conditions[32]. However, the only standard that would be taken into account is the answer to the question could another contractor in the same circumstances deliver the rest of the works at the same time?

The answer to this question requires the analysis of two essential elements. Firstly, the professional level, as the professional level of both contractors should be at the same level as the contractor in question. And the professional level in this question would mean the financial abilities, the professional level of the manpower, and/or other relevant logistic abilities. The second element is the identicality of the

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30 Stephen Furst and others, *Keating On Construction Contracts* (10th edn, Sweet & Maxwell 2018), Chapter 8, 8-012, page [231]

31 Stephen Furst and others, *Keating On Construction Contracts* (10th edn, Sweet & Maxwell 2018), Chapter 8, 8-013, page 232

32 *Pentland Hick v Raymond & Reid* [1893] A.C. 22. Analytic evidence by HH Judge Seymour QC in *Astea Ltd v Time Group Ltd* [2003], at [158]-[162].

circumstances. It is required to examine the capability of the other contractor to deal with the rest of the works in the same circumstances.

If that is the case, then does the UAE law deal with the time at large principle?

The UAE law does not expressly recognize the time at large principle, however, as explained earlier, it is established by the high courts that the court has the full power to examine the term of the completion and it is only the court's decision whether there is a delay or not. Which means that, from the technical perspective, in the circumstance when the contractual term of completion became inactive anymore the contractor will be in a position to complete the project at the reasonable completion period, whereas the ultimate decision of being in delay or not will be the court's call.

The foregoing analysis covers the typical completion time as it is broadly known in the construction industry. Nonetheless, there are other completion processes should also be considered in analysing the completion time, such as commissioning, hand-over, and taking over of the projects.

3.1.1.3 Commissioning, Hand-over, and Taking

If the completion of the project is an essential element to be considered in delay dispute, however, there are other processes that technically relate to the completion of the works at the project site, however, from the legal point of view, such processes have no link to the actual completion date. Notably, some of the legal practitioners are not fully aware of such key differentiation, and such unawareness would eventually lead to misrepresentation of the claim and/or the respective arguments.

In the context of delay in construction and engineering projects, the understanding of the different kinds of those processes which collectively relate to the process of reaching the completion phase is essential in order to reach the proper identification of the actual terms of the delay in completion and also in order to identify the exact timing whereby the delay should start to be counted.

Furthermore, the key impact of understanding the difference between those processes is in terms of the timing of transferring the responsibility of the executed works from party to another.

a) Commissioning[33]

It is the process that, from the technical perspective, targets testing of the quality of all or certain parts of the executed works in order to verify whether or not it been executed, from the functional perspective, as per the agreed requirements.

This process, normally, is to be concluded by the person in charge i.e the engineer, the contract manager, or a third party be appointed by the employer, who initiates the commissioning of the executed works in order to verify whether or not it fits the requirements of the employer or being executed as per the contract conditions. Also, is the delivered works relate to a certain scope of works, this process will take place while the contractor is keeping working on the rest of the project, which means that the earlier the commissioning provider involves in the project the greater chances to provide the results of the testing and accordingly avoid the prospects of wasting time due to commissioning.

This process takes place prior to both the hand-over and the taking-over processes, thus, the end of the commissioning process, from the legal perspective, does not have a legal impact in terms of the duration

[33] It would described in synanmous *Tests on Completion* as described under Clause 9 of the FIDIC Redbook 1999, or *Tests and Inspections* under Clause 40 of the NEC3.

of the contract nor on any of the relevant responsibilities of the parties. In other words, the only role that the commissioning process has is merely a technical impact in order to make sure that the delivered/executed works do fit its purposes and the employer requirements. Which means that, in delay disputes, the contractor does not have the right to rely on the positive results of the commissioning and argue that such results constitute completion of that scope of work.

Nonetheless, the commissioning process would have a key role in the delay dispute. In the practical scenario where the commissioning test's results come negative i.e the contractor did not execute the works as per the contract conditions or as per the employer's goal or contrary to the specifications, the commissioning provider will produce what is known as *Non-conformance* or *Non-conformity Report*, known amongst construction practitioners as an NCR[34], which addresses what exactly failed to meet the quality requirements. Such a scenario can cause a definite delay in completing the defective works on time if that defective scope of work has been executed exactly on its scheduling timing and the commissioning provider raised an NCR, this means that the contractor will definitely consume time, after the lapse of the agreed completion time, working on correcting the defective parts.

[34] Juan Rodriguez, (1 May 2019), <https://www.thebalancesmb.com/non-conformance-report-how-to-report-a-quality-issue-844987>, NCRs must include as a minimum the information relating to what is the main reason for the NCR or what went wrong; why the works does not meet specifications; what can be done to prevent the problem from happening again; explanation of corrective action taken or to be taken; and key players involved in the NCR and specifications affected under the NCR.

b) Handing-over

Following to the due inspection of the site and the proper tests for the delivered works, the employer's representative can confirm technically that the works have been executed as per the contract requirements, the project site can be handed over to the employer.

Handing over of the project is the process that takes place in the period between the commissioning process and the taking over. Pursuant to the handing over of the site, from the legal perspective, the responsibility of the care, custody, and control of the project transfers from the contractor to the employer.

Worth mentioning in this regards that many of the practitioners may do not realise the difference between the handing over process differs from the taking over process from the legal perspective. The handing over process is the process in which the employer takes possession of the site from the contractor, it does not refer to the official contractual take over of the project.

In other words, and in order to simplify the difference between both processes a reference should be made to the basic two essential statutory obligations over the employer, is the obligation to make the payments on time; and the obligation to hand over the possession of the site from the contractor on time. In this meaning, Article 884 of the CC states expressly that:

> *"the employer shall be bound to take delivery of the work done when the contractor has completed it and placed it at his disposal, and if, without lawful reason, he refuses, despite being given official notice, to take delivery, and the property is destroyed or damaged in the hands of the contractor without any wrongful act or default on his part, the contractor shall not be liable".*

From Article 884 it seemingly became clearer that the taking over process, or as defined in the article as the delivery of the works is merely an actual transfer of the possession of the project from the contractor to the employer.

Notwithstanding the transferral of the responsibility, the hand over of the project does not necessarily mean that all the delivered works have been executed in its best conditions, there would be minor defects that will be subject to rectification works during the period known as the *Defective Liability Period*[35]. However, as per the hand over process, the project generally is reasonably capable to be generated.

c) Taking-over

It can be described as the last phase in the completion passage of the project, whereby the project entirely is being officially taken over by the employer by virtue of the *Taking-over Certificate(TOC)*[36].

From the technical perspective, the issuance of the TOC indicates that the contractor has done the works as per the contract requirements and the due testing processes have been concluded without NCRs.

From the legal perspective, the importance of the taking-over process is that the defects liability period commences from the date of issuing the TOC. whereby the contractor is under a duty to remedy the defective works or to complete the incomplete works within.

It is worth mentioning in this regard that, as per the contract, the employer or his representative could issue a *Partial Taking-Over Certificate*[37]. Which is the certificate whereby the employer or his

[35] Sometimes reffered to as Rectification Period.

[36] Clause 10.1 of the FIDIC Red Book 2017 indicates that the taking over certificate shall be issued by the employer if the works have been completed in accordance with the contract, including time of completion.

[37] The FIDIC Red Book 2017 under clause 10.2 addresses the mechanism of the *Taking Over of Parts of the Works*, whereby it addresses with the consequences of issuing the PTOC and the circumstances in which either party of the contract shall be held liable.

representative confirms taking over of certain parts of the executed permanent works If that is the event, accordingly, the liquidated damages shall be reduced, and if the employer pursued damages for the delay of completing the remainder of the works, there is no chance to include the taken over parts in that claim. Also, concerning the defects liability period, it commences in relation to the taken over parts from the date of issuance of the PTOC.

Lastly, it is worth mentioning that, subject to relevant domestic regulations, the local government offices or entities e.g Municipalities, communication entities, would issue what is also called *Taking-over Certificate*. It is essential to outline the fact that issuance of such certificate does not indicate that the contractor has completed the project as per the conditions of the underlying contract i.e it does not alternate the TOC by the employer or his representative. The issuance of such certificate by the competent authorities merely indicates that the contractor has executed the works pursuant to the regulations and the requirements imposed by the relevant governmental bodies.

Notably, many of the contractors in delay disputes wrongfully rely on the date of such certificates and argue that this is the completion date or at least demonstrate that pursuant to such certificates the contractor has completed the works as per the requirements. In that regards, in the UAE courts have an express direction in drawing the difference between the TOC by the municipalities and the one issued by the employer[38].

Legally speaking, the taking-over process and the TOC by the employer would be considered as the only completion phase which has a legal effect and key role in the delay dispute, it is the cornerstone in order

[38] In Grievance No 30/2018, Abu Dhabi court established that *"The contractor failed to submit evidence for the final hand over of the project, whereby the initial hand over of the works supported by the certificate issued by the competent governmental administrative offices does not constitute as actual hand over because it merely shows that the contractor has executed the works pursuant to the government office's requirements not pursuant to the contract conditions*"

to precisely identify whether or not the contractor has delayed in completing the project, due to the fact that the date of issuance of the TOC is the date whereby the employer testifies that the contractor has completed the work pursuant to the contract conditions or not.

3.1.2 The Commencement date

The commencement date is one of the essential factors, relatively to the completion of the work, that effectively ease the resolution of the delay dispute and assist in the determination of the delay period in question. More importantly, it clarifies whether the contractor is solely responsible for the delay and should compensate the employer for all the damages or the estimated damages accordingly or there were other factors beyond the contractor's control that led to the delay of the completion, and its responsibility should be reduced accordingly.

Furthermore, the proper identification of the actual commencement date, from the legal point of view, assists the tribunal to stand precisely on the actual execution period of the work. Also, it facilitates giving the decision declaring whether the contractor has had saved no endeavors to execute the works within the stipulated contract period or within a reasonable time.

Commencement date would be defined as the actual date where construction of the project time begins to run as per the initial agreement between the parties. It means that the commencement date is not fixed to the date of signing the contract, this scenario would be acceptable if the contractor is ready financially and has had afforded the required permissions and its team is ready, in full, to start the construction.

Most often, the underlying contract includes an express reference to the commencement date and the mechanism of its determination. The potentials of the contractual provisions relating to the determination of the commencement date could be limited under three kind of mechanisms:

a- the date stipulated in the agreement, i.e specified calendar date;

b- the date of the contract[39]; or

c- a commencement notice by the employer. The employer would need some time to finalise some requirements such as financial and/or required permissions.

The commencement date indicates, from the technical perspective, that the contractor has effectively commenced execution of the works. However, the commencement of the work does not necessarily mean the physical commencement of the work, as the parties may agree in the contract on some preparatory works to be conducted by the contractor within a specified timeframe, in which the contractor will be bound to fulfill prior to commencing the work.

The contractor's failure to commence the works within the contractual stipulated term or during the reasonable time from the date of acquiring undisturbed possession of the site without a lawful excuse, despite being notified by the employer, triggers the contractor's responsibility to compensate the employer for the damages suffered or anticipated to be incurred if the completion of the works delayed beyond the agreed anticipated completion time[40]. Furthermore, if such failure has extended to further unmanageable delay, which would make the performance impossible, the employer would have the right to elect immediate termination of the contract in addition to the damages of the suffered loss[41].

[39] It would happen practically, that the contractor is capable financially, and its team is ready to commence the execution of the works directly upon entering into the contract. Such practical scenario most often exist in the cases of tendering contracts, because of the long preparatory time before signing the contract agreement in which the contractor has sufficient time to afford the financial requirements and/or other required elements to kick-off the onstrcution directly after the signing of the agreement.

[40] The contractor may delay in commencing the construction of the project, however, throught the progress of the project the contractor may mitigate such lateness and complete the project as per the agreed time schedules.

[41] See, for example, *Dubai Cassation Court, 28 May 2015, consolidated Cases No 351&353/2014-Civil.*

3.1.2.1 Employer's standard duties "*Access to the Site*"

As explained earlier, if the commencement date is clear in the contract, the contractor burdens the duty of executing the works within the agreed timeframe or at a reasonable time from the agreed commencement date. Nevertheless, there are some standard duties that burden the employer towards the contractor which are necessary for the latter to commence the execution of the works as agreed, otherwise, the contractor will be entitled to EOT, as will be discussed later in detail. Generally, the employer shall save no effort providing the contractor fair assistance which allows the contractor to commence the work as per the stipulated time or at the very least within a reasonable time.

Those duties would be pursuant to the contract, either standard form contracts or bespoke ones, whereby the parties agree to locate some duties on the employer during the pre-execution phase in order to allow the contractor to commence the work, or by virtue of the construction customs, or lastly, by virtue of the duty of good faith.

The main duty on the employer, that would cause problematic legal scenarios, is the access to the site obligation.

For the contractor in order to commence performing the work, it needs to be afforded full access and possession of the site either by the term agreed upon in the contract or during a reasonable time if the contract is silent. Therefore, access to the site is an essential duty over the employer to the contractor during the pre-execution phase, which has a notable role and affecting directly the period of completing the project.

There will be no issues in the cases where the contract manages expressly this obligation. Simply, the parties may agree in the contract on the timing and the mechanism of such access e.g they may agree on

partial access, such as access only to certain parts of the site, also they can agree that the access should be fulfilled on phases respective to certain infrastructure preparations. In all cases, the employer must adhere to the contractual obligation and perform this essential obligation timely manner. However, the situation would be problematic in the circumstances where the parties neglect to manage that operation in the contract.

In the UAE, although the legislator does not include express obligations on the employer towards the contractor during the pre-execution phase. However, as explained earlier, having regard to their respective interests, the parties are free to agree in their contract on such kind of obligations. As such, parties may agree to burden the employer with specific obligations and/or responsibilities with regard to providing necessary fundamental information, comprehensive local regulation framework, and/or any other relevant information that if being hidden would eventually delay the commencement of the work. Also, as outlined earlier, Article 246 of the CC plays a core role in managing access to the site operation if the parties have neglected to manage this matter in their contract. Which means that, generally, the UAE law, directly and indirectly, manages this obligation and put the employer constantly liable to acquire the contractor undisruptable possession and full access to the site to commence the works.

Neglecting provisions managing the access to the site in the underlying contract would not cause complex legal issues under the UAE law, this is basically because of Article 246 of the CC expressly which states that

1- *the contract must be performed consistently with the requirements of the good faith.*
2- *The contract shall not be restricted to an obligation upon the contracting party to do that which is expressly contained in it, but shall also embrace that which is required to it by virtue of the law custom and the nature of the transaction.*

Article 246 expressly indicates that even if the parties have not agreed expressly on the access to the site obligation to be performed in a specified time or on a certain mechanism, the employer, by virtue of Article 246 shall be under duty to afford the contractor undistributed access to and possession of the site in order to commence the execution of the work[42].

In light of Article 246, it becomes clearer and convincing to broadly apply the article and not to limit it merely to the access to the site, but the employer also is obliged to finalise all the pending matters that would relate to the third party's rights over the land e.g. existing occupiers or any relevant rights to creditors over the site. Still further, the obligation to access the site indirectly burden the employer an obligation to finalise all the regulatory governmental arrangments that are required to afford the contractor undisruptable access to the site. However, it may happen that the parties agree in their contract to exclude that part and transfer such obligation to the contractor's administrative team.

From the legal perspective, the employer's failure to perform the access to the site obligation gives the contractor the right to claim EOT for the wasted period before access to the site, and if the employer rejected that claim, the contractor will be in a position of having a solid compensation claim for the damages incurred or the estimated damages or expenses after delivering the work. However, as will be discussed later, the failure of fulfilling this obligation does not necessarily give the contractor the right to terminate the contract unless the failure extended to the much that makes the performance of the contract impossible.

In conclusion, taking into consideration the key link between the commencement date and the delay in completing the project, from the contractor's perspective, the legal team who is assigned to lead a delay

[42] See, for example, *Dubai Cassation Court, 23 December 2012, Case No 384/2011-Real estate,* see also *Dubai Cassation Court, 13 March 2011, Case No 164/2010-Real estate*.

claim should be full aware of the fact that the commencement date has an effective impact on the route of the claim in terms of identifying accurately the actual commencement date of the works which ultimately would justify, based on the employer's failure to perform its obligations, the contractor's delay on completing the project and proving the substantiation of the claimed EOT. On the other side, from the employer's perspective, identifying the commencement date in a precise manner is necessary to prove the fulfillment of the employer's obligation throughout the pre-execution phase and that the employer has had granted the contractor a full undisruptable possession of the site in order to prove the contractor's failure to commence on the stipulated commencement date or at a reasonable time, and accordingly, the claimed EOT was groundless.

CHAPTER FOUR

THE SUBJECT OF THE DELAY DISPUTE

4.1 Introduction

Throughout the proceedings, the legal practitioner might face a variety of technically complex issues that could make it difficult for them to manage the claim. Some of those technical issues are directly in link with the core subject matter of the delay claim, this is mainly because of the similarities in the features and the high complexity link between those issues. Therefore, it is essential to identify the core subject of the delay claim in order to avoid presenting illegitimate claims and/or arguments. Which triggers the question, what is exactly the delay dispute relates to?

Generally speaking, delay dispute is that dispute that should be built primarily on the factors that only relevant to the contractor's fault or conduct which eventually led to the failure in delivering the works within the agreed anticipated completion period or during the reasonable time. Which means that the classic scenario of a delay dispute is that dispute in which the employer acting as a claimant initiated the dispute against the contractor to seek compensation for the delay in delivering the project.

Notwithstanding the foregoing, practical scenarios constantly include other elements that can effectively take a significant role in the dispute. In other words, there would other elements that contradict the contractor's failure to fulfill its obligation to deliver the works on time. Those elements could make the presentation of the delay claim tougher than it appears, whereas pursuant to any of those elements and the circumstances of the encountered claims, the contractor would have had the right either to suspend the works or even to terminate the contract. The most known effective elements are the employer's conduct, the third party's conduct, the natural events.

Therefore, the practitioner who is representing the contractor in a delay dispute should be aware of the contractor's position and/or rights if the history of the project includes any of those scenarios to defend properly the claim or, even further, to initiating a successful counterclaim against the employer.

This chapter will address some of the known practical scenarios that could release the contractor from being held liable for the delay, and also how the contractor could deal with those elements.

4.2 The employer's conduct

Despite the fact that the contractor primarily obliged to deliver the works within the stipulated time, however, the employer would act in a manner that leads the contractor to delay delivering works on time.

Practically, the employer's conduct would either take place prior to the commencement of the performance of the works or afterward.

4.2.1 Pre-commencement actions

As previously outlined, the actions that would be prior to the commencement of the performance, are like the instances where the underlying contract imposes some obligations over the employer that it must be fulfilled within a certain time or phase in order to allow the contractor to commence performance e.g providing designs information, access to the site, …. etc.

In such instances, if the employer failed to perform its obligations towards the contractor, whereby the commencement of the works been delayed due to such failure, the contractor will not be in breach of the contract if failed to deliver the works on time. The contractor simply could, based on well-recorded data

and reports, rely on such failure to defend any potential damages claim would be initiated by the employer.

Nevertheless, the employer's failure to fulfill such obligations would not constitute a breach if such failure took place prior to the due commencement date or the agreed date to initiate the works, as this is the only time whereby the contractor will have the right to rely upon on his EOT claims.

4.2.2 Post-commencement actions

Even after the commencement of the works, the employer would act in a manner that causes delay in the completion of the works on time. Those actions would take the form of actions based on the underlying contract itself, such as the variation instructions. Also, it would be in the form of unlawful action, such as the cease of the due payments for the contractor. Lastly, it would take a form of direct intervention in the contractor's workflow which causes disruption to the progress flow of the works.

4.2.2.1 Variations

One of the most key controversial issues in the construction community and one form of lawful actions by the employer after the commencement of executing the works. it is the process that triggers many practical issues that would lead to complex conflict between the employer and the contractor[43].

Generally speaking, the term Variation refers to any alteration instruction towards any part of the contract scope to be executed through different methods rather than that have been initially agreed by the parties

[43] Hudson A, N DennysR Clay, *Hudson's Building And Engineering Contracts* (13th edn, Sweet & Maxwell) [654]-[680].

to be executed. Such alteration may include physical changes of any of the pre-agreed unit(s)/sector(s), change in the pre-agreed design/drawings, works' method, or any of the term(s) or item(s) of the contract.

Normally, construction contracts, whether standard forms or bespoke, include the mechanism for dealing with variation requests or instructions. In such instances, the variation instructions would not be a problematic issue, as the parties by applying the agreed managing mechanism shall manage their contract and the requested instructions properly.

Nonetheless, the problems arise mainly from the un-follow of the contracting mechanisms or in the instances where the contract basically does not include variation mechanism. Indeed, it would be noticed logically that most of these problems would be caused mainly by the employer, as in normal circumstances the contractor's position should not trigger any problem. Simply, the contractor once receives the instructions shall start submitting the expected expenses and time consumed.

Practically, the most known problems that would be triggered by variation instructions could be limited to:

a) the timing of the instructions;
b) the nature of the instructed new works; or
c) rejection of the employer to certify the contractor's valid claims for EOT and/or the additional expenses.

In the context of delay disputes, from the legal perspective, subject to a case by case circumstances, all the abovementioned problems put the contractor in a position to be entitled to EOT.

Henceforth, in the events where the project being delayed because of the instructed variations and the contractor successfully raised well-recorded data concerning the history of the instructed variations and

proved that the employer solely caused the delay of such encountered period on the basis of any of the problems outlined foregoing, most likely, the contractor will win the argument and lead the tribunal to declare the employer responsible for the delay of that period in question.

4.2.2.2 Cease of payments

Almost all of the construction and engineering projects are subject to installments payments mechanism. Most often, the underlying contract includes payments schedule whereby it manages the payments due dates, either being due on certain phases, milestone, calendar fixed dates. Such payment methods, constantly, puts the employer under a duty to manage the availability of the due payments on the due agreed periods in order to allow the contractor to flow the progress of the works pursuant to the agreed timeframe or the agreed phases.

Practically, however, the employers would unlawfully hold any of the due payments. Such unlawful cease would by way or another disturb the contractor's productivity if it depends primarily on that due payments in order to keep the performance flow as arranged. Still further, despite the fact that the employer unlawfully hold the due payments, eventually, if the contractor or his team has not deal properly to such conduct (as will be outlined later in details), and if the contractor's solicitor – during the dispute, has not properly presented such unlawful conduct by the employer, the contractor would appear as the defaulter party by failure to deliver the works on the agreed period.

4.2.2.3 Disruption

It would be the most confusing technical part with the delay caused by the employer. In terminology, disruption is the case where an event or a certain action takes place that leads to the disturbance for a pre-planned programme. That event or action what so-called the disruptive event or action.

Similarly, in the construction industry, disruption is the disturbance of the contractor's planned productivity plan due to external factors that would wrongfully put the contractor in the default position in terms of delivering the works within the completion period.

In terms of claiming compensation, many of the practitioners confuse the delay claim and its factors with disruption. The source of such confusion steems out of the fact that the ultimate result of disruption is the delay in completing the works within the agreed completion period. However, in fact, the disruptive event was beyond the contractor's control, and consequently, the contractor instead of being the source of the delay will be the entitled party for compensation. Henceforth, legal practitioners would include many of disruption factors and events in their presentation of their delay arguments, which drives to a massive legal and technical confusion to the tribunal, which would eventually lead to hold the contractor wrongfully in responsibility.

The key differentiation between delay and disruption would be in relation to the timing of evidencing the event. The disruption, on one hand, would not be, in many scenarios, such obvious to be immediately evidenced, it would take phases until the contractor realises that the performance of the works negatively been impacted by the disruptive event. On the other hand, the delay is, in all scenarios, such an evidential substantial event pursuant to the pre-agreed path of the performance of the works.

Pragmatically, disruption takes place due to any event, mainly relates to the employer, that negatively impacts the contractor's productivity as per the pre-agreed programme. Causes of disruption vary subject to different categories, however, typical causes of disruption relate to employer's late instructions, restrictions on site access, distributed possession of the site, out of sequence work instruction.

A practical example of disruption would be the scenario where the contractor, in a building construction project, reached the higher levels, nevertheless, the employer has directed an event e.g. appointment of a separate joinery sub-contractor to perform a certain scope of work – the result of such appointment requires the main contractor to go back to the lower levels to rectify the executed works from the defects caused by the appointed sub-contractor. Such a scenario requires the contractor to hold the performance i.e holding the manpower and machines until the repair of the defects being executed. In that sense, disruption will mainly result in increased expenses, workman power, machinery costs, overhead costs, or expenses incurred to bring extra items relative to the disruptive works.

In terms of presenting disruption claims, disruption should be presented to the tribunals in a totally separate category from those other compensation claims. Otherwise, the tribunal would fall in the trape of compensating the contractor at large i.e general compensation without identifying the disruption based on a wrongful assessment, or the tribunal would fall in another trape and reject the disruption claim and held that the contractor has been compensated for the damages at large and that disruption compensation is a duplicated claim.

4.3 The natural events

The contractor's works would be negatively affected by some natural factors whereby nor the employer or the contractor shall be held responsible for the delay that would be resulted because of such factors. Those events mainly take place due to natural unforeseeable events i.e *force majeure* e.g. weather conditions, floats, fires, earthquakes, or any other events. Nonetheless, some of those factors would be a result of a third party's conduct or any event caused by an external factor such as granting the required approvals, or changes of the applicable legislation and regulations. All such factors would enforce the contractor to hold the performance until the end of such an event.

Most often, the underlying contract includes the mechanism of managing the consequences[44]. Usually, those mechanisms are subject to a full detailed report by the party affected by the event.

As will be explained later in detail, due to the consequences of such a neutral event, the party who its performance been affected by such an event i.e the contractor would be excused from performing its obligations for the period of the occurred event. If the contractor's performance has been affected by such a neutral event, it will be entitled to extend the time of completion[45], and if the event is permanent such as a change in legislation, the contractor will be entitled to terminate the contract.

4.4 The Contractor's position

In any of the previously outlined scenarios i.e where there is an event that apparently leads or will lead to delay in delivering the works within the agreed completion period, because of the employer's conduct, the contractor will be in a position to elect one of the legal mechanisms that constitute pressure on the employer to change its conduct and shall push the employer to mitigate such obstacles to let the contractor resume the works. Those legal mechanisms would be either the right to suspend the works until that particular event or events terminate or to recourse to the applicable legal recourse to terminate the contract. Furthermore, there are common law methods that the UAE law does not apply, nevertheless, there are provisions that lead to the same result, these methods are the preventive principle. Lastly, unsimilar to the common law practice which recognises a further mechanism for the contractor to approach, the UAE law does not apply the global claim approach.

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44 Sub-Clause 18.1 of the FIDIC Redbook 2017 addresses the Exceptional Event and covers the circumstances that constitutes force majeure.

45 For example, Sub-Clause 18.4 of the FIDIC Redbook states that *"if the contractor is the effected party and suffers delay and/or incurs cost by reason of the exceptional event of whicvh he/she gave a notice under Sub-clause 18.2 [Notice of an Exceptional Events], the contractor shall be entitled subject to Sub-clause 20.2 [Claims for Payment and/or EOT] to: (a) EOT; and/or (b) if the exceptional event is of the kind described in sub-paragraphs (a) to € of sub-clause 18.1 [Exceptional Events] and, in the case of sub-paragraphs (b) to € of the sub-clause, occurs in the country, payment of such cost*".

4.4.1 The contractor's position due to the employer's conduct

4.4.1.1 Suspension of the works

The construction contract is no different from any bi-lateral contract that imposes mutual obligations over its parties. Obligations of the parties are contingently on each other to the extent that the performance of each party's obligation depends essentially on the performance of the obligations of the other party. In that sense, and given the fact that the contractor's primary obligation, i.e execution of the works within the stipulated time, depends mainly on the performance of the employer's obligations either statutory, contractual, or good faith requirements).

Therefore, and in the circumstances where the employer, by its default, caused interruption to the performance of the contractor's obligation, the latter has the legitimate right to suspend the performance of the works till the employer performs his obligation.

The UAE law manages expressly, through the articles of the CC supported by the high courts' practice, the right of suspension. Generally, Article 247 of the CC constitutes the main recourse to any contracting party, in a bilateral contract, to rely on his right to suspend his due obligations towards the other party if the latter keeps preventing the performance of the contract sufficiently. The Article states that

> *"In contracts binding upon both parties i.e bilateral, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do"*

Pursuant to Article 247, in the circumstances where the employer fails to perform his due obligations towards the contractor, the latter has the right to suspend the works until the employer return to the proper performance of its contractual obligations.

The most common practical examples, for the employer's failure to perform its obligations whereby the contractor could recourse to suspend the works, would be found in the variation scenarios, in the events where the employer refuses to consider its instructions as variations or at the very least delay or refuse to certify the varied works as per the variation mechanism included in the contract. In those events, the contractor could directly rely on Article 247 to suspend the works until the employer steps back to the normal performance of its obligations.

In the context of delay claims, if the dispute includes a suspension scenario, the party who failed to fulfill its obligations will has no right to include the period of the suspension in the claim, as the other party will be in a legal position to rely on its legitimate right to suspend the works during that period pursuant to Article 247.

Notwithstanding the foregoing, it is worth mentioning in this regard that the right to suspend the works by the contractor is not an absolute right to be used anytime. It requires, as per Article 247, that the employer's obligation is due to be performed but the employer rejects to perform it, while, on the other side, the contractor is waiting for the performance of that obligation in order to continue the work. Not only that but furthermore, the contractor must be sure that the employer has no legitimate reason right not to perform its obligation. For example, in the case of non-payment, the contractor must be sure that the employer has no right to justify the non-payment.

Moreover, it is worth noting in this regard that it is established by high courts that the party who seeks reliance on the right of suspension must be ready to perform his due obligation. By applying this on delay claims, if the contractor seeks to rely on the right to suspend the performance, it is required to establish

the legibility of using this right, which requires to prove to the court that the contractor is capable to complete performing the works[46].

Lastly, it is worth noting that the contractor should not suddenly suspend the works without serving a notification to the employer including a reference to the due obligation and a deadline for this performance. This notification mainly secures the contractor prior using its right of suspension and gives it solid grounds as the employer would step back and perform the due obligation.

In conclusion, the right to suspend the works by the contractor is not an easy or simple resource to be used as it appears. The contractor would thing wrongfully that it has the right to suspend the works, while in fact, the employer has had the legitimate right not to perform its obligations. This scenario will put the contractor in a very weak position in the dispute, leading ultimately to lose the right of suspension argument.

4.4.1.2 **Termination of the contract**

In addition to the suspension right, the contractor also has the right to terminate the contract due to the employer's conduct.

The UAE law manages the right of termination by virtue of the articles of the CC and the high courts' directions. Notably, the UAE includes general provisions for the termination of bilateral contracts generally, and also a specific provision mainly to the contractor.

The general provisions for the right of termination can be found in Articles 267 and 273. Generally, Article 267 states that the bilateral contracts cannot be varied or rescinded except by virtue of mutual

[46] See, for example, *Dubai Cassation Court, 22 October 2014, Case No 340/2013-Commercial*.

consent of the parties, court order, or pursuant to the law provisions. Furthermore, Article 273 relates to the unforeseen force majeure, whereby in such circumstance, the contract will be terminated automatically.

Specifically, in relation to the Muqawla contracts, Articles dealing with the general termination provisions found under Articles 892, 893, and 894. Articles 892 and 893 deal generally with the termination of the contract either in normal conditions or by virtue of force majeure.

However, Article 894 designed specifically to the contractor, as it states:

> *"if the contractor commenced performing the works and became incapable to complete it afterward for a reason beyond its control, it shall be entitled to the value of the executed works and the expenses that incurred in the performance up to the benefit the employer has accrued"*

As noted, generally, Article 894 addresses a broad situation including all the circumstances where the contractor will not be able to complete the works for any reason beyond its control.

Practically, by applying the wording of Article 894, the employer's conduct would be constituted, subject to a case by case scenario, a reason beyond the contractor's control that gives the contractor a justifiable legal tool to deal with such conduct to terminate the contract. In such circumstances, the contractor should serve the employer a notification including the reasons that prevent the performance of the works and request the employer to end those reasons or at least work on mitigating it. If the employer failed to comply with the contractor's notification, the contractor can directly initiate the proceedings claiming termination of the contract.

4.4.1.3 The preventive principle

The prevention principle is a long time common law established principle, sometimes called the *Peak Principle*[47]**,** is the principle that prevents the employer from benefiting from levying liquidated damages because of his conduct, either through negligence, omission, or direct instructions, that led at the first place to preventing or delaying the contractor from delivering the works within the agreed timeframe. From this sense, as will be addressed later in detail, the preventive principle considers as a direct consequence of the concurrent delay.

In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*, Lord Denning held:

> "*It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if the other party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time*

Due to the employer's conduct that led to the delay in delivering the project within the stipulated time, and as the contractor's obligation to deliver the works on time became inactive, the contractor is not bound anymore with that obligation, and the completion of the works become *at large.*

Does the UAE law apply the preventive clause?

[47] The Prevention Principle was first presented in the case of *Peak Constuction Ltd v Mckinney Foundations Ltd* [1970]. And that is why it sometimes called as the *Peak Principle*. The Court of Appeal held that the employer could not claim liquidated damages for a delay, when there is no mechanism in the contract which allows the contractor to apply for an extension of time in relation to that particular delay. This case is an example of how the contra proferentum rule can apply to construction cases. In this case, the court held that provisions relating to liquidated damages and extensions of time in an employer-devised contract should be construed against the employer

The UAE law does not include an express provision dealing with the preventive principle, nonetheless, there are other principles, that collectively, and supported by the practice of the high courts, lead to the same application of the preventive principle.

For instance, as outlined earlier, Article 246 of the CC establishes a general principle in relation to the performance of the contract and states that the contract must be performed with a manner consistent with the good faith requirements. Which means that in the circumstances where the employer's conduct causes a delay in delivering the works on time, the employer sought to claim damages shall be constituted as contrary to the good faith requirements pursuant to Article 246.

Furthermore, Articles 318 and 319 collectively stipulates that a person should not be unjustly enriched without a valid legitimate cause "the Unjust Enrichment" principle. Thus, Articles 318 and 319 prevent the employer from levying damages for the delay he caused at the first place.

Still further, as will be addressed later in detail, the UAE courts' approach in relation to concurrent delay, pursuant to Articles 290 and 291 of the CC, is to adopt the proportion concept in determining the due compensation for the delayed period. In other words, in the events where the employer causes delay to the performance of the project and initiated legal proceedings claiming damages, the UAE courts will take into consideration the delay period caused by the employer's conduct and deduct it from the general compensated period.

In conclusion, despite the fact that the UAE law does not expressly apply the preventive principle, however, Articles 216, 318, 319, 290, and 291 would be solid grounds for the practitioner who is acting for the contractor to successfully present the preventive principle and challenge the employer's claim for delay damages whenever the dealy cause primarily by the employer.

4.4.1.4 The global claim

Generally speaking, presentation of the contractor's claim, in light of the examples outlined earlier, will be an unproblematic claim where the reason for the delay confines under one main reason. However, it is practically possible, that multiple delay events occur during the same period. Technically, and given the fact of the complexity of those events, in such circumstance, the contractor will find itself in a technical matrix and most probably it would be hard, impossible in some circumstances, to establish its claim based on separate cause-and-effect details i.e to demonstrate accurately which particular event caused such certain claimed delay to the progress of the works. Based on that premise, the contractor would decide to claim one claim includes all the time and incurred expenses that caused because of the occurred delay events collectively. This claim is known as the Global Claim or as sometimes referred to as the *Loss* or *Rolled-up Claims*.

In light of the foregoing explanation, it may become clearer that the contractor, without any consideration to the causal link between the occurred delay events and the delay itself, the contractor's claim indicates that the contractor requests the tribunal, on the contractor's behalf, to separate up the employer's breaches in order to summarize the particular breach that led to the delay.

Henceforth, global claims will be unobjectionable as long as the contractor will be able to present its claim based on reasonable particularisation of the events and its link with the occurred delay. However, in the sense of ignoring of particularity, global claims have been subject to considerable criticism in the sense of ignoring the employer's right to defend his position throughout the judicial process, which is one of the essential basics of law.

In *British Airways Pension Trustees Limited (Formerly Airways Pension Fund Trustees Limited) v Sir Robert McAlpine & Sons Limited & ORS*[48], per Saville L.J:

> *"Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing.*
> *The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind, it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required.*
> *Thus general statements to the effect that global or composite claims are embarrassing and justify striking out, to be found for example in Hudson 11th Ed. paragraph 8–204 are not automatically applicable to every case".*

If that is the case, then what exactly the contractor needs to prove to successfully present an unobjectionable global claim? Or what exactly is meant by particularisation of the claim?

Taking into consideration the complexity of the construction projects and the concurrency of multiple events that would make it possible for the contractor to separate up the occurred delay event, nevertheless, the contractor needs, at the very least, to present his claim to the tribunal based on well-documented evidence that could demonstrate reasonable causal link between the event and the delay or disruption[49].

Presentation of a particularised claim does not necessarily mean that the contractor will succeed in claiming the total alleged loss. It is true that, from the technical perspective, it will be obvious to the tribunal that there are cumulative events caused the delay. However, the tribunal, in other circumstances,

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[48] *British Airways Pension Trustees Limited v Sir Robert McAlpine & Sons Limited & ORS [1994] 12 WLUK 231; 72 B.L.R. 26*

[49] Wilson, "Global Claims at the Crossroads" (1995) 11 Const LJ 15.

shall rely on its discretion, taking causality into consideration, to assess whether the presented events caused the sought delay or not, collectively or there are certain events need to be eliminated.

Does the contractor have the opportunity to initiate a global claim in the UAE?

Generally speaking, the UAE law does not accept the global claim concept. This is mainly because in relation to the tort claim, the UAE courts, pursuant to Article 113 of the CC and supported with numerous case-law judgments precedents[50], primarily, require the claimant to prove his claim. Furthermore, similarly to the situation in any civil claim, the UAE law, pursuant to Article 292 of the CC and the practice directions of the high courts, for granting compensation requires the establishment of three fundamental requirements in order to grant the claimant its relief sought, failing which, no compensation would be granted.

These three requirements, known as the *Tripartite Test*, requires the claimant to prove that:

a) the other contracting party has failed to fulfill its obligation;
b) actual damage sustained; and
c) the causal link between the first two elements.

In the context of the contractor's position, technically, the contractor is burdened to establish the causal link between the employer's conduct and the damage suffered directly because of such conduct, otherwise, the claim will be rejected. Furthermore,

Therefore, global claim subject to the UAE courts, in light of the required essential elements, mainly the causal link requirement, and given that, as explained earlier, the global claim essentially depends on

[50] See, for example, *Dubai Cassation Court, 29 May 1994, Consolidated Cases No 93 & 124/1994-Civil*.

particularity and the prove of the causal link between the delay events and the delay or the disruption, if the contractor does not retain well-documented evidence and/or records that will be able to assist the court in establishing the link between the occurred events and the delay, the contractor will have very poor prospects to attain such kind of claims before the UAE courts.

4.4.2 The contractor's position due to the natural events and/or force majeure

In the circumstances where the contractor will be incapable to complete the works due to reasons beyond its control such as the natural events or as common practice known as force majeure, the UAE law has an express position in addressing such circumstances. Notably, the UAE law has both general provisions applicable upon the bilateral contract generally and specific provision applicable upon the Muqawala contracts.

Mainly, paragraph 1 of Article 273 of the CC establishes a general principle for the bilateral contracts and states expressly that

> *"in a bilateral contract, in the circumstances where the performance of the contract becomes impossible due to unforeseeable force majeure events, the obligation of the other contracting party shall be revoked and the contract shall automatically be terminated"*

In addition, as outlined earlier, Article 894 addresses mainly the contractor's position in the event of the force majeure. Whereby, the contractor will be in a position to rely on the unforeseeable event to terminate the contract and to claim reimbursement of the executed works and the expenses incurred to execute the works.

Notwithstanding the foregoing, it would be practically possible that the unforeseeable event would be a temporary event that would come to the end after a period. In such circumstance, the parties will negotiate

the performance of the contract, having regards to their commercial interests and also depending on nature and the time of the event. Ultimately, the contractor will be in a position to elect between terminating the contract or to suspend the works until the event terminates. Worth mentioning in this regards that in the circumstances where the event apparently would come to the end in a reasonable time and/or the employer has shown good gesture in the negotiations, the contractor would lose its claim to terminate the contract if the court evaluated that the contractor is abusing his right. Examination of the contractor's right to terminate will be for the discretion of the court[51].

[51] See, for example, *Dubai Cassation Court, 27 November 1999, Case No 263/1999-Civil*.

CHAPTER FIVE

TYPES OF DELAY

5.1 Introduction

The awareness of the types of delay is essential for the practitioner in order to be able to identify the proper grounds for initiating the delay claim or to raise proper argumentative grounds that need to be deployed.

This is mainly because not all the types of delay are compensatable, there are certain circumstances whereby the employer is incompetent to levy liquidated damages due to the delay of completing the project within the stipulated time. Furthermore, there are circumstances where the events, that caused delay in achieving certain milestones of the project, exist, however, it does not have an impact on the stipulated completion time of the project. Still further, there are other circumstances whereby the employer is initially incompetent to claim liquidated damages on the basis that the delay of the completion was, in the first place, due to his conduct.

In relation to the types of delay, generally, it is broadly known in construction that types of delay would be categorised under four main categories, being:

1- Critical and Non-critical;

2- Excusable and Non-excusable;

3- Concurrent Delay; and

4- Compensable and Non-compensable.

The importance of such categorizing is that it breaks down the types of delay in an effective logical order. In any delay dispute, it is essential to determine initially whether the delay is critical or not, then if it was critical one, is it an excusable delay or not, going further in analysis, it is required to determine if there is any concurrent delay events or the contractor solely should be held countable, finally delay can be classified into compensable or non-compensable.

Practically, applying this categorisation on any delay dispute does not an easy mandate for the practitioner or the tribunal to accomplish. However, there are basic principles and methodologies that could help in achieving the mission.

5.2 Critical and Non-critical

Describing the delay event being critical or non-critical referring to the technical impact of the event over the planned/stipulated anticipated completion date.

In a simple programming explanation, each construction project has its own *Critical Path* flow which includes the critical activities that need to be completed at certain milestones. While the other activities i.e not included in the critical path would be delayed beyond its scheduled completed schedules but will not cause a delay in the anticipated completion period of the project.

In light of the foregoing explanation, it would become clearer that only those delay events that relate mainly to the critical activities and will lead to delay in completing those activities on time and eventually will lead to delay in completing the project, those activities shall constitute critical causes of delay, and known as a critical delay.

In relation to the non-critical activities, as mentioned above that the delay in completing those activities will not cause a delay in completing the project. Those activities are known as *Floated Activities* causing what is known as *Programme Float*[52].

The first categorisation i.e the critical and non-critical, leads to a notable conclusion, , from a legal perspective, that only the critical delay events would be considered in delay dispute, which in turn puts the non-critical delay in an independent delay categorisation. In other words, the classification of the delay being non-critical can be disregarded from the context of delay disputes, as it will be hard to imagine a delay claim including elements or events causing a non-critical delay, which means that the non-critical delay is merely a part of the theoretical categorisation of the delay analysis.

5.3 Excusable and Non-excusable

Classifying the delay being excusable or not mainly relates to answering the question of whether the delay event was predictable by the contractor during entering into the contract or not. If the answer to this question is no, then we have an excusable delay event. While if the answer is yes, which the contractor hates to hear the most, then we have a non-excusable delay[53].

Excusable delay is that delay caused due to unpredictable events that lay beyond the contractor's control, whereby it will be hard, if not impossible, for the contractor to handle. While the non-excusable delay including delay events that were predictable by the contractor, although, it accepted to take the risk of executing the project.

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[52] Programme Float will be discussed in detail in Chapter 7 "Delay Analysis Techniques".

[53] Jamie Spellerber, (29 May 2019) "*Types of Constrcution Project Delays – Inexcusable Delays vs.Excusable Delays*", <https://www.levelset.com/blog/types-of-construction-project-delays/>

Notably, sometimes most of the legal practitioners wrongfully classify the excusable delay only under the force majeure category i.e acts of god. In fact, this is a wrong understanding of the excusable delay, this is mainly because delay should be constituted excusable whenever it has been caused by unpredictable event that the contractor became unable to control, which means that the excusable delay may include for example the changing in laws or regulations, late in action by the competent authorities, unforeseeable underground conditions. In other words, classifying the delay being excusable is much wider classification than force majeure. This means that the delay dispute would have an excusable delay but due to the wrong understanding of this classification properly, the practitioner would neglect to raise such an argument before the tribunal.

furthermore, practitioners should not also present the unpredictable and uncontrollable factors, directly as excusable delay without reverting to the contract documents because the parties, subject to their intended respective interests, may agree to exclude certain events such as adverse weather conditions from being an excusable delay event. If that is the case, and if that certain excluded event has occurred, then the contractor, through acceptance of the risk to complete the works despite the occurrence of such unforeseeable events, has waived his right to claim EOT and the delay shall be constituted as non-excusable.

In light of the foregoing explanation, from the burden of proof perspective, the contractor's legal representative would face some difficulties to prove the excusable delay from both the legal and technical aspects during the dispute. This is not the case for the employer's legal representative in the case of the non-excusable delay.

Given the fact that the non-excusable delay could be defined as that delay that occurred despite the fact of being predictable by the contractor during entering into the contract, or worse, that occurred within

the contractor's control. Which means that, from the practical perspective, the non-excusable delay is broad enough to include all the events where the contractor has failed to manage the performance of the works. In that sense, the non-excusable delay would include the poor and/or late performance of the subcontractors and/or suppliers, poor workmanship of the contractor's team. Therefore, based on that classification, presentation of the non-excusable delay shall require the practitioner to just provide the evidence that the contractor has predicted the delay event and failed to control it once occurred such as in the case of late performance or logistic arrangements.

5.4 Compensable and Non-compensable

In the circumstances where the occurred delay classified as being a non-excusable delay, such classification is not expected to cause a legally problematic situation. Simply the tribunal will declare that the delay event was predictable by the contractor and therefore it was was entitled to EOT and accordingly should be held liable for the delay in completing the project on time. However, in case of excusable delay, it will be required by the tribunal to break it down into a further classification which will consider the delay being compensable or not.

The classification of the excusable delay into compensable or non-compensable is a classification that relates primarily to the fact of whether the contractor would have been entitled to EOT in addition to compensation or just EOT.

Applying this classification practically, it would be clearer that the excusable-compensable delay is that kind of delay event that caused primarily and solely by an unpredictable event beyond the contractor's control, apart from the force majeure. In this meaning, the excusable-compensable delay could be confined into the delay caused only by the employer's conduct such as wrong timing variation or

disruption. Therefore, the contractor would have been entitled to be granted an EOT in addition to reimbursement for the extra expenses incurred because of that event.

Notwithstanding the foregoing, notably in the common law countries, parties started recently to include in their contract a clause known as *"No damage for delay"*. By virtue of that provision, the contractor agrees to waive its right to claim compensation for the extra expenses would be incurred due to any delay or hindrances by any event whatsoever caused by the employer or its representative. By virtue of such provision, the contractor will be only entitled to EOT and no right to pursue compensation.

In the UAE, this provision in the construction contracts has not been experienced yet, therefore, it would be difficult to examine this scenario from the legal perspective. Nonetheless, some of the provisions of the CC give a clear indication that this scenario will be contractually valid.

In tort claims, Article 296 of the CC expressly states that any purporting to provide an exemption from liability for a harmful act shall be void. Which means that the party does not have the right to waive the right of the compensation before the harm takes place[54]. On the other side, the law is silent in relation to the compensation results from the contractual breach. Which means that if this agreement takes place in the contract in question, the general principles shall be applied. And the general principles give the parties the right to agree on the clauses of their contract having regard to their interest. furthermore, Pursuant to Articles 258, 259, and 265 of the CC collectively states that whenever the wording of the contract is clear, it is impermissible to change the meaning of the clauses which reflect the parties' intentions.

[54] See, for example, *Dubai Cassation Court, Case No 121/1993-Civil*

On the other hand, we have the excusable-non-compensable delay that caused primarily by neutral events such as the force majeure. Whereby the contractor, would have been entitled to EOT, nevertheless, it will not be entitled to additional compensation as the delay does not also relate to the employer's conduct.

Force majeure would be the most commonly known example for the excusable-non-compensable. Most often, parties of all the construction contracts keen to include in their contract a provision that defines the force majeure and its relevant operative clause. Under this provision, parties agree on an exhaustive list of events to be constituted as force majeure, whereby they agree that

> *"an event of force majeure is an event or circumstance which is beyond the control and without the fault or negligence of the party affected and which by the exercise of reasonable diligence the party affected was unable to prevent"*[55]

Then they start, subject to further negotiations, to agree on the list of the events.

Under the operative clause, the parties will include the mechanism of dealing with the occurred event either during the existing period or after the end of the event. Under this clause, we can find the agreement of the parties to declare no liability of the other party, the non-affected party who is usually the employer in construction disputes, in relation to the due payments or the costs and extra expenses incurred during the existence of the event.

Subject to the end of the force majeure event, there will be two potential practical scenarios available; either the resume performance of the contract will be impossible, such as change of legislation whereby the government bans the construction of such kind of activities in that region e.g petrochemical and

[55] Damian McNair "*Force Majeure Clauses – Revisited*", <https://webcache.googleusercontent.com/search?q=cache:sP9FyWqPLuEJ:https://www.dlapiper.com/~/media/Files/Insights/Publications/2012/06/iForce%2520majeurei%2520clauses%2520%2520revisited/Files/forcemajeureclausesrevisited/FileAttachment/forcemajeureclausesrevisited.pdf+&cd=3&hl=en&ct=clnk&gl=ae>.

relevant activities. Or the contract could be completed as normal after the end of the event. In the latter scenario, the affected party, most often will the contractor in the context of delay disputes, should have used the reasonable effort to mitigate the consequences of the occurred event and to resume the work within a reasonable time.

Worth mentioning in that regard that, the UAE law and the practice directions of the high courts[56] address clearly the consequences of the force majeure, either through generic principles applicable to the bilateral contracts in general or particularly for the construction contracts.

Generally, Article 273 of the CC, concerning bilateral contracts, stipulates that:

> *"(1) In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically canceled.*
>
> *(2) In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware"*

[56] See, for Example, *Dubai Cassation Court, 10 February 2013, Case No 238/2018-Real estate,* See also *Dubai Cassation Court, 30 December 2012, Case No 174/2012-Real estate*

In relation to construction contracts, Article 893 of the CC states that

> *"If any cause arises preventing the performance of the contract or the completion of the performance thereof, either of the contracting parties may require that the contract be canceled or terminated as the case may be"*

Furthermore, Article 594 states that

> *"If the contractor commences to perform the work and then becomes incapable of completing it for a cause in which he played no part, he shall be entitled to the value of the work which he has completed and the expenses he has incurred in the performance thereof up to the amount of the benefit the employer has derived therefrom".*

Such clear managing legal grounds, make it easy for practitioners to rely on law provisions and case-law authorities to present force majeure arguments.

5.5 Concurrent Delay

This kind of delay would be considered to the most debatable classification of delay to be presented in legal disputes. This is because of the fact that, from the burden of proof perspective, it requires the proof of a high level of complex technical events during the history of the project. Not only that but as will be explained later it also requires to prove that the delay events took place concurrently during the same period of time.

Simply, it would be defined as

> *"such kind of delay that takes place due to the circumstances where more than one delay event, with almost the same effect, took place during the same period of time"*[57].

[57] See *Adyard Abu Dhabi v S.D. Marine Services* [2011] EWHC, per Hamblen "A useful working definition of concurrent delay in this context is "a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency"

Out of the said definition, it becomes clearer that concurrent delay requires the existence of three main elements:

a) two or more delay events;
b) with approximately the same effect; and
c) take place during the same period of time.

In relation to the first element, it is worth mentioning in this regards, that the encountered delay events must relate to both the employer and the contractor in order to argue the concurrency. In other words, practically, if there were more than delay event took place during a specified time of period, and either party seeks to argue concurrency, it is must be proven that any of the other concurrent delay events relate to the other party.

In relation to the presentation of concurrency argument, sometimes legal practitioners wrongfully approach directly assume that the delay events were concurrent relying only on the timing element, neglecting the effectiveness element. In fact, this approach is wrong and would fail to present a successful concurrent delay argument. This is because t fact that, it would happen that many delay events seem as concurrent and appear intertwined, however, upon the forensic investigations it would appear that many of those events were not initially causes of the claimed delay[58] as in the cases of the floated activities, as explained earlier. Therefore, in order to present an effective concurrent argument, a practitioner should be aware of the effectiveness of the concurrent delay events.

[58] John Marrin, "Concurrent Delay" (2002), Cons. L.J. 2002

If that is the case, then what is the main criteria in examining the concurrency of the delay events? And what is the impact of having a concurrent delay?

With regard to the examination of the concurrency and its impact on the determination of the responsible party and the ultimate result of entitling EOT or not, there are two broadly known mechanisms, which are more familiar to the common law legal practitioners. These mechanisms are namely the *Dominant Cause* approach, or the Malmaison Case approach.

The *Dominant Cause* approach, which was introduced firstly in the case of *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd*[59], is the approach that relies mainly on the dominant cause of the delay, whereby the responsibility of either the contractor or the employer will be determined depending on the dominance of the delay event caused by that party. As a result, if the event caused by the contractor was the dominant reason for the delay, then, the contractor shall be held responsible for the delay and consequently would not have been entitled to EOT and ultimately shall be held responsible to compensate the employer for the damages suffered.

Practically, the dominant cause approach would be ineffective and insufficient in determining the dominance delay reason in a satisfactory manner especially in major complex projects in which there are multiple complex technical delay reasons to be determined by the tribunal.

On the other hand, there is the *Malmaison Case* approach, which has been introduced in the case of *Henry Boot Construction v Malmaison Hotel (Manchester) Ltd*[60]. As per the Malmaison case approach, it was held that

[59] *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd.* [1918] AC 350.

[60] *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited* [1999] 70 Con.L.R. 32, (QBD (TTC)). The Malmaison case is often seen as the genesis of judicial authority and commentary on the treatment of concurrent delay in England and Wales. This case considered a contractor's

"where there are two delay events (one relates to the employer and the other does to the contractor) with almost similar causative effect, the contractor shall not be liable for the delay and its responsibility should be ignored and it is entitled to EOT"

Pursuant to the Malmaison Case approach, from the technical perspective, the contractor to be entitled to the EOT, should only show that the encountered delay event has occurred concurrently with another delay event caused by the employer or even any other reason. For example, if the delay was driven by multiple delay events, some relate to the contractor while the others do not, either relating to the employer or neutral event, the contractor should only proof that there was a concurrent delay to be entitled to EOT.

a) The position under the FIDIC

Although, the *FIDIC Redbook 1999* does not include a reference to concurrent delay. However, *FIDIC Redbook 2017* introduces concurrency expressly whereby Sub-clause 8.5 states that:

"If a delay caused by a matter which is the employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Special Provisions (if not stated, as appropriate taking due regard of all relevant circumstances)".

b) The position under the UAE law

The UAE legislator does not expressly recognise the concept of the concurrent delay. However, there are provisions that, in relation to considering the concurrent concept, have exactly the same effect. Articles

claim for an extension of time under the JCT 1980 conditions, where the issue of concurrent delay arose. In respect of how any concurrency ought to be treated, the approach was in fact agreed between the parties, as recorded oin the judgment at [13] "It is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event"

290[61], 291[62], and 878[63] of the CC, collectively, give the contractor the possibility to argue concurrent delay. Also, the approach of the local courts and, notably, the court-appointed experts' demonstrate that the concurrent delay recently became a familiar technical argument to be highly considered in delay disputes.

Primarily, Article 291 of the CC gives the Tribunal the right, if the employer levies liquidated damages resulted out of delay, to reduce the claim amount taking in consideration the level of participation of the employer in such delay[64]. Furthermore, if the delay caused by concurrent events, where some of the events were neutral, the Tribunal has the discretion to reduce the contractor's liability on the basis of the level of the participation of such neutral events to the delay. As such, contrarily, if the contractor is claiming compensation or prolongation costs based on the rejected entitled EOT, the employer can rely on the same articles arguing the contractor's participation in the occurred delay.

Not only by virtue of the articles of the law, but also the court-appointed experts, based on their experience, recognise the concurrent delay and include a full analytic reference to it in their reports to the court.

In relation to the examination of the concurrency, it is worth mentioning that, generally, the courts do not follow a certain approach of the aforementioned approaches, it is always subject to discretion of the court[65]. The court-appointed experts, usually prevail in their reports that there was concurrent delay

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[61] Article 290 states *"It shall be permissible for the judge to reduce the level by which an act has to be made good or to order that it need not be made good if the person suffering harm participated by his own act in bringing about or aggravating the damage".*

[62] Article 291 states *"If a number of persons are responsible for a harmful act, each of them shall be liable in proportion to his participation in the harm, and the judge may make an order against them in equal shares or by way of joint or several liability".*

[63] Article 878 states *"The contractor shall be liable for any loss or damage resulting from his act or work whether arising through his wrongful act or default or not, but shall not be liable if it arises out of an event which could not have been prevented".*

[64] *Dubai Cassation Court, 8 March 2011, Case No 384/2010-Commercial*

[65] Kim Rosenberg, "Concurrent Delay: What is all the fuss about?" (2018), Const. L.J. 2018

during the encountered period of the dispute, which would seem as they follow the Malmaison Case approach Nonetheless, in some cases, they tend to give the court an indication that there were some causes dominant over the others, which apparently means the adoption of the dominant cause approach.

In conclusion, addresses of the concurrent delay by the court-appointed experts differ from case to case scenario, in which the legal practitioner should have a significant impact on the expected findings of the expert. Which means that the legal practitioner has the opportunity to discuss concurrent delay from the technical aspects with the court-appointed experts.

Nonetheless, regardless of the available approaches for the expert to determine concurrency in a sufficient manner and accordingly to give the court a clue whether or not the contractor was entitled to EOT, the expert will find himself in a technical factual matrix whereby it will be necessary, in very far extent, to rely on the expert's experience to produce reasonable analysis based on the observation of the project records and the claim relevant data. Thus, it is primarily the practitioners' responsibility to present their concurrent argument in such sufficient and evident analysis supported with the evidence on the causal link between the alleged concurrent event and the actual occurred delay.

Such a friendly approach by the local courts assure the construction practitioners and makes them confident that they can successfully present complex technical matters such as concurrent before the courts.

CHAPTER SIX

CONTRACT DOCUMENTS

Undoubtedly, successful of any construction project starts from the project agreement i.e the formation and the creation of the contract document. Proper creation of an organised contract documents does not only lead to the proper and more smooth handling of the project but will also lead to the easier and more effective resolution of any potential dispute might arise between the contract's parties.

Practically, the contract documents have a magnificent role in determining the right mechanisms of resolving the disputes, particularly those provisions which relate to the risk allocation in which the parties identify the allocation of the obligations and rights of each party.

Primarily, the allocation of the risk under project contracts would be categorized into a) those risks that fall within the control of the employer; b) risks fall within the control of the contractor, and c) risks that fall beyond the control of both parties. Mainly, the allocation of the risks depends on taking into account which of the parties will be in more control to borne the risk.

Generally, the legal practitioner who is appointed to lead a construction dispute must start with concluding due revision of the contract documents in order to identify the elements of the claim in the best manner. In the context of delay claims, the practitioner in order to properly identify the delay causes and the party who was responsible for the delay, contract documents, particularly, provisions relating to the allocation of the risks, seem to be the cornerstone for achieving such initial investigation mission. Moreover, even throughout the dispute proceedings, contract documents will be the best reference to the relevant arguments, in which the practitioner will be able to produce ease references for the tribunal which apparently will lead to present effective reasonable submissions.

6.1 Contract documentation

Practically, there are some essential components of the contract that are necessary for the practitioner to review before initiating the delay dispute.

6.1.1 The Contract Agreement

Practically, most often the construction contracts, especially the tender contracts, consist of hundreds of pages and different appendices, whereby it will be hard for the signatories to sign each page separately. Therefore, it became common practice that each party's representative signs one document consists of little few pages known as the contract agreement, without signing the whole set of the contract documents.

Contract agreement would be considered as the guidelines of the whole contract. It, normally, includes the list of the whole contract documentation and annexes. Furthermore, it also includes a full generic descriptive detail in relation to the intended project, the project price, payment schedules, and other generic detail.

This document is essential to be considered by the practitioner in order to confine the scope of the research of the contract documents as it will assist the identification of the main components of the contract i.e which of the contract documents shall be considered an integrated part of the contract and which will be considered as mere references to the contracting party.

Lastly and most importantly is that, recently, there is a complex legal issue that might be triggered by this document specifically. This legal issue relates mainly to what is known amongst the practitioners as the express reference argument.

The arbitration jurisdiction is the best practical example of this scenario. Although the fact that, normally, the contract agreement includes a list of the integrated documents and annexes, and as explained foregoing, the parties will only sign the contract agreement and only parts of other documents thinking that the reference made in the contract agreement is sufficient. However, the law might set particular kind of clauses, such as the arbitration clause, to be signed *separately*. Based on that, if the contract agreement itself does not include the arbitration clause but only includes a reference to the arbitration agreement, this legal position would trigger the possibility of creating an invalid arbitration agreement.

Generally speaking, It is established by high courts that whenever the parties include a general reference to the document that includes the arbitration clause, such reference shall be deemed null and the arbitration agreement will be deemed null, unless such reference was clear and express to make the parties fully aware that the contract is subject to arbitration jurisdiction[66].

Nonetheless, in a notable judgment, high courts have shown a high degree of practical flexibility if the case relates to tender contract. The court has held that

> *"if the case documents prove that the contract between the parties through tender based on the general conditions document which includes the arbitration clause, it is not necessary for the parties to include a special reference to the arbitration clause in the contract, and none of the parties will have the right to challenge the jurisdictional agreement"*[67].

It is notable that this scenario is much common before the courts. This issue takes place practically in the events where either party initiates a dispute before the local courts, while the other party does not like to

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[66] *Dubai Cassation Court, 9 January 2011, Case No 168/2010*, see also *Dubai Cassation Court, 19 February 2012, Case No 153/2011-Real estate*.

[67] *Dubai Cassation Court, 9 May 2010, Case No 73/2010*. In the narrative of the merits, the court explained the methodology behind its decision. The court stated that *"normally, in tender contracts, whereby the employer issues the contract documents which includes the general conditions in a form of appendices. As such, giving the fact that the other party has accepted the bidding invitation based on those general conditions, it does note make sense for that party to challenge the arbitration jurisdiction alleging that it was by virtue of general reference".*

proceed to defend the dispute before the local courts and seeks the case to be subject to arbitration. In this case, the other party i.e the respondent shall have the opportunity to argue before the court that the arbitration jurisdiction in invalid based on the fact that the arbitration clause has not been signed separately.

6.1.2 The Contract General Conditions

As explained earlier, the general conditions, from the legal perspective, would be considered as the most important kind of documents which includes essentially the whole important clauses and terms to be investigated.

This document is an essential reference to identify many of the key issues that relate to the history of the project which will ultimately lead to creating a clearer picture in deciding the defaulted party. For example, in relation to the commencement date, this document usually includes the commencement date or the mechanism of its determination, further, it includes the obligations upon the employer during the pre-execution period, which will ease determining during the dispute whether the employer has had allowed the contractor to commence the works on time or not, and if not, whether the incapability to fulfill this obligation relates to the employer or circumstances beyond its control. In this document also, there is another important practical example which is the variation mechanism, whereby it will be easy for the practitioner to examine whether the parties have had followed the agreed mechanism or not.

In normal contracts, this document is such kind of document that does not include any of the technical characterisations or features of the intended project. Which means that the practitioner could not allocate any technical features if required for the dispute. Nevertheless, it would include references to particular

technical details such as tools, resources, references to other technical documents necessary to execute the project.

In relation to each party's rights, from the commercial perspective, this document has also an effective role in facilitating the reference to each party's rights and what exactly the amount of the compensation that would be sought and on which basis. For example, in relation to the delay claim, it will ease the calculation of the damages and the agreed delay penalties. Also, in relation to the liquidated damages, which is normally be included in a detailed reference and/or the mechanism of its calculation.

Lastly, this document usually includes the special conditions document, which would take a form of an extension or addendum to the contract that includes the special conditions that pertain to each particular kind of projects with special natures or purposes of usage.

6.1.3 Other kinds of documents

Generally, from the legal perspective, the contract agreement, and the general conditions would be the most effective kind of documents to be considered. The other kind of documents, that include technical detail such as drawings and other kind of technical schedules, would not be important in resolving such kind of legal disputes.

Nevertheless, the situation would notably differ in some cases whereby the parties include in the general conditions a reference to any of the technical documents that would have an effective role in resolving

the dispute. For example, the parties would include in the general conditions, under the section of the contractor's obligations, a reference to the drawings schedules which include dates and deadlines of the drawings submittals that the contractor must follow. In such a scenario, and having regard that the dispute relates mainly to the contractor's failure to deliver the work on time, the drawings schedules will have an effective role in demonstrating whether the contractor has had followed the deadlines or not.

6.2 Priority of Documents

Most often, practically, the contracting parties include a section, in either the contract agreement or the general conditions, whereby they agree upon a certain arrangement of the priority of the contract documents.

By virtue of this section, the parties agree that in the circumstances where there is a conflict between two kinds of documents and/or a conflict between two clauses or more, the explanation of the conflicting clauses i.e the intention of the parties shall be held by virtue of the upper document in the priority list.

From the legal perspective, such priority arrangement has a notable role in the circumstances where there are two or more conflicting clauses that relate to any of the parties' obligations whereby it is necessary to consider those clauses in determinating the defaulted party in the dispute.

In such circumstances, the practitioner shall find himself in a situation that it is legally binding to follow the order agreed by the parties even if this route unfavorable and would affect the legal position in the dispute.

CHAPTER SEVEN

DELAY ANALYSIS TECHNIQUES (DATs)

7.1 Introduction

Following to concluding the proper preparation for presenting the delay claim by concluding the due revision of all the relevant elements and the legal position of the client, throughout the legal proceedings, the time will come to the hardest part which relates to the proof of the delay.

From the legal perspective, arguing delay claims is and always will be subject to the success in achieving the burden of proof on each party. The process of presenting delay claims is usually a matter of allocating the responsibility for the occurrence of the delay through the accurate addressing for the reasons that led to the delay and the effect of those events on the completion programmes. Thus, legal practitioners, in order to establish their evidence, will usually be in a position of producing their submissions subject to a high-technical mixture including both legal and technical construction arguments.

Investigating delay claims is a process requires a full retrospective investigation to the time impact including all the encountered delay causes and its effect on the scheduled completion timings. Therefore, as long the presentation of the arguments is smartly accurate and simple, as the reasonability of the arguments will be acceptable.

The first step in presenting a successful delay claim relies mainly on identifying the fundamental scope of works and the key elements that led to the delay of achieving that scope. In that context, there are some technical analysis tips and programmes that assisting the legal practitioners in presenting their claims to the tribunals.

7.2 Categorizing the delay

The first step for the legal practitioner should be the identification under which category the delay falls, as explained earlier, is it excusable-compensable, excusable non-compensable, a non-excusable, or concurrent delay.

The importance of identifying the category of the delay is mainly to help the practitioner and the tribunal in allocating too early in the proceedings, the burden of the proof on the right party of the claim.

7.3 The burden of the proof

The legal basic rule, in almost any civil claim, is to burden the claimant to prove his claim and the respondent is to defend and prove otherwise.

The UAE law has the same position from the three requirements for proving the claim. Paragraph 1 of Article 1 of the Evidence Code states expressly that

> *"It is the responsibility of the claimant to prove his claim and that of the respondent to refute it"*[68]

Furthermore, as outlined earlier, Article 292 of the CC[69] states that

> *"In all cases, the compensation shall be assessed on the basis the amount of harm suffered by the victim, together with loss of profit, provided that that is a natural result of the harmful act".*

This doctrine is highly supported by the directions established by the high courts[70], which demonstrate the necessity for accepting the claim is that for the claimant to prove that the suffered damages are the natural result of the harmful act.

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[68] See, for example, *Dubai Cassation Court, 29 May 1994, Consolidated Cases No 93 & 124/1994*

[69] *See Dubai Court of Cassation, Case No 329/2010*

[70] See *Dubai Court of Cassation, Case No 2/2013*

Going forward from this analysis, it becomes clearer that a delay claim requires the claimant to establish the most known three basic proof elements which are, causes of the delay, the damages, and lastly, the causation between the occurred delay event and the damages. On the other side, the respondent's mission that would appear easier in terms of establishing non-causation arguments i.e that the occurred delay events caused generally by an external factor e.g. third party's conduct.

Worth noting in that regard that, in relation to the proof of the causality between the delay event and the damages, the UAE law, pursuant to the high courts' judgment precedents, it is established that as long the damages being proved, the causality link presumably exists, until the respondent proofs otherwise i.e force majeure; external factor; or the claimant's conduct[71].

Apparently, this established principle would seem as contrary to the general doctrine that the proof of the claim is indeed a burden on the claimant to achieve.

In fact, this is wrong, because actually, the application of the established principle requires firstly from the claimant to prove to the tribunal that there is actual damage suffered due to the encountered delay events. Which is exactly what the general burden of proof requires at the initial stages in the proceedings and which is also in parallel to the justice requirements.

Therefore, in the basic classic practical scenario of delay claims, we will have the employer, who has suffered damages because of the contractor's failure to deliver the works on time, is asked to submit to the tribunal a proof for its reliefs. Indeed, practitioners are not expected to face problems in this scenario because the fact that all the initial works required to prove the failure at the contractor's part will be

[71] See, for example, *Dubai Court of Cassation, Case No 2017/2013*; See also *Dubai Court of Cassation, Case No 156/2013*

merely a mission of producing documentary evidence e.g. the contractual anticipated completion term, delay notices which prove that the contract was in delay, and/or other relevant documents.

However, on the other side, we will find the contractor who has a harder legal-technical mission to accomplish, whereby it will be required by the contractor to prove otherwise the presumed link between the damage suffered by the employer and the delay i.e simply, to prove that the delay caused due to an external factor such as third party's conduct.

Besides the abovementioned classic scenario, there are unlimited practical scenarios differing from case to another whereby we would find that throughout the proceedings, the contractor initiates a counter-claim seeking a declaration of the right for compensation due to the employer's conduct e.g. rejecting entitled EOT. Furthermore, we would have more complicated practical scenarios whereby we find that each party requests the tribunal to order joining of other parties they may deem fit to hold responsible in the claim, which means that, the burden of proving the claim gets more harder and technically complicated to be presented to the tribunal.

If that is the case, in relation to the examination of the submitted evidence, does the court have any power to interfere in the path of the claim?

Yes, indeed the court has a discretion power in evaluating the evidence submitted by both parties in order to reach a clearer picture of the elements of the claimed damage and the value of the compensation accordingly. Which means that the parties would provide the court with all the available evidence to prove their respective arguments, nonetheless, the court can dismiss any of those evidence based on its discretion. Worth mentioning in this regard that the court when using its discretion in examining the

evidence, the court must take into account that the result of such examination must be based on the factual-merits otherwise, the higher court will interfere and correct the lower court's decision[72].

7.4 **DATs**

As seen, the burden of proving the delay will be an easily achievable task for the practitioner as long as it is possible to provide the tribunal with an effective and accurate delay forensic analysis that reflects the delay events and its impact on the completion period of the project. If that is the case, then the key question would be what is the proper way for the practitioner to present a reasonable technical-legal argument?

Firstly, it is worth noting in this regard that, as explained earlier, the practitioner before the court-appointed expert will be able to raise high degree technical arguments to prove the argument in question. Which makes the practitioner more confident that regardless of the complexity of the technical aspects of the available elements, it must be included in the submission.

In the simplest explanation of the methods of determining the delay in terms of the processing paths, generally, DATs would be categorised under the

a) *concept method*, which is the concept path is the method that determines the delay based on the study of the final progress schedules;

b) *forward path*; which is the method that determines the delay based on the comparison between the As-planned to the As-built

[72] See *Dubai Court of Cassation*, consolidated *Cases No 245&257/2011;* See also *Dubai Court of Cassation, Case No 319/2012.*

c) *backward path*; which is that method of determining the delay based on the comparison of the As-built to the As-planned; and lastly

d) *dynamic path*; in which the calculation of the delay based on the regular updated records that reflect the actual timing of achieving the activities.

Practically, DATs usually adopt retrospectively i.e in backward paths.

In relation to the DATs methods, from the perspective of studying the case in question, there are plenty of practicable technical techniques. However, the most known, and more known effective techniques, would be the:

- *As-planned* vs *As-built*;
- *Critical Path Method*; and
- *Contemporaneous Method*.

7.4.1 As-planned vs As-built

Technically, the analysis of the delay requires the identification of the gaps between what the parties have forecasted at the early beginning of the project "*As-planned*" and the actually completed timescale "*As-built*".

- **The as-planned programme**

As soon as practicable, after entering into the contract, the parties will enter into the phase of negotiating the anticipated construction programme, whereby, the employer shall demonstrate the ultimate features of the intended works and/or all the requirements for the works to be fit to its purpose. Based on the

employer's instructions, the contractor's team shall start to prepare the construction programme that should meet as possible as it would be the requirements of the employer. This suggested programme by the contractor will be subject to the employer's revision. If the employer accepted the suggested execution programme, the programme will often refer to as the *Baseline programme*[73].

Baseline programme, is that programme that includes all the critical information that been agreed between the parties, and technical information required by the contractor to execute the works within the stipulated completion time e.g milestones, phases, specialism, and other information related to the work of the sub-contractors, suppliers, and/or any other potential participants.

As the baseline programme includes all the initial agreed details between the parties, its importance of this programme appears clearly in the reliance on that programme to extract the initial forecasted budget, in order to quantify the extra incurred expenses due to the delay, and further in identifying the initial agreed milestones or phases, in order to show the exact delayed periods compared with the periods included in the baseline programme.

- **The as-built programme**

It is the programme that demonstrates the actual time consumed in executing a particular scope of work. If the contractor has a high-professional site team, the information of the as-built programme can easily found in the monthly reports, site manager reports, minutes of site meetings, and site progress documentation generally.

[73] "Baseline Schedule", (22 March 2019), Designing Buildings Wiki, <https://www.designingbuildings.co.uk/wiki/Baseline_schedule>, Sometimes refer to as the Baseline Schedule, Accepted Programme, Initial Detailed Programme, or Initial Contractual Programme., It is *"an approved copy of the project schedule that can be used to analyse project performance and report schedule cariances. Baseline schedules create a road map to prepare the baseline budget, mobilization, plans, and resource allocation plans".*

It might be clearer that the importance of the as-built programme information appears in the reliance on that information to provide accurate analysis to the actual consumed time to execute the task compared with the forecasted timescale as per the as-planned programme.

It is worth mentioning in that regard, that in analysing delay or proving a certain argument, most practitioners wrongfully rely on the interim payment certificates[74] and compare the progress percentages included in that certificates with the as-planned percentages. Such reliance would be effective in some circumstances, but in general, it would be described as wrongdoing approach. This is because despite the fact that the contractors usually include the progress percentage in their interim payments, but those certificates refer mainly to the progress of the billing not the progress of the works. In other words, the progress percentage included in the interim payment certificate refers to the progress percentage from the commercial perspective i.e how much the employer owes the contractor. Therefore, the actual progress percentage on the site at a certain time would differ slightly from the percentages recorded in the payment certificates.

Not only for that reason but also it would happen in practice that the contractor's team, mistakenly or for any reason whatsoever, including wrong percentages in those certificates in which the employer's team, by negligence, has not revised the percentage accurately or compared it with the actual progress on site.

Therefore, from the technical wise, if the practitioner would like to use this method in investigating the delay, the most proper approach is to compare the as-built progress with the initial forecasted progress pursuant to the as-planned programme.

[74] *Interim Payment Certificate* is that certificates or mechanism for the employer to make payments to the contractor before the works are complete, retrieved from "Interim Certificates in Construction Contracts", (12 June 2019) Designing Buildings Wiki <https://www.designingbuildings.co.uk/wiki/Interim_certificates_in_construction_contracts>

7.4.2 The Critical Path Method (CPM)

CPM, or as sometimes known as *Critical Path Analysis* (CPA), is the most key concepts in project management and planning that been developed in the 1950s and been used routinely since then[75].

It is the path that includes all the intended project's critical activities that collectively forming the project. It has been defined as per the *Project Management Body of Knowledge*[76] as

> *"the sequence of scheduled activities that determines the duration of the project."*

In broad terms, the success of completing the project on time depends primarily on the achievement of the activities on the critical path on time.

The reason that making this method as one of the most effective methods is that the CPM technically assists in:

- Proper identification for the critical activities that need to completed on time as scheduled;
- Tracking the timing consumed in executing the critical activities, and easily tracing the delayed activities that will be the key subject of the delay claim;
- Identifying the activities that would be delayed i.e. *Floated*; and
- Generally, the identification of the whole time would be consumed to complete the project.

7.4.2.1 Floated activities or Float Programme

Some of the activities can be delayed without delaying the completion of the project, those activities referred to as *floated activities*. Which means that the non-critical activities can be delayed for a certain

[75] James E. Kelley.Jr and Morgan R. Walker, " Critical-path Planning and Scheduling" [160]-[173], published in IRE-AIEE-ACM '59 (Eastern) Papers presented at the December 1-3, 1959, eastern joint IRE-AIEE-ACM computer conference <https://dl.acm.org/citation.cfm?id=1460318>

[76] Project Management Body of Knowledge (PMBOK Guide), 6th edn, (2017).

number of days, and sometimes more periods, without delaying the completion of the project. Henceforth, now it becomes clearer that the whole activities included in the critical path must have *Zero* float time.

Which means that, in the context of delay claims, if the study of the baseline programme shows that the delay relates in bigger portion to the number of activities with high float, this means that the scope of the works affected by the delay is limited and the chances of having a successful delay claim become lesser and accordingly high-value compensation will be rejected.

In terms of the CPA's role in the delay claim, the much the practitioner has a proper CPA the much likely the argument is a successful one. Whereby it will be more easy to prove that the lateness of executing the encountered critical activities led mainly to the delay of the whole project and accordingly can fairly demonstrate to the tribunal the deep impact of the role of those activities on the progress of the project. Indeed, obtaining such information requires primarily significant assistance from both, the engineering and administrative technical teams,

7.4.3 Contemporaneous Analysis

Also known as *Windows Schedule Analysis* (WSA). It is the technique that generally makes effective usage of the coexisting updated schedules compared with the As-built facts to demonstrate the effect on those schedules to the as-built/critical path. In other words, the analysts will consider the updated coexisting schedules and compare it with the actual progress of the works.

Practically, this method breaks the project down into windows of activities and/or phases and examines the impact of the occurred delay or disruption event to each window compared with the as-planned period to complete that window.

This method, would be considered, form the complexity and effectiveness perspective, as the most simple techniques. However, as this technique is one of the dynamic techniques, it significantly depends primarily on the updated schedules, the reliance on this technique would not be effective for the party who has poor updated documented records that can easily reflect the accurate site progress, and accordingly, will lead to the failure in proving the delay events.

7.5 Conclusion

In conclusion, the difficulty of the delay forensic analysis proportionate to the complexity of the project. Thus, the party who seeks presentation of a successful delay claim or successfully defending his position must rely on an accurate delay forensic analysis that demonstrates the accurate history of the project. Thus, the analysts, based on the available evident information, should use the most suitable delay analysis technique that could serve their investigation in the history of the project to properly analyse the delay claim encountered.

Generally, as it would be easily observed from the foregoing, that regardless to the effectiveness of the used analysis techniques, all the techniques depend on the success of providing accurate-updated records and schedules in order to assist the analysts in achieving their investigation and ultimately the success of proving the claim and providing proper substantiation of the compensation for delay. That is why, it is highly recommended, as per the *SCL Delay and Disruption Protocol*[77], for the parties to generate updated records for all the delay and disruption events along with the works progress reports.

[77] *SCL Delay and Disruption Protocol*, 2nd Edition, Chapter 11, P. 12 and following.

CHAPTER EIGHT

FINDINGS AND CONCLUSION

In conclusion, the presentation of successful arguments in delay claims in the UAE requires the appointed legal team to have a solid construction knowledge background which consists of the mixture of various technical and legal aspects to be included in the pleadings before the CAE and the court.

Generally, the legal aspect of delay claim would be totally covered under the CC provisions, whereby it is not expected that the practitioner would struggle in allocating relevant provision to rely on in deploying the argument. Furthermore, the high courts show constant flexibility in applying the law provisions in the context of giving the practitioner the full chance in discussing the relevant argument. In relation to the technical aspects, as outlined earlier, before the CAE, the practitioner will get the full chance in presenting high level complex technical arguments that could have a notable effect on the path of the dispute. Which ultimately will lead to enhancing the prospects of applying justice on the encountered claim.

In relation to the common law practitioner, it is essential to be aware of the UAE law position from some of the common law principles that are inapplicable and could not be raised to the local courts. Nonetheless, as noted earlier, before the CAE on the off-records there would be the chance to discuss principles with a common law background that would assist the CAE in studying the case. However, the CAE can only consider such principles from its technical effect on the case.

As such, the recommendation can be made based on this research for the legal practitioner who seeks pioneering of legal construction practice in the UAE. Firstly, it is essential to widen the construction technical knowledge as there will be the full chance to rely on any technical aspects in the project which

will be fully considered by the CAE and the courts. Secondly, it is required also to enhance the legal knowledge and the position of the UAE law from some particular principles applicable under the common law. Thirdly, it is constantly essential to conclude full revision to the contract documents and other documents relevant to the history of the project that will have the biggest portion in leading the dispute and the success in producing arguments supported with documentary evidence.

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