



**THE EFFECTS OF DELAY IN DELIVERING
PUBLIC CONSTRUCTION PROJECTS**

الاثار المترتبة على التأخير في تسليم المشاريع الانشائية الحكومية

by

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of the requirements for the degree of
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Abstract

This dissertation attempts to discuss the effects and consequences of delays in delivering public construction projects of government agencies in accordance with the prevailing procurement laws and administrative contracts which differ from private contracts in terms of authority the government entity has to protect and preserve the rights of the public and the taxpayers whom are the real financiers of those projects, in addition to the contractual and legal procedures the government entity undertakes in case of delay to ensure that the rights of the public are preserved and the project agreed completion time is preserved.

The dissertation also discusses the different cases and causes of delay in government projects and the extent to which the contract parties are responsible for those delays, the methods of delay analysis to determine responsibility and duration of delay, how the cost of delay is decided and calculated, conditions for applying delay damages, and enforceability of liquidated damages in case of termination.

In light of the existence of several legal and judicial systems, the most important of which are the civil law and the common law, differences in the legal actions and consequences of delays in government projects in the Emirate of Dubai, which applies civil law, and the United States, which applies common law are discussed to clarify the differences in the Administrative Contracts in both countries in accordance with the enacted laws and government requirements in force.

The significance of this Dissertation arises from the importance to understand the differences between administrative contracts in civil and public law jurisdictions in terms of delay damages

legal definitions, legal and contractual consequences of delays, and enforceability of delay damages and their effectiveness and usefulness in achieving the governments' intended goals in terms of completing public projects within the agreed budget and completion time, and compensating the governments for damages incurred in the event of contractor-caused delays. It is also significant that the effect of delay damages clauses on the attractiveness of government projects is considered and its effect on the pricing of these projects in light of the rights the enacted procurement laws grant the government entity to exercise in order to ensure that the interests of the public are preserved.

ملخص البحث

تناقش هذه الأطروحة تبعات التأخيرات في المشاريع الانشائية للجهات الحكومية وفق القوانين الخاصة بالعقود الإدارية والتي تختلف عن العقود الخاصة من حيث السلطة التي تملكها الجهة الحكومية في العقود الإدارية للحفاظ على حقوق العامة واموال دافعي الضرائب التي تمول تلك المشاريع، بالإضافة الى الاجراءات التعاقدية والقانونية التي تقوم بها الجهة الحكومية في حالة التأخير لضمان الحفاظ على حقوق العامة وانهاء المشروع ضمن الوقت والميزانية المخصصة له.

كما تناقش الأطروحة حالات وأسباب التأخير في المشاريع الحكومية ومدى مسؤولية أطراف العقد عن تلك التأخيرات بالإضافة الى طرق تحليل التأخير لتحديد مسؤولية ومدة التأخير وكيفية حساب كلفة التأخير وشروط تطبيق غرامة التأخير وكيفية التعامل معها في حالات الفسخ.

ونظراً لوجود عدة أنظمة قانونية وقضائية والتي من أهمها القضاء المدني والقضاء العام، مما قد يؤدي الى اختلاف في الإجراءات الواجب اتخاذها والتبعات القانونية للتأخير في المشاريع الحكومية، فسوف تناقش هذه الأطروحة تلك الإجراءات والتبعات في كل من امارة دبي، التي تطبق القانون المدني، والولايات المتحد الأميركية، التي تطبق القانون العام، لمقارنتها وبيان الفروقات في العقود الإدارية بين تلك الدول وفق القوانين والاشتراطات الحكومية النافذة.

وتبرز أهمية هذه الأطروحة في بيان الفروقات بين العقود الإدارية الخاضعة للقانون المدني وتلك الخاضعة للقانون العام وذلك في تعريف التأخيرات ونوعيتها وكيفية التعامل معها وتبعاتها بالإضافة الى أثر تلك الفروقات ومدى فائدتها في تحقيق الأهداف المرجوة منها والمتمثلة في انجاز المشاريع الحكومية ضمن الميزانية والوقت المخصص لها وتعويض الجهة الحكومية عن الضرر الذي يلحق بها في حال تأخر المقاول في انجاز المشروع ضمن البرنامج المتفق عليه لأسباب تتعلق بالمقاول او الجهة الحكومية او كليهما بالإضافة الى أثر الأضرار المادية للتأخير على جاذبية وكلفة المشاريع الحكومية في ضوء الإجراءات التي يكفل القانون للجهة الحكومية القيام بها بهدف ضمان حقوق العامة ومصالح المشاريع الحكومية.

Table of Contents

CHAPTER 1: INTRODUCTION	1
1.1 Overview	1
1.2 Background	2
1.3 Aim of the Dissertation	4
1.4 Research Significance	4
1.5 Research Methodology.....	5
1.6 Dissertation Structure	5
CHAPTER 2: PUBLIC PROCUREMENT LAWS.....	8
2.1 Definition of Public Procurement	8
2.2 Public versus Private Procurement.....	8
2.3 Public versus Private Law	10
2.4 Procurement Approach.....	10
2.5 Administrative Contracts.....	11
2.6 UAE civil Transaction code	14
2.7 Dubai Public Procurement Law	15
2.8 USA Federal Acquisition Regulation.....	19
2.9 States' Procurement codes	27
CHAPTER 3: DELAY IN CONSTRUCTION INDUSTRY	31
3.1 Definition of Construction Delay	31
3.2 Construction Delay Causes and Events.....	32
3.3 Types of Construction Delay.....	34
3.3.1. Excusable Delay versus Non-Excusable	34
3.3.2. Compensable Delay versus Non-Compensable	37
3.3.3. Concurrent Delay	37
3.4 Construction Delay Analysis Methods.....	42
3.4.1 Impacted As-Planned	42
3.4.2 Collapsed As-Built	43
3.4.3 As-Panned versus As-Built	43
3.4.4 Time Impact Analysis	43
3.4.5 Windows Analysis.....	44
3.5. Termination Due to Delay.....	44

CHAPTER 4: CONSTRUCTION DELAY DAMAGES	46
4.1 Definition of Delay Damages.....	46
4.2 Liquidated Damages.....	46
4.3 Delay Penalty	49
4.4 Delay Damages Mechanism.....	50
4.5 Extension of Time	52
4.6 Objectives of Delay Damages	56
4.7 Enforceability of Liquidated Damages after Termination.....	57
CHAPTER 5: EFFECTS OF DELAY IN PUBLIC CONSTRUCTION	60
5.1 UAE civil Transaction code	60
5.2 Dubai Public Procurement Law	61
5.3 RTA General Conditions.....	65
5.4 USA Federal Acquisition Regulation (FAR)	67
CHAPTER 6: CONCLUSION AND RECOMMENDATIONS.....	71
6.1 Conclusion.....	71
6.2 Recommendations	75
BIBLIOGRAPHY	77

CHAPTER 1: INTRODUCTION

1.1 Overview

There are several legal systems used in the world where the civil and common law systems are the most used ones. In common law, previous judicial precedents are binding and used to decide legal cases, while under civil law, such precedents are not binding. Contracts under civil law are overarched by the prevailing public policy and its mandatory provisions that have priority over any contractual provision although agreed by the parties thereto under the principle of contract autonomy. On the other hand, the common law is less rigid and more extensive in terms of contractual terms that comprise the complete contract except for limited public policy mandatory provisions. UAE is a civil law jurisdiction while USA is a common law jurisdiction except the state of Louisiana which is still a civil law jurisdiction.

Each law system has its own provisions and mechanism to settle and govern contractual terms between contract parties. Under the civil law, the judge is considered a chief investigator whose job is to find the facts and apply the provisions of the enacted law, of the case and to apply the provisions of the applicable code, while in common law, the judge role is to set precedents and judge the pleadings of the lawyers.¹

Public construction is usually governed worldwide by specific procurement laws, codes and policies applicable in the jurisdiction where construction works are carried out. Public projects are funded by public tax payers unlike private construction projects which are financed and

¹ Diffen, "civil law vs common law - Difference and Comparison | Diffen" (*Diffen.com*2019) <https://www.diffen.com/difference/civil_Law_vs_common_Law>.

built on purely commercial basis. The power embedded in the public authority gives it the right to dictate its terms over what a private contract has.

Countries of different jurisdictions have specific approaches and legal actions towards a delayed public construction project, they also have different interpretation of the delay damages clause included in these contracts whether considered penalty, actual damage or liquidated damage. It is therefore important to clearly understand the delay clause included in a public construction contract and be ready to either mitigate or accept the legal and financial consequences of any possible delay in the project in light of the power the government entity has under the prevailing procurement law in the country where the construction project is built.

On the other hand, USA is a common law jurisdiction, and despite the existence of an extensive procurement regulations at the Federal level, each State has its own procurement code or policy. All States are common law jurisdictions except the State of Louisiana that is still a civil law jurisdiction, which make its judicial system different from all other States. It is also worth mentioning that despite the fact FIDIC is a common law-based standard form of contract, it is rarely used in USA, and instead, most states follow American Institute of Architects (AIA) that is widely used in construction projects in most States.

1.2 Background

Public construction projects are different form private construction projects in terms of procurement mechanism and regulation provisions. Public construction contracts are usually ruled by the enacted procurement law in the jurisdiction where the project is constructed which

make them different from private construction contracts that usually follow the applicable contract law.

Delay in public construction project is a serious risk the contractor should consider and seek all necessary measures to avoid and recover in a responsive manner to eliminate legal consequences and to reduce financial damages. The delay clause is a matter of importance for both the government entity and the contractor alike, as the contractor will suffer additional costs in keeping site presence and paying damages, while the government entity will suffer lost benefits by delayed completion of the project.

When a public project is delayed each party shall perform its obligations and assume its rights as stipulated in the contract terms and in accordance with the enacted public procurement law. The government entity may be entitled for delay damages while the contractor may be entitled to an extension of time with or without associated expenses and losses should he be able to establish a contractual ground for an excusable delay and be able to demonstrate causation. Late completion caused by the contractor will amount to a breach of contract giving rise to a possible right of the government entity to claim for damages and /or termination of contract.

Besides, and to support any delay claim, delay analysis is required which is a complex process and requires full documentation of associated events and facts that is time consuming and has financial and legal consequences on the party proven to be responsible for. Such consequences will have serious impacts on the project feasibility and might ruin the relation between the parties.

1.3 Aim of the Dissertation

The research aims to examine the similarities and discrepancies between the construction delay provisions stipulated in the applicable public procurement laws in Dubai and USA, as civil law and common law jurisdictions respectively, and achieve the following objectives:

- a. Compare delay clauses under public procurement laws in different jurisdictions,
- b. Identify root causes of delay in delivering public construction projects,
- c. Address impact of delay provisions on the attractiveness of public contracts, and
- d. Suggest revision to delay clauses included in Dubai public construction contract.

1.4 Research Significance

Upon entering into a binding construction contract, the contractor must be willing and obliged to perform his duties under the contract as agreed, among which is completing the works according to the agreed construction program. The agreed construction program and completion date of public contracts are conditions that any breach of which shall call for legal actions and give rise to compensation for damages or/and termination of contract.

Delays in construction projects are generally unavoidable and almost inevitable as a result of the construction project nature including site conditions, material diversity and number of parties involved. Therefore, understanding the types and consequences of delays, especially in public projects, is an important subject in the construction industry for the contract parties to be well aware of and prepared to assume the responsibilities and understand the obligations each party may have as a result of any delay when arise.

Construction delay is a risk the contractor should allow for and include in his offer by means of monetizing the risk, while the government entity should prevent and avoid by inserting and applying delay damages clause to protect its interests and use this clause to encourage the contractor to finish on time and save the cost of damages.

1.5 Research Methodology

The methodology will be based on doctrine research through which relevant laws, codes, policies, literatures and articles on public construction delays in Dubai and USA will be examined first, then an analytical approach to highlight, discuss and summarize similarity and differences in dealing with construction delays in these two jurisdictions, being civil and common law jurisdictions respectively, and finally present my personal opinion on the delay in delivering public construction projects which will be based on my analysis and interpretation of the relevant laws and its implication on the construction industry.

1.6 Dissertation Structure

Chapter One offers an introduction to the dissertation subject and a summary of what the following five chapters will discuss.

Chapter Two includes an introduction of public laws, codes and policies that govern public procurement in general and construction projects in particular under both civil and common law jurisdictions in UAE and USA respectively, and it discusses the nature of public procurement of construction projects, differences between public and private procurement laws, laws that govern public procurement in UAE, Dubai and USA, the main variances between common and civil law in dealing with public procurement, the relevant clauses that regulate

and govern performance of public construction, and the power given to government entity under Administrative contracts.

Chapter Three discusses construction delays in details including definition of construction delay, delay events, causes of delay, types of delay, responsibility of delay, rights and obligations in case of construction delay, remedies for construction delay, construction delay analysis methods, cost of construction delay, termination in case of delay, and the procedure that need to be followed to govern the delay process. It defines excusable, inexcusable and concurrent delays and addresses compensation calculation and limit.

Chapter Four discusses the nature of construction delay damages including definition of delay damages, liquidated damages, construction delay penalties, the validity of each delay type and the conditions based on which each damage is governed. It highlights the differences between liquidated damages and penalty of delay and the enforceability of liquidated damages after termination. It also discusses extension of time and time bar for submitting a time extension claim. It exhibits the objectives and merits behind the delay damages clause and how such a clause would help finish public projects on time as per the agreed schedule.

Chapter Five discusses and compares the effects of delay in public construction in terms of responsibility, obligations and rights as stipulated in UAE civil code, Dubai public procurement law, Roads and Transport Authority General Conditions, USA procurement law in general and some States in particular.

At the end, Chapter Six concludes and summarizes the major differences in rights and obligations that the parties to a public construction contract have under Dubai procurement law, USA FAR and selected States' procurement codes. It includes recommendations regarding delay clauses in Dubai procurement law and suggests few amendments to these clauses to the benefit of public construction industry in the Emirate of Dubai with an objective to better protect the rights of the public and raise the governance of construction industry to the maturity level the USA public construction governance has.

CHAPTER 2: PUBLIC PROCUREMENT LAWS

2.1 Definition of Public Procurement

Public procurement is the process when a government entity buys goods and services from private entities is called public procurement. Public procurement is needed as governments cannot produce all goods and services the public need. It amounts to around 12 percent of global GDP which makes it a strong and effective contributor to the global economy where governments usually finance public procurement by raising taxes from all citizens.²

Public procurement involves a high risk of corruption given the financial size of the public transaction and the complexity of the procurement processes where private interests interact with the public interests. Therefore, a clear and transparent procurement process shall be in place to regulate and govern the procurement process in a way to protect the public interests.

2.2 Public versus Private Procurement

Public Procurement is conducted by the public sector while private procurement is conducted private sector.³

Public procurement is different from private procurement in terms of governing laws and regulation processes which are based on the objectives of each. Private procurement is based on commercial private benefits while the public procurement is based on common public interests and needs. The public procurement is usually regulated and governed by applicable procurement laws while private procurement is regulated by the applicable contract law based

² Wikipedia Contributors, "government Procurement" (Wikipedia November 18, 2019) <https://en.wikipedia.org/wiki/government_procurement>.

³ Kodiak Hub Community, "Public vs. Private Procurement: What's the Difference?" (Medium January 13, 2020) <<https://kodiakhub.medium.com/public-vs-private-procurement-whats-the-difference-d68aef7e0006>>.

on the terms stipulated in the contract agreed between the parties. The main differences between public and private procurement can be summarized as follows:

Budget: Given public procurement is normally carried out by a government entity, there is always certain challenges to the flexibility of funding and spending since public procurement budget is allocated at the beginning of every fiscal and there is always no agility in reallocating budget nor transfer of budget between items during that calendar year. Whereas for private sector, there is always flexibility and a room to transfer and reallocate budget whenever needed or when business conditions change.

Motivation: There is less sustainable procurement methods in private procurement since private sector always focus on driving revenue. Public sector usually addresses issues other than revenues and value for money which mainly focus on adding social value to the government supply chain.

Regulations: The biggest limitation to procurement agility within public procurement is the regulations. Public procurement is constrained by legislation at local, federal and international levels which create less room for creative procurement methods. Regulations in the private sector are meant for monitoring equality and bribery.

Moreover, both types of procurement are also governed by Tort law which identifies duties of the general public towards the kind of behaviour that is socially acceptable which make it different from contract law from different angles including behaviour, damages and responsibilities of the parties.⁴

⁴ UpCounsel, “Liability in Contract and Tort: Everything You Need to Know” (UpCounsel2018) <<https://www.upcounsel.com/liability-in-contract-and-tort>>.

2.3 Public versus Private Law

The private law regulates and governs the relationships between individuals and prevailing judicial system while the public law governs and regulates the relationships between private individuals or companies and the government entity. Therefore, the public law rules and governs the judicial system itself not the individuals.⁵

2.4 Procurement Approach

Public sector has its own approach of procuring products and services, the private sector also has its own that provides flexibility in acquiring its products and services. There are specific differences between both approaches in the following domains:⁶

Funding: The major difference between private and public sector procurement lies in the way of funding. Private companies can easily transfer money between its own departments or business streams when whenever a business need arises. On the other hand, it is very hard for the government to increase or decrease funds among different public sector areas due to cumbersome governance process and procedure.

legislation and the regulations: The public sector worldwide is constrained and defined by massive forms of legislation that are enforced at all levels which restrict the public procurement processes. This is not the matter with private sector as there is much more freedom and certainly free from the legislative restrictions in comparison with public sector.⁷

⁵ RKB, “What Is the Difference between Public and Private Law? | RKB Law Kent” (RKB | Solicitors | Law | June 13, 2019) <<https://rkb-law.co.uk/what-is-the-difference-between-public-and-private-law/>>.

⁶ Ryan White, “InterFocus Laboratory Furniture Solutions” (InterFocus Lab Furniture 2015) <<https://www.mynewlab.com/resources/public-procurement-guide/public-private-procurement/>>.

⁷ Kodiak Hub Community, “Public vs. Private Procurement: What’s the Difference?” (Medium January 13, 2020) <<https://kodiakhub.medium.com/public-vs-private-procurement-whats-the-difference-d68aef7e0006>>.

Suppliers selection: The private sector is more open to opportunities as it operates mainly under valuable policies when it comes to business needs, so private sector does not require entering bids to acquire goods and services from suppliers but directly negotiate about the prices, specifications and quality before acquiring the needed products and services and have favourable contract terms and conditions. Public sector is not open to opportunities as the private sector and it needs to call for tender before it can enter any contract with the suppliers to acquire products and services.

Motivations and interests: Private sector is mainly driven by making money thus it focuses on shareholders' returns and increase in profit margins. However, the case is completely different with public sector as it should assure that the money is spent for the wellbeing of the public, for which it conducts regular internal and financial audits to insure compliance with procurement regulations

Management style: The private sector is liable to the shareholders before making business decisions, while public sector is different in this matter. Public procurement has legislative body which takes care of the procurement process to make sure it is in line with the applicable procurement procedure which makes public procurement more transparent than the private.

2.5 Administrative Contracts

Administrative contracts fall under public law and they are classified as such either by virtue of a legal acknowledgement, or by their nature that concern a public service ⁸. Some contracts are classified as administrative by law while others are classified administrative according to the judge decision.

⁸ Marie Grace, "The Administrative Contract" (Al Tamimi & Company May 2011)
<<https://www.tamimi.com/law-update-articles/the-administrative-contract/>> accessed October 6, 2021.

The following conditions are used to test and qualify a contract as administrative

1. The government entity must be part to it,
2. The local authority has jurisdiction over it,
3. The contract is to provide public service, and
4. The public law should be referred to in the contract

Therefore, not all contracts the government entity enter into are administrative contracts and may fall under private law contracts when the government entity signed a contract to acquire specific private products and services to the government entity and not for public.⁹

The execution of an administrative contract grants the government entity the following powers:¹⁰

1. The power of direction and control: The government entity can give specific service orders concerning the execution of the contracting party's obligations.
2. The power to impose sanctions: The government entity may sanction the contracting party in the event of lateness or bad execution by this contracting party which include fines, penalty and termination.
3. The power of unilateral termination: The government entity can terminate the contract, either for default or for convenience, at any time.

⁹ Rana El Huseini, "The Challenge of Defining an Administrative Contract - Government, Public Sector - United Arab Emirates" (*www.mondaq.com* September 2011) <<https://www.mondaq.com/government-contracts-procurement-ppp/146100/the-challenge-of-defining-an-administrative-contract#:~:text=The%20UAE%20Federal%20Supreme%20Court>> accessed October 6, 2021.

¹⁰ Marie Grace, "The Administrative Contract" (Al Tamimi & Company May 2011) <<https://www.tamimi.com/law-update-articles/the-administrative-contract/>> accessed October 6, 2021.

4. The power of unilateral modification: The government entity has the right to demand alterations and issue change orders to the construction project whenever it deems that necessary for the benefit of the public subject to certain limitations expressly stated in the contract.

The UAE is a civil law jurisdiction where all courts fall under one legal system and a claim related an administrative contract will be judged under civil courts with a special regulatory framework for administrative contracts. The UAE Federal Supreme Court ruled that not all contracts concluded between the government and an individual is necessary an administrative contract, however, the subject of the contract itself is what decides the nature of the contract. In addition, the government intension to contract in accordance with the public law has to be reflected in the contract by inserting exceptional and unusual conditions that are not used in any private law contracts and make them the most noticeable part of the contract compared to civil contracts. It also states that the government always includes certain terms in the administrative contracts that must include the right to change the scope and modify the terms, terminate the contract for convenience, and impose penalties without the need for a court decision.¹¹

Based on the above, and despite the fact that there are no special courts for administrative contracts in the UAE, but there are certain conditions that qualify a contract to be an administrative contract, which means that the civil courts in the UAE differentiate between private and public contracts and therefore administrative contracts are recognized and judged differently.¹²

¹¹ Federal Supreme Court No.3,3rd L.Y dated 04 July 1976.

¹² Rana El Huseini, "The Challenge of Defining an Administrative Contract - government, Public Sector - United Arab Emirates" (www.mondaq.comSeptember 2011) <<https://www.mondaq.com/government-contracts-procurement-ppp/146100/the-challenge-of-defining-an-administrative-contract#:~:text=The%20UAE%20Federal%20Supreme%20Court>> accessed October 6, 2021.

2.6 UAE Civil Transaction Code

UAE is a civil law jurisdiction and its Federal government procurement is governed by Cabinet Resolution no. (32) of 2014 concerning “Federal government Procurement Regulation and Storehouse Management”. It applies to all federal supplies of products and services procured by any federal entity within UAE.

All UAE civil transactions, including construction works, is governed and regulated through the Federal Law no. (5) of 1985 concerning Civil Transaction Code in the UAE “CTC” and its amendments.¹³

Articles 872 – 896 stipulated in Chapter III of CTC “Contract of Works” are concerned with the regulation and governance of all civil construction works undertaken in the UAE. It includes the rights and obligation each party to a construction contract shall assume and abide by beside what are agreed in the contract signed between them. The CTC articles supersede the agreed contract terms between the parties to a contract should these terms contradict with CTC articles. CTC is intended to protect the rights of a construction contract parties by filling the gaps in any construction contract for works carried out in the UAE whether at private or public levels alike.

Articles (390) specifies the compensation procedure that need to be followed by a contract parties for delay damages compensation. It states that:

- 1- Both parties may agree at the time of signing a contract the compensation amount that a party may pay to the other party in case of default by inserting a provision to that extent in the contract between them.

¹³ Law No (5) of 1985 concerning civil Transaction code.

- 2- If any of the parties submits a request to reconsider the compensation amount, the Judge may change the agreed amount and makes it equal to the actual damage and will consider the agreement of the parties for the compensation amount as null and void.

On the other hand, Article (877) stresses the importance of completing the construction works as per the terms of the construction contract, and it regulates the procedures that need to be followed in case of default. It states the following:

“The contractor must complete the work in accordance with the terms of the contract. If it turns out that he is doing what he pledged in a defective or inconsistent manner, the business owner may request the immediate termination of the contract if the repair of the work is not possible. But if the repair is possible, the employer may request the contractor to abide by the terms of the contract and correct the work within a reasonable period. If the term expires without completing the correction, the employer may request the judge to terminate the contract or authorize him to entrust another contractor to complete the work at the expense of the first contractor”.

2.7 Dubai Public Procurement Law

Dubai government has its own Public Procurement Law no. (12) of 2020 concerning “Contracts and Warehouse Management in the government of Dubai”¹⁴ which is applicable to all Dubai government supply of products and services. This law was enacted in 2020 and had replaced the previous law no. (6) of 1997 concerning “Contracts of Government Departments in the Emirates of Dubai”.

The government of Dubai has specific procurement rules which has certain provisions with regards to the requirement to award the public contracts to UAE citizens or companies the UAE citizens have a majority share, not to refer to FIDIC, requirement of on-demand performance

¹⁴ Law No. (12) of 2020 concerning Contracts and Warehouse Management in the government of Dubai.

bond, conduct arbitration only in Dubai, apply delay damages up to 10% of contract value, and jurisdiction over disputes conferred on Dubai courts.¹⁵

The law comprises a set of articles that govern and regulate the public procurement process in Dubai including construction works carried out by private entities for the government of Dubai.

Article (4) of the law states the scope of application of the law as follows:

1. All contracts entered into by government Entities, renewed after the enforcement of its provisions, and management of those entities for their inventory.
2. Contracts concluded prior to the enforcement of its provisions by the government entity in any unfavourable case provided for in the law under which those contracts were concluded, or not provided for in that law.

Article (24A-9) states the need to include within the conditions of contract the provision of “Penal terms, fines, and the right to claim compensation in cases that require it”. Therefore, it is a must for any public procurement contract to insert the above provision which gives the government entity the right to impose penalties and to claim compensation for damages, including delay damages, should the contractor is in default with respect to the conditions stated in the contract.

Provisions related to time schedule, penalties and termination of contract are also required to be included in the contract in accordance with Article (43), which in return emphasises the importance of finishing construction works on time as agreed, and in case of delay, the government entity has the right to claim compensation. However, Article (48) allows the government entity, when the contractor is delayed in performing any of the contract terms, to

¹⁵ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell 2016).

negotiate the measures the contractor shall take to make good the default and rectify the damage the government entity may suffer.

Article (58) regarding “Supplier’s Contractual Obligations” states in Provision (a) that the contractor shall abide by the terms and conditions stated in the contract and has to perform the contract accordingly, particularly the completion date. Provision (b) of the same Article grants the government entity the right to impose penalties for any inexcusable delay by the contractor. However, in case of excusable delay, Provision (c) grants the contractor the right to submit to the Director General of the government entity a request to waive the delay penalty within (30) days from the date when the delay incident happened. Article (58c) states that in case of excusable delay such as force majeure, delay by the government entity or any other source of delay beyond the control of the contract parties, the contractor may apply to the Director General of the government entity requesting to waive the penalty of such delay supported with all the evidences necessary to prove his position within (30) days from the delay incident.

Article (116) regarding “Emergency Circumstances and Force Majeure” states that, if during the implementation of the contract, emergency circumstances arise that cannot be foreseen and the implementation of the contract has become cumbersome and the contractor suffers heavy losses to which he has no control, the contractor must continue with the implementation of the contract works but has the right to demand a fair compensation based on a request to be submitted to the competent committee which shall review and study the contractor’s demand and later submits necessary recommendations in this regard to the Director General to take what he deems appropriate, provided that coordination with the relevant department of the government entity is taken into account to provide the necessary financial funds for compensation.

Article (68) regarding “Delays in Construction Contracts” stipulates the rights granted to government entity in case of inexcusable construction delay by the contractor, as follows:

- 1- Impose delay penalty with maximum limit 10% of the contract original value without the need to refer the case to the court or get court decision.
- 2- Pay and be responsible the consultant’s supervision fees all along the delayed period beyond the current program and completion date.
- 3- Provisions included in Article (66) may apply should the contractor’s delay compromise the interests of the government entity.

Article (66) states that if the contractor suffers excessive delays in performing his duties under the contract, or he suspends the works for more than (15) continuous days, the government entity has the right to take any or all of the following actions, given a notification in this regard is served to the defaulting contractor to adjust his position within certain period of time decided by the government entity:

1. Terminate the contract and liquidate the performance bond;
2. Claim compensation for any damage, loss or price difference it has incurred;
3. Hold all supplies and equipment existing on site that belong to the contractor and existing and use them to complete the works without any damage responsibility towards them.;
4. Charge the contractor an administrative fee of ten percent (10%) of the value of uncompleted works; and/or
5. Appoint a new contractor to carry out the uncompleted works and charge him any cost differences resulting from appointing the new contractor.

Article (118) regarding “Grievances” grants the contractor the right to submit a grievance to the Director General with respect to any decision taken against him under this law. It states that any person with an interest in grievance shall be entitled to write to the Director General regarding the procedures, decisions and measures taken against him under this law and the decisions issued pursuant thereto within (30) thirty days from the decision date.

The grievance will be considered by a committee formed by the Director General in accordance with a decision issued by him in this regard, provided that the formation of this committee shall not include any person who participated in taking the procedure or any person who participated in the procedure. The committee must decide on the grievance within (30) thirty days from the date it was referred to it and its decision on the grievance shall be final.

2.8 USA Federal Acquisition Regulation

The United States of America “USA” is a common law jurisdiction except the state of Louisiana which is a civil law jurisdiction. Public procurement in USA has high level of maturity and complexity based on the long and extensive procurement knowledge and experience they have for each type of products and services including construction works which tap onto every event or situation that a construction contract may face or encounter. It has public procurement regulation systems at Federal, State, and local levels.

At the Federal level, public procurement is governed by the Federal Acquisition Regulation “FAR” which is Title (48) of the code of Federal Regulation “CFR”. The FAR is structured into Volumes, Sub Chapters, Parts and Sub Parts.¹⁶ Volume (I) has (7) Chapters and (51) Parts, while Volume (II) has (1) Chapter and (2) Parts.

¹⁶ Federal Acquisition Regulation 2019.

Chapter (B) “Competition and Acquisition Planning”, Part (11) “Describing Agency Needs” Clause (11.401) states that the construction schedule is a critical element of the contract and shall be clearly detailed in the petition and the contracting officer is required to make sure that the performance schedule is realistic. Clause (11.402) states the factors that need to be considered when preparing the construction time schedule, among which are the complexity of the project, required completion date, and the use of multiple completion dates. Clause (11.404) stresses on the importance that the contracting officer should insert Clause (52.211-10) “Commencement, Prosecution, and Completion of Work” in construction clauses of the government contract.

Clause (11.501) addresses the policy of applying liquidated damages as follows:

- 1- The contracting officer must study the possible impact of liquidated damages clause on the contract price, and to only insert such clauses if:
 - (a) The government entity may suffer damages if the project is delayed; and
 - (b) It is hard to accurately guess or prove the damages compensation amount.
- 2- Liquidated damages are not a penalty or adverse performance motivation, but compensation for the government entity damages.
- 3- The rate of liquidated damages must be a realistic estimate of the damage compensation the government entity may encounter if the project is delayed.
- 4- Use the ultimate amount when calculating the amount of damage to the government entity to make sure it covers all possible damages.
- 5- Consider inserting different rates of liquidated damage to cover the possible difference in damages the government entity may sustain over the construction duration.

The contracting officer must consider all necessary actions to eliminate applying liquidated damages and he should immediately pursue all means of actions and support required from the government entity to help the contractor accelerate the works and recover the construction delays before taking his decision to terminate the contract. The chairman of the government entity has the right to decrease or right off the amount of liquidated damages the contractor has to pay in compensation for the delay he may cause to the construction project.

Clause (11.502) stipulates and describes the procedure to be followed when calculating and applying the liquidated damages provisions to construction contracts, as follows:

- 1- The rate of liquidated damages shall describe and calculate the delay per day.
- 2- The rate should also cover any cost the government entity may encounter as a result of such delay including supervision and inspection fees of both, the government entity and the consultant.

Chapter (G) “Contract Management” Part (42) “Contract Administration and Audit Services” Clause (42.1304) “government Delay of Work” states that when a delay is caused by the government entity representative, an administrative settlement arrangement for the contractor’s claims shall be concluded according to Clause (52.242-17), however in case the contract has an equitable adjustment clause, the above said clause will not be valid.

Chapter G “Contract Management”, Part (49) “Termination of Contract”, Clause (49.401) “General” gives the government entity the right to terminate the contract if the contractor is in default in performing his duties under the contract. It states that if the contractor is unable to

fulfil his contractual obligations under the contract, the government entity has the right to terminate the contract in full or in parts.

Clause (49.402-2) “Effect of Termination for Default” states the effects of termination for default by the contractor as follows:

- 1- The government entity is not responsible to pay the contractor for the uncompleted works.
- 2- The government entity may demand the contractor to deliver completed supplies and raw materials.
- 3- The contracting officer shall not use the power imbedded in his position, as the government entity representative, to acquire the construction supplies and raw materials on site. He may do so only if the new contractor is facing difficulties in obtaining the necessary supplies and raw materials required for the construction
- 4- The government entity must pay the contractor for all the works completed and any materials and supplies acquired by the government entity for completing the works.
- 5- Over payment to the contractor shall be avoided to protect the government entity against any potential liability towards third parties, by taking any of the following actions:
 - (a) Determine if the Payment Bond submitted by the contractor is enough to cover all third parties’ possible claims.,
 - (b) Demand the contractor to submit suitable relief statements from relevant third parties stating that they have no lien rights over the construction works.
 - (c) Get a duly signed statement from the contractor and his affiliates confirming the release of the government entity from any potential liability towards the contractor and his affiliates.

(d) Reserve any amount the contracting officer deems crucial to safeguard the government entity's rights, or and

(e) Take any other appropriate measures in light of the situations and the contractor's financial position.

6- Any additional cost the government entity may suffer or incur as a result of getting new supplies and services shall be the responsibility of the contractor and he should be liable to pay the government entity such costs.

Clause (49.402-3) "Procedure for Default" covers the case of the contractor's default in performing the construction works as per schedule where no notice of failure or possible termination is obligatory on the government entity to send to the contractor before sending the official termination letter. However, if termination for contractor-caused delay is required, the government entity representative should send a written notification to the contractor informing him in advance of the government entity intention to terminate the contract. This notice shall remind the contractor of his contractual obligation under the contract and shall demand the contractor to submit his justification and explanation should he deems the contract is not due to termination for contractor's default. If the contractor fails to present his explanation on why the contract should not be terminated, it shall be considered as the contractor has no explanation and that the termination decision is valid.

Clause (49.402-4) "Procedure in Lieu of Termination for Default" stipulates the course of actions the contracting officer may consider when terminating the contract for contractor's default which include allowing the contractor to continue performance under a revised completion time.

Clause (49.402-7) “Other Damages” states that if the contract is terminated for default by the contractor, the government entity representative should immediately demand the contractor to pay liquidated damages to the government entity including administrative costs in accordance with the contract terms stipulated in the relevant default clause.

Clause (49.404) “Surety-Takeover Agreements” states that the surety is jointly liable with the contractor for damages caused by the contractor’s default and that the surety has the rights to complete the construction works on behalf of the contractor. Therefore, the contracting officer should consider signing a tri-agreement between the government entity, the surety, and the contractor to determine outstanding rights of the contractor, which include but not limited to, his claims toward the unsettled completed works. Besides, this agreement must oblige and require the surety to complete the remaining construction works under the contract, and the government entity should settle with the surety all costs pertaining to the completed works that were unpaid to the contractor at the time of default, subject to the following conditions:

- (1) Any unsettled amounts due to the contractor for all completed works up to termination date, including retentions of progress payments, are subject to and must be checked against any outstanding amounts due to the government entity.
- (2) The surety must be responsible for liquidated damages the contractor is obliged to pay to the government entity for all inexcusable delays for the construction works he caused before the termination date.

Clause (49.406) “Liquidation of Liability” states that both the contractor and the surety are jointly liable to the government entity for consequential damages, and the government entity representative has the right to liquidate the liabilities of both the contractor and the surety by utilizing all retentions made on previous payments towards completed construction works until

termination date. If the amount of liquidated liabilities and the unsettled payments for completed works are inadequate to cover the liabilities the contractor and the surety, the government entity representative shall take all necessary actions to get the remaining amount from the contractor and the surety.

Clause (52.211-12) “Liquidated Damages-Construction” states that in case of termination, the liquidated damages clause will survive, and the damage amount shall continue to accumulate until the construction works are all completed.

For change orders instructed by the contracting officer, an extension of time for the construction completion date will be granted in accordance with Clause (52.211-13) “Time Extensions” which states that the extension of time will depend upon the extent the change orders contributed to the completion date of the construction works. The change order may suggest that completion date will be extended to cater for the changed works only while the completion date for all other works will not change.

Clause (52.243-7) “Notification of Changes” addresses under item (e) the equitable adjustment concept. It states that if the contracting officer approves that government entity action caused a change in the contractor’s cost or completion time required for construction works under the contract, the principle of equitable adjustment shall be used to change, either or both, the contract price or completion date. The equitable adjustment is not applicable should the contractor failed to bring such request to the attention of the government entity of such government-caused delay.

Clause (52.249-10) “Default - Fixed-Price Construction” states that should the contractor fails to insure completion of works according the schedule agreed between the parties including any extension of time thereof, the government entity may consider terminating the contractor’s right

to proceed with construction works by sending a written notice in that regards. In this event, the government entity may appoint a new contractor to complete the construction works who may utilize any material at site to carry out required construction works.

The contractor and the surety are both responsible the damages the government entity may sustain due to the contractor's failure to finish construction works on time as agreed, including any extra cost the government entity may pay to carry out the remaining construction works, even if the contract is terminated by the government entity as a result of the contractor's default. However, the contractor's right to proceed should not be terminated nor the contractor will be liable for damages under this clause if the delay is caused by unforeseeable circumstances beyond the control of the contractor, including but not limited to, acts of God and acts of the government.

It is also stated that within (10) days from the start of any cause of delay, the contractor should inform the contracting officer about such delay and request extension of time. Should the contracting officer find that the causes of delay warrant such extension, then the project completion date shall be extended accordingly. The decision of the contracting officer shall be final and binding to the parties, subject to an appeal pursuant to dispute clause. On the other hand, if after termination of the contract, it is found that the contractor was not in default and the construction delay was excusable, then the rights and obligations of the contract parties shall remain as if termination was for convenience of the government entity.

Clause (52.249-14) "Excusable Delays" states that the contractor shall not be in default if the delay is not caused by the contractor but due to an event that is beyond his control and shall be considered an excusable delay. In such case of excusable delay and based on contractor's request, the contracting officer should investigate the case and if he finds out that the delay is a

result of one or more of the unforeseeable events mentioned above, the completion date shall be revised and extended accordingly.

2.9 States' Procurement Codes

At State level, public procurement is governed by the respective State procurement code or policy which mainly refer to the FAR in its main provisions while it has its own detailed provisions for particular terms which do not deviate or contradict with the general provisions stipulated in the FAR, but mainly differ in the details of application. The Federal law supersedes the State law in all aspects except for human rights should the State law is to the contrary.

Unlike all other States, Louisiana is a civil law jurisdiction and its civil code was enacted in 1870, which indicates that Louisiana judges are obligated to follow written codes to reach at decisions. If no code governs the disputed case, judges may use the established customs to arrive at decisions. However, Article (3) states that custom should not conflict with the law and judges' decisions are not meant to making law. Nevertheless, Louisiana civil code has some common law features which makes its judicial system a hybrid of both. The State Public Bid Law, Act 92 of the 2020 Regular Session, defines liquidated damages as a fixed lumpsum of damages in a public construction contract intended to compensate the Public Entity for delay in performance by the contractor.¹⁷

No damages for delay clause, which prevents the contractor from recovering financial damages for employer-caused delay, is upheld by Louisiana courts for private contracts, However, the

¹⁷ Law Library - American Law and Legal Information, "civil law" (*law.jrank.org*2021) <<https://law.jrank.org/pages/5235/civil-Law.html>>.

Louisiana Public Works Act bans the clause that state “no damages for delay” to be inserted in any contract governed by the Louisiana Public Works Act.¹⁸

The State of Alaska has its own procurement code which falls under Title 36, Chapter 36.3 “Public Contract”. Article (5) of the code addresses the “Legal and Contractual Remedies” of the public contracts. Section 36.30.620 addresses the “Contract Claims”.

The State of Arizona Procurement Manual, Article 6.2.5 “Performance Standards” stresses on the inclusion of performance standards to be inserted in the contract and used in evaluating the contractor’s compliance with the contract terms including what is stated in Article 9.1.4.5 “Terms and Conditions Inclusions” which contains liquidated damages clause for delay.

The State of California public contract code Section (7203.a) states that if the contract between contractor and the State has a clause that particularly includes the responsibility of the contractor for construction delay damages, it shall not be enforceable unless a pre-agreed amount for such damage is stipulated in the contract under a liquidated damages clause.

The State of Colorado procurement manual Clause (29) “Remedies Types” defines liquidated damages as financial damages that are provided in the contract to specify the amount of money the contractor is obliged to pay to the government entity in case of breach and it replaces the right to recover actual damages. Colorado courts are usually not in favour of applying liquidated damages provisions unless damages are hard to calculate or prove and they are proportionate to the harm sustained.

The State of Georgia Procurement code Title (13) “Contracts”, Chapter (6) “Damages and Costs” defines the purpose of damages as the compensation for the injury sustained by the

¹⁸ Matthew Emmons and Mark Mercante, “No Damage for Delay Clauses Have Limits on Louisiana Public Works Projects” (www.bakerdonelson.com October 24, 2014) <<https://www.bakerdonelson.com/no-damage-for-delay-clauses-have-limits-on-louisiana-public-works-projects>> accessed October 17, 2021.

innocent party because of a contract breach. Article (13-6-7) “Damages and Expenses Recoverable-Liquidated Damages” states that if the contract parties agree on the compensation amount for damages under the contract, such amount shall be considered liquidated damages and the parties to the contract are bound to it.

The State of Michigan standard contract terms, Clause (9) “Liquidated Damages” states that construction works delay will cause damages to the State which will be hard to fix, therefore, the State shall be entitled to impose \$ 5,000 plus \$1,000 per day of delay as liquidated damages to compensate the State for the damages it may sustain due to late completion by the contractor.¹⁹

The State of Mississippi procurement manual, Clause (5.101.03) “Liquidated Damages” authorizes the use of liquidated damages clause when it is difficult to calculate the amount of damage. When the contractor is given notice of delay and fails to make good the delay within certain period of time as stated in the notice, then the contractor is legally responsible for the delay damages.²⁰

The New York City standard construction contract, Article (15.1) “Liquidated Damages” states that in the event the contractor is delayed beyond the agreed completion date, the contractor is responsible to pay the City the amount of money stipulated in the relevant schedule of the General Conditions for each day of delay in completing the construction works in the form of liquidated damages. It also states that liquidated damages are not a waiver of the City’s right to recover any other damages stipulated in the contract or by law.²¹

¹⁹ The State of Michigan, *Standard Contract Terms* (2020).

²⁰ The State of Mississippi, “Mississippi Procurement Manual.”

²¹ City of New York, *Standard Construction Contract* (2017).

The State of North Carolina construction law compendium, Article (VI) “Recoverable Damages” states that the contract parties may agree on the amount of damage compensation at the outset of their contract and that the liquidated damages provision in case of delays are upheld given realistic estimate of damages and not penalty. Besides, “no damages for delay” clauses are enforceable on private projects while it is not on public projects, however, if the employer does not grant the contractor extension of time as a result of an employer-caused delay, North Carolina courts may award damages to the contractor even if the contract includes ano damages for delay clause.²²

The State of Virginia public procurement act, Article (2.2-4335-A) “Public Construction Contract Provisions” states that any public construction contract which contains a provision that waive the contractor’s right to claim and recover damages for a fault beyond his control shall be against public policy and will not be enforceable.²³

The State of Wisconsin procurement manual, Clause (VI) “Liquidated Damages” states that in case of contractor’s default, liquidated damages maybe used to assess damages sustained by the government entity before deciding to terminate the contract for default, and in such case the liquidated damages are not a penalty.²⁴

²² The State of North Carolina, “Construction Law Compendium.”

²³ Virginia Public Procurement Act 2021.

²⁴ Wisconsin Department of Administration, “State Procurement Manual.”

CHAPTER 3: DELAY IN CONSTRUCTION INDUSTRY

3.1 Definition of Construction Delay

Construction refers to the process of designing, constructing, and operating a building or infrastructure project. Its lifecycle involves many different stakeholder groups, each of which has varying expectations and control over the project. Due to the complex nature of construction projects and the various parties involved, disputes and claims can arise frequently. Serious disputes account for about 10% to 30% of all construction projects.²⁵

Construction delay is the situation where project activities are carried out at a time later than planned due to acts related to either the employer, consultant, contractor and /or any third party(s) to the contract including any unforeseen acts beyond the control of the contract parties.²⁶

Delays in construction projects are very costly for the contractor. It usually comes with higher interest charges and additional expenses related to the project. Many problems will arise due to the lack of foreseen problems in the contract, so various legal construction forms are used.

Delay affects the time for completion by affecting the duration needed to complete critical activity while disruption affects the productivity of an activity on the critical path. The contractor in such a case need to accelerate, which will cause him extra cost, in order not to

²⁵ Federal Facilities Council, Reducing Construction Costs : Uses of Best Dispute Resolution Practices by Project Owners : Proceedings Report. (National Academies Press 2007).

²⁶ Wikipedia Contributors, "Construction Delay" (Wikipedia September 15, 2019) <https://en.wikipedia.org/wiki/Construction_delay>.

delay the activity. Delay usually requires claim for extension of time, while disruption require claim for lost productivity.

Extension of time claim is always related to employer risk event (activity on critical path that the employer assumes responsibility and risk). The contractor assumes that float in the program is owned by the contractor to mitigate delay risk, while the employer assumes float is owned by the project and that the risk of delay should be embedded in the duration of the activity at the time of planning by the contractor.

3.2 Construction Delay Causes and Events

Construction delay causes fall under three main categories: ²⁷

- 1- Neutral origins: This is not due to a default caused by any contract party either party and caused by, but not limited to, the following events:
 - Stakeholders (local community, authorities) interference
 - Unforeseen ground condition
 - Modifications made to government regulations and laws
 - Material price escalations
 - Financial changes in bank interest and inflation rate
 - Severe weather conditions

- 2- Delays due to fault of the client: this type of delay is due to matters of which the client is responsible for and caused by, but not limited to, the following events:

²⁷ The Construction Wiki, "Delays on Construction Projects" (www.designingbuildings.co.ukSeptember 2021) <https://www.designingbuildings.co.uk/wiki/Delays_on_construction_projects#Types_of_delay>.

- Extreme change orders,
- Deliberate decisions and approvals,
- Delay in handing over site,
- Delays of approving shop drawings, and
- Delay in payments to contractor

3- Delays due to fault of the contractor: this type of delay is due to matters of which the contractor is responsible for and caused by, but not limited to, the following events:

- Lack of proper management
- Cash flow problems,
- Bad work quality,
- Execution errors by contractor, and
- Lack of sub-contractor's proper management.

Civil Engineering Research Journal had published the results of a survey conducted among construction engineers in India to ascertain the relative importance index and the ranking of these causes.²⁸ It was concluded that the top three major causes of construction delays are related to the contractor's cashflow problems, followed by the client's variation orders and his slow decisions. Therefore, the financial capability of the contractor is extremely important for the project not to be delayed, thus delay by the client towards any payment to the contractor will affect his planned cashflow and contribute to that cause of delay. Besides, the volume of variation orders instructed by the client and his prompt action towards approval needed for the

²⁸ Mohammed Taha Al Qersh, "Leading Factors Contributing to the Generation of Claims in Indian Construction Industry-Consultant's Perception" (2018) 4 civil Engineering Research Journal.

works are crucial to keep the project on schedule and to eliminate any delay in completing the project on time.

3.3 Types of Construction Delay

When it comes to construction projects, delays happen all the time. They are the factors that determine if a project is going to be completed on time or not. Understanding the various types of delays is very important for analyzing them, which mainly include the followings:²⁹

Any construction project usually comprises activities part of which are critical in terms of contribution to completion time of the project, while others don't since they are on float status which means that they will not affect the project completion time given the flexibility of time they have. All project tasks and activities that do not have float and must start and end at certain date are called critical path activities, and any delay in starting or ending these activities shall result in a delay to the whole project. There are different types of construction delay subject to the party who assumes the risk of that delayed activity. These types are detailed here below.

3.3.1. Excusable Delay versus Non-Excusable

Excusable delays are those delays that are beyond the control of the contractor and they fall under the "Employer Risk" and called "Compensation Event", where inexcusable delays are within the contractor's control and fall under "Contractor Risk" and known as "Un-Compensable Event".

²⁹ Wikipedia Contributors, "Construction Delay" (Wikipedia September 15, 2019) <https://en.wikipedia.org/wiki/Construction_delay>.

Excusable Delay: The focus of an excusable delay is to protect the contractor from paying delay damages and penalties to the government entity for late performance.

FAR Clause (52.249 – 14a) “Excusable Delays” states that the contractor will not be considered in breach of contract if the construction delays is due to causes beyond his control or not due to his fault or negligence. Besides, the clause also clearly defines the causes that are considered beyond the control of the contractor which include act of God, sovereign or contractual acts of the government entity, fire, flood, epidemic, strikes, and unusual severe weather conditions.

CTC Article (58-c) “Supplier's Contractual Obligations” states:

“Where the delay by the Supplier is due to an emergency, force majeure, act of the government entity, or any other reason beyond the control of the Supplier, the Supplier may submit an application for exemption from penalties and fines along with a proof of occurrence of the emergency, force majeure, government entity's act, or other reason, within thirty (30) days from the date of its occurrence. The application will be referred to the relevant Committee for consideration and verification. The Committee will make a recommendation on whether or not to grant the exemption, which will be enforceable only upon approval of that recommendation by the Director General”.

The above Article grants the government entity the right to exempt the contractor from the delay penalty and grant him time extension to the construction schedule given the contractor submits an application to waive the delay penalty supported by the necessary proof of the cause of delay which should belong to either a force majeure or government entity’s act, subject to Director General approval.

Based on the above, if the contractor comes across an excusable delay, he will not be in default and shall be entitled for time extension to the project completion schedule. Article 878 of CTC states that the contractor is responsible for the damage he may cause as a result of his default,

but if the default is caused by an event or action beyond his control, he will not be liable or responsible for such default.

Non- Excusable Delay: The contractor is responsible for any delay caused by him or any of his affiliates and sub-contractor as stated in the relevant law and the contract expressed terms stipulated in the contract signed between the government entity and the contractor. This type of delay, which is under the full control of the contractor, is non-excusable delay.

CTC Article (43-a5) “Drafting Contracts” states that the government entity when drafting a contract must include all relevant provisions, particularly the penalties and fines to be imposed on the contractor if he is delayed in performing the contract. Article (48) “Cases for Adopting Negotiation” states that the government entity may commence negotiations where the delays in performing any of the terms of the Contract;

CTC Article (58-b) states that when the contractor is delayed in performing the contract, the penalties mentioned in the contract shall apply.

FAR Clause (11.501) “Liquidated Damages Policy” states that the Contracting Offices can use liquidated damages clause to compensate the government entity for non-excusable delay that the contractor is completely responsible for, subject to the followings:

- Completion time is so important to the government entity which may result in damages to the government entity if the project is delayed, and
- The amount of the damage is difficult to accurately estimate or prove.

The above Clause also states that the liquidated damages must not be considered penalty or positive performance incentives, but only used to compensate the government entity for damages in a reasonable manner compared to the harm caused by late completion.

3.3.2. Compensable Delay versus Non-Compensable

Non-Compensable Delay: A non-compensable delay is an excusable delay resulting from events beyond the contractor's control and entitles the contractor only for time extension. The non-compensation principle is derived from the fact that neither the contractor nor the government entity has control over such delay, therefore, both parties assume their own costs. The contractor bares the cost of the delay and the government entity bares such cost in terms of waiving its right for liquidated damages by granting a time extension to the contractor.

Compensable Delay: Compensable delay is an excusable delay mainly caused by the government entity, and in such event, the contractor shall be entitled for both time extension and financial compensation. The emphasis of compensable delays is on compensating the contractor for the cost impact resulting from the delay. In general, compensable delay is caused by government entity act regardless of the reason of that act whether it is variation order or work changes.³⁰

3.3.3. Concurrent Delay

Concurrent delay is the most controversial argument between the government entity and the contractor due to many reasons among which is the lack of clear definition or regulation of such delay neither in the standard form of contracts nor in the relevant laws. This has left the

³⁰ Cohen Seglias, "GOVERNMENT CONTRACTING DATABASE" (Cohen Seglias June 2018) <<https://www.cohenseglias.com/contracting-database/excusable-nonexcusable-delays/#:~:text=Excusable%20Delays%20are%20delays%20that>> accessed October 7, 2021.

construction contract parties are aware of the right approach to resolve concurrent delay and must depend on literature review, experts' opinions, and courts' previous decisions in this area.

Concurrent delays are frequently occurring in construction projects where concurrent delay cases are complex cases due to the several components of details and elements that are required to analyze for such delay event.

Courts and arbitral tribunals have several approaches when defining and assessing concurrent delays due to several facts including silence or unclarity of contracts about it which in return cause disputes. It is therefore imperative that contracting parties should make sure to incorporate contractual provisions related to clarifying concurrent delay in order to minimize the possibility of concurrency-related disputes. These provisions are intended to allocate responsibility on how concurrency-related risks are managed and to describe the considerations needed to assess the responsibilities of delays that seem to be concurrent.³¹

Concurrent delay typically entitles the contractor to a time extension, but no financial considerations for damages. Therefore, the contract provisions should not only define concurrent delay but also need to clearly define the limits of the contract parties' rights to time and financial compensation in case of concurrent delay.

³¹ Amin Terouhid, "Concurrent Delays: Definitional and Procedural Considerations" (www.americanbar.org December 2019)
<https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/winter2019/concurrent-delays/>.

In the United States, the Association for the Advancement of Cost Engineering “AACE” International Recommended Practice (RP), the most-cited technical reference to define concurrent delay, offers the following definition:³²

“Two or more delays that take place or overlap during the same period, either of which occurring alone would have affected the ultimate completion date.”

To ensure that concurrent delay exists, the AACE suggests that the following tests must be proven:³³

- Existence of two or more independent delays even if one of the delays is caused by a force majeure,
- Not all delays identified in the first test are the responsibility of the same party,
- The completion date will be delayed if any of the above events is delayed.
- The delayed works must be significant.

In the UAE, the law does not expressly recognize the concurrent delay and had left to the judges to decide on defining and tackling this issue, given the technical nature of this argument. However, there are some provisions in the CTC that relates to concurrency concept which the courts rely upon. These provisions are included in Articles 290 and 291.

³² Amin Terouhid, “Concurrent Delays: Definitional and Procedural Considerations” (www.americanbar.orgDecember 2019)
<https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/winter2019/concurrent-delays/>.

³³ John Livengood, Christopher Carson and Andrew Avalon, “FORENSIC SCHEDULE ANALYSIS TCM Framework: 6.4 -Forensic Performance Assessment FORENSIC SCHEDULE ANALYSIS TCM Framework: 6.4 -Forensic Performance Assessment” (2009).

Article (290) of CTC states that the judge has the right to reduce the obligation of a party to make good a default if the other party has directly or indirectly participated in that default.

Article (291) of CTC grants the judicial authority the right to reduce the delay penalty imposed by the government entity that resulted out of delay by taking into account the extent to which the government entity has participated in the delay. On the contrary where the contractor is claiming compensation for prolongation cost because of excusable delay due to neutral event, the government entity can rely of this Article to argue the contractor's participation in the delay.

Abu Dhabi court of cassation had defined concurrent delay as follows:³⁴

“A period of project overrun which is caused by two or more effective causes of delay which are approximately equal causative potency”.

Based on the above definition, both the government entity and the contractor risk events are considered concurrent if the delaying effects of the events arise at the same time and caused critical delay even they may arise at different times.³⁵

In circumstances of concurrent delay, the contractor may claim his entitlement for an extension of time regarding the government entity risk event, and the government entity may say that it is entitled to liquidated damages in terms of a contractor risk event. Therefore, concurrent delay analysis method and procedure need to be clearly defined to eliminate any potential dispute in resolving concurrency issues.

³⁴ Rupa Lakha, “It’s about Time!” (Charles Russell Speechlys February 8, 2019) <<https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/construction-engineering-and-projects/2019/its-about-time/>>.

³⁵ Rupa Lakha, “It’s about Time!” (Charles Russell Speechlys February 8, 2019) <<https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/construction-engineering-and-projects/2019/its-about-time/>>.

Roads and Transport Authority of Dubai “RTA” recognizes the concurrent delay in the General Conditions of its contracts. Clause (8.4) “Extension of Time for Completion” states that in case of proven concurrent delay, the contractor is only entitled to time extension for completion date at no cost.

The FIDIC Redbook 2017 had introduced under Sub-Clause (8.5) an expression regarding concurrent delay which recognizes the current delay and assumes that the contractor may be entitled for time extension should a concurrent delay has happened. It also defines concurrent delay as the delay caused by the contractor that coincides with a delay caused by the employer and assumes that the contract terms shall be the reference to resolve all matters related to concurrent delay.

The above FIDIC clause provides guidance on how concurrent delay shall be approached. It addresses the concurrent delay to remind the parties to negotiate this matter before signing the contract. There is no standard approach on concurrent delay at an international level is been adopted, however FIDIC suggests the SCL’s definition and procedure to be accepted internationally for concurrent delay.

On the other hand, there is a renowned method that is called “Time but No Money” that is used to decide on concurrent delay which entitles the contractor to an extension of time as a defense to the government entity entitlement for liquidated damages.

3.4 Construction Delay Analysis Methods

The objective of construction delay analysis used in the construction industry is to identify the cause and effect of any delay and to create a reasonable analysis that satisfies the necessities to identify the reason of delay and to decide the liability and the resultant damages.³⁶

There are many techniques used by construction practitioners for delay analysis. The selection of the right delay analysis method is significant to the calculation of the construction delays given the advantages and disadvantages each method has. Several aspects must be considered when deciding on the delay analysis method to be used including, but not limited to, contract requirements, data availability, budget constraints, size of dispute, and time allowed for the analysis.

Delay analysis can be conducted before and after the delay event in a prospective or retrospective manner. Prospective analysis estimates the likely completion dates of upcoming activities by looking forward, while retrospective analysis is looking backwards. Below is a summary on each delay analysis method.

3.4.1 Impacted As-Planned

The impacted as-planned analysis includes modifying the as-planned construction schedule by adding delay events to the planned construction schedule to ascertain the hypothetical impact

³⁶ PJ Keane and AF Caletka, DELAY ANALYSIS in CONSTRUCTION CONTRACTS (Blackwell Publishing Ltd 2008) <<https://onlinelibrary.wiley.com/doi/book/10.1002/9781444301144>>.

of such events. The delay is then calculated by determining the difference between the project completion date in the impacted as-planned schedule and the original as-planned schedule.

3.4.2 Collapsed As-Built

The collapsed as-built analysis is the reverse of the impacted as-planned analysis. It is simply about taking out delay events from the as-built schedule to determine when the project could have been completed if the delayed event was not there. This method of analysis is widely used and may be preferred by the contractors due to its clear logic in determining the root cause of the delay and the significance of the subject delay in contributing to the delay in completion date.

3.4.3 As-Planned versus As-Built

The as-planned vs. as-built analysis is a simple analysis method that compares both the as-planned schedule to the as-built schedule. This method compares the planned start and finish dates with the actual start and finish dates of the activities on the critical path in order to identify activities with delayed start and late finish dates.

3.4.4 Time Impact Analysis

The time impact analysis (TIA) is a full analysis method used to examine each delay event separately in sequential manner to analyze its impact. This method counts the delay of an event before and after the delay happened. The completion date before and after the event is then calculated and the difference between both completion dates determines the amount of the

delay. This hypothetical technique is used during construction to resolve delayed performance in a timely manner.

3.4.5 Windows Analysis

The windows analysis is a retroactive method where the total project duration is divided into smaller periods called “windows”, each window will be used to calculate the delays of the critical activities in within. This methodology is used to compare the duration of as-planned critical activities to the duration of as-built critical activities for each selected period. However, this method requires a long period of time and full detailed records of the project.

3.5. Termination Due to Delay

The government entity has the right to terminate the construction contract either for convenience or for default subject to written notice to the contractor in that regard. Substantial delay caused by the contractor shall give rise to the government entity’s right under the law to terminate the contract for default.

Dubai Law no (12) of 2020 Article (66) “Breach of Works Contracts by Suppliers” states that in case a contractor encounters substantial delays in performing construction works, the government entity may terminate the contract after serving a notice to the contractor demanding its compliance within certain period.

FAR Clause (49.402-1) “The government’s Right” states that the government entity has the right to terminate the contract for default caused by delayed performance of the contractor subject to the notice requirements stipulated under Clause (49.102-a) “Notice of Termination”

which states that the government entity representative shall send a written notice to the contractor should he decides to terminate the contract either for default or convenience. Details of legal effects of termination due to construction delays are discussed in Chapter Five of this dissertation.

CHAPTER 4: CONSTRUCTION DELAY DAMAGES

4.1 Definition of Delay Damages

Construction contracts usually provide for the delay consequences that include the entitlement of an employer to remove parts of the contractor's scope of work, instruct the contractor to increase resources, impose delay penalties, demand delay damages, and/or terminate the contract and assign a new contractor to do the works.³⁷

The "Delay Damages" is mainly used in construction industry when a change order or a claim is submitted for time extension or / and cost. It is defined as the damages that are caused by delay in construction works, however, this definition depends on how the term "delay" is defined in terms of critical or non-critical delay.

Critical delay is defined as the delay that causes extended project duration. It includes financial damages that are mainly related to, among others, the cost of site office and liquidated damages. On the other hand, non-critical delay does not cause an extended project duration and therefore it does not include the damages mentioned in the critical delay.³⁸

4.2 Liquidated Damages

The employer uses liquidated damages to quantify delay damages where it is difficult for the employer to accurately determine its actual damages at the start of the project. It is used when the project duration exceeds the agreed completion time due to a contractor-caused delay. The

³⁷ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell 2016).

³⁸ Delay Damages, "Delay Damages" (*Delay Damages*)

<<http://www.delaydamages.com/#:~:text=The%20term%20E2%80%9CDelay%20Damages%E2%80%9D%20is>> accessed October 10, 2021.

employer has the right to deduct a pre-agreed amount of money from the contractor as compensation for contractor-caused delays that include failure to meet set milestones of works or project completion date.³⁹ Some of the costs the employer will consider when deciding the liquidated damages rate include the cost of inspection, design, supervisions fees, site office running cost, lost profit, and financing cost.

The position of liquidated damages clauses under UAE CTC may bring less certainty, for both employer and contractor, in terms of enforceability and amount adjustment. Liquidated damages can be rendered unenforceable if the employer terminates the primary obligation, or it fails to establish all the liquidated damages requirements under the Tripartite Test which includes:

- A breach committed by the contractor,
- Actual damages suffered by the employer, and
- Prove of connection between the contractor's fault and the employer's damage.

UAE CTC Article (390-2) grants the court the right to change the amount of the liquidated damages agreed between the parties at the time of signing the construction contract. upon the request of one of the parties, to make the compensation equal to the actual damage suffered, however, the court is responsible to enforce the liquidated damages clause as stipulated in the contract signed between the parties except under the case if one of the parties submits a proof that no damages were suffered by the other party.

³⁹ Faisal Attia, "Liquidated Damages - the Bigger Picture" (Al Tamimi & Company March 2012) <<https://www.tamimi.com/law-update-articles/liquidated-damages-the-bigger-picture/>> accessed October 7, 2021.

Dubai law no (12) of 2020 Article (68) grants the government entity the right to impose delay penalty if the contractor fails to complete the project as per the agreed completion date, without the need for a legal notice, judicial proceedings, or proof of damage. The delay penalty will start to accumulate from the date of failure to meet the deadline. Besides, the government entity is also granted the right to hold the contractor liable to the Consultant supervision fees during the delay period. If the delay is excusable, the contractor is required, within thirty (30) days from the date of such delay, to apply for exemption from delay penalties supported by a proof of such excusable delay subject to the government entity's decision to waive the penalty and grant extension of time.

In case of termination for contractor-caused delay, the government entity has the right to claim compensation for any damages it has sustained, in accordance with Article (66-2) "Breach of Works Contracts by Suppliers", that says: "*claim compensation from the defaulting Supplier for any damage or loss it has sustained and any costs or the price differences it has incurred*".

RTA General Conditions Clause (8.7) "Delay Penalties" states that when the contractor is unable to complete the construction works according to the agreed construction schedule, the contractor shall be obliged to pay RTA delay penalties for this delay, which shall be paid for every day between the agreed completion date and the actual completion date. The maximum amount of delay penalty shall not exceed 10% of the accepted contract amount. These delay penalties shall not release the contractor from his obligation under the Contract.

Clause (15.1) "Notice to Correct" states that the Engineer may send notice to the contractor to make good the delay within specified reasonable time. If the contractor is unable to comply

with the notice above, the RTA, upon giving (14) days-notice, is entitled to terminate the contract and preserve all other rights.

In the USA, liquidated damages clause will be enforced subject to the following conditions:⁴⁰

- The damage is difficult to estimate and hard to prove, and
- The liquidated damages amount inserted in the contract is reasonable compensation for the actual damage.

Otherwise, the clause will be considered a penalty and shall be rendered unenforceable and delay compensation will be restricted to the actual damages suffered.

Clause (356) of the Restatement 2d Contracts states that the damage for a breach of any contract condition or obligation that is caused by a party to the construction contract, may be liquidated by means of an agreed term in the contract. The liquidated damage amount shall be reasonable and comparable with the actual loss that may be suffered, however, if the amount is unreasonable and excessive compared to the actual loss, the liquidated damages clause will not be enforceable and shall be considered a penalty on the basis of public policy.

4.3 Delay Penalty

In civil law jurisdictions, penalty is used interchangeably with liquidated damages, while in common law jurisdiction each word has its own meaning and legal consequences. Under civil law, penalty clause is generally enforceable, subject to the court or arbitral tribunal decision to increase or decrease to make the penalty amount comparable with the damage suffered, while

⁴⁰ Frank McKenna and Lisa Means, “Liquidated Damages and Penalty Clauses: A civil law versus common law Comparison” (May 2008) <<https://www.reedsmith.com/-/media/files/perspectives/2008/05/the-critical-path/files/0804critpdf/fileattachment/0804crit.pdf>>.

in common law jurisdiction, it is not enforceable, even if agreed by the contract parties, unless it satisfies the following conditions:⁴¹

- The clause is not related to a primary obligation,
- There is a legitimate interest, and
- It is proportionate.

Therefore, common law courts conduct a number of steps to decide on the enforceability of a penalty clause based on the classification of subject obligation, given penalties to primary obligation are enforceable, while secondary obligation are not.

Common law courts usually do not investigate primary obligations, but they do for secondary obligations. Primary obligation is a condition that is obligatory, while secondary obligation is an incidental obligation to the primary obligation or arises when primary obligation cannot be performed.

4.4 Delay Damages Mechanism

Contracts normally include a mechanism to deduct certain amount of money from the contractor payments if the construction works are delayed beyond the completion date agreed between the parties thereto. Under civil law, there is usually a limit to the delay amount, normally 10% of the contract price, and in most cases the employer may use his right to terminate the contract if the calculated delay amount exceeds this limit.⁴²

⁴¹ Matthew Clarke, “What Is a Penalty Clause? When Is It Enforceable? L Blog L Nelsons” (Nelsons September 23, 2019) <<https://www.nelsonslaw.co.uk/penalty-clause/>>.

⁴² World Bank, “Procurement Guide - Contract Management Practice.”

In construction industry, the agreed completion date is a central term of the contract. To ensure that this date is observed well by the contractor, the contracting parties usually agree, before signing the contract, to a compensation mechanism to calculate the compensation the contractor is willing to pay to the employer in case of delay in completing the construction works. The compensation mechanism is normally fixed at a daily rate. This compensation is called liquidated damage in common law jurisdiction while in civil law jurisdiction it is accepted to call it delay penalty.

In civil law jurisdictions like UAE, the CTC allows the contracting parties to agree an advanced compensation amount for any breach of the contract conditions that any party may encounter, however, while the court or arbitral tribunal may enforce this clause as agreed between the parties, the court or the arbitral tribunal, upon the request of either party, may alter this amount to make it comparable with the actual loss.

In common law jurisdictions like UK and USA, and in light of the Prevention Principle, the employer should not deprive the contractor from completing the contracted works, and delays caused by the employer should entitle the contractor to claim delay damages which include, among others, extension of time. If the contract does not include an extension of time provision, then the agreed completion date is set at large, which in return renders the liquidated damages provisions to become unenforceable and the employer can no longer enforce liquidated damages clause and claim delay damages from the contractor. Instead, the employer has to prove the actual damages suffered in order to be able to claim damages and thus the burden is shifted to the employer to prove his actual damages.

in their effort to cancel liquidated damages, some contractors in the UAE rely on the Prevention Principle, however, and given that the UAE law allows the courts to review or vary the amount of liquidated damages to make it equal to the actual loss, the Prevention Principle is not enforceable in the UAE.⁴³

4.5 Extension of Time

Extension of time provisions are usually included in construction contracts to achieve several objectives among which maintaining the integrity of the construction program, allowing the employer to delay construction works, allowing the employer to cause delay without risking the contractual program, and protecting the contractor from penalties and delay damages for late completion.⁴⁴

Extension of time granted to a contractor has major consequences on project completion time and the final cost of the project. The government entity before granting extension of time should ask the contractor to furnish all the necessary details and proofs related to the delay events analysis and supported by a revised construction schedule in order to study them all and recommend the necessary extension of time the contractor may be entitled to.

For determining the additional cost of the contract price resulting from granting extension of time, the government entity should carefully check the following components that will comprise the basis for the additional cost the contractor will claim for:⁴⁵

⁴³ Eric Teo, "UAE & Chinese Construction Law" (Al Tamimi & Company July 2011) <<https://www.tamimi.com/law-update-articles/uae-chinese-construction-law/>> accessed October 8, 2021.

⁴⁴ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell 2016).

⁴⁵ World Bank, "Procurement Guide - Contract Management Practice."

1. **Additional site resources costs:** The employer must make sure that the contractor site resources including material, labor and plant are available at site and that the contractor cannot move them to other sites and thus put the productivity and construction works at the risk of potential delays due to unavailability.

2. **Site and head office overhead costs:** The overhead cost of the site and head offices are fixed running costs on the contractor either construction works in progress or not. It will continue to accumulate as long as the team dedicated to the project is there during the delay events. The site overhead is a direct contract cost which includes power, water, and site management staff. The head office cost is based on the assumption that the revenue that could have been generated from the construction works at site is lost. One of the methods applied to determine the head office overhead is the “Eichleay Formula” which is calculated as follows:

$$\text{Allocation of delayed contract overhead} = \frac{(\text{contract price} \times \text{head office overhead})}{\text{contractor total billings}}$$

The above formula is used to calculate the allocated amount of money of the total head office cost to the calculation of the delay cost. The following formula is used to determine the daily allocable overhead:

$$\text{Daily allocated overhead cost} = \frac{\text{Delayed contract allocated overhead}}{\text{Contract period in days}}$$

3. Profit: The contract terms may allow the contractor to claim certain profit percentage on any additional works added to the contract over and above the direct cost of such works. Should the

contract allow for profit to be added to the direct cost of works, the government entity must make sure that the inserted profit percentage is fair and not excessive or exaggerated.⁴⁶

Under UAE CTC, there is no legal right to an extension of the time for completion, therefore, the contractor needs to make sure that the contract has an appropriate extension of time clause detailing the mechanism and method of calculation for any extension of time that may be granted to him in order to have a legally valid and enforceable term to cover his claim for an extension of time for completion.

Generally, extension of time provision in any construction contract requires the contractor to notify the employer whenever a delay occurs and to submit a claim in that regard. The contractors will lose his right to time extension if he fails to comply with the notification requirements. In such case, the contractor may still get some relief under UAE law should it be able to establish that the employer has acted in breach of the legal requirement to act in good faith.⁴⁷

In common law jurisdictions, under “Prevention Principle”,⁴⁸ if a construction contract does not include an extension of time clause, and in the event of employer-caused delays, time will be set “at large” and the employer will not be able to impose liquidated damages clause while the contractor is required to complete the works within reasonable time, but not as per the contractual completion time which will collapse, therefore, the employer will be prevented from deducting liquidated damages for delay caused by the contractor. Where as in the UAE, there

⁴⁶ World Bank, “Procurement Guide - Contract Management Practice.”

⁴⁷ Hasan Rahman, “The A-Z of Construction Law in the United Arab Emirates” (DLA Piper LLP 2021).

⁴⁸ Rupa Lakha, “It’s about Time!” (Charles Russell Speechlys February 8, 2019) <<https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/construction-engineering-and-projects/2019/its-about-time/>>.

are certain provisions in CTC which prevent the defaulted party to benefit from its own breach and therefore, if the employer refuses to grant an extension of time for its own caused delay or even if nonexistence of extension of time clause, a court or arbitral tribunal may decide to award the contractor an extension of time after due consideration of the overall consequences of the delay.

Under UAE law, the constructive acceleration concept to mitigate the employer-caused delay is not recognized, therefore the contractor who accelerates construction works and suffers additional cost will not be able to claim that cost easily. Also, the UAE law does not recognize the concept of mitigation where the contractor is required to take practical actions to reduce or mitigate its losses arising from employer-caused delay, however a court may reduce the damage even if no reasonable attempts to mitigate the delay were taken. Therefore, in the absence of an express contractual provision, the employer cannot instruct a contractor to accelerate construction works for an employer-caused delay to complete construction early due to the employer's failure to grant extension of time.⁴⁹

It is also worth mentioning that under private contract, the UAE CTC does not include any legal entitlement for extension of time nor a mechanism on how to be granted or treated. The contractor therefore must rely on the contractual terms to be able to get his rights before the Court of Merits. However, Article (272) of CTC includes the power of courts to change unfair contract conditions including the power to extend time for performance.

⁴⁹ Beale, Co-Scott Lambert and Jeremy Russell, "Ready, Set, Accelerate! Construction Acceleration in the UAE May 2019" (*Lexology* May 8, 2019) <<https://www.lexology.com/library/detail.aspx?g=9ff02a39-693e-4015-bf98-7592b28eac1e>> accessed October 8, 2021.

4.6 Objectives of Delay Damages

The delay damage clause is intended to compensate either party for the default or breach of the agreed contract conditions by the other party. The employer will be compensated for the contractor-caused delay according to the liquidated damages rate inserted in the contract, while the contractor will be compensated for the natural and employer-caused delay through time extension, with or without cost, subject to the delay event circumstances.

The objectives of delay damages clause vary subject to the applicable laws in the jurisdiction where the construction works are carried out. In common law jurisdictions, the delay damages clause is relatively fixed and cannot be altered unless proven penalty. In civil law jurisdiction, the term “penalty” is used interchangeably with liquidated damages, and therefore penalty is enforceable like liquidated damage, however, and upon the request of either party, the tribunal or the court may change its value by increase or decrease to make the compensation equal to the damage, despite the parties’ agreement on its amount.

Delay damages, as a principle, mean the limitation of liabilities towards delay. Delay damages in common law jurisdictions are not penalties and has nothing to do with compensation for time over run, it represents an undertaking of one party to compensate the other party to pay an agreed amount of money in case of noncompliance with the contract conditions.

4.7 Enforceability of Liquidated Damages after Termination

When a contract is terminated, liquidated damages provisions may fall under (3) main categories as follows:⁵⁰

- LDs do not apply at all and any damages may be claimed under general damages;
- LDs accrue up to the termination date, or
- LDs continue to accrue until completion of contract the works.

The situation when any of the above categories may apply is subject to the enacted laws where the contract is carried out and the agreed express terms of the contract.

Under UAE law, liquidated damages clauses are considered ancillary contractual obligations that will not be enforceable unless a primary obligation is recognized, which means that liquidated damages are not deemed to require an action for a delay damages claim, but can only stand for establishing the damage amount to be claimed.⁵¹ There are two separate contractor's obligations, primary and ancillary, arising out the liquidated damages clause in a construction contract:

- 1- Primary obligation: completing construction as per the agreed schedule
- 2- Ancillary obligation: pay liquidated damages in case of delay subject to:
 - The contractor is proven to be in breach of the primary obligation, and

⁵⁰ Jon Turnbull, "Will Your Liquidated Damages Survive Termination?" (*Allen Overy* April 26, 2019) <<https://www.allenoverly.com/en-gb/global/blogs/compact-contract/will-your-liquidated-damages-survive-termination>> accessed October 25, 2021.

⁵¹ Faisal Attia, "Liquidated Damages - the Bigger Picture" (Al Tamimi & Company March 2012) <<https://www.tamimi.com/law-update-articles/liquidated-damages-the-bigger-picture/>> accessed October 7, 2021.

- The employer has suffered a loss because of the contractor delays.

Based on the above, if the primary obligation is dismissed by means of termination, the liquidated damages clause shall be disregarded, unless the contract expressly states that the liquidated damages clause shall survive after termination. However, upon the termination of the primary obligation, the court may evaluate the damages based on general rules for damage but not as per the agreed amount of liquidated damages subject to satisfactory results of the “Tripartite Test” which states the following requirements need to be fulfilled in order to award liquidated damages:

- There is a breach by the party who agreed to pay LDs,
- The party who appeals LDs clause has suffered actual damage; and
- There should be a direct link between the breach and the damage.

This rule has been applied by the Dubai Court of Cassation which reversed the Court of Appeal judgment on a case raised by an employer to terminate a construction contract and to award the employer the liquidated damages as stipulated in the contract. The Dubai Court of Cassation rendered that in case of contract termination, the liquidated damages clause is not enforceable.⁵²

Dubai law no.12 of 2020, Article (66) “Breach of Works Contracts by Suppliers” states that the government entity has the right to claim compensation from the defaulting contractor for any damage or loss it has sustained. Therefore, it is expressly stated in the government procurement

⁵² Faisal Attia, “Liquidated Damages - the Bigger Picture” (Al Tamimi & Company March 2012) <<https://www.tamimi.com/law-update-articles/liquidated-damages-the-bigger-picture/>> accessed October 7, 2021.

law that damages to government entity can be claimed and shall survive after termination of construction contract for the period before termination.

RTA Clause (15.4) “Payment after Termination” states:

“b) withhold further payments to the contractor until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the employer, have been established.”

FAR Clause (49.402-7a) “Other Damages” states:

“If the contracting officer terminates a contract for default or follows a course of action instead of termination for default, the contracting officer promptly must assess and demand any liquidated damages to which the government is entitled under the contract. Under the contract clause at 52.211-11, these damages are in addition to any excess repurchase costs.”

Based on the above, liquidated damages are enforceable under public contracts even after termination by the government entity for contractor-caused delay and will continue to accrue till the project is completed, however, it will be subject to contract terms in case of clear expression to the contrary.

CHAPTER 5: EFFECTS OF DELAY IN PUBLIC CONSTRUCTION

5.1 UAE civil Transaction code

Federal law no. (5) of 1985 concerning the civil Transaction code of the United Arab Emirates and its related Articles (872–896) Chapter III “Contracts of Works” Part (1) “Muqawalah” , are applicable to public construction works. The Federal law regulates and govern the general obligations and rights of both the employer and the contractor which shall supersede whatever terms agreed in the contract between the parties should such terms are in conflict with the law articles.

Article (386) clearly explains the obligation of the contractor in case of delay that he should pay compensation to the employer for the damage unless the delay is beyond his control in terms of force majeure or delay caused by the government entity. It states:

“If it is impossible for an obligor to give specific performance of an obligation, he shall be ordered to pay compensation for non-performance of his obligation, unless it is proved that the impossibility of performance arose out of an external cause in which (the obligor) played no part. The same shall apply in the event that the obligor defaults in the performance of his obligation”.

The delay damage compensation to the employer shall not be imposed unless a notice is been served to the contractor in this regard and in accordance with Article (387). However, this notice is not always obligatory on the employer if any of the following circumstances stated in Article (388) prevails:

- It is becoming impossible for the obligor to perform his obligation;
- Subject matter of the obligation is based on illegal act; or
- Written rejection by the obligor to perform his obligation.

Article (390) states that the contracting parties may make a provision in the contract to fix in advance the amount of compensation, subject to the provisions of law. It also states that the Judge may, upon request of a party, change the agreed compensation in order to make the amount equal to the actual damage and that any agreement between the parties in conflict with the above shall be void. On the other hand, Article (389) states that if the amount of delay compensation is not mentioned or agreed in the contract between the parties, the Judge has the right to assess the damage and award the amount of damage to be equivalent to the damage suffered. For the court to award the delay compensation, the “Tripartite Test” mentioned before shall be performed.

In case of excessive delay by the contractor, and the project situation became impossible to make good the delay, the employer shall have the right to terminate the contract in accordance with Article (877) which states that the construction works must be completed in accordance with the conditions of the contract and if the construction works are defective or carried out in a manner to the contrary of the what have been agreed, the employer may call the contract for immediate termination should making good the work is impossible, however, if it possible to make good the work, the employer shall be required to demand the contractor to abide by the contract terms and conditions and to make good the work within certain period of time. Should such period of time has elapsed, and the contractor has failed to make good the work within that period, the employer then has the right to apply to the judge to terminate the contract or to engage another contractor to complete the construction works at the cost of the contractor.

5.2 Dubai Public Procurement Law

Dubai had recently disabled the public procurement law no. (6) of 1997 concerning Contracts of government Departments in the Emirate of Dubai and issued a new law no. (12) of 2020

concerning Contracts and Warehouse Management in the government of Dubai. The new law was issued to replace the disabled law, improve the public procurement process, raise the level of governance and make it more transparent. The new law regulates and govern the rights and obligations of the Dubai government entity and the contractor assigned to conduct and carry out the public works.

The Dubai Public Procurement Law No. (12) Of 2020 is a procedural law that stipulates all aspects and procedures needed for public procurement of goods and services. All suppliers contracted by Dubai government must complete the works stipulated in the contract as per the agreed program in addition to any extension of time granted thereof. Article (68) “Penalty for Delay in Performing Works Contracts” of this law states that:

“A Supplier must properly complete the works stipulated in the works Contract within the deadline stipulated in the Contract or any extension thereof. Where the Supplier fails to meet this deadline, the delay penalty prescribed in the Contract will be imposed on the Supplier for each day of delay.”

Based on the above article, if the contractor fails to abide by the construction program or any extension of time thereof, delay penalty will be imposed for everyday of delay from the agreed completion date till the actual date of completion. The total penalty value should not exceed 10% of the contract value. The delay penalty does not require prove of damage or any notice or judicial proceedings against the defaulting Supplier. The delay penalty will be applied without prejudice to the government entity’s right to recover the fees paid to the Consultant for supervising the works during the delay period.

Article (68) of this law also states that the total amount of the delay penalty should not me more than ten percent (10%) of the Contract value and starts to from the first day of delay beyond the

agreed completion date without the need for notice of legal proceedings against the contractor or prove of damage. The delay penalty shall not deprive the government entity from its right to hold the contractor responsible for the cost of the Consultant supervision during the delayed period.

If the delay in performing the works compromises and affects the interests of the government entity, the government entity has the right to apply the provisions of Article (66) “Breach of Works Contracts by Suppliers” which states and clearly stipulates the actions the government entity is granted to take against the contractor in case of substantial delay which includes:

- liquidation of the performance bond,
- Claim compensation for damages,
- Retain the contractor’s supplies and equipment at site,
- Charge the contractor 10% of the remaining works cost as administrative fees, and / or
- Appoint new contractor and held the delayed contractor responsible for any cost differences

The Article states that if the contractor performance is delayed, stop works at site for more than (15) consecutive days, fails to comply with the contract terms, or withdraw from his obligations under the contract, the government entity is required to notify the contractor of his default and stating the period during which the contractor should rectify his fault. If the contractor is an able to rectify his fault within the period stated in the notification, the government entity has the right to take either or all the following actions against the contractor:

1. Terminate the Contract, liquidate the Performance Bond, and carry out the construction works by another contractor. The contractor will not have the right to claim any damages as a result of the government entity termination;

2. Demand the contractor to pay compensation for any damage or harm the government entity has incurred and any cost difference it has paid for the new contractor, sustained and any costs or the price differences it has incurred;
3. Hold any supplies or equipment on site owned by the contractor and utilize it all in completing the construction works at site without being liable or responsible for any damage that might happen to it while using it to complete the works at site;
4. Impose administrative fees equal ten percent (10%) of the value of remaining construction works, and /or
5. Award the contract to a new contractor to complete the works and charge the contractor any cost difference as a result of this award.

On the other hand, the law granted the Director General of the government entity the right to wave and exempt the supplier from the delay penalty subject to Article (58) of this law. It states the following:

“Pursuant to a resolution of the Director General, the Supplier may be exempted from the delay penalty in accordance with the provisions and procedures stipulated in Article (58) of this Law.”

Article (58) “Supplier's Contractual Obligations” states the followings:

- 1- The contractor should perform his duties under the contract in accordance with the terms and conditions stated in and must particularly comply with and abide by the construction schedule and the agreed completion date.
- 2- If the contractor is delayed in carrying out the construction works, it shall be subject to pay construction delay penalties in accordance with this law and what is stipulated in the contract.

- 3- If the cause of the contractor's delay is due to an act by the government entity, force majeure, or any cause not within the control of the contractor, the contractor may submit an application, supported by all necessary documents required to prove the cause of the delay, to be exempted from delay penalties. Such application should be submitted within (30) days from the date of the delay event. The application will be raised to the competent committee in the government entity to study, verify, and recommend a decision whether to grant the contractor an extension of time and waive the delay penalty subject to the Director General approval.

It is clear from the above clause that the Director General of the government entity has the right to waive the delay penalty in case the delay is caused either by force majeure, act of the government entity, or by an act beyond the control of the contractor, subject to the contractor submits an application in that regard within (30) days from the date of delay occurrence. Otherwise, the contractor is obliged to pay the government entity delay penalty as stated in the contract and the relevant law.

5.3 RTA General Conditions

Roads and Transport Authority "RTA" is one of the most reputable government Entities in Dubai with AED 10 Billion annual expenditure on transportation and infrastructure projects. It has its own procurement conditions which are in line with the Dubai procurement law but detailed to be compatible with the infrastructure industry.

RTA General Conditions stipulates the rights and obligation of a contractor in case of construction delay. Clause (8.6) "Rate of Progress states that if the construction progress is very

slow and/or the progress is behind the approved construction program, the Engineer has the right to instruct the contractor to submit a revised construction program supported by a report describing the acceleration method the contractor is planning to follow in order to expedite progress and complete within the approved completion time. If the acceleration method cause additional cost to the employer, the contractor is obliged to pay such cost to the employer, over and above the delay penalties, subject to Clause (8.7).⁵³

The said cause also states that if the contractor's acceleration method does not improve the rate of progress in a manner to recover the delay and meet the approved time for completion, the Engineer may instruct the contractor, at no cost to employer, to increase manpower and equipment , number of shifts, and additional working days per week, given such instructions will not entitle the contractor to raise any claim against the employer for any cost or financial consequence resulting from the Engineer's above instructions. Should the contractor fail to comply with the Engineer's instructions made pursuant to this Clause, the employer has the right to employ another contractor to recover the delay, achieve the construction schedule, and meet the completion date, where the contractor is responsible for all the costs associated with such failure.

Beside what is stated above, and in accordance with the provisions stated in Clause (8.7) "Delay Penalties", if the contractor fails to comply with the project's completion time, the contractor shall pay the employers delay penalties which shall be paid for every day of delay beyond the agreed completion date till the date of Taking Over Certificate. However, the total penalty amount shall not exceed 10% of the accepted contract amount where the daily delay penalty is

⁵³ Roads and Transport Authority, *General Conditions* (Dubai RTA 2015).

calculated by dividing the total penalty amount by 20% of the time for completion. These penalties shall not relieve the contractor from his duties, obligations or responsibilities which he may have under the Contract.

5.4 USA Federal Acquisition Regulation (FAR)

The Federal Acquisition Regulation (FAR) regulates the federal public procurement including delays in construction projects.⁵⁴ Clause (11.5) “Liquidated Damages” prescribe the policies and procedures adopted for liquidated damages as compensation for the government entity in case of construction delay. It states that the contracting officer must be careful before including the liquidated damages clause in the construction contract and to consider the potential impact on contract price. It suggests using the liquidated damages clause only if the following conditions are met:

- The time of completion is crucial to the government entity, the delay of which will cause damages to the government, and
- The amount of such damage is difficult to prove or estimate accurately.

As mentioned earlier in this dissertation, Clause (11.5) stresses on the fact that liquidated damages are not penalty nor negative performance incentives, but compensation to government entity for damages caused by the contractor and that the rate of liquidated damages should be a reasonable and fair compensation for the damage that is caused by late completion of the construction contract. Also, it is suggested that the government entity representative may adopt several rates for liquidated damages if he expects the damages may change over time until the completion of the project.

⁵⁴ Federal Acquisition Regulation 2019.

The contracting officer must consider all necessary actions to eliminate applying liquidated damages and he should immediately pursue all means of actions and support required from the government entity to help the contractor accelerate the works and recover the construction delays before taking his decision to terminate the contract. The chairman of the government entity has the right to decrease or right off the amount of liquidated damages the contractor has to pay in compensation for the delay he may cause to the construction project.

Clause (11.502-b) “Liquidated Damages Procedures” states that the rate of liquidated damages per day must be included in any construction contract that has liquidated damages provision.

The liquidated damages rate should include the followings:

- 1- The cost of the government entity’s supervision and inspection, and
- 2- Any other probable expenses associated with the delay of completing the projects.

It is clear from the above Clause that the additional cost the government entity may suffer because of construction delay is imbedded in the liquidated damages rate. Clause (11.503-c) “Contract Clauses’ requires the contracting officer to include Time Extension clause if he decides to use the liquidated damage clause to prevent having the situation where the project will become at large.

Clause (49.401) “Termination for Default” states that termination for default is the government entity’s right to terminate a contract, if the contractor fails to accomplish its contractual obligations under the contract subject to the notice requirements stated in this clause. However, if the contract is terminated based on an excusable delay, where the contractor has no control

over such delay, termination for default in that case will be considered as termination for the convenience of the government entity.

Clause (49.402-2) “Effect of Termination for Default” discusses the government entity’s rights and obligations in case of termination for a contractor-caused default. It states that the government entity is not responsible for the cost associated with unconstructed works and that it is entitled for repayment of advance payment and progress payment made for such works. However, the government entity representative shall not his power under the default clause to acquire any construction materials unless it is determined that the government entity does not have such title under the contract. The government entity representative shall acquire construction materials to provide to another contractor only if it is difficult for the other contractor to have this material. Also, the government entity shall pay the contractor the price mentioned in the contract for all completed works and any construction material acquired by the government entity under the default clause.

Over payment to the contractor shall be avoided in order to protect the government entity against any potential liability towards third parties. The government entity representative should decide that the payment bond submitted by the contractor is enough to cover all third parties’ possible claims, demand the contractor to submit suitable relief statements stating that third parties have no lien rights over the construction works, and get a duly signed statement confirming the release of the government entity from any potential liability towards the contractor and his affiliates.

Clause (49.402-4) “Procedure in Lieu of Termination for Default” states the course of actions available to the Contracting Offices in case of termination for default, when in the government

entity's interest. The contracting officer may allow the contractor to continue the construction works under a revised construction schedule or a new subcontract. The contracting officer must also, in accordance with Clause (49.402-7) "Other Damages", claim any liquidated damages to which the government entity is entitled under the contract including administrative costs and any suitable action as prescribed in Clause (32.6) to state the government entity demand for the damages.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

Delays in construction projects are generally unavoidable and almost inevitable due to the nature of construction projects in terms of site conditions, material diversity and number of parties involved. Therefore, understanding the types and consequences of delays, especially in public projects, is an important subject in the construction industry for the contract parties to be well aware of and prepared to assume the responsibilities and understand the obligations each party may have as a result of any delay when arise.

Upon entering into a binding construction contract, the contractor shall be willing and obliged to perform all his duties under the signed contract, among which is completing the construction works in accordance with the agreed time program. The construction program and completion date of public contracts are conditions that any breach of which may lead to legal actions and compensation for damages or/and termination of contract.

Public procurement contracts under both common and civil laws grant the government entity the right to take certain measures and actions to protect the interests of the public. Whether defined as liquidated damages or delay penalties, both are inserted in public contracts to compensate the government entity for inexcusable delay caused by the contractor and to encourage the contractor to complete construction works on time.

Construction delay is a risk the contractor should take into account at the bidding stage, while the government entity should prevent and avoid by inserting and applying delay damages clause to protect its interests and to use this clause to encourage the contractor to complete works on time.

Completing public projects on time is a condition in public contracts as these projects are procured based on the needs of the public, the delay of which will have negative impact on the services the governments around the world are striving to offer to their citizens. Besides, public projects are funded by the citizens through the taxes and fees they pay for their governments to acquire in return the basic services and products they may all need. The government entity's right to impose delay penalties / liquidated damages without the need for a legal action nor a proof of default evidence increases the financial risk of the contractor and push the contractor to submit its tender at higher price than usual to compensate for the possibility of delay risk.

Based on the above and the nature of public projects, procurement laws, polices and codes in all countries around the world favour the interests of the public, represented by government Entities, over the contractor's commercial interests. Therefore, public construction delays are regulated extensively and damages to either parties of the public contract in case of delay is addressed in all administrative contracts to make sure the public project will finish on time and within allocated budget. As such, construction delays will have financial impact on both the contractor and the government entity alike subject to the party who is responsible for the delay.

Public projects have certain importance given the service they provide to the public, which make them different from private contracts that are based on commercial interests. Therefore, governments around the world have their own procurement laws or codes that govern the

procurement of the needed products and services. However, due to the difference in the legal systems of different countries around the world, there will be certain differences in the way how public construction projects are governed subject to what the enacted laws state.

The power the government entity has in an administrative contract over private contract is among the major differences between public and private contracts which include the power of unilateral termination either for default or convenience. The government entity will always have the upper hand in the procurement process given its mandate to serve the public on benefits basis rather than commercial basis which private contracts have.

Under public procurement law, when a contractor encounters inexcusable delays in delivering the public construction works, the government entity will be entitled for delay damages without referring the case to the court or have proof of damage, subject to the enacted procurement law provisions and the judicial system where the construction works are carried out.

Compensation for delay damages varies from judicial system to another. In common law jurisdiction, the delay compensation shall take the form of liquidated damages and it should be reasonable and comparable with the damage suffered by the government entity, otherwise it will be considered a penalty and will not be enforceable. In civil law jurisdiction, liquidated damages and penalties are used interchangeably, thus penalty clause is used to compensate the government entity for delay damages and it is enforceable, however, the Judge has the right to alter the penalty amount to make the compensation equal to the actual damage.

Under Dubai procurement law, there is a maximum limit for the amount of delay penalty that may be imposed on the contractor which is 10% of the original contract value, while under FAR there is no limit for the liquidated damages and may continue accumulating until the handover of the project, unless agreed otherwise. When a public construction contract is terminated, the

liquidated damages clause will generally survive under FAR while it will fall down under Dubai law, unless expressly agreed otherwise.

Concurrent delay under public contracts is still a controversial subject in terms of the parties' rights and obligation should it happen, even standard form of contracts do not expressly include it within its terms, except the recent FIDIC Redbook 2017 which only provides a definition of such delay and leave it to the parties to decide on how it should be tacked. Therefore, and in the absence of lawful clauses on concurrent delay, courts rely on the expressed terms included in the contract between the parties to decide on the rights and obligation arising from concurrent delay.

Some public procurement laws, especially in the USA, allow for the principle of “No Damage for Delay”, which entitles the contractor for time extension only, but no money, in case a public project is delayed due to the government entity act. Despite the unfairness of this principle to the contractor, it is still a risk that the contractor should allow for in his offer in order to recover the potential financial liability in case of government entity delay. On the other hand, Equitable Adjustment method is also used in USA to compensate the contractor in case of government-caused delay where the contractor is compensated for both time and cost. Public contracts in UAE are more towards “No Damage for Delay” where the contractor is only entitled for extension of time without cost.

Excusable delays that are not caused by the contractor have to be brought to the attention of the government entity within certain time bar from the date it happens, otherwise, the contractor shall lose his rights of time extension and/or cost. In USA, the time bar is (10) days while in UAE it is (30) days.

6.2 Recommendations

Despite the similarity of public procurement law provisions enacted in USA and UAE, in terms protecting the interests of the public when procuring public products and services, there are few procedural differences that would embrace the government entity's rights under a public construction contract.

Based on the top causes of construction delays that include: contractor's financial problems and client's variation orders, following are some of the USA public procurement practices that I suggest adopting and include in the UAE public procurement law:

- Introduce Payment Bond as one of the bonds the contractor is required to submit to the government entity in order to protect the rights of suppliers and subcontractors working on a project.
- Conduct a cost / benefit analysis study on the possible impact of liquidated damages clause on the contract price and decide the delay damage rate accordingly while insuring that the construction schedule is realistic in light of the project nature, environment, and complexity.
- Raise the maximum limit of liquidated damages above the 10% of the contract value in order to delay the costly decision of termination and prevent the situation of an open-end contract that the contractor will take advantage of when the delay damages reach its maximum value.
- Add the project financier as a signatory to the public contract to create a joint liability with the contractor towards his obligations under the contract.
- Decrease the variation orders limit below the 30% of the original contract value that is stipulated in the recent UAE public procurement law no (12) of 2020 (which was 15%

in the previous law) in order to minimize the disruption of the contractor's construction schedule.

- Make sure to include in the contract the clause of "Extension of Time" in order to eliminate the case of "Time at Large" where the project is delayed by the government entity without a mechanism in the contract to grant extension of time, thus the liquidated damages clause may fall down and the government entity will lose the right to recover the damages caused by the contractor's delays, given the right of the judge or arbitral tribunal to grant the contractor an extension of time and reduce his financial obligations towards the liquidated damages.
- Given the principle of contract autonomy, liquidated damages amount agreed between the parties should not be altered or changed by the court or arbitral tribunal, so as to provide the financial comfort to the parties for the limit of financial obligations each party has towards the other in case of default.

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