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**Entitlement to Extension of Time in cases of Concurrent  
Delays under the UAE Law**

استحقاق الحصول على تمديد مدة المشروع في حالات التأخيرات  
المتزامنة وفقا لقانون دولة الامارات العربية المتحدة

**By**

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Dissertation submitted in partial fulfilment of the requirements for the  
degree of MSc Construction Law and Dispute Resolution

Faculty of Construction Law and Dispute Resolution

Dissertation Supervisor  
Professor Aymen Masadeh

June 2013

## DISSERTATION RELEASE FORM

Student Name	Student ID	Programme	Date
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<b>Title</b> <b>Entitlement to Extension of Time in cases of Concurrent Delays under the UAE Law</b>
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## **Entitlement to Extension of Time in cases of Concurrent Delays under the UAE Law**

### **Abstract**

Concurrent delay in construction is a controversial and interesting topic. It involves risks but is often seen as an avenue to evade contractual liability towards the other party. The absence of clear provision in UAE Law regarding concurrent delay means that the task of resolving concurrent delay disputes is not an easy one. Each party tends to present his claim by making reference to foreign legislation or recommendations, paying no heed to the unalterable fact that the governing law of contract is UAE law. This study aims to identify the rules and the basis for judges in the UAE to determine the criteria for awarding extension of time (EOT) in cases of concurrency and to identify the UAE law's approach to concurrent delay. In addition, this study (a) attempts to highlight the vital importance of the program of work (b) examine the accepted Delay Analysis method adopted by UAE courts to determine extension of time, and (c) identify the precise role of experts delegated by courts in the UAE. The study references relevant cases in UAE and Dubai courts of Cassation. It concludes that the Contractor may be entitled to an extension of time reference to Article 894 of UAE civil transaction code for the full duration of the delay, where the dominant cause of that delay is related to Employer risk. Concurrent delay may not, however, prevent the contractor from cost compensation under the UAE law. The contractor needs to prove a causative link between the delay and the damages sought, making reference to Article 283 to successfully pursue cost compensation. The findings of this dissertation are intended to benefit future submissions and evaluations of Extension of Time claims in cases of concurrent delay and ensure these are wholly compatible with the laws of the UAE.



## الخلاصة

تأخيرات المتزامنة في البناء هو موضوع مثير للجدل ومثير للاهتمام. أنها تنطوي على مخاطر ولكن غالبا ما ينظر إليها على أنها وسيلة للتهرب من المسؤولية التعاقدية تجاه الطرف الآخر. في ظل غياب نص واضح في قانون دولة الإمارات العربية المتحدة بشأن تأخيرات المتزامنة يجعل مهمة حل النزاعات المتعلقة بتأخيرات المتزامنة ليست بالسهلة. حيث يميل كل طرف إلى تقديم مطالبته بجعل الإشارة إلى تشريعات أو توصيات أجنبية، متجاهلا بذلك حقيقة غير قابل للتغيير أن القانون الذي يحكم العقد هو قانون دولة الإمارات العربية المتحدة. تهدف هذه الدراسة إلى التعرف على القواعد والأسس للقضاة في دولة الإمارات العربية المتحدة لتحديد معايير لمنح تمديد الوقت في حالات التأخيرات المتزامنة والتعرف على نهج قانون دولة الإمارات العربية المتحدة إلى تأخيرات المتزامنة. وبالإضافة إلى ذلك، فإن هذه الدراسة (أ) تحاول تسليط الضوء على الأهمية الحيوية لبرنامج العمل (ب) النظر في أسلوب التحليل تأخير المقبولة التي اعتمدتها المحاكم الإماراتية لتحديد تمديد الوقت، و (ج) والتعرف على دور الخبراء الهندسيين المنتدبين عن المحاكم في دولة الإمارات العربية المتحدة. وكانت مراجع الدراسة هي القضايا ذات الصلة في محاكم الإمارات العربية المتحدة ومحكمة النقض العليا في دبي. ويخلص إلى أن المقاول قد يستحق لتمديد الوقت المحدد وفقا للمادة 894 من قانون المعاملات المدنية الإمارات العربية المتحدة لمدة كاملة من التأخير، حيث يرتبط السبب المهيمن من هذا التأخير إلى صاحب العمل. تأخير المتزامنة قد لا تعوق المقاول من تعويض المادي، وفقا لقانون دولة الإمارات العربية المتحدة. المقاول يحتاج لإثبات وجود علاقة سببية بين التأخير والأضرار المطلوبة، مع الإشارة إلى المادة 283 للمطالبة بالتعويض المالي. والمقصود من نتائج هذه الأطروحة للاستفادة المستقبلية في تقديمات وتقييم المطالبات المتعلقة بتمديد الوقت في حالات تأخيرات المتزامنة وضمان انها متوافقة كليا مع قوانين دولة الإمارات العربية المتحدة.

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## **Key Words**

Approach – As Built – As-Planned V As-Built Method (PvA) – Case – Causation Test 'But for' – Civil Transaction Code (CTC) – Claim – Collapse as Built Method – Common Law – Cost Compensation – Completion Date – Concurrent Delay – Consider – Construction – Contract – Contractor – Contractor's risk – Court – Critical Path – Date for Completion – Delay Analysis – Delay – Determine – Dispute – Dominant Cause Approach – Dubai Court of Cassation – Effective – Eligibility – Employer – Employer's Risk – Entitlement – Expert – Extension of Time (EOT) – FIDIC – Impacted As Planned Method – Jurisdiction – liability – Malmaison Test – Method – Muqawala – Prevention Act – Prevention Principle – Programme of Work – Prospective Technique – Protocol – Relevant – Retrospective Technique – Society of Construction Law (SCL) – Time impact analysis (TIA) – UAE law.

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## Chapter One

### Introduction

In recent years, the UAE has witnessed remarkable and impressive development in the realm of the construction industry. However, in the face of worldwide recession, the value of construction contracts delayed or cancelled in Dubai has hit \$75 billion, and affected 59 projects, according to a report released by HSBC Global Research.<sup>1</sup> The number of cases filed with Arbitration Centers has increased. For example, cases lodged with the Dubai International Arbitration Centre (DIAC) increased from 77 in 2007 to 292 in 2009. The total value of disputed contracts registered with the DIAC between January 2010 and June 2010 was AED 2.38 billion with most cases relating to real estate and construction.<sup>2</sup> The Dubai International Financial Centre (DIFC) Court of First Instance also witnessed an increase in the number of cases filed up from 26 in 2010 to 30 cases by 2011.<sup>3</sup>

Construction contracts are governed by the Construction (*Muqawala*) Chapter of the UAE Civil Transaction Code of the year 1985 (CTC).<sup>4</sup> In this law, there is no clear or specific provision that caters to the awarding of extension of time (EOT) to the Contractor in case of concurrent delay. This study sets out to identify the rules and the basis for judges in the UAE to determine the eligibility for awarding extension of time in cases of concurrency and, how it shall be determined.

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<sup>1</sup> Jamie Stewart, Construction Week, ' \$75bn of projects under pressure in UAE ' ( Construction Week 2009) [http://www.constructionweekonline.com/article-4315-75bn\\_of\\_projects\\_under\\_pressure\\_in\\_uae/](http://www.constructionweekonline.com/article-4315-75bn_of_projects_under_pressure_in_uae/) [19 Dec 2012]

<sup>2</sup> Dubai International Arbitration Centre, 'Bi-Annual Statistics'(2010) available at [http://www.diac.ae/idias/resource/photo/diac\\_biannual.pdf](http://www.diac.ae/idias/resource/photo/diac_biannual.pdf) [9 April 2013]

<sup>3</sup> DIFC, 'Factsheet' (2012)

<sup>4</sup> UAE Civil Transaction Code 1985, Chapter III, Part 1, Section 1



## 1.1. The Importance of the Study

A concurrent delay dispute is a debatable subject in the UAE's construction industry. Each party attempts to use the concurrent delay as an excuse against the other party in order to skip liability for delay damages. Some of the standard contracts have addressed the issue of concurrent delay.<sup>5</sup> By comparison, other standard contracts such as 'FIDIC',<sup>6</sup> which is broadly used and adopted in the UAE construction industry in both private and governmental sectors,<sup>7</sup> are silent. In the absence of a clause in the contract that addresses the issue of concurrent delay, the disputed parties may attempt to resolve the conflict by referring to foreign legislation or institutional recommendations.

However, even the common law jurisdictions have several approaches and rules relating to the concurrent delay argument. These approaches are addressed in chapter 3 of this study and are extracted from one of the latest and most famous cases that dealt with the matter of concurrent delay. An attempt to adopt a particular approach which has its basis in courts outside the UAE, may not necessarily be the most likely approach for UAE's courts to consider. This dissertation is vitally important to address the following pertinent question:

What is the UAE law's approach in regard to concurrent delay?

Hence, it may be advisable to include a competent clause regarding concurrent delay that complies with UAE law; and to adopt a method to resolve such disputes in courts that the UAE recognizes.

---

<sup>5</sup> Australian Standard, General Conditions of Contract (AS2124-1992), Clause 35.5 'where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause referred to in the preceding paragraph, then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for Practical Completion.'

<sup>6</sup> *Fédération Internationale Des Ingénieurs-Conseils*, Conditions of Contract for Construction for Building And Engineering Works Designed By The Employer ( 4 edn 1987 & 1 edn 1999)

<sup>7</sup> Dubai Municipality Contract, available at. <http://www.docstoc.com/docs/3005948/DUBAI-MUNICIPALITY-CONDITIONS-OF-CONTRACT-FOR-WORKS-OF-CIVIL-ENGINEERING>

## **1.2. Aim and Objectives of this Study**

This dissertation focuses on the matter of concurrent delay on construction projects. The aim of this study is to determine the Contractor's eligibility to an EOT and cost compensation in the case of concurrent delays in the UAE. The objective of this study is to ascertain whether the practice adopted in the construction industry and Common Law rules of determination of the concurrent delays are appropriate and acceptable under UAE jurisdiction. In addition, this study attempts to establish the power of the programme of work and the accepted delay analysis method used by courts in the UAE to determinate EOT; and also to establish the role of experts delegated by the courts in UAE.

## **1.3. Method Adopted in this Study**

This dissertation analyses cases under UAE courts and compares them with the approaches in common law jurisdictions. The aim is to identify the UAE law's approach for determining the entitlement to an EOT in the case of concurrent delay.

The expectation of this study is that the recognized approach by UAE courts in regard to concurrent delay disputes is different from the approaches of common law jurisdictions. The prevalent practice in the UAE construction industry is to be influenced by approaches of common law jurisdictions that may not be acceptable to the courts in the UAE.

The reason for conducting a comparative study between the two legal systems is that it will assist in understanding the UAE legal position in concurrent delay disputes. It will also help clarify the matching and conflicting points between the UAE law and Common Law jurisdictions. The UAE's construction industry is dominated by professionals from all around the world. They are from widely different backgrounds and have experiences of concurrent delay which are founded on different legislative systems or based on recommendations provided by certain institutions such as the Society of Construction Law (SCL). This collective experience may not, however, be recognized by the UAE legislature and therefore will not be helpful when disputes of concurrent delay end up as legal proceedings.

The obstacles encountered during this study mainly centre on having limited access to cases in the UAE courts and a lack of cooperation by judges and arbitration parties due to

confidentiality of the cases. Due to a lack of resources devoted to this subject in the UAE, this dissertation attempts to collect opinions from professionals working in the country's construction industry regarding the best practice to evaluate and overcome disputes related to concurrent delay. The opinions of these professionals will give some idea of the extent of compatibility of the construction industry with the law in the UAE.

It is necessary to explain the meaning of concurrent delay and some of the engineering practices prior to starting legal analysis. This allows smooth flow on the subject of concurrent delay, starting from the foundation of understanding the technicalities, and then moving on to known legal concepts in common law jurisdictions and finally discovering how the UAE law deals with concurrent delay.

This dissertation has been structured as follows. The next chapter gives an overview of the general perceptions of concurrent delays. Chapter three includes the approaches adopted by courts in the Common Law and the UAE in resolving concurrent delay dispute. Finally, chapter four presents the conclusion of the study.

## Chapter Two

### Overview of Concurrent Delay

This chapter intends to clarify the perception of concurrent delays in construction. The chapter starts with defining the concurrent delay and then moves on to give a brief introduction about the delay analysis methods used to expose concurrency. Finally, it highlights the recommendations provided by well known organizations and the extent of its influence in the UAE construction industry.

#### 2.1. Concurrent Delay Definition

Concurrent delay can be defined as two or more events of delay occurring simultaneously and each one of them affecting the time for completion of the project. The SCL has described this as true concurrency. However the terminology of concurrent delay also describes the conditions where two events of delay occur consecutively, but have a concurrent effect on the project completion date, a scenario which the SCL called the ‘concurrent effect’.<sup>8</sup>

In *Adyard Abu Dhabi v SD Marine Service*<sup>9</sup>, Hamblen J accepted the definition of concurrent delay as, ‘a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.’<sup>10</sup> If the two events are not equal in effect, one will be treated as the effective and the other will be ineffective cause of delay. The ineffective cause of delay is treated as if it were not causative at all.<sup>11</sup> Therefore, the definition of concurrent delay, has established that three elements must be met to observe concurrency, which are as follows: 1) Simultaneous occurrence of the events of delay. 2) The events of delay are effective causes of delay. 3) Equal contributory strength.

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<sup>8</sup> SCL, *Delay and Disruption Protocol* (SCL, England 2002) Appendix A

<sup>9</sup> [2011] EWHC 848

<sup>10</sup> SCL, John Marrin QC, ‘concurrent Delay Revised’ a paper presented to the society of Construction Law at a meeting in London on 4<sup>th</sup> December 2012 ( 179 SCL, February 2013)

<sup>11</sup> SCL, John Marrin QC, ‘concurrent Delay Revised’ a paper presented to the society of Construction Law at a meeting in London on 4<sup>th</sup> December 2012 ( 179 SCL, February 2013)

Another definition of concurrent delays is by Richard Seymour QC in *Royal Brompton Hospital NHS Trust v Hammond*<sup>12</sup>. He said: ‘The works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not. In such circumstances there is a real concurrency of causes of delay.’<sup>13</sup> He has taken the status of the project into the account when defining concurrency. However, ‘Seymour LJ’ did not consider whether the event of delay shall have equal causative potency or not.

The definition of concurrent delay in *Adyard*<sup>14</sup> is comprehensive. The concurrency established when the events of delay are relevant, effective and having equal causative potency.

## 2.2. Delay and EOT Clauses in FIDIC 1999

The FIDIC 1999 standard conditions of contracts was originally drafted from the ICE Standard Form of Contract, which was drafted for a domestic use in England. Therefore, FIDIC may not be considered by other countries’ legislative systems rather than common law legislation basis.<sup>15</sup>

The FIDIC 1999 includes certain clauses that contractors may refer to when claiming for an EOT due to relevant events of delay which are stipulated as Employer risks. These are summarized in the table below. Table (1) shows that there are 16 clauses in the FIDIC 1999 that entitle contractors to claim for an EOT and they are all linked to clause 8.4.<sup>16</sup>

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<sup>12</sup> [2001]EWCA Civ 206,76 Con LR 148

<sup>13</sup> John Marrin QC, ‘concurrent Delay Revised’ a paper presented to the society of Construction Law at a meeting in London on 4th December 2012 ( 179, February 2013) *Royal Brompton Hospital NHS Trust v Hammond* (no7) [2001]EWCA Civ 206,76 Con LR 148, para [31]

<sup>14</sup> *Adyard* (n 9)

<sup>15</sup> N Bunni, *The FIDIC Forms of Contract* (3<sup>rd</sup> edn, Blackwell Publishing, Oxford 2005) 17

<sup>16</sup> FIDIC 1999, CL 8.4 ‘The Contractor shall be entitled, subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes:’

No.	Clause Description	EOT		Cost	
		Entitle	Under Clause	Entitle	Under Clause
1.9	Delayed Drawings or Instructions	yes	8.4	yes	20.1
2.4	Right of Access to the Site	yes	8.4	yes	20.1
4.7	Setting Out	yes	8.4	yes	20.1
4.12	Unforeseeable Physical Conditions	yes	8.4	yes	20.1
4.24	Fossils	yes	8.4	yes	20.1
7.4	Testing	yes	8.4	yes	20.1
8.4	Extension of Time for Completion	yes	8.4	yes	20.1
8.5	Delays Caused by Authorities	yes	8.4	yes	20.1
8.9	Consequences of Suspension	yes	8.4	yes	20.1
10.3	Interference with Tests on Completion	yes	8.4	yes	20.1
13.2	Value Engineering	no		yes	13.2
13.3	Variation Procedure	yes	8.4	yes	20.1
13.7	Adjustments for Changes in Legislation	yes	8.4	yes	20.1
16.1	Contractor's Entitlement to Suspend work	yes	8.4	yes	20.1
17.4	Consequences of Employer's Risks	yes	8.4	yes	20.1
19.4	Consequences of Force Majeure	yes	8.4	yes	20.1
20.1	Contractor's Claims	yes	8.4	yes	20.1

**Table (1): The Employer's risks based on FIDIC 1999 and their relation to EOT claim.**

As can be seen in the table above, cost compensation due to EOT to the time for completion, is not automatically granted within clause 8.4. Contractors aiming to claim for cost compensation due to an extension of time (EOT) shall substantiate their claim by referring to clause 20.1 (Contractor's Claims).<sup>17</sup>

There is no clause in the FIDIC 1999 that addresses the issue of the concurrent delay. The FIDIC also does not address the methods used to determine the EOT. Instead the FIDIC has given the Engineer arbitral power to evaluate and determine the Contractor's entitlement to an EOT. Unless the parties agree to the Engineer determination, the matter is left to the decision of an Adjudication dispute board and further to Arbitration proceeding. The method the Engineer may adopt or follow in evaluating and determining the contractor entitlement to an EOT in case of concurrent delay dispute, is unknown if it is reflecting the UAE law or other school of law.

<sup>17</sup> FIDIC 1999, CL 20.1

To avoid such a dispute, it has been recommended to the contracted parties that they insert a clause in their contract addressing the issue of concurrent delay dispute.

### 2.3. Overview of Delay Analysis

Any construction project is a function related to time. It appears in various stages during the construction schedule, such as commencement, progress, completion, defect liability period and EOT.<sup>18</sup> Delay tends to be common in Construction industries. The reasons for events of delay that affect the completion date<sup>19</sup> could be many. Delay may occur due to Contractor, Employer, Engineer, Third party or Act of God. This section includes:

- Programming and Critical path
- Introduction of four types of common methods used to determine EOT in concurrent delay dispute and evaluation of each method
- Exploration of different methods and their results
- Recommendation made by SCL to resolve concurrent delay dispute
- Identification of the best delay analysis methods that can be adopted to determine EOT

#### 2.3.1. Programme of Work and the Critical Path

Before elaborating on the delay analysis methods, it is important to have a brief idea about the programme of work and the critical path. Many contract forms request a detailed programme of work to be submitted to the Engineer for his review and consent. The programme of work shows the Contractor's intention and method adopted for executing the works.

The construction process goes through a number of activities. These activities have a sort of relationship to how an activity is related to the start or finish of other activities.<sup>20</sup> The logical

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<sup>18</sup> Jhon Murdoch and Will Hughes, Construction Contracts Law and management, ( 4<sup>TH</sup> edn, Taylor & Francis, London & New York)

<sup>19</sup> completion date stipulated in the contract

<sup>20</sup> Primavera Project Management, index, critical path

relationships create a path consisting of numbers of activities that will be undertaken to complete the works. The programme of work consists of a number of paths, where the longest one in duration controls the project completion time, which is known as 'the critical path'. A delay in any of the activities located within the critical path will result in a delay to the finish date of the entire project.<sup>21</sup> The delay analysis is a method that reveals the relationship between the programme of work and the event of delay in determining the project completion date.

### **2.3.2. Delay Analysis Techniques**

Any change to the plan may result in delay to the completion date of the project. The impact of event of delay may be direct or consequential.<sup>22</sup>

Delay analysis techniques are either prospective or retrospective. The prospective technique forecasts the probable impact on the project completion date and can be used before and after the occurrence of an event of delay. Alternatively, the retrospective is used after the actual completion of the project in order to attempt to display the actual impact on the project completion date. There are several methods for delay analysis; however four practices are commonly used which are discussed later.<sup>23</sup>

#### **2.3.2.1. Impacted As Planned Method. (Prospective Techniques)**

This method involves inserting events of delay related to the Employer in the shape of activities having duration equal to the delay event duration or as a constraint and is properly linked to the affected activities on the planned programme. After the delay events are inserted in the programme, the revised completion date is calculated. The variance between the revised completion date and the planned completion date is the entitlement to EOT.<sup>24</sup>

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<sup>21</sup> K Pickavance, Delay and Disruption in Construction Contracts ( 3 edn, LLP, London 2005) 7

<sup>22</sup> Patrick Weaver, Delay, Disruption and Acceleration costs ( Mosaic , Project Services Pty Ltd, Practical PM Pty Ltd , 2005)

<sup>23</sup> Anthony F. Calekta, P. John Keane, Delay analysis in Construction Contracts ( 1 edn, Blackwell Publishing , Oxford, UK , 2008) page8

<sup>24</sup> Chris Larkin, ' To go retrospective or to go prospective' ( Construction Week, 2008) available at <http://www.constructionweekonline.com/article-2190-to-go-retrospective-or-to-go-prospective> accessed 2 November 2012



This method is an accepted approach to determine delay by the U.S Veterans Administration. It measures the contractor's work planned without considering or measuring the actual performance of the contractor at site. However the logic of the programme shall be unchallenged with reasonable activities duration.<sup>25</sup>

The Impacted as Planned method is simple and very easy to understand, requiring less effort and cost. The main requirement of this method is to have the events of delay start and finish dates recorded, in addition to the approved baseline programme.

The Society of Construction Law says that the Impacted as-Planned method can be used to determine EOT based on the contract terms, where the contractor is entitled to relief from LDs for likely effect of an Employer's.<sup>26</sup> In The Red Book 'FIDIC 1999', for example, Clause 1.9<sup>27</sup>, shows that it is not necessary that the project is in delay to grant EOT. If the event of delay will cause delay to the project completion, then the time for completion<sup>28</sup> has to be extended.

However, Calekta and Keane stipulated that this method is not a record of fact, commenting that, 'The as-planned programme is, after all, itself a theoretical model of how a particular contractor would like to build a project; it is not a record of fact'<sup>29</sup>. Another disadvantage of this method is that it not useful to analyse concurrent delays since it shows only the effect of the Employer risks on the programme of work.

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<sup>25</sup> Abdulaziz A. Bubshait & Michael J. Cunningham, 'Comparison of Delay Analysis Methodologies'( Journal of Construction Engineering and Management, 1998)

<sup>26</sup> 4.3 & 4.4

<sup>27</sup> FIDIC 1999, CL1.9, 'If the Contractor suffers delay and/or incurs Cost as a result of a failure of the engineer to issue the notified drawing or instruction within a time which is reasonable and is specified in the notice with supporting details, the contractor shall give notice to the Engineer and shall be entitled subject to clause 20.1 [Contractor's Claims] to: (a)an extension of time for any such delay, if completion is or will be delayed, under sub-clause 8.4 [ Extension of time for Completion] and,(b)Payment of any such cost plus reasonable profit, which shall be included in the contract price.'

<sup>28</sup> FIDIC, clause 1.13.3.Time for Completion: the original duration of the project to execute and complete that work stipulated within the contract.

<sup>29</sup> Anthony F. Calekta, P. John Keane, Delay analysis in Construction Contracts ( 1 edn, Blackwell Publishing , Oxford, UK , 2008) page79

In accordance with UAE law, a contractor must be in actual delay as per Article 894.<sup>30</sup> This method is built upon a theoretical assumption and not based on facts – and thus, may not be practical to rely on to prove delay and damages in legal proceedings in the UAE.

In conclusion, this method is not an effective technique to determine EOT in the case of concurrent delay dispute. However, it can be used for certain events of delay occurring at the early commencement of the project where the Contractor is unable to commence the work at site due to reasons beyond his control.

#### **2.3.2.2. Time Impact Analysis ‘TIA’ (Prospective Technique)<sup>31</sup>**

The Time Impact Analysis was defined as the delay analysis method, where the influence of each and every event of delay on the program of work is determined separately at the period of time in which it occurs.<sup>32</sup> This method shows the time impact on the contractor’s plan for the remaining works.<sup>33</sup>

The TIA method is recommended by the SCL<sup>34</sup> as it deals with the multipart issues of concurrent delay. The TIA method is commonly used in the UAE and is the preferred method for determining EOT.<sup>35</sup> Opinions of professionals were taken for the most preferred method for delay analysis. The result was that 20 out of 28 professionals with experience in EOT claims and delay analysis believed that the TIA method is more often the acceptable method in the UAE. However, the disadvantage of this method was that it is difficult to communicate and may be challenged if it does not reflect the facts.

This method is broadly accepted in Construction practice; The TIA method can be applied prospectively and retrospectively based on actual records and facts. Therefore, it may be deemed an acceptable delay analysis method by the UAE court under CTC, article 894<sup>36</sup>. And

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<sup>30</sup> UAE Civil Transaction Code 1985, Article 894

<sup>31</sup> Time impact analysis has other names such as modified impacted as planned or modified impacted as built. In Great Eastern HHJ Wilcox called it impacted as planned.

<sup>32</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) Appendix A, Definitions and glossary.

<sup>33</sup> Chris Larkin, ‘To go retrospective or to go prospective’ (Filed in Contract Administration, Project Management, 9 September 2008) available at [ [http://www.cmguide.org/archive/4\[2/11/2013\]](http://www.cmguide.org/archive/4[2/11/2013])]

<sup>34</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) 3.2.12

<sup>35</sup> Appendix B

<sup>36</sup> UAE Civil Transaction Code 1985, Article 894

also article 40<sup>37</sup> where it says the event of delay shall refer to its time of occurrence. Moreover the TIA method is a useful tool that can address and examine the issue of concurrent delay.

#### **2.3.2.3. As-Planned V As-Built Method. (Retrospective Technique )**

The As-Planned vs. As- Built method (PvA) involves comparison between the planned and actual durations for activity as an entitlement to an EOT.<sup>38</sup> The as-built programme is prepared periodically on the project; it is a chronological trace for the actual time of each activity.

The PvA method simply compares the planned durations with the actual durations of the construction of activities in the programme. The variance between the planned and the actual durations is the period for entitlement to an EOT. This method shows the delay but it neither shows the reason for the delay nor the party responsible.<sup>39</sup> The PvA method is suitable for small projects which contain a small number of activities. However, this method may not be acceptable in the UAE where the reason and the party responsible for the delay must be revealed

#### **2.3.2.4. But for / Collapsed As Built ( Retrospective Technique )**

This method involves removing the impact of events of delay from the updated programme and establishing how the works would have progressed in the absence of delay events. The Collapse as-built is a fact-based method and it relies on records.<sup>40</sup> The rule of the Collapsed as Built is 'had the delay event not occurred, when would the project have finished?'<sup>41</sup>

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<sup>37</sup> UAE Civil Transaction Code 1985, Article 40, 'There is a presumption that an event (known to have occurred) has occurred in the immediate past.' الأصل إضافة الحادث الى أقرب أوقاته

<sup>38</sup> Rob Palles, Clark , ' The as-planned –v- as-built method of delay analysis'(Brewer Consulting 2006) <http://www.brewerconsulting.co.uk/cases/case.php?id=5942>

<sup>39</sup> Jim Doyle Dip, 'Concurrent Delay in Contracts' ( Doyle's Construction Lawyers 2005)

<sup>40</sup> Chris Larkin, ' To go retrospective or to go prospective' ( Filed in Contract Administration, Project Management , 9 September 2008) available at [ [http://www.cmguide.org/archive/4\[2/11/2013](http://www.cmguide.org/archive/4[2/11/2013)]

<sup>41</sup> David Goodman, 'Demonstrating delay: A brief introduction to the 'Collapsed As-Built' (or 'As-Built-But-For') methods of delay analysis' (Brewer Consulting 2009)

The collapsed method is a difficult one for investigating concurrent delay. If two events had affected a project completion date, which event would we collapse? <sup>42</sup> Moreover, It takes much time, effort and cost to prepare an as built programme and to examine the accuracy of the records. A high degree of care is required; otherwise the results will be misleading.

However, in my opinion, the biggest advantage of this method is that it can be a good tool in the absence of an agreed programme of work. This method is based on facts and not on assumption of how the work will be performed. In addition, it is a good analysis method that determines each party delay by removing one of the party delays; thereby establishing that the remaining delay is caused by the other party.

### **2.3.3. Delay Analysis Techniques and Different Results**

A comparison was made between three different delay analysis methods – As planned, As-built and Time impact analysis. The results demonstrated that the outcome delay analysis is not predictable and can give different results.

Table (2) below has been extracted from the study made, suggesting the suitable delay analysis method to be used against certain circumstances and conditions. <sup>43</sup>

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<sup>42</sup> Chris Larkin, 'To go retrospective or to go prospective' ( Filed in Contract Administration, Project Management , 9 September 2008) available at [ [http://www.cmguide.org/archive/4\[2/11/2013\]](http://www.cmguide.org/archive/4[2/11/2013])]

<sup>43</sup> Abdulaziz A. Bubshait & Michael J. Cunningham, ' Comparison of Delay Analysis Methodologies' ( Journal of Construction Engineering and Management, August 1998

Suggested used of Delay Analysis Methodologies			
Project control data for review and analysis (1)	Methodology		
	As- planned (2)	As- built (3)	Modified As - built (4) (Time Impact Analysis)
Original , approved construction schedule - CPM network or bar chart , with no progress status or updating having been performed	YES	NO	NO
Original , approved construction schedule - CPM network or bar chart , with some progress status or updating having been performed	YES	YES	NO
Original , approved construction schedule - CPM network or bar chart , with regular progress status or updating having been performed	NO	NO	YES
Original, approved construction schedule - CPM network or bar chart , with some progress status or updating having been performed . Evidence of concurrent and consecutive delay among parties	NO	NO	YES

**Table (2): The recommended delay analysis method against project material available.**

The study shows that the Time impact analysis method is the best practice for concurrent delay and it also shows that the selection of best practice for delay analysis depends on particular conditions. The TIA method is therefore recognized as the best practice that may be used in different conditions for dealing with concurrent delay.

The Protocol has categorized different types of analysis that can be conducted depending on available information as shown in table (3) below extracted from the SCL Protocol.<sup>44</sup>

<sup>44</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) 4.13

Type of analysis	As- planned programme without network	Network as - planned programme	Updated as- planned networked programme	As - built records
As planned vs. as - built	X	or X	and X	or X
Impacted as - planned		X		
Collapsed as built				X
Time impact analysis		X	or X	and X

**Table (3): The recommended type of analysis conducted for material available. extracted from the SCL Protocol.**

The Protocol recommends assisting EOT claims by using the Time impact analysis method. 'During the course of the project, Contractor delays and Employer delays may occur sequentially, but having concurrent effect. Therefore the protocol considered that the Time impact analysis method is recommended to be applied.'<sup>45</sup> The protocol has also mentioned that the selection of the delay analysis technique depends on the type and terms of contract. As shown in table (4) below.

Contract Terms and Conditions	as-planned	time impact analysis	as-planned vs as-built	collapse as-built
Contractor forms provides that contractor is entitled to relief from LDs for employer risks		yes	yes	Yes
Contract forms provide that contractor is entitled to relief from LDs for likely effect of an employer risk.	yes	yes		

**Table (4): The recommend delay analysis method based on the contract terms and conditions.**<sup>46</sup>

Some of the professionals working in this field claim that it does not matter which method is used for delay analysis, as any will finally lead to same result.<sup>47</sup> On the other hand, there are some professionals who argue that the delay analysis technique depends on the case conditions and type of event of delay. This opinion is widely supported; for instance Calekta

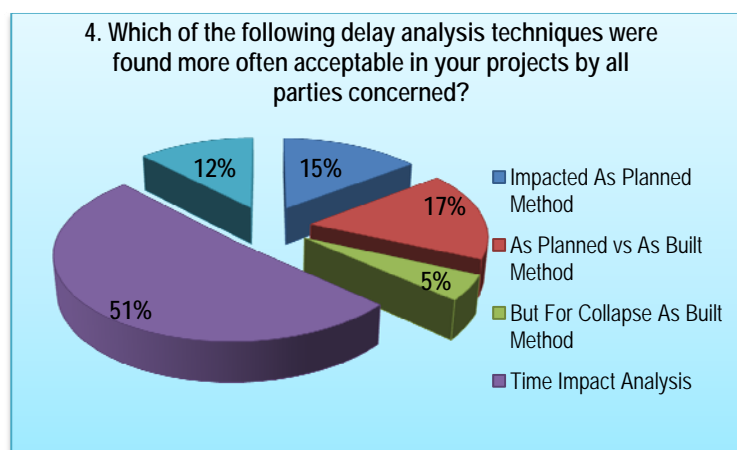
<sup>45</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) 3.2.12

<sup>46</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) 4.3 & 4.4

<sup>47</sup> Appendix B, Professionals' Opinions

and Keane said, ‘Determining which technique is the most appropriate to use under given circumstances is a subjective decision, guided by experience and the available information’.<sup>48</sup>

For the purpose of evaluating the variety of delay analysis methods for this study, the opinion of selected construction professionals was sought. Of those professionals, 54% had more than 10 years experience in the field of EOT claims. Of all those whose opinion was lobbied<sup>49</sup>, 32% were contractors, 25% Engineers, 25% Claim Evaluators and 18% project management or client representatives. They also had different backgrounds and experience – coming from the United Kingdom, the UAE and other Gulf states. The opinions of those involved with EOT claim and concurrent delay dispute in the construction field in the UAE has shown that the TIA is the more often acceptable method for delay analysis. Subsequently, the adopted technique for analysing delay depends on the type of event of delay and surrounding circumstances.<sup>50</sup> A breakdown of the opinions gathered for this study found that 51% considered the TIA to be the more often acceptable method for delay analysis, followed by 17% who favoured the as-Planned v as-Built method and 15% who preferred the Impacted as Planned method, as shown in chart 1 below. The remaining 17% of respondents favored other delay analysis techniques.



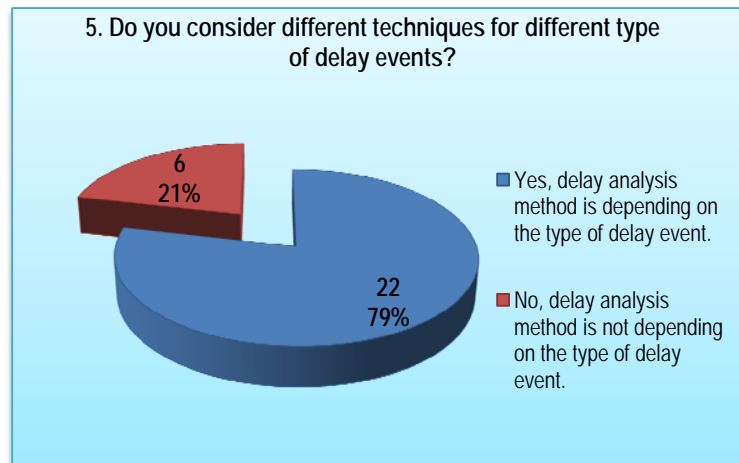
**Chart 1: The more often acceptable delay analysis method. Opinion of 28 professionals involve in EOT claims in UAE.**

<sup>48</sup> Anthony F. Calekta, P. John Keane, Delay analysis in Construction Contracts ( 1 edn, Blackwell Publishing , Oxford, UK , 2008) page8

<sup>49</sup> Appendix B, Professionals’ Opinions

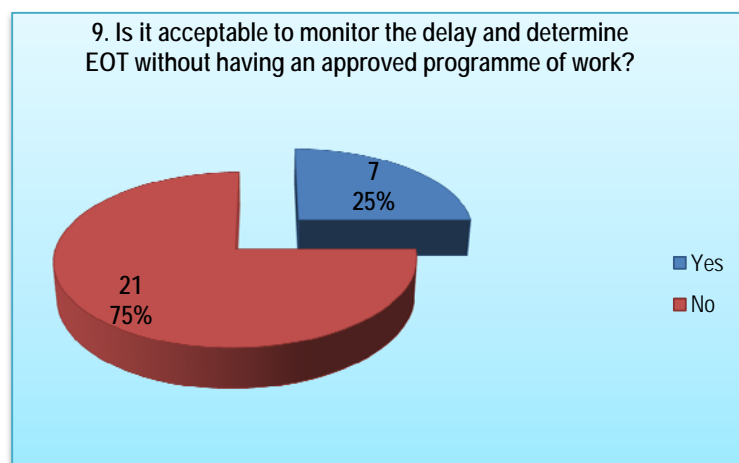
<sup>50</sup> Appendix B, Professionals’ Opinions

Of all the respondents, an overwhelming 79% were in complete agreement that the technique adopted for analysing delay is dependent on the type of event of delay and surrounding circumstances.



**Chart 2: The more often acceptable delay analysis method. Opinion of 28 professionals involved in EOT claims in UAE.**

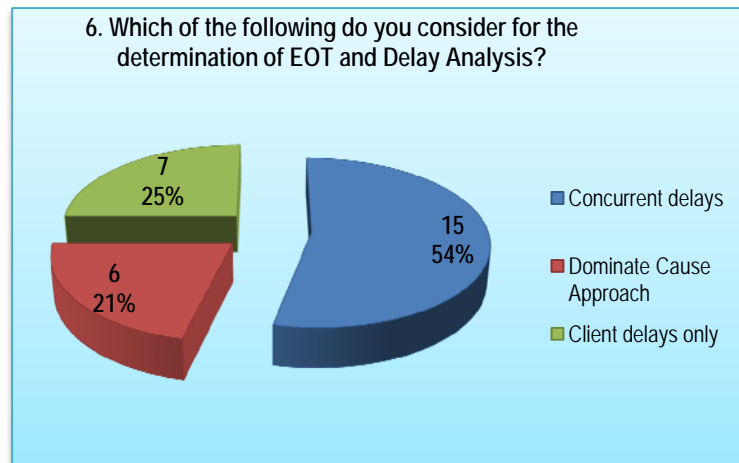
The programme of work is communicated to be essential to evaluate and determine EOT. 75% of the professionals did not accept the determination of EOT in the absence of agreed programme as shown in chart 3 below. The collapse as built method in fact can be used to determine EOT. The as built programmer will be built based on the record and then, after collapsing the event of delay, to monitor the impact on the completion date.



**Chart 3: The importance of the programme of work in determining EOT. Opinion of 28 professionals involved in EOT claims in UAE.**

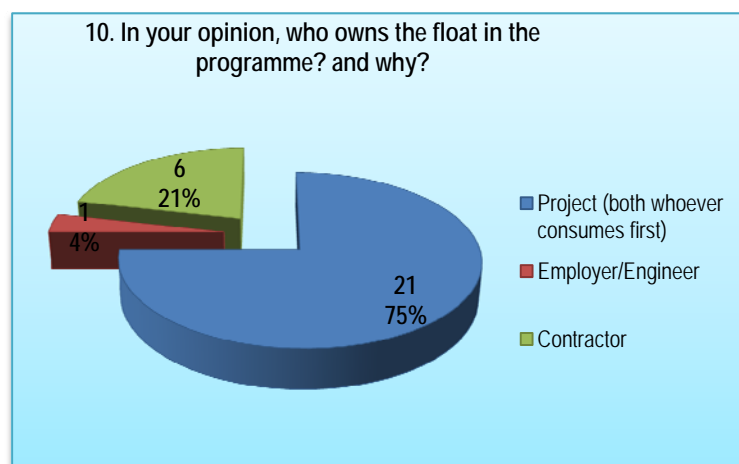


Although the majority were occupying a contractor's role, most of the professionals whose opinions were lobbied are seeking the concurrent delay in the EOT claims - a figure of 54% as shown in chart 4 below.



**Chart 4: The more often acceptable delay analysis method. Opinion of 28 professionals involved in EOT claims in UAE.**

The total float issue has been addressed for the purpose of delay analysis mechanism. 75% of the professionals' opinion that the total float is for both and to whoever consumes first as shown in chart 5.



**Chart 5: The owner ship of the float. Opinion of 28 professionals involved in EOT claims in UAE.**

The linkage between the total float and the concurrent delay would be a debatable issue. The total float will absorb one of the disputed parties' delay and expose the other party to damages. This concept of allocating the total float will result in a situation where the Employer and Contractor being in a race, who will consume the float first in order to put the other part in critical position! Consequently the project will be exposed to delays.

In conclusion, each method has its advantages and disadvantages; the approach adopted very much depends on the facts, time of occurrence, information available, terms of contract and nature of dispute. The TIA can be adopted in different circumstances but not in cases where there is no programme of work or where it has been challenged by contradicting the facts. In this case the 'But for / collapse as-built' approach would be more prudent.

#### **2.4. Society of Construction Law, Delay and Disruption Protocol**

In October 2002, the SCL issued the 'Delay and Disruption Protocol' as recommendations and best guideline for so-called proper delay analysis.

The protocol intends to be a balanced document and to apply its recommendation with common sense. It is not intended as a contract document.<sup>51</sup> The protocol recommends that the parties should deal with the impact of the event of delay as soon as possible and not wait for the actual impact. The EOT should be settled at the time of occurrence of the event of delay, which is known to be as an employer risk, is likely to prevent the completion date.<sup>52</sup> Article 1.2.12 from the Protocol says, 'For an EOT to be granted, it is not necessary for the Employer Risk Event already to have begun to affect the contractor progress with the works, or for the effect of the Employer risk Event to have ended'.<sup>53</sup>

The EOT can only be established if the Employer's event of delay is reduced or foreseen to reduce the total float for path of activities to below zero.<sup>54</sup> The SCL approach for concurrent delay is that the Contractor's delay should not reduce his entitlement to EOT. The Contractor

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<sup>51</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) page 3

<sup>52</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) page 5

<sup>53</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) 1.2.12

<sup>54</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) page 6

should be awarded EOT for the full period.<sup>55</sup> The Protocol has therefore cleared up the position on concurrency relating to an Employer taking advantage of the Contractor's delay. The Employer may try to use the contractor delay to issue an additional works or variation order after the completion date of the project, stating that the project is already in delay due to the contractor shortfall to perform the works in accordance with the agreed programme of work. The protocol considered this eventuality and decided to make a recommendation that the Employer has to issue or to grant an EOT to the contractor prior to the issue of such late instruction.<sup>56</sup>

The Protocol approach is to deal with the event at the time of occurrence in order to make certain the entitlement to EOT.<sup>57</sup> The SCL position on concurrency was shown in two cases.<sup>58</sup> *Henry Boot construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*<sup>59</sup> and in *Royal Brompton Hospital NHS Trust V Hammond & Ors*<sup>60</sup>.

In terms of cost compensation due to EOT, the Protocol position is that it is not necessary that entitlement to EOT automatically results in entitlement to cost compensation.<sup>61</sup> Article 1.6.3, says that, 'there is thus no absolute linkage between entitlement to an EOT and the entitlement to compensation for additional time spent on completing the contract.'<sup>62</sup> This argument by SCL is not clear and contradicts Article 1.8.1 in the same protocol 'Delay causes Prolongation. Prolongation causes increased cost.'<sup>63</sup> Contractor claim for an EOT is related to Prolongation claim, in which the contractor's head office and site overhead expenses increased due to the extended period of the project.<sup>64</sup>

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<sup>55</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) ) 1.4.7

<sup>56</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) 1.4.13

<sup>57</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) 1.4.11

<sup>58</sup> SCL, 'Construction Breakfast Seminar 29 October 2004' (Allens Arthur Robinson, 2004) *Henry Boot construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR32 and in *Royal Brompton Hospital NHS Trust V Hammond & Ors* (No7) [2001] 76 con LR148. page 9

<sup>59</sup> [1999] 70 Con LR32

<sup>60</sup> [2001] 76 con LR148

<sup>61</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) 1.6.2

<sup>62</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) 1.6.3

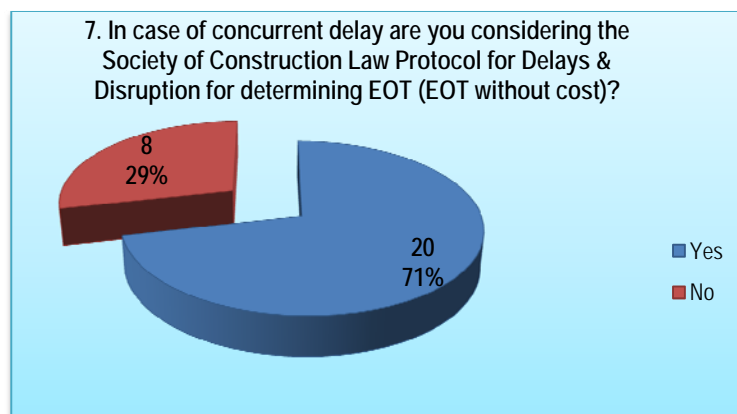
<sup>63</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) 1.8.1

<sup>64</sup> Procurement Practice Guide, 'Handling Prolongation and disruption claims' ( Procurement System for Construction, New South Wales Government Dec 2008)

In case of concurrency, contractor should only recover loss for the additional costs incurred due to the Employer's risk.<sup>65</sup> Contractor should separate the additional cost incurred due to Employer delays.<sup>66</sup> The concurrent delay has three possibilities which are as follows:

1. Employer delays are equal to Contractor delays
2. Employer delays are more than Contractor delays
3. Employer delays are less than Contractor delays

The Protocol established his position that a Contractor is eligible to recover prolongation cost only for the extra duration in the case where the Employer's delay is more than the Contractor's delay. Otherwise the contractor is not allowed any recovery of prolongation cost.<sup>67</sup> The opinion of the selected professionals shows that 71% are referring to SCL recommendation in case of concurrent delay that the contractor would be entitled to an EOT without cost. Chart 6.



**Chart 6: SCL recommendation in UAE. Opinion of 28 professionals involved in EOT claims in UAE.**

<sup>65</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) Page 7

<sup>66</sup> SCL, *Delay and Disruption Protocol* (reprint SCL, England 2004) Articles no. 9 'if the contractor incurs additional costs that are caused both by Employer Delay and concurrent Contractor Delay, then the Contractor should only recover compensation to the extent it is able to separately indentify the additional costs caused by the Employer Delay from those caused by the Contractor Delay. If it would have incurred in any event as a result of contractors delay, the Contractor will not be entitled to recover those additional costs.'<sup>66</sup>

<sup>67</sup> SCL, *Delay and Disruption Protocol* (reprint 2004) Article 1.10.4, 'If it would have incurred the additional costs in any event as a result of contractor delays, the Contractor will not be entitled to recover those additional costs. In most cases this will mean that the Contractor will be entitled to compensation only for any period by which the Employer Delay exceeds the duration of the Contractor Delay.'<sup>67</sup>

The protocol recommends using certain formula to calculate damages due to prolongation, if it is not possible to quantify the unabsorbed overhead, such as using of Emden and Eichleay formulae to recover head office overheads.<sup>68</sup> This recommendation may not be considered in legal proceeding as per CTC Article 283, where there must be a fault and damage, and causal link must be established.<sup>69</sup>

The merit of the SCL Protocol has been considered by the Supreme Court of South Australia in *Alstom v Yokogawa*.<sup>70</sup> The court rejected a delay analysis method used by the claimant as it is not recognized by the SCL.<sup>71</sup> Roy Pickavance commented on the SCL guidelines EOT that it will work well with the GC and NEC standard contract but it may not be easy to practice it under the JCT contracts. Notwithstanding the above, he commented also that it is a good procedure to manage the change in the project and would save time and cost.<sup>72</sup>

However, there are some concerns that protocol approach may be different than court approach.<sup>73</sup> In the UK, *Adyard Abu Dhabi v SD Marine Services*<sup>74</sup>, Hamblen J said; 'The SCL protocol is not in general use in contracts in the construction industry and nor has it been approved in any reported case. There was no evidence that the parties were aware of it or that they contracted with it in mind. Further, the SCL Protocol itself says that 'it is not intended to be a Contractual document. Nor does it purport to take precedence over the express terms of a Contract or a statement of law...'. In such circumstances the SCL Protocol can be of little assistance in relation to the legal causation issues which arise in this case.'<sup>75</sup> Roy Pickavance

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<sup>68</sup> SCL Delay and Disruption Protocol ( October 2002) 1.16.8

<sup>69</sup> UAE CTC, Article 283

<sup>70</sup> [2012] SASC 49 (2 April 2012)

<sup>71</sup> SPARKE HELMORE Lawyers, 'SA Supreme Court affirms Society of Construction Law Delay and Disruption Protocol', [http://www.sparke.com.au/sparke/news/publications/sa\\_supreme\\_court\\_affirms\\_society\\_of\\_construction\\_law\\_delay\\_and\\_disruption\\_protocol.jsp](http://www.sparke.com.au/sparke/news/publications/sa_supreme_court_affirms_society_of_construction_law_delay_and_disruption_protocol.jsp) accessed 13 March 2013

<sup>72</sup> R Pickavance, 'A Review of the Society of Construction Law Delay and Disruption Protocol' ( 2002)

<sup>73</sup> A Burr & N Lane, ' The SCL Delay and Disruption Protocol : Hunting Snarks' ( Sweet & Maxwell Ltd , construction Law Journal 2003) page 142

<sup>74</sup> [2011] EWHC 848

<sup>75</sup> *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848, <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2011/848.html&query=Adyard+and+Abu+and+Dhabi+and+v+and+SD+and+Marine+and+Services&method=boolean>

comments on the EOT protocol by SCL that it is an ‘attempt to dictate the law where no legal precedent exists’<sup>76</sup>

In conclusion, without it being written into the contract, judges in the UK or UAE may not use any reference to it in a case.

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<sup>76</sup> R Pickavance, ‘A Review of the Society of Construction Law Delay and Disruption Protocol’ ( 2002)

## Chapter Three

### Legal Analysis of Concurrent Delay

This chapter presents the approaches adopted by courts in both Common Law and UAE law in the case of a concurrent delay dispute.

The first section in this chapter includes introductions and a brief summary to a number of approaches adopted by common law jurisdictions, in order to facilitate the analysis of concurrent delay disputes in the UAE courts. The second section in this chapter includes issues related to concurrent delay disputes resolved by the UAE courts. The analysis of these cases will reveal the approach adopted by courts in the UAE.

#### 3.1. Concurrent Delay Dispute under the Common Law

There were various rules that courts in Common Law countries adopted in cases of concurrent delay based upon a review of the contract conditions, independent fact-finding and, finally, the application of ‘common sense’.

Near the beginning of a judgement on concurrent delay dispute, referring to *Wells v Army*<sup>77</sup>, in 1902, it was stated that a contractor cannot skip delay liability by relying on employer conduct of breach, if he also has been in delay. The rule extracted from *Wells v Army* stated:

‘Never mind how much delay there may be caused by the conduct of the building owner, the builder will not be relieved from penalties if he too has been guilty of delay in the execution of the works.’<sup>78</sup>

Nowadays, this concept has been changed due to the changes of ruling parameters that led to such judgment. Lord Osborne, hearing an appeal by City Inn, commented that this rule had been founded on a different basis. He said, ‘...that case was decided under contractual

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<sup>77</sup> (1902) 86 L.T. 764; (1902) 2 HBC 4<sup>th</sup> Edition 346

<sup>78</sup> City Inn Ltd v Shepherd Construction Ltd[2010] CSIH 68 CA101/00, *Wells v Army & Navy Co-Operative Society* 1902 86 L.T. 764; (1902) 2 HBC 4<sup>th</sup> Edition 346.

conditions which are completely different from those involved in the present case, I consider that it is of limited value.’<sup>79</sup>

This section highlighted four common principles adopted by courts in Common Law jurisdictions to resolve the concurrent delay dispute. These are

1. Causation Test
2. Dominant Cause Approach
3. Prevention Principle
4. Malmaison Test.

The following sections introduce Common Law approaches to concurrent delay dispute. They start with the principle, which can be devastating to the plaintiff, and would end up in what independent societies would consider a reasonable and fair determination to resolve disputes resulting from concurrent delay.

### **3.1.1. Causation Test**

Courts in Common Law countries adopt the causation principle to decide whether a particular act is so connected as to be a cause of the delay.

The ‘but for’ or ‘sine qua non’ rule is that ‘the injury would not have occurred but for the defendant's negligent act.’<sup>80</sup> Rephrasing the words in the rule to suit the question for concurrent delay damages, it would be (the delay to the project would not have occurred but for the Employer act).

In causation test, there are two conditions that must be met. Firstly, there is a causal connection between the Employer’s breach of contract and the Contractor’s loss. Secondly, the Employer’s breach of contract is the direct cause of the Contractor’s loss.<sup>81</sup> This principle

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<sup>79</sup>City Inn Ltd v Shepherd Construction Ltd[2010] CSIH 68 CA101/00

<sup>80</sup> <http://legal-dictionary.thefreedictionary.com/But+for+rule>

<sup>81</sup> J Doyle Dip, ‘Concurrent Delay in Contracts’(2005) available at [http://www.mosaicprojects.com.au/Resources\\_Papers\\_011.html](http://www.mosaicprojects.com.au/Resources_Papers_011.html) accessed 24 March 2013



was observed in *Thiess Watkins Construction Ltd v Commonwealth*<sup>82</sup>. Giles J said: ‘To take a simple example, if an owner-caused delay of 5 days commencing on day 15 means that a contractor which would have completed the work on day 20 still has 5 days work to do, and there is a neutral delay on day 23, I see no difficulty in concluding that the time based costs incurred on day 23 were caused by the original delay.’<sup>83</sup>

Applying the rule of causation to the above example, the result will be; but for the Employer caused delay, the Contractor would not have incurred the delay on day 23. This method is considered in determining cost compensation. However, some judges have different opinions about the eligibility of this test in order to determine EOT under concurrent delay cases. The same will be shown in the subsequent sections.

### **3.1.2. Effective or Dominant Cause Approach**

The concept of this approach is that one event only can be held as a true cause of delay. That event is considered to be the ‘dominant cause’ of delay. The claimant needs to prove that the effective cause of delay is the contractual liability of the respondent.<sup>84</sup>

Under the concept of dominant cause approach, ‘if there are two causes, one being the contractual responsibility of the Defendant and the other being the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point of order in time, but it is to be decided by applying common sense standards.’<sup>85</sup>

This approach has received support by the court in *City inn Ltd v Shepherd Construction*, where the ‘But for test’ does not apply to grant EOT in case of concurrent delay as it will prevent

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<sup>82</sup> (Giles J, NSW, Supreme Court, 23 April 1992).

<sup>83</sup> Thiess Watkins White Construction Ltd v Commonwealth, Giles J, NSW Supreme Court, 23 April 1992

<sup>84</sup> J Doyle Dip, ‘Concurrent Delay in Contracts’(2005) available at [http://www.mosaicprojects.com.au/Resources\\_Papers\\_011.html](http://www.mosaicprojects.com.au/Resources_Papers_011.html) accessed 24 March 2013

<sup>85</sup> J Marrin QC, ‘Concurrent Delay Revisited’ Society of Construction Law (2013), cited from Keating (5th edition, Sweet & Maxwell, 1991), Page 195.

contractor from recovering EOT in case of concurrent event of delay.<sup>86</sup> In *City Inn Ltd v Shepherd Construction Ltd*,<sup>87</sup> Lord Drummond Young said:

‘...a relevant event may still be taken into account even though it operates concurrently with another matter that is not a relevant event. In other words, the ‘but for’ rule of causation, that an event A will only be a cause of a result B if B would not have occurred but for A, has no application.’

Despite of the contractor’s delay, it is enough that the event of delay is a relevant event to be granted EOT. The concurrent delay shall not prevent the contractor from his entitlement to EOT due to Employer’s risk for a relevant event of delay. ‘Young LJ’ had supported the dominant cause approach to determine EOT in case of concurrency, he said,

‘I agree that it may be possible to show that either a relevant event or a contractor's risk event is the dominant cause of that delay, and in such a case that event should be treated as the cause of the delay. A similar principle was recognized in *Doyle*,’<sup>88</sup>

The challenge to this approach is in the case of true concurrent delay where both parties are found to have caused delay, of which both events of delay are ‘Dominant’. In such scenario, the responsibility of delay will be reasonably apportioned as ‘Young LJ’ said.

‘Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable.’<sup>89</sup> He added that, ‘I am of opinion that the part of the total delay apportioned to Relevant Events should be substantially greater than that apportioned to the two items for which the defenders are responsible. I consider that a fair and reasonable result would be that the defenders are entitled to an extension of time of

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<sup>86</sup> City inn Ltd v Shepherd Construction – a UAE perspective’, Pinsent Masons ( August 2010)

<sup>87</sup> [2007] ScotCS CSOH\_190 (30 November 2007) Par15

<sup>88</sup> *City Inn Ltd v Shepherd Construction Ltd* [2007] ScotCS CSOH\_190 (30 November 2007) Par20

<sup>89</sup> *City Inn Ltd v Shepherd Construction Ltd* [2007] ScotCS CSOH\_190 (30 November 2007)

nine weeks from the original Completion Date. On that basis I conclude that completion has been delayed beyond the completion Date by Relevant Events’.<sup>90</sup>

However, at the end, there must be a major reason for the delay incurred to the project. As ‘Young LJ’ said: ‘I accordingly conclude that the delay in completion was the result of concurrent causes. The majority of those were the result of the late instructions or variations issued by the architect, and are Relevant Events.’<sup>91</sup> Engineer’s instructions and variations are considered, under the common sense, to be relevant events of delay that hinders contractors to perform the works within the time stipulated in the contract’.

Lord Drummond’s judgement has been supported in the *City Inn* appeal, where Lord Osborne said: ‘Where there are potentially two operative causes of delay, the architect does not engage in an apportionment exercise. Where the contractor can show that an operative cause of delay was a Relevant Event, he is entitled to an extension to such new date as would have allowed him to complete the Works in terms of the contract. The words ‘fair and reasonable’ in the clause are not related to the determination of whether a Relevant Event has caused the delay in the Completion Date, but to the exercise of fixing a new date once causation is already determined.’<sup>92</sup> It is very impressive that the time for completion has to be changed due to an occurrence of any of the relevant events of delay, but it is the duration of that extension that shall be determined, and not the entitlement to EOT.

In the case of a concurred delay, the court may refer to the dominant cause of delay being a cause of breach of contract. In *Great Eastern Hotel Company Ltd v John Laing Construction Ltd & Laing Construction Plc*<sup>93</sup>, the court said: ‘I am satisfied on the basis of Mr. Mitchell’s evidence that the dominant cause of Trade Contractor delay was in fact the delay to the project caused by Laing’s proven breaches.’

In conclusion, in the case of concurrent delay, the ‘But for’ is not a preferable test compared to the dominant cause approach. There are conditions that must be met in accordance with the

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<sup>90</sup> *City Inn Ltd v Shepherd Construction Ltd* [2007] ScotCS CSOH\_190 (30 November 2007) Par161

<sup>91</sup> *City Inn Ltd v Shepherd Construction Ltd* [2007] ScotCS CSOH\_190 (30 November 2007) Par157

<sup>92</sup> *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68 CA101/00

<sup>93</sup> [2005] EWHC 181 (TCC)

dominant cause approach. Firstly, the event of delay shall be relevant for the claim to succeed. Secondly, the dominant cause shall be single; otherwise the risk will be reasonably apportioned.

### 3.1.3. Prevention Principle

The prevention principle was summarized in *Trollope & Colls v North West Metropolitan Regional Hospital board* [1973], by Lord Denning: <sup>94</sup> ‘The general rule of ‘Prevention Predicable’ is ... it is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to time stated. He cannot claim any penalties or liquidated damages for the non-completion in that time.’

The general concept of the prevention principle is that a party cannot benefit from its breach of contract. A party, which has been prevented from performing its contractual obligations due to an act of the other party, is not binding to perform that obligation.<sup>95</sup> This has been conveyed by Jackson J who said: ‘In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time.’<sup>96</sup>

Rolfe J in *Turner v Corporation Ltd v Co-ordinated industries Pty Ltd*. (1994) 11 BCL 202 at 212, has described the ‘Peak Principle’<sup>97</sup>: ‘Essentially it is that a party to the contract has been prevented from fulfilling its contractual obligation by virtue of conduct of the other party. The consequence is said to be that the ‘preventing party’ cannot rely upon the failure by the other

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<sup>94</sup> J Marrin QC, ‘Concurrent Delay Revisited’ *Society of Construction Law* (2013)

<sup>95</sup> P Godwin, & Others, ‘The prevention Principle, time at large and extension of time clauses’ (2009) available at <http://www.lexology.com/library/detail.aspx?g=09e90e60-fa47-411b-813d-0e3c6427f836> [25 March 2013]

<sup>96</sup> *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)* [2007] EWHC 447 (TCC) (06 March 2007)

<sup>97</sup> ‘Prevention Principle’

party to comply with its contractual obligations, even if the other party is otherwise in breach so that it could not have complied with its contractual obligations in any event. It is said this flows from a general stated principle that a party cannot benefit from its own wrong. Whilst the so-called principle may be stated in general terms, it seems to me it can only have that application, usually, in circumstances where the contract does not provide for the effect of breach causing prevention.’<sup>98</sup>

In contracts that do not contain a clause addressing the issue of EOT, the Contractor is committed to the date for completion stipulated within the contract without any extension of time. If a variation order occurs, this may be considered as misleading and prevention conduct. The Employer will not be able to claim liquidated damages for the contractor’s delay because the project duration has become at large.<sup>99</sup> This principle appears in *Gaymark investment v Walter construction group*,<sup>100</sup> In this case the Contractor failed to notify the Employer for an EOT within the time bar limitation due to the Employer’s event of delay. This resulted in putting the employer in the position of having committed an act of prevention with no contractual route for dealing with the subject. The court commented on the *Gaymark investment v Walter construction group*<sup>101</sup> that, ‘If the builder having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of the time for practical completion resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing conduct of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct.’<sup>102</sup>

The Prevention Principle may be avoided in the case of an EOT clause presented in the contract that grants EOT for that particular prevention act. In the absence of the EOT clause within the contract provisions, and if a prevention act occurs, the Contractor is not bound to the date for completion, but he is obliged to complete the work within a reasonable period of

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<sup>98</sup> Peak Construction ( Liverpool) Ltd. v McKinney Foundation Ltd.(1970) 1 BLR 111

<sup>99</sup> K Pickavance, Delay and Disruption in Construction Contracts ( 3 edn, LLP, London 2005) 624

<sup>100</sup> *Gaymark Investments v Walter Construction Group* (1999) NTSC 143 Appeal

<sup>101</sup> (1999) NTSC 143 Appeal

<sup>102</sup> *Gaymark Investments v Walter Construction Group* (1999) NTSC 143 Appeal, Turner Corporation Limited v Austotel Pty Limited [1994] 13 BCL 378 per Cole J at 384-385

time, and the Employer will not be able to apply liquidated damages.<sup>103</sup> Jackson J stated: 'It is in order to avoid the operation of the prevention principle that many construction contracts and sub-contracts include provisions for extension of time. Thus, it can be seen that extension of time clauses exist for the protection of both parties to a construction contract or sub-contract.'

However, there are certain conditions that contractors must comply with in order to rely on prevention principle to grant EOT. MR Justice Hamblen said in *Adyard*<sup>104</sup>, 'As Jackson J stated in the *Multiplex v Honeywell*<sup>105</sup> case, the prevention principle does not apply if the contract provides for an extension of time in respect of the relevant events. Where such a mechanism exists, if the relevant act of prevention falls within the scope of the extension of time clause, the contract completion dates are extended as appropriate and the Builder must complete the work by the new date, or pay liquidated damages (or accept any other contractual consequence of late completion).<sup>106</sup>

If the contractor fails to substantiate the delays to the project and he had failed to claim EOT in accordance with the clause provision time bar, then in that case, the contractor may not be contractually entitled to EOT and liquidated damages may be enforced.<sup>107</sup> However in UAE law this may not necessarily be true where the contractor may refer to CTC Articles 318 and 319<sup>108</sup> providing that the unjust enrichment is unlawful.

In *Turner Corporation Ltd v Co-ordinated Industries Pty Ltd*<sup>109</sup> the prevention principle has some limitation and conditions. A contractor, who has been hindered from performing his contractual obligation, cannot rely on the Employer prevention act for not performing his

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<sup>103</sup> Longworth Consulting, 'Let the Punishment Fit the Crime' (2009) available at <http://www.longworthconsulting.co.uk/news%20construction%20contract%2010.htm> [23 May 2012]

<sup>104</sup> *Adyard* (n 9)

<sup>105</sup> [2007] EWHC 447 (TCC) (06 March 2007)

<sup>106</sup> *Adyard Abu Dhabi v Sd Marine Services* [2011] EWHC 848 (Comm)

<sup>107</sup> International Construction Law review [ 2009] I.C.L.R.57 <http://www.icl.com/ilaw/doc/view.htm?id=208149&searched=true&refine=publication&value=International%20Construction%20Law%20Review&queryString=&dateRefine=&redirect=&citYear=&citVolume=&citPage> [ 19 January 2013]

<sup>108</sup> UAE Civil Transaction Code, Articles 318 & 319

<sup>109</sup> [1995] NSWCA 476

contractual obligation.<sup>110</sup> The court in *Turner Corporation Ltd v Co-ordinated Industries Pty Ltd*<sup>111</sup> said: 'Where the contractor is 'unable or unwilling' to finish the works before the time limited by the last extension of time'.<sup>112</sup> The prevention act will not grant an EOT, if the contractor is unable to achieve an earlier completion date due to his own delay. Coulson J said: 'Accordingly, I concluded that, for the prevention principle to apply, the contractor must be able to demonstrate that the employer's act or omission have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention will not apply.'<sup>113</sup>

In conclusion, in order to award an EOT for delays experienced by Employer under the 'Prevention Principle', certain criteria, herein listed below, must be met. Otherwise the Prevention principle does not apply.

1. Delay must be actual and not potential
2. The effect of the Employer's risk shall be determined as a matter of fact.<sup>114</sup>
3. The contract does not include a clause of EOT
4. In case of concurrent delay, the Employer's prevention act had prevented the contractor from achieving earlier completion date than the completion date.<sup>115</sup>

#### 3.1.4. Malmaison Test

The court's judgment in *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd*<sup>116</sup> has established the common principle for examining EOT in case of concurrent delay.

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<sup>110</sup> J Doyle Dip, 'Concurrent Delay in Contracts'(2005), *Turner Corporation Ltd v Co-ordinated Industries Pty Ltd* [1995] NSWCA 476.

<sup>111</sup> [1995] NSWCA 476

<sup>112</sup> *Turner Corporation Ltd v Co-ordinated Industries Pty Ltd* [1995] NSWCA 476.

<sup>113</sup> Jhon Marrin QC, 'Concurrent Delay Revisited' (Society of Construction Law 2013)

<sup>114</sup> J Doyle Dip, 'Concurrent Delay in Contracts'(Doyles Construction Lawyers 2005)

<sup>115</sup> completion date is the actual or forecasted date to complete the work, date for completion is the date stipulated in the contract to complete and hand over the works

<sup>116</sup> (1999) 70 Con LR32

The Malmaison Rule says: 'If there are two concurrent delays, one which is a relevant event and the other is not, the contractor is entitled to an extension of time for the period of delay caused by the relevant delay notwithstanding the concurrent effect of the other event.'<sup>117</sup>

The Malmaison Test resolves the concurrent delay dispute by distinguishing the relevant event of delay from that irrelevant event of delay while applying common sense. The relevant event of delay is the one that will cause delay for sure and with no doubt. Dyson J,<sup>118</sup> has given an example of what would be a relevant event of delay and an irrelevant event of delay. He said: 'If the contractor suffered a delay of a week because of exceptional weather, a relevant event, and the same period of delay because of shortage of labour, not a relevant event, then if the architect feels it fair and reasonable to do so, he could grant an extension of time – and he cannot refuse to grant one on the grounds that the delay would have occurred any way because of the shortage of labour.' The Engineer cannot grant that the project was delayed due to shortage of manpower but can grant that it was delayed for exceptional weather.

Where it is provided that the relevant event of delay is not the Contractor risk, the Contractor is therefore entitled to an EOT for the complete duration of delay. This rule has come to be known as 'The English School' for determination of EOT in case of concurrent delay.<sup>119</sup> The SCL Protocol is adopting this principle in its recommendation.<sup>120</sup>

In conclusion, the Malmaison Test for determination of EOT in the case of concurrent delay is dependent on the event of delay being relevant. Subsequently, the EOT will be granted for the total period of delay.

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<sup>117</sup> J Doyle Dip, 'Concurrent Delay in Contracts'(2005), Henry Boot Construction Ltd v Malmaison Hotel Ltd[1999] 70 Con LR32. and in City inn appeal Par [32]

<sup>118</sup> Henry Boot Construction Ltd v Malmaison Hotel Ltd(1999) 70 Con LR32

<sup>119</sup> G Grewal, 'Walter Lilly & Company Ltd v. (1) MacKay and (2) DMW Developments Ltd – What contractors need to know' ( July 25, 2012)

<sup>120</sup> N Davies, 'Concurrent delay and winner Takes All' (2012) available at <http://daviesandd Davies.blogspot.ae/2012/02/concurrent-delay-and-winner-takes-all.html#/2012/02/concurrent-delay-and-winner-takes-all.html> [ 7 February 2013]



### 3.2. Delay Analysis Methods in Court

In legal proceedings, each one of the parties presents his claim, adopting a certain technique to substantiate the impact of the event of delay. The court opinions on the Delay Analysis Method, observed from two cases, are as follows.

In *Skanska Construction UK Ltd vs Egger (Barony) Ltd*<sup>121</sup> the plaintiff party adopted the time impact analysis where the defendant presented his analysis by collapse as built method. Egger's expert used a very complex technique to explain delay analysis; whereas Skanska's expert had produced a simple and less sophisticated programme. The judge described his work as 'not hidebound by theory as when demonstrated fact collided with computer programme logic.'<sup>122</sup> On the other hand, the judge found that Egger's expert was not familiar with his report and considered his approach to be highly flawed.<sup>123</sup> J Wilcox considered the delay technique 'impact analyses'. The judge observed it was important that the construction of the programme was precise and reflected the facts; otherwise the court might decide that the analysis made of the impact of the event of delay is not reliable. Judges are looking to the facts in the report and the more simple the delay analysis report is, the more reliable it might be.

Roger Gibson commented that the court is following the facts and not the computer programme output. Evidences and fact shall not conflict with the programme of works and if it does, then an adjustment is required.<sup>124</sup>

In *Great Eastern Hotel Company Ltd v John Laing Construction Ltd & Laing Construction Plc*<sup>125</sup>, the defendant's expert<sup>126</sup> had made his argument based on the retrospective approach

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<sup>121</sup> [2005] EWCA Civ 501

<sup>122</sup> *Skanska Construction UK Ltd vs Egger (Barony) Ltd, Court of Appeal, LJ Buxton, LJ Dyson and HHJ*

*Kay*[2005] EWCA Civ 501

<sup>123</sup> INSITE, 'Construction law 2004' (Reynolds Porter Chamberlain, December 2004)

<sup>124</sup> R Gibson, *Construction Delays: Extension of time and Prolongation Claims* (p109)

<sup>125</sup> [2005] EWHC 181 (TCC)

<sup>126</sup> Mr. Anthony Caletka

(collapse as built). Whereas The Plaintiff's expert<sup>127</sup> had deployed delay analysis based on the time impact method<sup>128</sup>. The outputs for both approaches were close.<sup>129</sup>

The defendant was unable to deal with the concurrent delay issue by using a retrospective approach. The defendant had made changes to the programme relating to how it affected the critical path of the project.<sup>130</sup> J David Wilcox<sup>131</sup> commented on this: 'Had the logic link not been deleted, not only would Activity 80 have been shown three weeks later, but Activities 40 and 90 would have been identified as being critical.' The changes made to the critical path had not been accepted by Wilcox J.<sup>132</sup> He said: 'It is evident in my judgment that Laing consistently underplayed mention of the true causes of critical delay and asserted other reasons for delay that would not reflect upon them. They consistently misreported the delays actually occurring and manipulated the data in the programme update to obscure the accurate position.' The attempt to change the critical path may not be accepted by the court. Changes relating to the programme of work or the updated programme will result in hiding the impact of the delay event and the damage will be unforeseeable.

Wilcox J accepted the Time impacted analysis method (TIA) as it showed the impact of the event of delay as occurred. And rejected the Collapse as built method, commenting that the analysis did not take into account the fact of delay. The responsible party for the delay was unaware of the significant impact of his act, and consequently prevented from undertaking

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<sup>127</sup> Mr Gary France

<sup>128</sup> *Great Eastern Hotel Company Ltd v John Laing Construction Ltd & Laing Construction Plc* [2005] EWHC 181 (TCC) 'Mr. France used an impacted as planned programme analysis by which the project is analysed on a monthly basis to measure the impact of events as the project proceeded.' the impacted as planned when it done to updated programme is called modified impacted as planned or time impact analysis. Therefore we have change the name in the text, but not in the citation, to reflect the definition given in sec 2.6.2.2.

<sup>129</sup> *Great Eastern Hotel Company Ltd v John Laing Construction Ltd & Laing Construction Plc* [2005] EWHC 181 (TCC)

<sup>130</sup> 'These are not changes that could have been made accidentally. There are no explanations given or apparent on the evidence. Had they not been made I am satisfied that it would have been easier for GEH and their advisors to see through the inaccurate reports being made by the Contract Manager'. *Great Eastern Hotel Company Ltd v John Laing Construction Ltd & Laing Construction Plc* [2005] EWHC 181 (TCC)

<sup>131</sup> [2005] EWHC 181 (TCC)

<sup>132</sup> 'These are not paths which were identified by either party during the project itself.'

recovery measures. The TIA showed what had actually happened and the impact at that particular point of time.<sup>133</sup>

In conclusion, although the TIA is a technique preferred by courts, the reliable delay analysis method in legal proceeding shall reflect the facts and simply present them. Otherwise, whatsoever technique adopted will be dismissed.

### 3.3. Concurrent Delay Dispute under UAE Law

*Muqawala* is the name used for construction contract in the UAE. *Muqawala* contract is described as a continuing contract,<sup>134</sup> and binding upon both parties<sup>135</sup>. 'A muqawala is a contract whereby one of the parties thereto undertakes to make a thing or to perform work in consideration which the other party undertakes to provide.'<sup>136</sup> In Muqawala law there is no clear article about granting extension of time.

Article 874 of the UAE CTC, stipulated that Time is one of the essential elements of contract 'In a Muqawala contract, there must be a description of the subject matter of the contract, and particulars must be given for the type and amount thereof, the manner of performance, and the period over which it is to be performed, and the considerations must be specified.'<sup>137</sup>

Article 894 of the UAE CTC deals with a case where the delay to a project is due to a reason over which the contractor has no control. In the case of a concurrent delay, the Employer may allege that the delay is related to a reason of Contractor act. 'If the contractor commences to perform the work and then becomes incapable to completing it for a cause in which he played no part, he shall be entitled to the value of the work which he has completed and the expenses he has incurred in the performance thereof up to the amount of the benefit the employer has derived therefrom.'

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<sup>133</sup> R Gibson, *Construction Delays: Extension of time and Prolongation Claims* (p109)

<sup>134</sup> AD Court of Cassation, 293/Judicial Year 3, Consultant Yusuf Abdul Halim Al Hata, President of the Division [27 May 2009]

<sup>135</sup> UAE Civil Transaction Code 1985, Article 874

<sup>136</sup> UAE Civil Transaction Code 1985, Article 872

<sup>137</sup> UAE Civil Transaction Code 1985, Article 874

The expression of concurrent delay is rarely found in cases brought in UAE courts. However the following cases reflect disputes that in their circumstances were understood to be concurrent delay disputes, in which each one of the parties held the other party to be responsible for delaying the project's date of completion.

### **3.3.1. In case of concurrent delay, who would be responsible for the delay?**

In The case of *Dubai Court of Cassation, 266/2008* [17 March 2009], The Plaintiff (Employer) filed legal proceeding against the Defendant (Contractor) for delay in construction in addition to defects and poor workmanship to apply penalty. The Defendant made counter claim claiming balance due of AED 1,081,420 and prolongation cost of 3,505,770 for a delay incurred due to reasons related to the Employer.

The court delegated an Expert to examine the case, who reported to the court the following findings.

1. The balance due by the Employer for work done of AED 937,434.
2. The reasons of delay were as follows:
  - a. Delay in issue of detailed design drawings by the Engineer
  - b. Modification to the design
  - c. Employer and Engineer delay in selecting finishing materials
3. The Dominant cause of delay was due to subcontractor nominated by the Employer.
4. Compensation for delay due to a reason the contract has played no part of AED 351,142

The court said: ‘...the head contractor, who will not be liable for any penalty for delay if it is demonstrated that his failure to hand over the building on the date specified in the contract was attributable to causes in which he played no part.’<sup>138</sup>

The court accepted the expert’s report and found that the dominant cause of the project delay was not under the contractor’s control and was due to reasons of which the Employer was responsible by the conduct of the nominated subcontractor. The judge explained Article 890 that the main contractor will be responsible for the delay by a subcontractor he had appointed.<sup>139</sup> The EOT will be considered the reasonable (actual) time taken to complete the work.

In conclusion, in the case of concurrent delay, the Contractor may be entitled to EOT if the Employer’s event of delay is the dominant cause of delay.

### **3.3.2. In case EOT has been granted to Contractor due to Employer’s event of delay.**

**Would the failure on part of the contractor to meet the revised date for completion be considered as an outcome of a concurrent delay resulting from the Employer’s event of delay, for which an EOT has already been granted?**

The answer to this question has reference to the Dubai court of Cassation (1/2006) [16 April 2006]. The facts of this case are as follows: The project was in delay and the contractual completion date elapsed (10 April 2001). An instruction of variation had been issued after the date for completion (14 July 2001). The variation granted an extension of time for an additional 3 months; the revised date for completion was amended to 15th October 2001. One month had been agreed to be added to the EOT; the final revised date for completion was 15th November 2001. No additional works, variation or instruction had been issued since 14th July 2001, The work was actually completed on 12 June 2002.

UAE CTC, Article 894 says, ‘The contractor will not be liable for the delay penalty for a reason he played no part.’

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<sup>138</sup> Dubai Court of Cassation, 266/2008 [17 March 2009].

<http://login.westlawgulf.com/maf/app/document?&src=search&docguid=I3FC6FCFF8C0544A38F11C5BAEE24CFAA&epos=2&snippets=true&srguid=i0ad6180e0000013d68a12d359b85151e>

<sup>139</sup> UAE Civil Transaction Code 1985, Article 890.

The expert reported to the court that, although there was a delay in performing the project, the work was not completed on schedule due to additional works, change of the purpose of use of the building from residential to apartment hotel, and some areas were not ready to commence the works. The court accepted the expert's report that the dominant cause of delay was due to relevant event of delay, which the employer was responsible for. The expert had considered in his report that the employer had conducted a prevention act since there was a part of the project area that was not ready for the contractor to commence his work. The judge agreed.

In conclusion, in cases of concurrent delay, where the dominant cause of delay is due to Employer conduct, courts in the UAE may entitle contractor for an EOT equal to the actual duration of the project and delay penalties will not be enforced.

### **3.3.3. Would the contractor be entitled to EOT in the absence of a programme of work?**

In the case of the *Dubai court of Cassation* (1/2006) [16 April 2006], the Contractor did not submit an updated programme of work to the Employer for his review.

The contractor did not provide any time schedule or cash flow for the works, the result of which was that there was no evidence that the delay was due to the Contractor's negligence in carrying out the works as per the agreed programme of work or due to variation works. Therefore it was difficult to allege that the reason for the delay was absolute due to the Contractor negligence of carrying out the work as per the schedule. Therefore, imposing delay penalty on the contractor was not substantiated.

The judge had considered the expert's report and agreed that in the absence of an agreed programme of work, it would be difficult to hold the contractor responsible for the delay in case of concurrent delay. In order to apply penalties upon the contractor failure, the delay should be absolutely due to contractor negligence in performing the works. This has left the employer in a position whereby the variation orders and change in design are documented whereas the contractor negligence in carrying out the work as per schedule is not.

In conclusion, the absence of programme of work may not prevent the contractor from his entitlement to EOT. On the contrary, it is in the contractor's favour due to lack of evidence to demonstrate Contractor delay.

Another case in the *Dubai court of Cassation (213/2008) Commercial Appeal* [19 January 2009] where the facts of the case were as follows:

The Plaintiff (Employer) entered into a construction contract on 12 May 2003 with the Defendant (Contractor) for the construction of a building consisting of basement, ground floor and 7 typical floors. The contract duration was 365 days and completion date was on 11 May 2004. The contract included a delay penalty clause that the defendant (Contractor) would be liable for penalty of 10% of the contract amount in the event he failed to hand over the building in a timely manner.

The Plaintiff (Employer) claimed that the Defendant (Contractor) had delayed the building handover, which caused damages to the plaintiff. On the other hand the defendant had submitted his counter claims that the delay was due to reasons in which he had played no part, mainly due to consultant and nominated subcontractor by the plaintiff (Employer). The Defendant requested the balance amounts payable to it by the plaintiff, plus damages and 12% interest p.a.

The court delegated an Expert to examine the facts. The expert submitted reports reasoning that the delay 'occurred because of the appellant and the consultant who delayed in selection, approval and supply of the finishing materials; and that they delayed in the nomination of the sub-contractors and forced the respondent to accept them'. The Expert's findings were that the main reasons for the delay were due to the Employer misconduct, which he found to be relevant causes of delay, with the dominant cause of delay being due to nominated subcontractor shortfall. The court ordered the Plaintiff (Employer) to pay the Defendant (Contractor) an amount of AED 368,428 and a rate of 9%. The plaintiff appealed the judgment which was amended to AED 197,469. The plaintiff appealed by cassation (No 213 of 2008 Commercial) to reverse the Judgment and the defendant appeal (No 253 of 2008 Commercial) the judgment to be partially reversed with respect of the compensation for damages. The appeal was dismissed.

The court judgment stated: ‘If that work has been assigned to the sub-contractor by the project owner or his consultant, any execution faults or delay of work completion beyond the agreed period shall be the responsibility of whoever has appointed the sub-contractor and the original contractor shall not be liable for the same’.

Although this case contains the issue of privity of contract, the subject of privity of contract is beyond the scope of this study. The objective of this case is to examine the issue of concurrent delay. The delay by the subcontractor who is nominated by the Employer is considered as an Employer’s event of delay. The dominant cause of delay was due to the nominated subcontractor, the main contractor would have been entitled to EOT.

### **3.3.4. What would be the entitlement for cost compensation in case of concurrent delay?**

Second issue of the *Dubai court of Cassation (213/2008) Commercial Appeal* [19 January 2009]

The general rule for causation in UAE Law, CTC, AR. 283; ‘ (1) Harm may be direct or consequential (2) If the harm is direct, it must unconditionally be made good, and if it is consequential there must be a wrongful or deliberated element and the act must have led to the damage.’<sup>140</sup>

The rule extracted from the case states: ‘The contractual liability is materialized only in case its three essential elements namely the fault, the damage and the causal relationship between them are made out, so that if any essential element is not made out, the liability shall not arise, and the obligee has to prove the obligor’s fault and the damage incurred by him; while the causal relationship between them will be presumed. The obligor may only get rid of the liability if he proves that the damage is due to force majeure, unexpected incident, obligee’s act or third party’s act. Although the established failure by the obligor to perform his contractual obligations without acceptable reason is regarded as a fault that entails his liability for the compensating for the damage incurred; however the burden of proving that damage lies on the obligee in accordance with the basic principle stipulated in Article (1) of the Law

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<sup>140</sup> UAE Law, Civil Transaction Code, Article 283



of Evidence that ((the plaintiff has the right to prove his right and the defendant may negate it))'.<sup>141</sup>

Respondent's (Employer) fault which led to the delay of the project execution for 316 days beyond the set date of handover; which caused damages to the appellant being of administrative expenses and idle resources throughout the delay period. The court has rejected the Contractor's claim for compensation against damages. Although the court has found that the dominant cause of delay was due to Employer misconduct, the party who claimed for damages shall prove the fault, damage and causal relationship between them. The proof of damage is a matter of fact. The court found that the Appellant (Contractor) did not deserve any compensation in accordance with the general rule of the contractual liability because the Appellant (Contractor) has failed to prove that he has incurred damages due to Respondent (Employer) misconduct act. The judge states his judgment as: 'And whereas the result reached by the judgment under appeal is sound and has proven evidence in the papers as the appellant failed to prove the damage alleged by it, thus the challenge becomes unfounded and has no factual or legal foundation. In the light of the abovementioned, the appeal must be dismissed.'<sup>142</sup>

In conclusion, entitlement to an EOT does not lead automatically to cost compensation – a ruling that is in line with the SCL recommendations. However, if the contractor seeks cost compensation under EOT, he must prove that he has incurred damages because of Employer breach of contract (fault, damage and causal relation).<sup>143</sup> Otherwise the challenge becomes unfounded and has no factual or legal grounding.

### **3.3.5. In case of concurrent delay, how shall the EOT be determined?**

*Dubai Court of Cassation, 184/2008* [30 December 2008]. The Claimant (Contractor) entered into a contract with the Defendant (Employer) for the construction of two buildings within a duration of 12 months, starting on 5th March 2002 and finishing on 4th March 2003, for an

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<sup>141</sup> *Dubai Court of Cassation* 213/2008 Commercial appeal [19 January 2009]

<sup>142</sup> *Dubai court of cassation*, 253 of 2008 Commercial. ( note: the contractor appeal in case 213/2008)

<sup>143</sup> UAE Law, Civil Transaction Code, Article 283

amount of AED 4,900,000. Once the project commenced, it came to light that the foundation of the existing building was obstructing construction work. In case of proceeding with the work, it might endanger the existing building. The work had been suspended until the Engineer modified the foundation design and new building permit was issued on 16th December 2012. The Defendant (Employer) omitted work of AED 2,297,250 (47% of the contract amount). The contractor then filed a case under ref no.80/2007 commercial, in the Dubai court, versus the Employer requesting compensation of AED 3,954,150.17 against damages incurred as a result of the Employer act. The Defendant requested delegation of an engineering expert to examine the value and amount of delay in completing the work, and the amounts owed by the Claimant.

The rules are articles 894<sup>144</sup> and 887<sup>145</sup> from the UAE CTC.

The Expert reported to the court his findings as follows:

1. The amount owed by the Defendant was AED 718,293 detailed as follows:
  - a. The project has been delayed from 5 March 2002 to 16 December 2002 due to design modification in which it is out of the contractor control. The contractor owed the Employer a compensation for damages of AED 26,730.
  - b. According to custom, the Claimant worth AED 229,725 compensation equal to 10% of the value of the work omitted.
  - c. The balance due of AED 302,750.
  - d. Variation orders of AED 159,880
2. The amount owed by the Claimant of AED 585,758 as follows:

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<sup>144</sup>UAE Civil Transaction Code 1985, Article 894, 'If the contractor commences to perform the work and then becomes incapable to completing it for a cause in which he played no part, he shall be entitled to the value of the work which he has completed and the expenses he has incurred in the performance thereof up to the amount of the benefit the employer has derived therefrom.'

<sup>145</sup> UAE Civil Transaction Code 1985, Article 887, 'If any variation or addition is made to the plan with the consent of the employer, the existing agreement with the contractor must be observed in connection with such variation on addition'

- a. AED 465,000 delay penalty being of 10% of the contract amount due to Claimant delay in completing the work in a timely manner.
- b. AED 120,758 value of works defendant performed on behalf of the claimant.
3. Sum up, AED 132,535 owed by the Defendant in favour of the Claimant.
4. The court ruled the defendant should pay AED 132,535 in favour of the Claimant.

Both the Claimant and Defendant appealed the judgment. Appeal was dismissed. Both the Claimant and Defendant appealed by cassation. Court of Cassation dismissed the appeal and confirmed the trial court judgment.

From the analysis of the expert's explanation for the delay; the expert returned the contract to its first date and awarded the contractor an EOT for design changes; also issuing a revised date for completion. At a certain stage of the project, the expert found the contractor unable to complete the work with the lawful extended duration, and he was solely responsible for the delay. The way the expert chose to analyse delay was matching with the Impacted as Planned and the TIA methods. The Expert had analyzed the project in periodic phases as the work progressed on site. The Expert had awarded EOT to the contractor for relevant event of delay at that particular time where the contractor should have been awarded for EOT. Whereas the concept of the TIA is designed to reflect the impact of event of delay at that particular point of time of occurrence, Article 40 in the UAE CTC says, 'There is a presumption that an event (known to have occurred) has occurred in the immediate past'<sup>146</sup>. The TIA method is in line with Article 40 in the UAE CTC. The relevant event of delay by the Employer at the time of occurrence was the dominant cause of delay. The court has accepted the method used by the expert, which is similar to the TIA.

However, the Contractor failed to complete the work as per the extended date for completion, of which the Contractor would be liable for delay penalties in accordance with the contract

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<sup>146</sup> UAE Civil Transaction Code 1985, Article 40 الأصل إضافة الحادث الى أقرب أوقاته

provision and Article 878 of the UAE CTC.<sup>147</sup> The contractor shall pay the compensation amount as stipulated in the contract; otherwise the judge will evaluate the damages. Article 389 says, 'If the amount of compensation is not fixed by law or by the contract, the judge shall assess it in an amount equivalent to the damage in fact suffered at the time of the occurrence thereof.'<sup>148</sup> In private *Muqawala* the Contractor may request the judge to make compensation equal to the employer loss in accordance with article 390. 'If the amount of compensation is not fixed by law or by the contract, the judge shall assess it in an amount equivalent to the damage in fact suffered at the time of the occurrence thereof.'<sup>149</sup>

In conclusion, the TIA method of analyzing delay is considered an acceptable method by the courts in the UAE. EOT shall be awarded to the contractor at the time he is entitled to it and he should not have to wait till the end of the project. This is in line with the SCL principle 'not to wait and see'. The contractor may be entitled to EOT for the Employer relevant event of delay although the dominant cause of delay is due to the contractor.

### **3.3.6. What is the role of the expert delegated by the court in case of concurrent delay dispute?**

In disputes related to construction, the court in the UAE will delegate an expert to examine and investigate evidence. In the *Dubai Court of Cassation*, 184/2008 (30 December 2008), the expert has performed duties which have been objected to by the disputing parties. The expert has liquidated the account between disputing parties despite claims that he has no authority to do so.

The general rule of set-off is as follows: 'Set-off may either be mandatory, occurring by operation of law, or voluntary, occurring by agreement between the parties, or judicial, occurring by order of the court.'<sup>150</sup>

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<sup>147</sup> UAE Civil Transaction Code 1985, Article 878, 'The contractor shall be liable for any losses or damages resulting from his act to the work whether arising through his wrongful act or default or not, but he shall not be liable if it arises out of event which could not have been prevented.'

<sup>148</sup> UAE Civil Code, Article 389

<sup>149</sup> UAE Civil Code, Article 389

<sup>150</sup> UAE Civil Transaction Code 1985, Article 390

The rule extracted from the case *Dubai Court of Cassation*, 184/2008 states that, ‘Adoption of the trial court to liquidate the account between the parties by the expert appointed in the case commissioned is regarded as a clearing spend acting without judicial bind expressly stating the reasons for its ruling’<sup>151</sup>

The Expert found that both parties were in breach of contract. He had awarded the contractor an EOT for the period of delay which he had played no part and he did impose penalties on the contractor for the period he failed to complete the work beyond the extended duration. In term of cost compensation, the expert evaluated the damages for each event of delay separately and he did set-off the dues. Of which the court accepted his method and practice. The expert report is similar to the SCL recommendation that the cost compensation or liquidated damages shall be for the extra duration of the concurrent delay.

However, an expert’s evidence is not necessarily binding on the court and is subject to court assessment, *AD Court of Cassation*, 269/2003, Consultant Yusuf Abdul Halim Al Hata, President of the Division: ‘Article 90(1) of the Law of Proof provides that the opinion of the expert shall not bind the court. It is evident from this that the report of an expert does not have any binding force on the court. It is no more than one of the elements of factual proof in the action, which is subject to the discretionary assessment of the trial judge.’

In conclusion, when two concurrent events of delay have concurrent effect, and the contractor event of delay is longer than the Employer event of delay, the contractor is entitled to EOT and cost compensation for the relevant event of delay caused by the Employer. And the contractor is liable for the additional delays due to his dominant event of delay. The SCL recommendations for the liquidated damages where Employer delays are less than Contractor delays may be considered in UAE courts.

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<sup>151</sup> Dubai court of cassation No 184 of 2008 Commercial

## Chapter Four

### Conclusion

The scope of this study is to identify the rules under UAE Law in order to determine the eligibility and the method adopted by courts in the UAE for awarding extension of time in cases of concurrency.

In accordance with the UAE and Dubai Court of Cassation judgments, the contractor is entitled to an EOT for a relevant cause of delay in which he played no part, despite the contractor himself being in concurrent delay. Courts in the UAE are actively seeking out the main ‘true’ reasons that cause delay to the project date of completion, based on facts and evidence. This is entirely in line with the ‘Dominant Cause’ Approach. Quantifying the EOT duration by Expert’s opinion is subject to court approval.

UAE Courts consider that delay in design, variation orders, prevention act and delay due to subcontract nominated by Employer, are all relevant events of delay that may grant a contractor entitlement to an EOT. The Employer’s risks listed in FIDIC 1999 standard form of contract are all recognized to be relevant events of delay, except delay due to subcontractors nominated by the Employer.

The opinion of a number of professionals indicates that in cases of concurrent delay there will be EOT without cost as per the SCL Protocol. This is not necessarily the case in UAE courts where the entitled EOT is based on dominant cause. The contractor will be entitled to cost compensation for any relevant event of delay if the contractor succeeds in establishing the causal link between fault and damage. However, in the case of concurrent delay where the contractor’s delay is more than the Employer’s delay, the contractor will be liable for liquidated damages for the additional duration.

The EOT claim is wholly about ‘money’ once the contractor succeeds in establishing that the dominant cause of delay is related to the relevant event of delay under the Employer’s risk stipulated in the contract. Not only will the contractor not be liable to pay delay penalties or liquidated damages, but he will make his first step to claim for compensation.

Notwithstanding the fact that the contractor himself has been in concurrent delay. The fault, which is in EOT claim of concurrent delay, refers to the Employer's event of delay, and the damage is referring to the contractor's financial loss incurred. The causal link requires that the contractor shall prove that the financial loss incurred or extra payment made was due to the prolongation of the project by the dominant cause. Otherwise the contractor claim will be dismissed.

The Expert in UAE law is delegated by the court; his role is to provide the court with evidence and facts from the point of view of an independent third party. The court is not bound to accept the Expert's report. As in the cases mentioned earlier, the expert has to provide the source of his evidence and say where he got his findings. 'The expert must state the source from which he has derived his findings, and the evidence for it.'<sup>152</sup> The court may consider the Expert's report as a fact and evidence since it has its reference to the facts and documents. Another role of the Expert is to liquidate the account between the disputed parties. Once the Court of First Instance accepts the Expert's report, it becomes the court's report and the facts of the case.

The court accepts the Prospective Approach for delay analysis reported by delegate experts and may accept methods that reflect the facts. The TIA method can be recommended as one that it is acceptable to courts in the UAE. The opinion collected from a number of professionals shows that the TIA method is a preferred method for delay analysis in the UAE construction industry. Furthermore, in the absence of a programme of works, the contractor will be entitled to a full EOT due to lack of evidence about poor performance in accordance with the schedule.

In summation, courts in the UAE adopt the dominant cause approach for an entitlement to EOT. However, the entitlement to EOT due to dominant cause under UAE law does not necessarily lead to entitlement to cost compensation. Causal relationship between default (event of delay) and damage (cost contributed to delay) shall be established to succeed with a compensation claim under UAE law. Entitlement to EOT is under the UAE CTC Article 894

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<sup>152</sup> Dubai Court of Cassation, 51/2007 [29 April 2007]

and the cost compensation is under the Article 283<sup>153</sup> of the same law which states that the delay must lead to damage. The contractor is not obliged to demonstrate his claim based on causation test for entitlement to EOT, but he has to do so if he claims for cost compensation.

The UAE law in case of concurrent delay matches the *City inn case*<sup>154</sup> in principle. The substantiation of the delay is not similar to that for cost compensation. The dominant cause approach is used for EOT whereas ‘but for’ is the test used for cost compensation.

The first recommendation this dissertation makes to the construction industry is that reasons my ended with a dispute should drop to the minimum. EOT should be awarded to contractor for relevant events of delay once it occurs, even if the contractor is in delay due to his own act. The second recommendation is to have an approved programme of work, without which Employers may fail to establish responsibility for Contractor delays.

To put matters in context, contractual disputes in the UAE construction sector have often threatened to reach epidemic proportions. Following the global economic meltdown of 2008, the last thing required by an industry still in recovery is an unnecessary drain on the time, expertise and funds of employers and contractors alike. If these recommendations were adopted, they would prove hugely beneficial to the UAE construction industry no time and money wasted on unnecessary legal disputes; better relationships between Employers and Contractors; fewer delays in handover; improved reputation for industry as a whole.

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<sup>153</sup> UAE CTC, Article 283. ‘(1) Harm may be direct or consequential (2) if the harm is direct, it must unconditionally be made good, and if it is consequential there must be a wrongful or deliberated element and the act must have led to the damage.’


<sup>154</sup> [2007] ScotCS CSOH\_190 (30 November 2007)



## **Appendix A: UAE Cases**

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<b>Serial No</b>	
<b>Date</b>	<b>Court Hearing Date: March 17, 2009</b>
<b>Judge</b>	
<b>Cassation No/Year</b>	<b>Case No.: 266/2008 Commercial Objection for Cassation</b>
<b>Articles/Laws referred to</b>	
<b>Keywords</b>	
<b>Principles</b>	
<b>The Judgement</b>	<p style="text-align: center;"><b>Wording of Judgment</b></p> <p><b>Case No: 266/2008 Commercial Objection for Cassation</b></p> <p><b>Court Hearing Date: March 17, 2009</b></p> <p>Having reviewed the action papers, heard the summary report prepared and read out by Rapporteur Judge ..... and after legal deliberation.</p> <p>Whereas, the objection for cassation has fulfilled the legal requirements in terms of form;</p> <p>Whereas, the facts of the case, as inferred from the challenged judgment and the other documents, are summarized in that .... (Petitioner) instituted Action 656 of 2006 – commercial full jurisdiction before the Court of Dubai against .....Company (Respondent), moving the court to assign an engineering expert specialized in the civil constructions work to review the plans and contracting agreements between litigants, to examine the condition of the building subject of dispute, in order to specify the contraventions made by the construction contractor; i.e. Defendant company, and to determine the compensation due for same, and to award the due amounts to be concluded by the expert's witness plus the due legal interest. Petitioner, is explanation of its claims, stated that Petitioner</p>

owns the plot No.... in Almarqabat area in Dubai.

On May 12, 2003, Plaintiff entered into a contract with Defendant to construct a building over the said land plot comprising a basement, ground floor, and seven upper floors as per the agreed specifications and conditions within a period of 365 days. It was further agreed that in case of any delay, Defendant shall comply with the agreed upon penalty. Since Defendant executed the building behind schedule, and the work carried out had defects in execution, and Plaintiff has incurred damage as a result, hence Plaintiff moves for a judgment to be entered awarding its claims against the Defendant.

On October 30, 2006, Court of First Instance ruled to assign an engineering expert, whose turn came from the roll, in order to inspect the works done and determine how compliant they were to the agreed upon specifications, and whether there is any sort of delay in the execution, and if so, what is the cause of such delay, in addition to determining all aspects of defect in the works and the missing works and the value thereof. The court-appointed expert has performed its mission and submitted its report indicating that Plaintiff has fulfilled all the contractual obligations thereof, and that Plaintiff is entitled to a sum of AED 937,434. Defendant has thus submitted an incidental motion to obligate Plaintiff to pay the dues Defendant estimated at AED 1,081,420 in addition to the amount of AED 3,505,770 as a compensation for delay in execution caused by Plaintiff, and, in the alternative, to obligate Plaintiff to pay the amount deduced by the court-appointed expert plus the interest of 12 % due thereon as of completion date on April 16, 2005 until full payment is made.

On October 8, 2007, Court of First Instance ruled to re-assign the expert to conduct the inspection again, in light of the objections submitted by the parties thereto. After the court-appointed expert had submitted the supplementary report in which court-appointed expert concluded that Plaintiff is entitled

to a delay penalty amounting to AED 351,142 to be paid by original Plaintiff. On January 24, 2008, Court ruled to re-assign the task to the court-appointed expert for re-investigation in light of the legal defenses memorandums of both parties. On April 30, 2008, after the court-appointed expert had submitted its second supplementary report, Court ruled to dismiss the original Action, and on the motion, to obligate the original Plaintiff to pay the defendant a sum of AED 937,434 plus the legal interest of 9% annually as of legal claim date on January 15, 2007 until full payment is made, and to dismiss all other claims.

Plaintiff has appealed the aforementioned court judgment by the commercial Appeal No. 340 of 2008, and Defendant has also appealed the same judgment by the commercial Appeal No. 341 of 2008, and after combing both appeals, on September 24, 2008 Appellate Court has ruled the dismissal of commercial Appeal No. 340 of 2008, and in the subject matter of Appeal No. 341 of 2008 to amend the appealed judgment as follows: **Firstly:** To obligate original Plaintiff to pay to Defendant a compensation a sum of AED 351142 as well as the legal interest of 9% annually as of judgment date. **Secondly:** to amend the date of the interest enforced to all the rest of the dues which is a sum of AED 937,434 to be as follows: 9% annually as of maturity date on April 16, 2006 and until full payment on the reserved amount as a guarantee for maintenance which is a sum of AED 431,538, in addition to 9% annually as of construction date on April 16, 2005 and until full payment on the rest of the dues of AED 505,896; and to affirm the appealed judgment in respect of the other aspects. Original Plaintiff challenged this judgment by the present objection for cassation on November 2, 2008 moving the court to reverse said judgment, and examine the objection for cassation in the Deliberation Room, Court deemed same as worthy of considering, and scheduled a court hearing to hear same.

**Whereas**, the objection for cassation is based upon two grounds, Petitioner objects in the first and second aspects of the first reason and the second reason of objection against the appealed judgment as vitiated with misapplication of the law, deficiency in causation and prejudice against the right of defense, since appealed judgment has obligated Petitioner to pay to Respondent a compensation for the delay of Respondent in completing the construction of the building, and to dismiss obligating Respondent to pay the agreed upon delay penalty of AED 700 for each and every day of delay which are 365 days, with a maximum of 10% of the total contract value , on the basis that Petitioner is the causer of delay which is attributable to the subcontractors which Petitioner has selected *per se*. It is well-known that the construction contractor is the party that is committed to pay the delay penalty whether the selection of the subcontractors was done by Employer or by construction contractor, and the fact that they were selected by Employer does not negate the fact that they are directly reporting to construction contractor. Moreover, the expert report may not be relied on since it includes deciding a legal issue that the Trial Court should decide on *per se*. The judgment is vitiated with deficiency in causation since said judgment has dismissed the reassignment of expert to address the objections of Petitioner, and said judgment has also ignored the expert report submitted by Petitioner, which renders said judgment erroneous, and thus necessitates the reversal thereof.

**Whereas**, this objection is refutable, since it is well-established, as per the judicial precedents, of this Court that the responsibility of original contractor for the delay caused by subcontractor necessitates that original contractor is the one who assigned or selected these subcontractors, but in the event the selection was made by Employer (the owner of the building) or the consultant of Employer, Employer, and not original contractor, shall be held accountable for any delay in the execution of the work on the part

of said contractors. Moreover, contractor shall not be accountable for a delay penalty if it is evident that the violation of contractual obligation of delivering the building at the date set forth in the contracted agreement is attributable to reasons beyond its control. In addition, it is well established in the previous rulings of this court that Trial Court have full authority to understand and interpret the facts of the case and to search and estimate the submitted evidences including the report of the court-appointed expert which is deemed one of the elements of proof in Action, and Trial Court if has full discretionary power to consider said report and the grounds on which it is based, whenever Trial Court deems such grounds valid, without any need for any reply on the consultative expert report submitted by one of the litigating parties, and without any obligation on Trial Court to return back the mission to the expert, whenever Trial Court finds in the expert report and the case papers enough evidence to constitute the firm belief thereof, and has based the judgment thereof on valid grounds that are well established in case papers, and without any need to reply on the objections voiced by litigants or to follow litigants in the legal defenses thereof, since the fact that Trial Court has taken the expert report in consideration implicitly means that Trial Court has not found in any of the objections for cassation what necessitates any reply thereto, and so long as the court-appointed expert has tackled the points of dispute between the parties and has reached a correct conclusion and has proved same by valid grounds without considering this a decision in a legal issue so long as Trial Court has addressed this issue and has given its opinion with regard thereto.

Based on the above and since the judgment of Court of First Instance affirmed by the challenged judgment has ruled the dismissal of the original Action which included moving the court to obligate Respondent to pay the agreed upon delay penalty based on the grounds of said judgment: “....Since Court finds the

court-appointed expert report trustworthy... and Court concludes from said report and all the case papers that cross Plaintiff has executed all the contractual obligations and the original Plaintiff is the cause of the delay in the execution of the works since original Plaintiff and the consultant has taken much time in selecting the various finishing materials, and the difference between original Plaintiff and Consultant is in the price difference between the canceled item on granite Ceramic for the walls and the reference price that the consultant has calculated..." The challenged judgment has further added " ...**Whereas** the appealed judgment in the original Action has dismissed same, judgment was based on substantiated grounds in conformity with the Law, where said judgment has relied on the original expert report which was based upon correct grounds from which it was evident that the delay in execution was attributable to the fact that the consultant has not made the required detailed plans available, in addition to conducting many modifications and numerous interferences on the part of the consultant and the owner in imposing certain sub- contractors...and the delay in selecting said sub-contractors. In addition, there has been delay in choosing and in supplying the ceramic, bathrooms, kitchens which the suppliers have chosen upon the knowledge of the owner, in addition to the negligence of suppliers to execute the obligations thereof which renders original Plaintiff not entitled to any compensation where it was evident that the delay is attributable to the owner and the consultant.. On subject matter of Appeal No. 341 of 2008 filed by Defendant ... Since the court-appointed expert has executed the entrusted mission... and has concluded in the first supplementary report that this company is entitled to a compensation for the delay of the project of AED 351,142... since all the works conducted by Defendant was on valid grounds... And the appealed judgment has dismissed any compensation to Plaintiff... And in spite of the fact that the appealed



judgment stated that the reason for delay is attributable to the owner and the consultant ... by so stating judgment has committed an error and has contradicted the supplementary expert report , and thus necessitates reversal and awarding compensation in favor of the Plaintiff..." The aforementioned are correct grounds which are substantiated in the case papers and in the aforementioned supplementary expert report which states that the reason Petitioner is obligated to pay the said compensation is due to the damage incurred by Respondent due to the fault of Petitioner and the delay thereof since Respondent has incurred installments expenses, administrative expenses, machinery costs and expenses during the delay period which establishes the error, damage incurred and causation in Action, and thus is deemed sufficient to support the challenged judgment, and complying with the Law and inclusive of the reply to all the objections raised by Petitioner, and thus all such objections raised by Petitioner are nothing but a futile argument, since Trial Court has the discretionary power without any comment on the part of the cassation Court, and thus these objections are rendered inadmissible.

Whereas Petitioner objects in the third aspect of the first reason of the grounds on the challenged judgment as vitiated by misapplication of the law since challenged judgment has ruled to obligate Petitioner to pay the legal interest as of April 16, 2006 on the sum of AED 431,538 and to pay the legal interest as of April 16, 2005 for the sum of AED 505,896 without giving any legal ground, which renders said judgment erroneous necessitating the reversal thereof.

Whereas this objection is refutable, since it is firmly established in the previous court rulings of this court that Articles (76), (88) and (90) of Commercial Transaction Law provides that if the commercial commitment is a sum of money of well known amount at the time of the arise of the obligation, and Debtor has delayed paying the debt, debtor shall pay

to Creditor the interest according to the agreed upon rate. It has been established in the legal tradition in Dubai to calculate the interest at a rate of 9% annually and as of maturity date. This is deemed a compensation for Creditor for the delay in payment after the agreed upon date or at the date on which payment was agreed to be made. It is also well established that the debt is deemed of well known value even if Debtor has disputed over the amount of said debt so long as Court did not have absolute power in the estimation. Based on the above, and since the challenged judgment adhered to the aforementioned and has ruled to obligate Petitioner to pay to Respondent the interest on the sum of AED 431,538 – which is a part of the dues of this company to be paid by Petitioner as of the date of the execution and delivery of the building on April 16, 2005, and to obligate Petitioner to pay the interest due on the amount of AED 505,896 which is the amount due for Respondent on condition that said amount shall not be cashed except after the elapse of the set maintenance period calculated as of delivery date as of April 16, 2006. Hence, appealed judgment has not breached the Law, and thus the objection raised against it is rendered groundless. Therefore, the present objection for cassation is hereby dismissed.



## نتائج البحث &lt; القواعد القانونية &lt; نص الحكم

اطبع هذه الصفحة

## نص الحكم

تاريخ الجلسة : 2009-03-17

رقم القضية : 2008 / 266 طعن تجاري

بعد الإطلاع على الأوراق وسماع تقرير التلخيص الذي أعده وتلاه بالجلسة القاضي ----- وبعد المداولة.  
وحيث إن الطعن استوفى أوضاعه الشكلية.

وحيث إن الوقائع - على ما يبين من الحكم المطعون فيه وسائر الأوراق - تتحصل في أن ----- ( الطاعن ) أقام الدعوى رقم 656 لسنة 2006 تجاري كلي أمام محكمة دبي على شركة ----- (المطعون ضدها ) طالبا الحكم بنبذ خبير هندسي متخصص في أعمال الإنشاءات المدنية للإطلاع على المخططات وعلى عقد المقاولة ولمعaine حالة البناء موضوع النزاع لبيان المخالفات التي وقعت من مقاول البناء الشركة المدعى عليها ولتحديد ما يستحقه قبلها من تعويض والحكم عليها بما يسفر عنه تقرير الخبرة مع الفائدة القانونية - وقال في بيان ذلك بأنه يمتلك قطعة الأرض رقم----- بمنطقة المرقبات في دبي وقد تعاقد بتاريخ 2003-05-12 مع الشركة المدعى عليها على أن تقوم بإنجاز بناية على هذه الأرض تتكون من سرداب وطابق أرضي وسبعة طوابق علوية طبقا للمواصفات والاشتراطات المتفق عليها على أن يتم الإنجاز خلال 365 يوما وأن تلتزم الشركة المدعى عليها في حالة التأخير بغرامة التأخير المتفق عليها وأنها إذ تأخرت في إنجاز البناء عن المدة المتفق عليها كما شاب عملها عيوباً في التنفيذ ولحققت به من جراء ذلك أضراراً فإنه يلتمس الحكم له عليها بطلباته. وبتاريخ 2006-10-30 حكمت محكمة أول درجة بنبذ الخبير الهندسي صاحب الدور بالجدول لمعaine ما تم إنجازه من الأعمال ومدى مطابقتها للمواصفات المتفق عليها وما إذا كان هناك ثمة تأخير في مدة التنفيذ والمتسبب فيه وما شاب العمل من عيوب ونواقص وقيمتها - وقد باشر الخبير مهمته وأودع تقريره المتضمن أن الشركة المدعى عليها قد قامت بتنفيذ كافة التزاماتها التعاقدية وأن لها باقي مستحقات في ذمة المدعى قدرها 937.434 درهما فقدمت الشركة المدعى عليها طلبا عارضا بإلزام المدعى بأن يدفع لها باقي مستحقات قدرتها بمبلغ 1.081.420 درهما وبإلزامه بأن يدفع لها أيضا مبلغ 3.505.770 درهما تعويضا لها عن مدة التأخير في الإنجاز الذي تسبب فيه المدعى واحتياطيا الحكم لها عليه بأن يدفع لها المبلغ الذي خلص إليه الخبير مع الفائدة بواقع 12% من تاريخ الإنجاز الحاصل في 2005-04-16 حتى تمام السداد.

وبتاريخ 2007-10-08 حكمت محكمة أول درجة بإعادة المأمورية إلى الخبير لإعادة بحثها على ضوء اعتراضات الطرفين وبعد أن قدم الخبير تقريره التكميلي الذي خلص فيه إلى النتيجة السابقة إضافة إلى استحقاق الشركة المدعى عليها لغرامة تأخير قدرها مبلغ 351.142 درهما في ذمة المدعى الأصلي حكمت المحكمة بتاريخ 2008-01-24 بإعادة المأمورية إليه لإعادة بحثها على ضوء مذكرتي دفاع الطرفين المقدمتين بتاريخ 2008-01-07 وبعد أن قدم الخبير تقريره التكميلي الثاني حكمت المحكمة بتاريخ 2008-04-30 برفض الدعوى الأصلية وفي الطلب العارض بإلزام المدعى الأصلي بأن يدفع للشركة المدعى عليها مبلغا وقدره 937.434 درهما والفائدة بمعدل 9% سنوياً من تاريخ المطالبة القضائية في 2007-01-15 حتى تمام السداد وبرفض ما عدا ذلك من طلبات. استأنف المدعى هذا الحكم بالاستئناف رقم 340 لسنة 2008 تجاري واستأنفته الشركة المدعى عليها بالاستئناف رقم 341 لسنة 2008 تجاري وبعد ضم الاستئنافين حكمت محكمة الاستئناف بتاريخ 2008-09-24 برفض الاستئناف رقم 340 لسنة 2008 تجاري وفي موضوع الاستئناف رقم 341 لسنة 2008 تجاري بتعديل الحكم المستأنف على النحو الآتي:- أولاً بإلزام المدعى الأصلي بأن يدفع للشركة المدعى عليها تعويضا قدره 351142 درهما والفائدة بمعدل 9% سنوياً من تاريخ الحكم. ثانياً: بتعديل الفائدة المحكوم بها على باقي المستحقات وقدرها 937434 درهما لتصبح كالآتي:- 9% سنوياً من تاريخ الاستحقاق في 2006-04-16 حتى تمام السداد على المبلغ المحجوز كضمان للصيانة وقدره 431538 درهما و9% سنوياً من تاريخ إنجاز البناء في 04-16-2005 حتى تمام السداد على باقي المستحقات وقدرها 505896 درهما ويتأيد الحكم المستأنف فيما عدا ذلك طعن المدعى الأصلي في هذا الحكم بالطعن المائل بتاريخ 2008-11-02 طالبا نقضه ونظر الطعن في غرفة المشورة ورات



المحكمة أنه جدير بالنظر وحددت جلسة للنظر.

وحيث إن الطعن أقيم على سببين ينعي الطاعن بالوجهين الأول والثاني من السبب الأول وبالسبب الثاني من سببي الطعن على الحكم المطعون فيه مخالفة القانون والقصور في التسبب والإخلال بالحق في الدفاع إذ أقام قضاؤه بإلزامه بأن يدفع للشركة المطعون ضدها تعويضاً عن تأخرها في إنجاز البناء وبرفض إلزامها بغرامة التأخير المتفق عليها بواقع 700 درهم عن كل يوم من أيام التأخير البالغة 365 يوماً بحد أقصى 10% من قيمة المقاولة تأسيساً على ما أورده من أنه هو المتسبب في التأخير الذي يعود إلى أعمال مقاولي الباطن الذي قام هو باختيارهم - حال أن مقاول البناء هو الذي يلتزم بغرامة التأخير سواء كان اختيار مقاولي الباطن من قبل رب العمل أو من قبل مقاول البناء وأن اختيارهم من قبل رب العمل لا ينفي تبعيتهم لمقاول البناء - فضلاً عن عدم جواز الاعتماد في ذلك على ما انتهى إليه تقرير الخبير لكونه يتضمن فصلاً في مسألة قانونية كان يتعين على محكمة الموضوع أن تتصدى للفصل فيها بنفسها وقصور الحكم في التسبب لرفضه طلب إعادة المأمورية للخبير لبحث اعتراضاته ولالتفاتته عن التقرير الاستشاري المقدم منه مما يعيبه ويستوجب نقضه.

وحيث إن هذا النعي مردود ذلك أن المقرر في قضاء هذه المحكمة أن مناط مسئولية المقاول الأصلي عن التأخير الذي يتسبب فيه المقاول من الباطن أن يكون المقاول الأصلي هو من قام بتعيينهم أو باختيارهم أما إذا كان اختيارهم قد تم بواسطة رب العمل (مالك أقباء) أو الاستشاري التابع له فإن أي تأخير في الإنجاز الحاصل من قبلهم يسأل عنه رب العمل دون المقاول الأصلي الذي لا يسأل عن غرامة التأخير إذا ثبت أن إخلاله بالتزامه بتسليم البناء في التاريخ المعين في عقد المقاولة إنما يرجع إلى أسباب لا بدله فيها، كذلك من المقرر في قضاء هذه المحكمة أن لمحكمة الموضوع السلطة التامة في تحصيل وفهم الواقع في الدعوى وبحث وتقدير الأدلة المقدمة فيها بما فيها تقرير الخبير المنتدب الذي يعد عنصراً من عناصر الإثبات فيها لها الأخذ به محمولاً على أسبابه متى اقتنعت بها وأحالت إليها بغير حاجة للرد على ما ورد بتقرير الخبرة الاستشاري المقدم من أحد الخصوم في الدعوى ودون أن تلتزم بإعادة المأمورية إلى الخبير متى وجدت في التقرير الذي أخذت به وفي باقي أوراق الدعوى ما يكفي لتكوين عقيدتها في الدعوى وأقامت قضاؤها على أسباب سائغة لها أصلها الثابت بالأوراق وبغير حاجة للرد على اعتراضات الخصوم أو تتبعهم في كافة مناحي دفاعهم لأن في أخذها بتقرير الخبير الذي ندبته ما يفيد أنها لم تجد في تلك الطعون ما يستحق الرد عليها بأكثر مما تضمنه تقريره وطالما أن الخبير قد تناول نقاط الخلاف بين الطرفين وانتهى بشأنها إلى نتيجة سليمة ودل عليها بأسباب سائغة ودون أن يعتبر ذلك منه فصلاً في مسألة قانونية طالما تعرضت إليها المحكمة وأدلت فيها برأيها - لما كان ذلك وكان الحكم الابتدائي المؤيد بالحكم المطعون فيه قد قضى برفض الدعوى الأصلية فيما تضمنته من طلب إلزام الشركة المطعون ضدها بغرامة التأخير المتفق عليها تأسيساً على ما أورده في أسبابه من أنه ((....)) وإذ كانت المحكمة تظمن إلى تقرير خبير الدعوى المنتدب... وتستخلص منه ومن سائر الأوراق أن المدعية تقابلت قامت بتنفيذ كافة التزاماتها التعاقدية وأن المدعى الأصلي هو المتسبب في تأخير تنفيذ الأعمال لتأخره والاستشاري في اختيار مواد التشطيب المختلفة وخلافه والاستشاري في فرق السعر بين البند الملغى الخاص بالسيراميك الجرانيتي للحوائط وبين السعر الاسترشادي الذي قام الاستشاري باحتسابه...)) وأضاف الحكم المطعون فيه إلى ذلك قوله ((.... حيث قضى الحكم المستأنف في الدعوى الأصلية برفضها فإن قضاؤه جاء صحيحاً موافقاً للقانون حيث استند إلى تقرير الخبرة الأصلي والذي قام على أسباب سليمة تبين منها أن التأخير في التنفيذ يرجع إلى عدم توفير الاستشاري للمخططات التفصيلية المطلوبة مع كثرة التعديلات وكثرة تدخل الاستشاري والمالك في فرض مقاولي الباطن... وتأخره في اختيارهم كذلك تأخره في توريد السيراميك والحمامات والمطابخ التي تم اختيار الموردين لها بمعرفة المالك وعدم التزامهم بتنفيذ التزاماتهم مما يجعله غير مستحق لأي تعويض حيث ثبت أن التأخير يعود إليه ولمستشاره الهندسي.. وعن موضوع الاستئناف 341 / 2008 المرفوع من الشركة المدعى عليها.. فلما كان الخبير المنتدب قد التزم بتنفيذ المأمورية المكلف بها.. وانتهى في تقريره التكميلي الأول إلى أن هذه الشركة تستحق تعويضاً عن تأخير تنفيذ المشروع لثبوته أن سبب التأخير يعود إلى المالك والاستشاري.. فإنه يكون بذلك قد أخطأ وخالف الثابت بتقرير الخبرة التكميلي ويتعين إلغاء في ذلك والحكم لها بهذا التعويض...)) وهي أسباب سائغة لها أصل ثابت بالأوراق وبتقرير الخبرة التكميلي المشار إليه من أن سبب إلزام الطاعن بهذا التعويض يرجع إلى الأضرار التي لحقت بالشركة المطعون ضدها من جراء خطأ



الطاعن في التأخير في الإنجاز لتكبدتها مصاريف الدفع والمصاريف الإدارية وتكاليف ومصاريف المعدات خلال مدة التأخير بما يوفر الخطأ والضرر وعلاقة السببية في الدعوى وتكفي لحمل الحكم المطعون فيه ولا مخالفة فيها للقانون وتتضمن الرد على كافة ما أثاره الطاعن من ثم يكون ما أثاره الطاعن من نعي مجرد جدل موضوعي فيما لمحكمة الموضوع سلطة تقديره لا يجوز التحدى به أمام محكمة التمييز ومن ثم غير مقبول.

وحيث إن الطاعن ينعي بالوجه الثالث من السبب الأول من سببي الطعن على الحكم المطعون فيه الخطأ في تطبيق القانون إذ قضى بإلزامه بالفوائد من

2006-04-16 بالنسبة لمبلغ 431538 درهماً وبالفوائد من 2005-04-16 بالنسبة لمبلغ 505896 درهماً - وذلك دون أن يبين سنده فيما قضى به بما يعيبه ويستوجب نقضه.

وحيث إن هذا النعي مردود - ذلك أن المقرر في قضاء هذه المحكمة أن مفاد نصوص المواد 76 ، 88 ، 90 من قانون المعاملات التجارية أنه إذا كان محل الالتزام التجاري مبلغاً من النقود وكان معين المقدار وقت نشوء الالتزام وتأخر المدين في الوفاء به كان ملزماً بأن يدفع للدائن الفائدة بالسعر المتفق عليه في العقد على ألا تزيد عن 12% فإن خلا العقد من الاتفاق على سعر الفائدة فقد استقر العرف القضائي في إمارة دبي على احتساب الفائدة بسعر 9% سنوياً وعلى أن يكون ذلك من تاريخ الاستحقاق وهي تعتبر تعويضاً للدائن عن تأخر المدين في الوفاء بالالتزام في التاريخ المتفق عليه أو في التاريخ الذي كان يتعين فيه تنفيذ الالتزام. كذلك من المقرر أن الدين يعتبر معين المقدار ولو نازع المدين في مقداره طالما لم يكن للقضاء سلطة مطلقة في التقدير. لما كان ذلك وكان الحكم المطعون فيه قد التزم هذا النظر وقضى بإلزام الطاعن بأن يدفع للشركة المطعون ضدها الفوائد على مبلغ 431538 درهماً - وهو عبارة عن جزء من مستحقات هذه الشركة في ذمة الطاعن - وذلك من تاريخ إنجاز وتسليم البناء له بتاريخ 2005-04-16 وإلزامه بأن يدفع الفوائد على مبلغ 505896 درهماً وهو باقي المستحق للشركة على ألا يصرف لها إلا بعد انتهاء فترة الصيانة المحددة بسنة من تاريخ التسليم - وذلك من تاريخ 2006-04-16 فإنه لا يكون قد خالف القانون ويكون النعي بذلك على غير أساس.

وحيث إنه لما تقدم بتعين رفض الطعن.

اطبع هذه الصفحة

# مركز الترجمة

## TRANSLATION CENTER

Dubai Courts E-Services

Dubai Courts

### Judgment Wording

Case No. 1/2006 Civil- Cassation

Session: 16/04/2006

After perusal of papers and hearing the summary report prepared and recited at the pleading hearing by Judge/Reporter -----.

Whereas despite that this cassation was filed on 2/1/2006 under Law No. 30 of 2005 as to amendment of some enforced provisions of the Civil Proceedings Act from the date when the same was published in the Gazette on 14/12/2005; nevertheless, and according to Article (1) of the Civil Proceedings Act, this cassation against the appealed judgment issued on 24/9/2005 which period of cassation haven't commenced before the new Act, then –according to practice of this court- the cassation has fulfilled its formal requirements pursuant to Article 173 and 176 of the same Act.

Whereas merits of the case; according to the appealed judgment and other papers, the appellee company (-----) has filed Case No. 211 of 2004 Civil-Plenary before Dubai Court of First Instance, against ----- Building Contracting Company, owner: -----, requesting to bind them to pay it a



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"المترجم: هذه الترجمة صحيحة، وغير قابلة للتصديق لدى وزارة العدل، وتقدم إلى من يهمه الأمر"

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sum of AED 232414 as well as its statutory interests at 9% from the date of claim till full payment. In supporting this they stated that pursuant to three subcontracts, the defendant assigned to it on 7 and 8-7-1999 Plumbing, Sanitary and AC works in the project constructed on Plot No. 43, Bur Dubai, consisting of (G+ 3 floors); and pursuant to two subcontracts dated 10/8/2000, it was assigned by them for the provision and installation of electricity, water and drain connections, fire-fighting, and fire alarm system works in the project constructed on Plot No. 124-578 Dubai, Ragat Al Baten, consisting of (G+7 floors); then under letters dated 22/10/2000, 20/12/2000, and 14/7/2001, they assigned it to additional works and variations on the project; after completion of works, the defendant requested it on 3/12/2003 to perform some variations on the electricity and plumbing works; and as it completed all the assigned works, it was entitled for a sum of AED 55650 on the first project works, and a sum of AED 168364 on the second project; the defendant already deducted a sum of 8400 which represents 10% of the value of electricity and plumbing variation works; therefore, it is entitled to the entire claimed amount. However, the defendant illegally refused to pay the said amounts; then the plaintiff filed the case. According to the legal notice submitted by the defendant's lawyer, the owner of the defendant company has died on 10/5/2002 i.e. before filing the case; so the plaintiff company corrected the case form by filing the case against his two sons: ----- and ----- (Second and Third Appellants) requesting to bind them to jointly pay to the plaintiff the same claimed amounts with the interests on the basis that the defendant company has devolved to them by



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succession; then the defendants submitted a contingent request to bind it to pay to them a sum of AED 132601 .....

And as the Appellants reproached the appealed judgment by the second reason that it has opposed facts supported by documents as it adjudicated to sustain the first instance judgment to overrule the counterclaim to bind the appellee company to pay delay penalties after approval of the engineering expert's report on the basis that the delay in performance of works executed by the appellee company was due to additional works and time periods granted by the owner of the appellant company as well as variations to the designs from furnished hotel apartments and variation of the building entrance.

Meanwhile, it is established according to both subcontracts dated 10/8/2000 that the completion period is eight months from 10/8/2000 to 10/4/2001; and it is established according to documents that the term of additional works and variations was three months from 14/7/2001 to 15/10/2001; the appellee has fulfilled the completion by 15/11/2001 rather than 15/11/2001 for all original and additional works and the variations. However, it has delayed the completion until 12/6/2002 i.e. seven months delay; such delay was not denied; rather it acknowledged under its case pleading that al additional works, variations and contracts under this dispute as mentioned by the engineering expert as the reason for such delay, were before 15/7/2001, and no amendments or additions occurred during the period from 15/7/2001 to 12/6/2002; and that the claimed



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delay penalties are for this period only. This shall not affect the additional works agreed on 3/12/2003 since these works and the completion term thereof are not a matter of debate, and they occurred after a long time and are not related to the claimed delay in the counterclaim. It is also established according to the consultant expert's report and the report of the assigned engineering expert that reasons of delay were also due to failure of the appellee to complete the works in conformity with the agreed schedule and the promises taken by it to work diligently to complete the works, as well as failure to provide sufficient work force and required materials for work when needed; therefore the judgment is defected and worth to be annulled. As this reproach is denied; since it is established according to the practice of this court that the trial court has full power to comprehend the truth of the case and to assess the evidences submitted in the case including the expert's report, and to be contented with confident points and to reject anything else as long as its judgment was built on authentic reasons supported by documents. It is also established that the contractor shall be bound to the delay penalty if it is proved that its failure to fulfill its obligations in timely completion of works subject to the contract is due to reasons that are not attributes to it. Therefore, and whereas the appealed judgment has built its judgment to sustain the first instance judgment to reject the appellant's contingent request based on its reasons: ((despite that a delay has occurred, but it is established by the expert's report and the reasons thereof which the court in contented with and takes the same as part of its reasons, that the remaining amount to the appellee for the works executed within the scope of



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the agreements between the two parties, is AED 181641 including the amount which was deducted by oath, and that the works were not completed at the agreed dates due to additional works and time periods granted by agreement for the appellee and also due to variations made on the design and on the nature of usage of the property from regular apartments to furnished hotel apartments, as well as amendment of the building entrance and overlapping of civil works and non-readiness of some locations so that the plaintiff (appellee) can execute electromechanical and AC works according to the agreed schedule, particularly as the appellant (Defendant) didn't provide the documented work schedules and didn't submit the statement of cash flow which accompanies such works, amendments and variations made to the project from its inception till completion. This means that it is not established whether the delay in execution was due to failure of the appellee to conform with the obligations under the agreements or due to the several amendments and additions or due non-readiness of locations for work execution, on the light of the variations to the design itself which means that it is not possible to decide that definitely there was a default committed by the plaintiff. Therefore, the request to impose a delay penalty on it is overruled). And as the conclusion reached by the judgment was authentic and supported by documents and the expert's report and sufficient to build a decision; then this reproach shall be baseless. And whereas summary of the second aspect of the first reason is error in law enforcement as it decided to bind them to pay the determined amount despite that no succession without payment of debts, and if a person dies, his debt remains related to his properties



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but not to his successors; and as the appealed judgment has opposed this view then it is defected and worth to be annulled. Whereas this reproach is correct, as it is established in the practice of this court that a private corporation or individual commercial business does not hold a legal personality nor independent liability from its owner's liability but rather it is a part of his financial liabilities; accordingly he shall be solely and personally obligated to its liabilities, and this obligation after his death devolves to his successors as they are general successors under the limits of the part of succession that devolved to them; and as the appealed judgment decided to sustain the appealed judgment to obligate the appellant company owned by the second and third appellants as they are personally liable to the debt payable by their testator (the original owner of this company), so the said judgment has defaulted in law enforcement and shall be annulled for this reason.

Whereas the subject is suitable for adjudication on this annulled part, and based on the aforementioned, the appealed judgment shall be amended and shall be decided to obligate the second and third defendants jointly to pay from their testator's succession (-----) the adjudicated amount to the plaintiff and to sustain other parts thereof.



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## الخدمات الإلكترونية لمحاكم دبي

محاكم دبي  
DUBAI COURTS

## نص الحكم

تاريخ الجلسة : 2006-04-16

رقم القضية : 2006 / 1 طعن مدني

بعد الإطلاع على الأوراق وسماع تقرير التخصيص الذي أعده وتلاه بجلسة المرافعة السيد القاضي المقرر ----- وبعد المداولة.

حيث إنه وإن كان الطعن المائل قد رفع بتاريخ 2-1-2006 في ظل العمل بالقانون رقم 30 لسنة 2005 المعدل لبعض أحكام قانون الإجراءات المدنية المعمول به من تاريخ نشره في الجريدة الرسمية بتاريخ 14-12-2005 ، إلا أنه وبمراعاة ما نصت عليه المادة الأولى من قانون الإجراءات المدنية فإن الطعن المائل على الحكم المطعون فيه الصادر بتاريخ 24-9-2005 والذي لم يبدأ سريان ميعاد الطعن فيه قبل العمل بالقانون الجديد يكون - وعلى ما جرى به قضاء هذه المحكمة - قد إستوفى أوضاعه الشكلية المقررة قانوناً وفق ما تقتضي به المادتان 173 و 176 من ذات القانون .

وحيث إن الوقائع - على ما يبين من الحكم المطعون فيه وسائر الأوراق - تتحصل في أن الشركة المطعون ضدها (-----) أقامت الدعوى رقم 211 لسنة 2004 مدني كلي أمام محكمة دبي الابتدائية على مؤسسة ----- لمقاولات البناء لصاحبها ----- بطلب الحكم بإلزامها بأن تؤدي لها مبلغ 232414 درهماً وفوائده القانونية بواقع 9% من تاريخ المطالبة وحتى السداد التام ، وبياناً لذلك قالت أنه بموجب ثلاثة عقود مقالة من الباطن أسندت المدعى عليها بتاريخ 7 و 8-7-1999 إليها أعمال السمكرة والصحي والتكليف في المشروع المقام على قطعة الأرض رقم 43 بر دبي المكون من دور أرضي وثلاثة طوابق ، وبموجب عقدي مقالة من الباطن مؤرخين 10-8-2000 اسندت إليها أيضاً توريد وتركيب أعمال الكهرباء وتوصيلات المياه والصرف ومقاومة الحريق ونظام انذار الحريق في المشروع المقام على قطعة الأرض رقم 124-578 دبي منطقة رقة البطين المكون من دور أرضي وسبعة طوابق ، ثم بموجب رسائل مؤرخة 22-10-2000 و 20-12-2000 و 14-7-2001 عهدت إليها بأعمال إضافية وتعديلات لهذا المشروع ، وبعد إنتهاء الاعمال طلبت المدعى عليها منها بتاريخ 3-12-2003 القيام بإجراء بعض التغييرات على أعمال الكهرباء والسمكرة ، وإذ أنجزت جميع الأعمال الموكولة إليها وترصد لها من قيمة أعمال المشروع الأول مبلغ 55650 درهماً ومن قيمة المشروع الثاني مبلغ 168364 درهماً ، وكانت المدعى عليها قد خصمت مبلغ 8400 درهم يمثل 10% من قيمة تغييرات أعمال الكهرباء والسمكرة ، وبالتالي فإنها تستحق المبلغ المطالب به ، إلا إن المدعى عليها امتنعت عن سداده دون وجه حق، ومن ثم فقد أقامت الدعوى. وبعد أن تبين من الاعلام الشرعي المقدم من محامي المؤسسة المدعى عليها ان صاحبها قد توفي بتاريخ 10-5-2002 قبل رفع الدعوى ، فقد قامت الشركة المدعية بتصحيح شكل الدعوى بتوجيهها إلى ولديه ----- و ----- (الطاعنين الثاني والثالث) بطلب إلزامهما بالتضامن بأن يؤديا لها ذات المبلغ المطالب به وفوائده تأسيساً على أن المؤسسة المدعى عليها آلت إليهما بالميراث، ثم وجه المدعى عليهم إلى المدعية طلباً عارضاً بإلزامها بأن تؤدي إليهم مبلغ 132601 درهماً





المؤرخين 2000-8-10 أن مدة الإنجاز هي ثمانية أشهر من 2000-8-10 إلى 2001-4-10 والثابت من المستندات أن المهلة للأعمال الإضافية والتغييرات هي ثلاثة أشهر من 2001-7-14 وحتى 2001-10-15 وقد التزمت المطعون ضدها بالإنجاز في موعد أقصاه 2001-11-15 بدلاً من 2001-10-15 لكافة الأعمال الأصلية والإضافية والتغييرات إلا أنها تأخرت عن الإنجاز حتى 2002-6-12 أي بتأخير قدره سبعة أشهر وإن هذا التأخير لم يكن موضوع انكار منها بل أقرت في صحيفة دعواها بأن كافة الإضافات والتغييرات والتعاقدات موضوع الدعوى والتي ذكرها الخبير الهندسي المنتدب كسبب للتأخير كانت قبل 2001-7-15 ، ولم تطرأ أية تعديلات أو إضافات أخرى خلال الفترة من 2001-7-15 وحتى 2002-6-12 ، وغرامات التأخير المطالب بها عن تلك الفترة فقط، ولا ينال من ذلك الأعمال الإضافية المتعاقد عليها بتاريخ 2003-12-3 حيث أن هذه الأعمال وفترة إنجازها غير متنازع عليها وجاءت لاحقه وبعد مدة طويلة وغير متعلقة بالتأخير موضوع المطالبة في الدعوى المتقابلة ، والثابت من التقرير الهندسي الاستشاري ومن التقرير الهندسي للخبير المنتدب أن من أسباب التأخير أيضاً عدم التزام المطعون ضدها بإنجاز الأعمال حسب البرنامج المتفق عليه والوعود التي قطعتها على نفسها بالعمل بجديته ومثابرة لإنجاز الأعمال وكذلك عدم توفير العمالة الكافية والمواد الضرورية للعمل حين الحاجة إليها ، ومن ثم فإن الحكم يكون معيياً مما يستوجب نقضه .

وحيث إن هذا النعي مردود ، ذلك أن من المقرر في قضاء هذه المحكمة أن لمحكمة الموضوع السلطة التامة في فهم الواقع في الدعوى وفي تقدير الأدلة المقدمة فيها ومنها تقرير الخبير الذي ندبته وفي الأخذ منه بما تطمئن إليه وإطراح ما عداه متى أقامت قضاها في ذلك على أسباب سائغة لها أصلها الثابت في الأوراق ، ومن المقرر أيضاً أن الما قول لا يلتزم بغرامة التأخير إذا ثبت أن إخلاله بالتزامه في إنجاز الأعمال في الميعاد المحدد لها بالمعقد إنما يرجع إلى سبب لا يد له فيه ، لما كان ذلك وكان الحكم المطعون فيه قد أقام قضاؤه بتأييد الحكم الابتدائي برفض طلب الطاعنين العارض على ما أورده بأسبابه من أنه ((.. وإن كان هناك تأخير إلا أن الثابت من تقرير الخبير المعين في الدعوى ومن أسبابه التي تعتقها وتأخذ بها جزءاً لأسبابها أن المتبقى للمستأنف ضدها (المطعون ضدها) عن الأعمال التي نفذتها في نطاق الاتفاقات بين الطرفين هو مبلغ 181641 درهماً بما فيها المبلغ الذي إنحسم باليمين ، وأن الأعمال لم يتم إنجازها في المواعيد المتفق عليها بسبب وجود أعمال إضافية ومدد زمنية منحت اتفاقاً للمستأنف ضدها وكذلك بسبب التغييرات التي طرأت على التصميم وعلى طبيعة استعمال العقار من شقق عادية إلى شقق فندقية مفروشة وتعديل مدخل البناية وتداخل الأعمال المدنية وعدم جاهزية بعض الأماكن حتى يتسنى للمدعية - المستأنف عليها - القيام بالأعمال الالكتروميكانيكية والتكييف حسب البرنامج المتفق عليه سيما وأن المستأنفة - المدعى عليها - (المؤسسة الطاعنة) لم تقدم برامج العمل الموثقة ولم تقدم بياناً بالتدقق النقدي المصاحب لهذه الأعمال والتعديلات والتغييرات التي طرأت على المشروع من بدايته وحتى نهايته .. بما مؤداه بأنه لم يثبت بأن التأخير في التنفيذ كان بسبب عدم تقيد المدعية المستأنف عليها بما أوجبه الاتفاقات عليها أم بسبب كثرة التعديلات والإضافات أم بسبب عدم جاهزية الأماكن للقيام بالأعمال ، نظراً للتغييرات التي أدخلت على التصميم ذاته بما لا يستطاع معه الحكم بوقوع إهمال من جانب المدعية بصفة قاطعة وهو الأمر الذي يضحى معه طلب توقيع غرامة تأخير عليها في غير محله)) ، وإذ كان هذا الذي خلص إليه الحكم سائغاً بما له أصل ثابت بتقرير الخبير المنتدب وكافياً لحمل قضاؤه ، ومن ثم فإن النعي عليه بما سلف يكون على غير أساس .



وحيث إن حاصل ما ينعي به الطاعنون بالوجه الثاني من السبب الأول الخطأ في تطبيق القانون إذ قضى بالزامهم بالمبلغ المقضى به رغم انه لا تركه إلا بعد سداد الديون ، فإذا ما توفى الشخص فإن دينه يظل متعلقاً بأمواله دون ورثته ، وإذ خالف الحكم المطعون فيه هذا النظر فإنه يكون معيباً بما يستوجب نقضه.

وحيث إن هذا النعي شديد ، ذلك أن من المقرر في قضاء هذه المحكمة أن المؤسسة الخاصة أو المنشأة التجارية الفردية ليست لها شخصية اعتبارية أو ذمة مستقلة عن شخصية وذمة مالكيها بل هي جزء من ذمته الماليه ، وتبعاً لذلك يكون هو وحده الملتزم شخصياً بديونها ، وينتقل هذا الالتزام بعد وفاته لورثته بوصفهم خلفاً عاماً له في حدود ما آل إليهم من تركته ، وإذ قضى الحكم المطعون فيه بتأييد الحكم المستأنف بإلزام المؤسسة الطاعنة الأولى والمملوكة للطاعنين الثاني والثالث باعتبارهما ملتزمين شخصياً بالدين المستحق في ذمة مورثهما (المالك الأصلي لهذه المؤسسة) ومن ثم فإنه يكون قد أخطأ في تطبيق القانون بما يوجب نقضه لهذا بسبب.

وحيث إن الموضوع صالح للفصل فيه بالنسبة لهذا الشق المنقوض، ولما تقدم فإنه يتعين تعديل الحكم المستأنف والقضاء بإلزام المدعى عليهما الثاني والثالث متضامنين بأن يؤديا من تركة مورثهما (-----) المبلغ المقضى به للمدعية وتأييده فيما عدا ذلك .

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<b>Serial No</b>	
<b>Date</b>	<b>Hearing date: 19-01-2009</b>
<b>Division</b>	<b>Commercial</b>
<b>Cassation No/Year</b>	<b>Case No.: 2008/213 Commercial Appeal</b>
<b>Articles/Laws referred to</b>	<ul style="list-style-type: none"> <li>• Article 890 of the Civil Transactions Law.</li> <li>• Article 1 of the Law of Evidence.</li> </ul>
<b>Head Words</b>	<p>After perusal of documents, hearing the summary report read in the hearing by the judge ----- and deliberation;</p> <p>Whereas both appeals have satisfied their formalities;</p>
<b>Principles</b>	<p>Whereas the facts – as indicated by the judgment under appeal and all documents – can be summarized that ----- has filed case No 658 of 2006 Commercial Entire versus ----- Company whereby he requested the delegation of engineering expert specialized in the civil engineering works to review the drawings and Muqawala contract, inspect the building, state the breaches committed by the defendant, determine the amount due to him (plaintiff) and order the defendant to pay it plus the legal interest thereon. In explanation of his case, the plaintiff stated that he made contract on 12-5-2003 with the defendant for the construction of a building consisting of basement + GF + 7 typical floors on the plot No ----- owned by him in Al Murqabat area and they agreed on the contract works value, the method of payment and the completion period</p>

which was 365 days provided that the defendant would be liable to pay the delay penalty set out in the contract in case it failed to hand over the building on the set date. The defendant violated the specifications, failed to install the agreed materials, its works had execution defects and it delayed the building handover; which caused many damages to the plaintiff. Further, the defendant refused to carry out the maintenance works for the building during the agreed period. Therefore, the plaintiff had to file this case. The defendant submitted incidental request whereby it requested the expert to state the amounts payable to it by the plaintiff and the damages incurred by it as consequence of the delay of work execution due to reasons attributable to the plaintiff, the consultant and the subcontractors nominated by the plaintiff, and to order the plaintiff to pay the amount determined by the expert plus interest of 9% as of the maturity date up to the full payment date. The court delegated an expert, and after the expert had submitted his both original and supplementary reports, the defendant applied for a judgment ordering the plaintiff to pay to it an amount of AED 368.428 plus interest of 12% p.a. on the amount of AED 197.469 as of 11-10-2005 up to the full payment date as well as interest of 12% on amount of AED 170.959 as of the case filing date up to the full payment date. On 31-3-2008, the court decided to accept the incidental request procedurally, and on the merits of the original case to terminate the litigation therein, and on the merits of the counter-claim to order the cross defendant (original



	<p>plaintiff) to pay to the cross plaintiff (original defendant) an amount of AED 368824 plus interest at the rate of 9% p.a. as of the date on which that judgment becomes final up to the full payment date. The plaintiff appealed that judgment by appeal No 215 of 2008 Commercial and the defendant appealed it as well by appeal No 236 of 2008 Commercial. On 25-6-2008, the Court ordered to amend the appealed judgment by changing the amount adjudged to AED 197.469 plus the interest at the rate of 9% as of 11-10-2005 up to the full payment date, and to affirm the other parts of the judgment. The plaintiff appealed that judgment by way of cassation by appeal No 213 of 2008 Commercial under a memorandum that was lodged with the Clerks' Department of this court on 14-7-2008 whereby he requested that judgment to be reversed. Further, the defendant appealed that judgment by way of cassation by appeal on cassation No 253 of 2008 Commercial under a memorandum that was lodged with the Clerks' Department of this court on 19-8-2008 whereby it requested that judgment to be partially reversed with respect of the compensation.</p> <p>The attorney for the respondent submitted a memorandum defense whereby he requested the appeal to be dismissed.</p> <p>In the pleading hearing, the Court decided to join both appeals together to be resolved by one judgment.</p>
<b>Head Words</b>	<b>First: Appeal No 213 of 2008 Commercial</b>

## Principles

The appeal was based on two grounds whereby the appellant finds fault with the judgment under appeal for being in breach of the law and in error in application thereof, defective in grounding, corrupt in reasoning, in breach of the facts established in the papers, in error in understanding the actual facts and in breach of the right of defense as it adopted the expert's report despite that the expert delegated in the case was not neutral and his report should have been discarded and ignored because he had expressed his opinion in this case in case No 657 of 2006 Commercial Entire which required him to abide by his prior opinion. The expert based the result reached by him with respect to the delay fulfillment by the appellant of his obligations and his late approval of the materials and raw materials of the contract works on that fact the appellant had nominated the sub-contractors; while the main contractor was fully responsible towards the employer for the fulfillment of his obligations under the contract irrespective of whoever had nominated the sub-contractor and whether such nomination was under the supervision of or by permission from or under assignment from the employer to the contractor; however the actual facts in the case indicated that the sub-contractors who carried out the works entered into sub-agreements with the respondent in its capacity as the main contractor; thus the latter should have been held liable for their breach of their obligations. The judgment ordered that the value of the retained amounts are to be paid to the respondent while it did not entitle to that value because it represented the

consideration of the granite ceramics item which had been cancelled; whereby the judgment becomes defective and must therefore be reversed.

This ground of appeal is refutable because it is well settled as has been held in the precedents of this court that the criterion of the original contractor's liability for the faults committed by the sub-contractors in the execution of works – as required by Article 890 of the Civil Transactions Law – is that the original contractor is the party who assigned all or any part of such work to the sub-contractor; but if that work has been assigned to the sub-contractor by the project owner or his consultant, any execution faults or delay of work completion beyond the agreed period shall be the responsibility of whoever has appointed the sub-contractor and the original contractor shall not be liable for the same. It is further well settled – as has been held in the precedents of this court – that the delegated expert's report is no more than an element of proof and an evidence placed before the Trial Court which has jurisdiction over the assessment thereof with review in that respect from the Court of Cassation. Whereas the judgment under appeal stated in its contents that it was satisfied with the expert's report because it felt Confident with the foundation upon which it was based on, and it (the judgment under appeal) concluded from that report the result reached by it that the respondent had fulfilled all its obligations and that the delay of work execution occurred because of the appellant and

	<p>the consultant who delayed in selection, approval and supply of the finishing materials, and that they delayed in the nomination of the sub-contractors and forced the respondent to accept them. And whereas the conclusion reached by the judgment under appeal is sound and conducive to the result reached by it and is sufficient in itself to refute the raised arguments and has no impact on the court's approval and adoption of the expert's report and delegation by the court of the expert in another mission between the parties to the case because this would not affect his neutralism; thus the challenge in whole becomes no more than substantive argument over the adequacy and sufficiency of the evidences with which the Trial Court satisfied; which challenge may not be raised before the Court of Cassation.</p> <p>In the light of the abovementioned, the appeal must be dismissed.</p>
<b>Head Words</b>	<b>Second: Appeal No 253 of 2008 Commercial</b>
<b>Principles</b>	<p>The appeal was based on two grounds whereby the appellant finds fault with the judgment under appeal for being in breach of the law and in error in application thereof, defective in grounding, in breach of the facts established in the paper and in error in understanding the actual facts as it rejected the request of compensation for the damage incurred by the appellant as result of the respondent's fault which led to the delay of the project execution for 316 days beyond the set date of handover; which caused damages to the appellant represented in the administrative expenses and costs</p>

suffered by it and idleness of the equipment throughout the delay period. The judgment based its ruling on the ground that the appellant claims for the compensation in accordance with the delay penalties provided for in the contract while the appellant did not rely in its request for compensation on such penalties; but it founded its request on the general rules of the contractual liability; whereby the judgment becomes defective and must therefore be reversed.

This ground of appeal is refutable because it is well settled as has been held in the precedents of this court that the contractual liability is materialized only in case its three essential elements namely the fault, the damage and the casual relationship between them are made out, so that if any essential elements is not made out, the liability shall not arise, and the obligee has to prove the obligor's fault and the damage incurred by him; while the casual relationship between them will be presumed. The obligor may only get rid of the liability if he proves that the damage is due to force majeure, unexpected incident, obligee's act or third party's ac. Although the established failure by the obligor to perform his contractual obligations without acceptable reason is regarded as a fault that entails his liability for the compensating for the damage incurred; however the burden of proving that damage lies on the obligee in accordance with the basic principle stipulated in Article (1) of the Law of Evidence that ((the plaintiff has the right to prove his right and the defendant may negate

it)). It is well settled – as has been held in the precedents of this court – that the proof or negation of the damage is a matter of fact which the Trial Court has independent jurisdiction over the assessment thereof from the evidences placed before it in the case without review in that respect from the Court of Cassation as long as its judgment is based on sound reasons sufficient to support it. Accordingly and whereas the judgment under appeal concluded that the delay of work execution was due to the respondent, and it (judgment) based its ruling that rejected the appellant's request of compensation for that delay on the fact that the case subject contract did not contain any delay penalty in that case, and that the appellant did not deserve any compensation in accordance with the general rules of the contractual liability because it (appellant) failed to prove that it incurred any damage because of the respondent. And whereas the result reached by the judgment under appeal is sound and has proven evidence in the papers as the appellant failed to prove the damage alleged by it, thus the challenge becomes unfounded and has no factual or legal foundation.

In the light of the abovementioned, the appeal must be dismissed.

## الخدمات الإلكترونية لمحاكم دبي



## نص الحكم

تاريخ الجلسة : ٢٠٠٨-١٢-٣٠

رقم القضية : ٢٠٠٨ / ١٨٤ طعن تجاري

بعد الاطلاع على الأوراق وسماع تقرير التلخيص الذي أعدهما وتلاههما بالجلسة القاضي المقرر / -----  
 ---- وبعد المداولة .

حيث إن الطعنين إستوفيا أوضاعهما الشكلية .

وحيث إن الوقائع . على ما يبين من الحكم المطعون فيه وسائر الأوراق . تتحصل في أن مجموعة ----- للمقاولات  
 أقامت الدعوى رقم ٨٠ / ٢٠٠٧ تجاري كلي أمام محكمة دبي الابتدائية على ----- طالبة الحكم بالزامه  
 بأن يؤدي إليها مبلغ ٣,٩٥٤,١٥٠,١٧ درهماً والفائدة بواقع ١٢% من تاريخ الاستحقاق ٢٠٠٦-٣-٨ وحتى تمام السداد وذلك  
 تأسيساً على أنه بموجب عقد المقاولة المؤرخ ٢٠٠٢-٣-٥ أسند إليها المدعى عليه عمليتي انشاء واتمام صيانه المبنين المقامين  
 على قطعتي الأرض رقمي ٢١٧ / ١١٥ السبخة ٤٩٠ / ١١٤ البطين بدبي وقد ترصد لها في ذمة المدعى عليه المبلغ المطالب  
 به وإذ إمتنع عن سداها إليها ومن ثم فقد أقامت الدعوى ، وجه المدعى عليه للمدعيه طلبا عارضا بندب خبير هندسي لبيان  
 الاعمال التي لم تقم الشركة المدعى عليها بتنفيذها وقيمتها ومقدار التأخير في التنفيذ والقضاء له بما يسفر عنه التقرير من مبالغ  
 بذمة الشركة المدعية ومحكمة أول درجة بعد أن رفضت الدفع المبدى من المدعى عليه بعدم قبول الدعوى لوجود شرط التحكيم  
 وندبت خبيراً في الدعوى وقدم تقريره حكمت بتاريخ ٢٠٠٨-١-٣١ أولاً: بقبول الطلب العارض شكلاً وفي موضوعه برفضه .  
 ثانياً : وفي موضوع الدعوى الأصلية بإلزام المدعى عليه بأن يؤدي إلى المدعيه مبلغ ١٣٢٥٣٥ درهماً والفائدة بواقع ٩% سنوياً  
 من تاريخ المطالبة القضائية ٢٠٠٧-٢-٥ وحتى تمام السداد ، إستأنف المدعى عليه هذا الحكم بالاستئناف رقم ١٠٢ / ٢٠٠٨  
 تجاري طالبا الغاء والقضاء مجدداً برفض الدعوى الأصلية والقضاء في الطلب العارض بالزام الشركة المدعية بان تدفع اليه مبلغ  
 ٥٨٥٧٥٨ درهماً والفائدة ، كما استأنفته الشركة المدعية بالاستئناف رقم ١٢٠ / ٢٠٠٨ تجاري طالبة تعديله إلى القضاء لها  
 بكامل طلباتها ، ومحكمة الاستئناف بعد أن ضمت الاستئنافين للارتباط قضت فيهما بتاريخ ٢٠٠٨-٤-٢٠ بتأييد الحكم المستأنف  
 ، طعن المدعى عليه في هذا الحكم بالتميز رقم ١٨٤ لسنة ٢٠٠٨ تجاري بموجب صحيفة أودعت قلم كتاب هذه المحكمة في  
 ٢٠٠٨-٦-١٦ طالبا نقضه ، قدم محامي الشركة المطعون ضدها ( المدعية ) مذكرة بالرد طلب فيها رفض الطعن ، كما طعن  
 الشركة المدعية في هذا الحكم أيضاً بالتميز رقم ١٨٧ لسنة ٢٠٠٨ تجاري طالبة نقضه ، قدم محامي المطعون ضده ( المدعى  
 عليه ) مذكرة بالرد طلب فيها رفض الطعن ، وإذ عرض الطعن على هذه المحكمة في غرفه المشورة ورأت انها جديرين بالنظر  
 فحددت جلسة لنظرهما وفيها أمرت المحكمة بضم الطعن الثاني للطعن الأول للارتباط وليصدر فيهما حكم واحد .

أولاً : الطعن رقم ١٨٤ / ٢٠٠٨ تجاري :

حيث ان الطعن اقيم على سببين ينعي الطاعن بأولهما على الحكم المطعون فيه مخالفة القانون والقصور في التسيب والفساد في  
 الاستدلال ، ذلك أن الخبير المعين في الدعوى أورد في تقريره إستحقاقه لمبلغ ٥٨٥,٧٥٨ درهماً في ذمة المطعون ضدها منه

مبلغ ٤٦٥,٠٠٠ درهم غرامة التأخير ومبلغ ١٢٠,٧٥٨ درهماً قيمة أعمال نفذها الطاعن فكان يتعين القضاء في طلبه العارض بالزام المطعون ضدها بأن تؤدي إليه هذا المبلغ إلا أن الحكم المطعون فيه خالف هذا النظر وقضى بتأييد حكم محكمة أول درجة القاضي برفض الطلب العارض أخذاً بتصفية الحساب التي أجراها الخبير الذي لا يملك إجراء المقاصة القضائية فانه يكون معيباً بما يستوجب نقضه .

وحيث ان هذا النعي غير مقبول ، ذلك أن مطالبة طرفي الدعوى كل منهما للآخر في الدعويين الأصلية والمتقابلة بمبالغ نقدية محدده القيمة وحالة الأداء عن عمل قانوني واحد يتضمن حتماً المطالبة بإجراء المقاصة القضائية فيما بين الطرفين ، وأن اعتماد محكمة الموضوع لتصفية الحساب بين الطرفين التي قام بها الخبير المعين في الدعوى بتكليف منها يعتبر بمثابة قضاء منها بأعمال المقاصة القضائية دون الزام عليها بالنص على ذلك صراحة في أسباب حكمها ، لما كان ذلك وكان الثابت أن محكمة أول درجة بعد أن قدم الطاعن طلبه العارض في الدعوى قد ندبت خبيراً في الدعوى وكلفته بتصفية الحساب بين الطرفين وقد حدد الخبير مستحقات كل منهما قبل الآخر واستنزل ما استحقه الطاعن قبل المطعون ضدها من مستحقات الأخيرة قبله وخلص إلى مديونية الطاعن للمطعون ضدها في مبلغ ١٣٢,٥٣٥ درهماً وخلصت المحكمة في قضائها إلى رفض الطلب العارض وفي الدعوى الأصلية إلى الزام الطاعن بهذا المبلغ باعتباره تصفية الحساب بين الطرفين ومؤدى ذلك أنه قد قضى للطاعن ضمناً بالمبلغ المطالب به ومن ثم فإن ما يتمسك به الطاعن في سبب النعي لا يحقق له سوى مصلحة نظريه بحته لا تصلح أن تكون سبباً للنعي على الحكم المطعون فيه وبالتالي فإن نعيه يكون غير منتج ومن ثم غير مقبول .

وحيث أن الطاعن ينعي بالسبب الآخر على الحكم المطعون فيه القصور في التسبب والفساد في الاستدلال ، ذلك أن الخبير احتسب للمطعون ضدها مبلغ ٢٢٩,٧٢٥ درهماً وهو ما يمثل ١٠% من قيمة العمل الذي تم سحبه منها ، هذا في حين انه اعترض على احتساب هذا المبلغ لأن سحب العمل تم بعد أن عجزت المطعون ضدها عن التنفيذ بما كان يتعين معه عدم احتساب هذا المبلغ ، إلا أن الحكم المطعون فيه لم يواجه هذا الاعتراض واكتفى باعتماد التقرير في هذا الشأن قولاً منه بأن ذلك من سلطة محكمة الموضوع بما يعيبه ويستوجب نقضه .

وحيث ان هذا النعي مردود ، لما هو مقرر أن لمحكمة الموضوع السلطة التامة في تقدير عمل الخبير باعتباره من أدله الدعوى ولها إذا رأت في حدود هذه السلطة الأخذ بتقرير الخبير لاقتناعها بصحة أسبابه أن تحيل إليه دون أن تكون ملزمة من بعد بالرد إستقلالاً على الطعون الموجهة إلى ذلك التقرير إذ في أخذها به محمولاً على أسبابه ما يفيد انها لم تجد في تلك الطعون ما يستحق الرد عليه بأكثر مما تضمنه التقرير ، لما كان ذلك وكان الحكم المطعون فيه قد أقام قضاءه في هذا الخصوص على ما أورده في مدوناته من أن (( وتوصل الخبير أيضاً في تقريره أنه تم سحب أعمال من المدعية بقيمة ٢,٢٩٧,٢٥٠ درهماً قام بها المدعى عليه بنفسه وحسب العرف السائد أن المدعية تستحق ما نسبته ١٠% من قيمة الأعمال المسحوبه منها مبلغ ٢٢٩,٧٢٥ درهماً )) وهي أسباب سائغة لها أصل ثابت في الأوراق وكافية لحمل قضائه في هذا الخصوص خاصة وأن الطاعن لم يقدم ما يفيد صحة دفاعه من أن سحب العمل كان بسبب عجز المطعون ضدها عن تنفيذ هذه الأعمال ومن ثم يكون هذا النعي على غير أساس .

وحيث انه لما تقدم يتعين رفض الطعن .

ثانياً : الطعن رقم ١٨٧ / ٢٠٠٨ تجاري :



حيث ان الطعن اقيم على خمسة أسباب تنعى المنشأة الطاعنة بالسببين الأولين منها على الحكم المطعون فيه القصور في التسبب والفساد في الاستدلال والإخلال بحق الدفاع ، ذلك أن الخبير المنتدب في الدعوى عول في تقريره على المستندات المقدمة إليه من المطعون ضده بحافظة مستنداته المؤرخة ١١-٧-٢٠٠٧ رغم أنها صور ضوئية منكوره فلا حجية لها في الاثبات وأغفل الرد على مستنداتها المقدمة له رفق كتابها إليه المؤرخ ١٢-٩-٢٠٠٧ والبالغ عددها ستة عشر مستندا ولم يبحث دلالتها رغم كونها مستندات جوهرية يتغير بها وجه الرأي في الدعوى ، وهذه المستندات أوردتها الطاعنة في سبب النعي الأول تفصيلا وهي عبارة عن كتب متبادله بين طرفي الدعوى حول صرف مبالغ مالية وطرق تأمين أساسات المباني المجاورة تجنباً الإنهيار تلك المباني وقيمة التكاليف الإضافية وزيادة الاسعار وما يجب عمله لتجنب التأخير فإذا عول الحكم على هذا التقرير رغم عواره فإنه يكون معيبا بما يستوجب نقضه .

وحيث أن هذا النعي غير مقبول ، ذلك أن الفقرة الثالثة من المادة ( ١٧٧ ) من قانون الاجراءات المدنية إذ أوجبت أن تشتمل صحيفة الطعن بالنقض على بيان الأسباب التي بنى عليها الطعن إنما قصدت بهذا البيان . وعلى ما جرى به قضاء هذه المحكمة . تحديد أسباب الطعن والتعريف بها تعريفاً واضحاً كاشفاً عن المقصود منها كشفاً وافياً نافياً عنها الغموض والجهالة بحيث يبين منها العيب الذي يعزوه الطاعن إلى الحكم المطعون فيه وموضعه منه وأثره في قضائه ، لما كان ذلك وكانت الطاعنة لم تبين ماهية المستندات التي اشتملت على صورها الضوئية حافظة المستندات المؤرخة ١١-٧-٢٠٠٧ المقدمة من المطعون ضده ودلالتها وأثرها في الحكم المطعون فيه وموضعها من قضائه ، كما أنها وأن كشفت عن فحوى المستندات المقدمة منها للخبير في ١٢-٩-٢٠٠٧ إلا أنها لم تكشف عن دلالة هذه المستندات والعيب الذي تعزوه إلى الحكم المطعون فيه في عدم أخذه بدلاله هذه المستندات ، ومن ثم فإن النعي بشقيه فيما يتعلق بهذه المستندات يكون مجهلاً وبالتالي غير مقبول .

وحيث ان الطاعنة تنعى بباقي أسباب الطعن على الحكم المطعون فيه القصور في التسبب والفساد في الاستدلال والاخلال بحق الدفاع ، ذلك أنها تمسكت في دفاعها بأن التأخير في التنفيذ كان راجعاً إلى التعديلات في الرسومات والتغيير في تصميم الأساسات حرصاً على سلامة المباني المجاورة وتأخر المقاولون الذين أسند إليهم المطعون ضده الأعمال المحذوفة من عقد المقاولة ، وتأخر المطعون ضده في سداد الدفعات المستحقة لها ، وكلها أسباب راجعة إلى المطعون ضده ولا دخل لها فيها وقد أصابها من جراء ذلك أضراراً قدرتها بمبلغ ٣,٣٩٦,٠٢٦,١٧ درهماً على النحو الموضح بكتابها المؤرخ ٨-٣-٢٠٠٦ المرسل منها إلى المطعون ضده والتقاريرين الاستشاريين المقدمين لمحكمتي أول وثاني درجة بجلستي ٢٧-١٢-٢٠٠٧، ٢٣-٣-٢٠٠٨ ، إلا أن الخبير المنتدب إحتسب عليها غرامة مقدارها ٤٦٥,٠٠٠ درهم وقدر قيمة الأعمال غير المنفذة بمبلغ ١٢٠,٧٥٨ درهماً في حين أن قيمتها الحقيقية مبلغ ٥٥,٠٠٩ درهماً فقط ، كما احتسب مبلغ ٣٠٢,٧٥٠ درهماً قيمة المتبقى لها في ذمة المطعون ضده من قيمة المقاولة في حين أن المتبقى لها مبلغ ٥٩٧,٥٣٥ درهماً وبذلك يبين أن الخبير المنتدب قد أقام تقريره على أبحاث خاطئة وأجرى تصفية غير صحيحة للحساب بين الطرفين ، وإذ تمسكت الطاعنة بدفاعها السالف وأوردت اعتراضاتها على التقرير إلا أن الحكم المطعون فيه لم يلتفت إلى ذلك وعول في قضائه على تقرير الخبير رغم ما شابه من أوجه قصور وعوار ودون ان يعتد بالتقريرين الاستشاريين المقدمين منها واغفل الرد على ما ورد فيهما فانه يكون معيبا بما يستوجب نقضه .

وحيث ان هذا النعي في جملته مردود ، ذلك أن من المقرر في قضاء هذه المحكمة أن إستخلاص التاريخ الحقيقي لإنجاز أعمال المقاولة طبقاً للشروط والمواصفات المتفق عليها وتحديد مده التأخير في التنفيذ التي على أساسها تحتسب غرامه التأخير ، وبيان

الأعمال المنجزة والأعمال غير المنجزة من المقاولة وقيمة كل منها وفقاً للمصوص عليه في عقد المقاولة ، وتحديد الأضرار التي قد تصيب أحد طرفي عقد المقاولة من جراء التأخير في التنفيذ وتقدير التعويض الجابر لهذه الأضرار ، كل ذلك هو من سلطة محكمة الموضوع مستهديه بوقائع الدعوى وظروفها دون معقب عليها من محكمة التمييز طالما كان إستخلاصها سائغا وله أصله الثابت في الأوراق ، ومن المقرر أيضا في قضاء هذه المحكمة أن لمحكمة الموضوع السلطة التامة في تحصيل وفهم الواقع في الدعوى وفي تقدير عمل الخبير المنتدب وفي الاخذ به والاطمئنان إليه متى إقتنعت بكفاية ما أجراه من ابحاث ودراسة ، واطراح ما عده من التقارير المقدمة من الخصوم ، كما أن اخذها بالتقرير الذي إطمأنت إليه محمولاً على أسبابه ما يفيد أنها لم تجد في الطعون الموجهة إليه ما يستحق الرد عليه بأكثر مما تضمنه التقرير ، متى أقامت قضاها على أسباب سائغة لها أصلها الثابت في الأوراق وكافية لحمل قضاها ، لما كان ذلك وكان الحكم المطعون فيه قد أقام قضاها في الدعوى على ما أورده بمدونات من أن (( الثابت من البيانات ومن تقرير الخبير أن المدعية تعاقدت مع المدعى عليه على بناء عمارتين في دبي الأولى ... والثانية بقيمة إجمالية للمشروعين مبلغ ٤,٩٠٠,٠٠٠ درهم وحددت شروط العقد بموجب العقد الموقع بين الطرفين بتاريخ ٢٠٠٢-٣-٥ ومدة العقد إثني عشر شهراً من تاريخ توقيع العقد لينتهي في ٢٠٠٣-٣-٤ وفي أثناء بدء العمل بالمشروع في العماره الواقعة في منطقة السبخه تبين أن العماره المجاوره تمر ملاصقة للأرض المراد بناءها مما يعرضها للخطر اثناء الحفر ما لم يتم إتخاذ الاحتياطات اللازمه وتعديل الأساسات بناء على طلب البلدية وشروطها حيث توقف العمل حتى يتم التعديل من قبل إستشاري المشروع وإعتماده من بلديه دبي حيث باشرت المدعيه الأعمال بعد صدور رخصه البناء المعدله وقامت المدعيه بأعمال إضافية تم إعتمادها من قبل الاستشاري بقيمة ١٥٩,٠٨٨ درهماً وقد توقف العمل بمشروع السبخه منذ بدايته لوجود مشكله في قواعد الجار مما إحتاج إلى تعديلات في القواعد من المراسلات وصور رخص البناء المقدمه من الطرفين فإن الرخصه الأولى صدرت بتاريخ ٢٠٠٢-٤-١٥ وصدرت المعدله بتاريخ ٢٠٠٢-١٢-١٦ مما يعنى أن هذه الفترة توقف محتسب لصالح المقاول ( المدعيه ) لأنها خارجه عن ارادته ويستحق تعويضا قدرت في تقرير الخبير بمبلغ ٢٦٧٣٠ درهماً وكذلك تبين وبعد صدور الترخيص المعدل أن هناك تأخير في التنفيذ تسببت به المدعيه وقد قدر في تقرير الخبره بنسبه ١٠% ويساوى مبلغ ٤٦٥,٠٠٠ درهم وتوصل الخبير أيضا في تقريره أنه تم سحب أعمال من المدعية بقيمة ٢,٢٩٧,٢٥٠ درهماً قام بها المدعى عليه بنفسه وحسب العرف السائد ان المدعية تستحق ما نسبته ١٠% من قيمة الأعمال المسحوبه مبلغ ٢٢٩,٧٢٥ درهماً كذلك قام المدعى عليه بانهاء اعمال قدرت من الخبير بمبلغ ١٢٠,٧٥٨ درهماً وبعد تصفية الحساب من قبل الخبير توصل الخبير في تقريره أن قيمة العقد عن المشروعين هو مبلغ ٤,٩٠٠,٠٠٠ درهم كما قدر قيمة الأعمال التي تم سحبها من قبل المدعى عليه مبلغ ٢,٢٩٧,٢٥٠ درهما فيكون المتبقى مبلغ ٢,٦٠٢,٧٥٠ درهماً ناقص المبالغ المدفوعه للمدعيه مبلغ ٢,٣٠٠,٠٠٠ فيكون المتبقى مبلغ ٣٠٢,٧٥٠ درهماً يضاف لهذا المبلغ ١٥٩,٨٨ درهماً أعمال اضافية متفق عليها تضاف اليها تعويض فترة تأخير القواعد ٢٦,٧٣٠ درهماً إضافة إلى أرباح ما تم سحبه من عمل مبلغ ٢٢٩,٧٢٥ درهماً فيصبح الاجمالي مبلغ ٧١٨,٢٩٣ درهماً ويخصم غرامه التأخير من هذا المبلغ ٤٦٥,٠٠٠ درهم إضافة إلى الأعمال التي نفذها المدعى عليه بقيمة ١٢٠,٧٥٨ درهماً فيكون المبلغ المتبقى للمدعيه مبلغ ١٣٢,٥٣٥ درهماً وحيث توصلت المحكمة الابتدائية إلى هذه النتيجة (( وإذ كان هذا الذي خلص إليه الحكم سائغا بما له أصله الثابت في الأوراق وفي نطاق السلطة الموضوعية للمحكمة في تقدير الأدله المطروحه عليها في الدعوى ولا مخالفة فيه للقانون وكافيا لحمل قضاها ويتضمن الرد المسقط لما اثارته الطاعنة في أسباب الطعن ومن ثم يكون

النعي على غير أساس .

وحيث انه لما تقدم يتعين رفض هذا الطعن أيضا .

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<b>Serial No</b>	Dubai Courts Electronic Services of Dubai Courts
<b>Date</b>	Hearing Date: December 30, 2008
<b>Judge</b>	
<b>Cassation No/Year</b>	Case No. 184/2008 Commercial objection for cassation
<b>Articles/Laws referred to</b>	
<b>Keywords</b>	
<b>Principles</b>	
<b>The Judgement</b>	<p>Having reviewed the action papers, heard both summary reports prepared and read out by Rapporteur judge ..... and after deliberation;</p> <p>Whereas, both objections for cassation have fulfilled the legal requirements in terms of form;</p> <p><b>Whereas</b>, the facts of the case, as established in the challenged judgment and the other papers, are summarized in that .....Group for contracting instituted action No. 80/2007-commercial full jurisdiction - before Dubai Court of First Instance against ..... moving for a judgment obligating the latter (defendant) to pay an amount of AED 3,954,150.17 and the legal interest at 12 % as of maturity date on March 8, 2006 until full payment is made. This claim is based upon the fact that by virtue of the contracting agreement dated March 5, 2002, Defendant assigned to Plaintiff the operations of construction and maintenance of both buildings constructed over the plots No. 217/115 Alsabkha and 490/114 <b>Al Buteen</b> - Dubai. The aforementioned sum is owed by Defendant and due for payment to Plaintiff, yet given that the Defendant refused to pay said amount, Plaintiff instituted the current Action. Defendant filed a motion to Plaintiff to assign an</p>

engineering expert to determine the work which Defendant did not execute, the cost of same and the delay period, Plaintiff further moved the court to award, in its favor, the amounts declared in the expert's report to be entitled thereto as a debt owed by Plaintiff Company. Court of First Instance, after dismissing the motion to dismiss the action submitted by Defendant on the grounds of the existence of arbitration clause, assigned an expert who submitted his report on the action, ruled on January 31, 2008 as follows: **First** : to admit the motion in terms of form, and dismiss the same in terms of subject matter; **Second**: on the subject matter of original Action, to obligate Defendant to pay the Plaintiff the amount of AED 132,535 plus the legal interest of 9% annually as of judicial claim on February 5, 2007 until full payment is made. Defendant appealed such judgment by appeal No.102/2008 commercial, moving for reversal of the judgment, and that a new judgment be entered dismissing the original Action, and to rule, on the motion, to obligate Plaintiff to pay Defendant a sum of AED 585,758 and the legal interest. Plaintiff, too, appealed the judgment by appeal No. 120/2008 commercial, moving the court to amend said judgment to award all its claims. Having joined both appeals for correlation, Court of Appeal ruled, in court hearing dated April 20, 2008, to affirm the appealed judgment. Defendant has challenged the judgment by objection for cassation No. 184 of 2008 commercial by virtue of a Statement filed to court clerks' department on June 16, 2008 requesting that said judgment be reversed. Attorney for Respondent Company (Plaintiff) has submitted a defense pleading in which he moved for dismissal of the objection for cassation. The Plaintiff Company, too, challenged the judgment by objection for cassation No. 187 of 2008 commercial, moving for reversal of said judgment. The attorney-at-law of Respondent (Defendant) submitted a

replication in which he moved for dismissal of the objection for cassation. **Whereas** both objections for cassation were filed with this Court in the deliberation room, it deemed same as worth considering, and thus the Court has scheduled a court hearing to hear same, in which the Court ordered the joinder of Second objection for cassation to the first objection for cassation on the ground of correlation, so that a single judgment would be passed therein.

**First: Objection for Cassation No. 184/2008 commercial**

**Whereas** the objection for cassation is based upon two grounds, through which Petitioner objects to the challenged judgment as being vitiated by breach of the law, defective causation and invalid inference, since the expert, who was assigned in the case, mentioned in the report that petitioner is entitled to an amount of AED 585,758 owed by the Respondent, being the amount of AED 465,000 as a delay penalty plus an amount of AED 120,758 in consideration of work carried out by Petitioner. Therefore, the judgment should have ruled, on the petitioner's motion, to obligate Respondent to pay such amount to Petitioner, yet the challenged judgment disregarded this legal view and ruled to affirm the judgment of Court of First Instance in respect of dismissal of the Motion, on the grounds of the accounts settlement conducted by the court-appointed expert, although he has no right to administer the judicial clearing, thus rendering the challenged judgment invalid and necessitating reversal of which.

**Whereas**, such plea is inadmissible, since the claims of each of the litigating parties to the other in the original and counter for cash amounts of determined values and the payment term for one legal action inevitably includes carrying out a judicial clearing between both claims. Moreover, the approval of Trial Court to settling the account between the parties conducted by the expert assigned in the case by

court is deemed an order from Court to conduct the judicial clearing without any obligation thereon to explicitly stipulate the same in the judgment grounds. Based on the aforementioned, and since it is established that Court of First Instance, after the Petitioner has submitted the Motion thereof in Action, has assigned an expert in the Action and has entrusted said expert with settling the accounts between the parties, and said expert has determined the amounts due on each party towards the other and has deducted the amount to which petitioner is entitled to take from Respondent and has concluded that the debt of Petitioner that should be paid to Respondent is AED 132535, and Court has ruled the dismissal of the Motion, and in the original Action Court has ruled to obligate Petitioner with the aforementioned amount after settling the accounts between the parties. This infers that the judgment has implicitly ruled for Petitioner the claimed amount and hence, what Petitioner adheres to in objection reasons does not constitute but a theoretical interest that is unfit to be a valid reason for objecting to the challenged judgment, consequently, the objection thereof is futile and thus inadmissible.

**Whereas,** Petitioner argues, in the second ground of its objection against the challenged judgment the same is vitiated by defective causation and invalid inference, since the court-appointed expert has calculated an amount of AED 229,725 in favor of Respondent which constitutes 10% of works value that was withdrawn therefrom. Petitioner has objected to the calculation of such amount because withdrawing the works took place after Respondent has failed to continue executing agreed upon works, which necessitates that said number should have never been calculated in the first place. The challenged judgment did not refute this objection and regarded it was to sufficient to approve the expert's report in this regard, claiming that this is left for the

discretion of the Trial Court, which renders said judgment erroneous. and hence necessitates reversal of which.

**Whereas,** this objection is invalid and refutable; since it is established in the law that the Trial Court has absolute authority to assess the task of the court-appointed expert for being evidence in the Action. Trial Court has the discretionary power to rely upon the expert's report, if it is convinced of the validity of the grounds thereof, and to refer to said report without being obliged to reply on a case-by-case basis to the objections raised against said report. Since if the Court relies upon the expert's report, this implies that Court has not found in such objections any matters worthy of being responded to other than those grounds set out in such report. Based on the aforementioned, since the challenged judgment was based in this regard on the transcripts thereof that: "The expert has come to the conclusion that there are works that have been withdrawn from Plaintiff of value AED 229,7250, which Defendant has carried out itself. As per the widely recognized consuetude, Plaintiff is entitled to 10% of the withdrawn works, which amount to AED 229,725". The above are deemed valid and plausible grounds, which are firmly established in case papers and are deemed sufficient to be relied upon by the support the judgment, particularly that Petitioner has not submit any evidence as to the validity of the defense on the fact that withdrawing the works was due to the failure of Respondent to execute the works, and hence the objection is rendered groundless.

**Therefore, this objection for cassation is hereby dismissed.**

**Second: Commercial Objection for Cassation No. 187/2008**

Whereas, the objection for cassation is based upon five grounds; Petitioner company argues, in the first two grounds of which, that the challenged judgment is vitiated by defective



causation, invalid inference and prejudice to the right of defense, since the court-appointed expert has depended, on preparing the report thereof, on the documents submitted by Respondent in portfolio of documents dated July 11, 2007 despite the fact that these are mere photocopies of no weight as evidence, and said expert ignored replying to the documents submitted by Petitioner in portfolio of documents dated September 12, 2007, which are sixteen in number. Moreover, Expert has not verified the significance of such documents, despite being substantial documents that would cause a thorough change in the opinion in this Action. These documents are previously stated in the first ground of objection in detail. These documents are correspondence exchanged between the parties hereto on the payment of cash amounts, methods of securing the foundations of neighbouring buildings to avoid the collapse of said buildings, the amount of additional costs and the rise in prices and what should be done to avoid any delay. If the expert's report has depended on this report despite being defective which renders the judgment invalid and necessitates the reversal thereof.

**Whereas**, this objection is inadmissible, since paragraph (3) of Article (177) of Civil Procedures Law provides that the statement of objection for cassation shall include the grounds upon which the objection for cassation was based, which, as established in the previous court rulings of this court, refers to determining the grounds for objection for cassation, and defining same clearly and comprehensively beyond any ambiguity or ignorance, so that the fault attributed to judgment by Petitioner is demonstrated as well as the effect of fault in said judgment. Based upon the above, and since Petitioner has not revealed the nature of the documents whose copies were included in the portfolio of documents dated July 11, 2007 submitted by Respondent, nor has Petitioner

revealed the significance and effect in the challenged judgment. Though Petitioner has revealed the documents submitted to the court-appointed expert on September 12, 2007, Petitioner has not revealed the significance of said documents and the error Petitioner attributes to the judgment in not taking into account the significance of said documents, thus this whole plea with both parts regarding these documents is vague, and is rendered inadmissible accordingly.

Whereas, petitioner objects to judgment, in all other grounds, as being vitiated by defective causation, invalidity of inference and prejudice against the right, where Petitioner has adhered in the legal defense thereof that the delay in the execution was attributable to the amendments in drawings and change in the designing of foundations out of great care for the security of the neighbouring buildings, the delay on the part of the contractors to whom Respondent has assigned the works cancelled from contracting agreement, and the delay on the part of Respondent to pay the payments due to Petitioner. The aforementioned reasons are all related to Respondent and Petitioner is not involved therein. Petitioner has incurred a damage estimated at AED 3,396,026,17 as shown in Petitioner's letter dated March 8, 2006 addressed to respondent as well as the expert's reports submitted to Court of First and Appellate Court in court hearings dated December 27, 2007 and March 23, 2008. The court-appointed expert has estimated a penalty of AED 465,000 and an amount of AED 120,758 for unfinished works to be paid by Petitioner, but the actual value of said unfinished works is only AED 55,009. The court-appointed expert has estimated the amount of AED 302,750 as the amount remaining for Respondent from contract value, but the actual sum is AED 597,535. All the aforementioned reveals that the court-appointed expert has based its report on erroneous researches and has conducted an

invalid clearing between the parties accounts. Since Petitioner has adhered to aforementioned defense and has submitted an objection against the expert's report, but the challenged judgment has not considered the above and has depended on the expert's report despite the deficiency and default in said report, and has not taken into account the expert reports submitted by Petitioner and has ignored to reply thereto, thus judgment is erroneous and necessitates the reversal thereof.

Whereas this objection is refutable *in toto*, since it is well-established in the judicial precedents of this court that deducing the actual date for the accomplishment of the contracting works as per the agreed upon conditions and specifications, determining the delay period on which a penalty shall be calculated, determining the completed and uncompleted works and the price of each according to what is stipulated in the contract, specifying the damages that may befall any of the contracting parties as a result of delay and estimating the curative compensation thereof, are all left for the discretionary power of Trial Court , which court is guided by the facts of the Action and the circumstances thereof without any supervision from the Court of Cassation so long as the conclusion of the Trial Court is correct and substantiated by case papers. It is also well-established in court rulings of this court that Trial Court has absolute power in understanding and constructing the facts of the Action and in estimating the task of the court-appointed expert, taking same in account whenever Court is convinced to the research and study conducted by the court-appointed expert and disregarding all other reports submitted by litigants. Moreover, the fact that the Trial Court have taken into account the expert report substantiated by the reasons therein indicates that Court has not found in any of the pleas directed to said expert report what needs reply thereto, so long as Court has based the

judgment on correct reasons which are substantiated by case papers. Based on the above, and since the challenged judgment was based upon the reasons stated in the transcript : " It is well established from the data and from the expert's report that Plaintiff has contracted with Defendant to construct two buildings in Dubai, the first ..... and the second .... with a total value for the projects and amount of AED 4,900,000, and has determined the contract terms and conditions signed by the parties in March 5, 2002 with a contract term of twelve months as of signing date to expire in March 4, 2003. During the start of the work in the building located in Alsabkha area, it was discovered that the neighbouring building is adjacent to the land plot to be constructed which renders the building at risk during excavation unless the necessary precautions are taken and the foundations are amended as per the order of Municipality and the terms thereof, and the construction work has stopped until the consultant carries out the necessary amendments and the amendments are approved by Dubai Municipality. Plaintiff has resumed the construction works after the issuing of the amended construction permit, and Plaintiff has conducted additional works that were approved of by the expert with an amount of AED 159,088. The work in Alsabkha project was suspended since the start due to the existence of a problem in the foundations of the neighbouring building which necessitated modifications in foundations of this building. It is evident from the correspondences and the copies of construction permits submitted by the parties, the first permit was issued in April 15, 2002 and the amended permit was issued in December 16, 2002 which means that this halt period is estimated in favor of the contractor (Plaintiff) because it is a *force majeure*, and hence Plaintiff is entitled to a compensation which is estimated in expert's report a sum of AED 26730. After the amended permit was

issued, it was discovered that there was a delay in execution caused by Plaintiff, which was estimated in expert's report at 10%, a sum of AED 465,000. In the report, the expert stated that some works were withdrawn from Plaintiff and are estimated at an amount of AED 2,297,250. Defendant has executed said works *per se*. According to the well-established traditions, plaintiff is entitled to 10% of the withdrawn works, i.e. an amount of AED 229,725. Moreover, Defendant has carried out construction works estimated by the court-appointed expert an amount of AED 120758. After settling the accounts, the court-appointed expert has concluded that the contract value for the projects is a sum of AED 4,900,000, and the court-appointed expert estimated the value of the works withdrawn from Defendant to be the amount of AED 2,297,250 and thus the remainder is the sum of AED 2,602,750 minus the amounts paid to Plaintiff which is AED 2,300,000, and the remainder is AED 302,750 to which an amount of AED 159,88 is added in consideration of the additional works agreed upon, to which, in turn, an amount of AED 26730 as foundations delay penalty is added, in addition to the profits of the works withdrawn an amount of AED 229,725, thus the total amount is AED 718,293, of which an amount of AED 465,000 is deducted, and the amount of AED 120,758 in consideration of the works executed by Defendant is added thereto, hence the amount to which Plaintiff is entitled is the amount of AED 132,535 , and since Court of First Instance has reached this conclusion". Since the conclusion of the aforementioned judgment is correct and is firmly substantiated by the case documents and it is in the discretionary power of the Trial Court to estimate the evidence submitted in the Action, and there is no breach of the law therein and it is sufficient to support, and it includes the refuting reply to all grounds of Appeal raised by Petitioner and thus the objection is rendered

	groundless. Based on the above, this objection for cassation is hereby dismissed as well.
--	----------------------------------------------------------------------------------------------

## **Appendix B: Opinion of Professionals**

Available at softcopy submission



## **Survey questionnaire and collection of responses from professionals in the Construction industry for the topic, Contractor's eligibility for EOT and cost compensation in case of concurrent delay in UAE**

### **Preface:**

A survey questionnaire was designed to collect the valuable inputs from professionals with due considerations for the following aspects:

- Ways to Get Information:
- Questionnaire Research Flow Chart:
- Time Considerations:
- Cost Considerations:
- Advantages of Written Questionnaires:
- Disadvantages of Written Questionnaires:
- Questionnaire Design - General Considerations:
- Qualities of a Good Question:
- Response Rate and Following up on Non-respondents:
- Nonresponse Bias:
- The Order of the Questions:
- Anonymity and Confidentiality:
- The Length of a Questionnaire:
- Notification of a Cutoff Date:
- The "Don't Know", "Undecided", and "Neutral" Response Options:
- Question Wording:
- Sampling:
- Significance:

### **Survey questionnaire:**

The questions that were set for collecting responses are as under:

1. Please advise on the number of years of experience in EOT claims

- less than 5 years
- 5 to 10 years
- 10 to 15 years
- more than 15 years

2. Which of the following describes your current role?

- Contractor
- Claim evaluator/expert for the Contractor
- Engineer
- Client/Employer
- Claim evaluator/expert for the Employer
- Other (please specify)





3. Please specify the region of your experience.

- UAE
- Gulf
- UK
- Others

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

- Impacted As Planned Method
- As Planned vs As Built Method
- But For Collapse As Built Method
- Time Impact Analysis
- Other (please specify)

5. Do you consider different techniques for different type of delay events?

- Yes, delay analysis method is depending on the type of delay event.
- No, delay analysis method is not depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

- Concurrent delays
- Dominate Cause Approach
- Client delays only

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

- Yes
- No

8. Are you referring to certain formula for determination of prolongation and contribution costs?

- Yes, formulas as given below
- No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

- Yes
- No

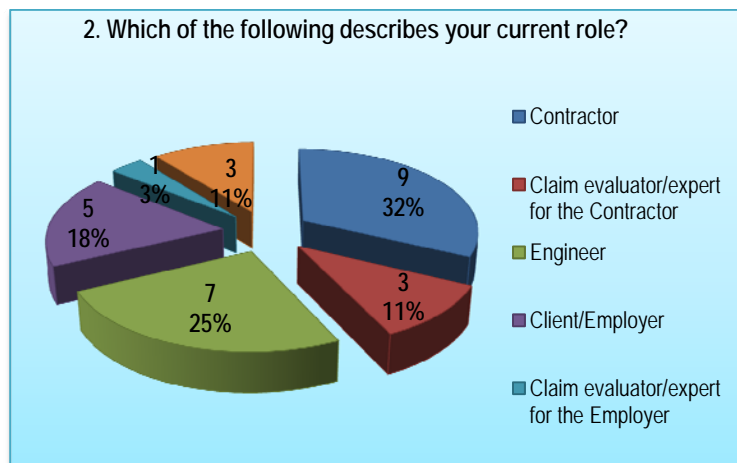
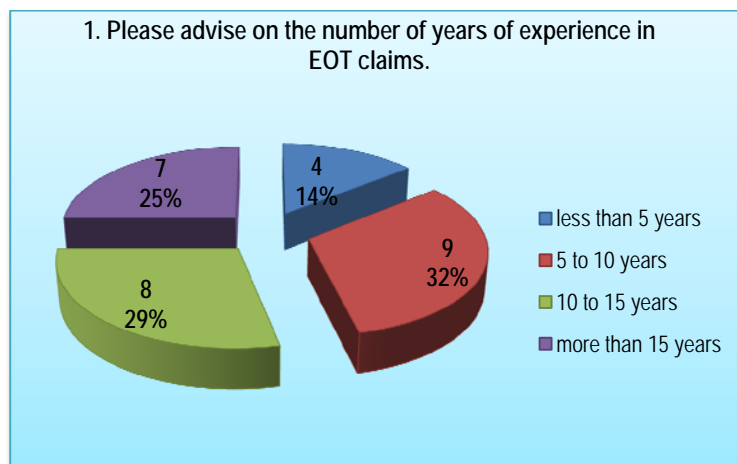
10. In your opinion, who owns the float in the programme? and why?

- Project (both whoever consumes first)
- Employer/Engineer
- Contractor



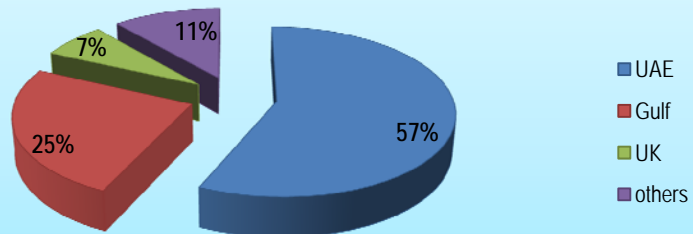
### Collection of responses:

Following is the analysis of the online survey conducted between 28-Feb-2013 to 10-Apr-2013 for collecting the responses from the Professionals in the Construction industry dealing with EOT claims. As of 10<sup>th</sup> Apr-2013, the total numbers of responses received were 28 nos, the analysis of which is presented in this section.

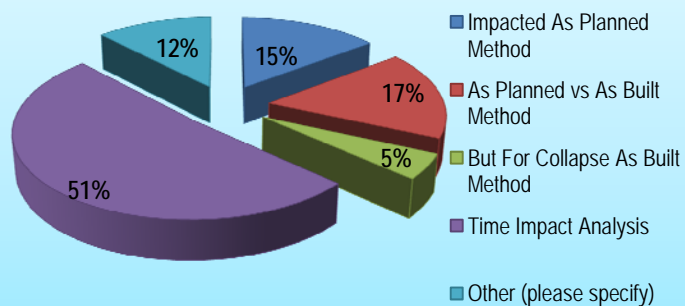




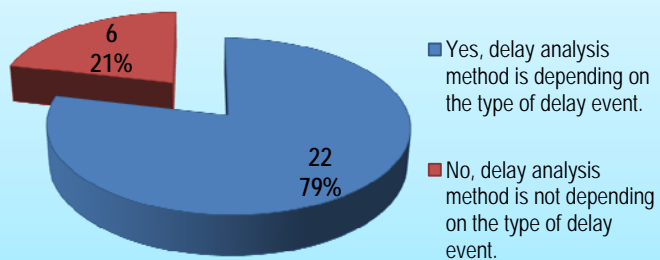
3. Please specify the region of your experience.



4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

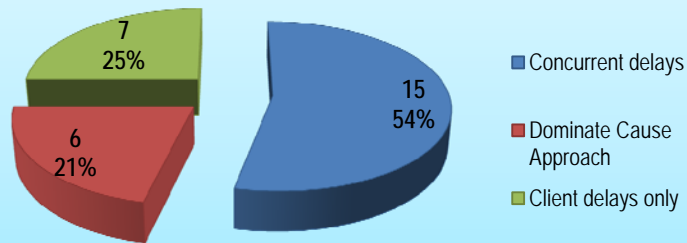


5. Do you consider different techniques for different type of delay events?

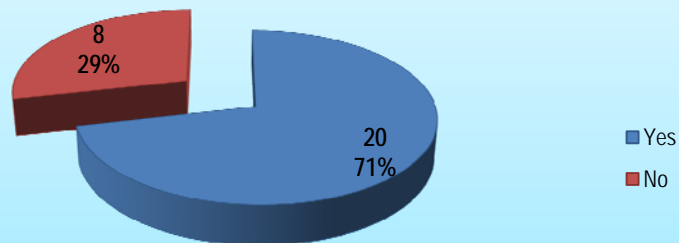




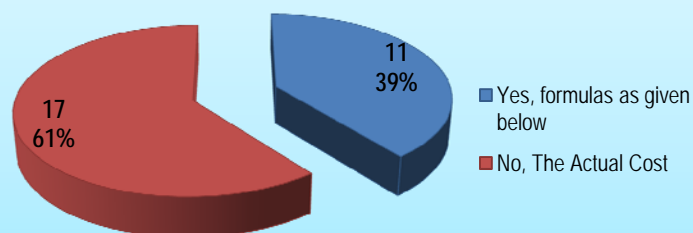
6. Which of the following do you consider for the determination of EOT and Delay Analysis?



7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

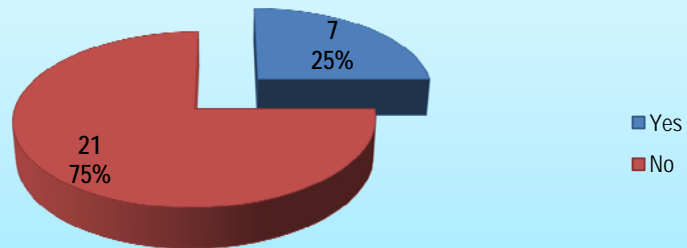


8. Are you referring to certain formula for determination of prolongation and contribution costs?

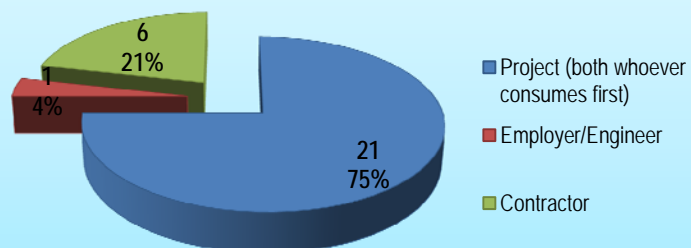




9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?



10. In your opinion, who owns the float in the programme? and why?





### List of Professionals participating in the survey:

Following are the Professionals in the construction industry who were involved in the EOT and concurrent delay claims in their respective organizations and took active participation in completing the online survey questionnaire.

S. no.	First Name2	Last Name	Position & Company
1	Iryna	Akulenka	Assistant Project Manager-Atkins, UAE
2	Lotfy	AbdelKader	Planning Manager-AI Rajhi Construction LLC, UAE
3	Abdullah	Al Gherbawi	Sr. Planning Engineer-EFECO (L.L.C.), UAE
4	Adnan	Rahhal	Projects Manager-Hydra Properties, UAE
5	Ahmed	Soliman	Planning Director -Ali & Sons, UAE
6	Abdurrahaman	Rahhal	Planning Manager - CGC, Abu Dhabi, UAE
7	Chirs	Rigeny	Contract Administrator-Hepher Associates Ltd., UAE
8	Ismail	Mohamed	Contracts Manager-ETA ASCONS, UAE
9	Jay	Palmos	Delay Expert-Trett Consulting, UAE
10	Russell	High	Contracts Director-Bunya, UAE
11	Sumesh	Cheeran	Sr. Planning Engineer-Amana Buildings, UAE
12	Trevor	Anscombe	Contract Administrator-Hepher Associates Ltd., UAE
13	Vijay	Raghavan	Planning Manager - Al Futtaim, UAE
14	Basil	Shraim	Planning Manager-CCC, UAE
15	Anand	Porle	Sr. Planning Engineer - PAL Technology, UAE
16	Eng Omar	Ahmad	Sr.Project Manager-Coffey Projects, UAE
17	Milav	Dalwadi	Planning Engineer- Al Qudra, UAE
18	Noha	Bebbers	Planning Engineer-AI Salaam Consultants, Al Ain, UAE
19	Milind	Dudhe	Sr. Planning Engineer - CGC, Abu Dhabi, UAE
20	Jaychandran	Nair	Planning Manager-Convergent Technologies, UAE
21	Tony	Regio	Principal Scheduler Specialist -S.A.Parsons, UAE
22	Trimmer	M.A.	Managing Director-Matrix Project Management - London
23	Mohammed Hussein	El Gamal	Resident Engineer-Hyder Consulting, UAE
24	Ahmad	Al Mohtadi	Planning Manager -DEPA, UAE
25	Mohammed	Moizuddin	Resident Engineer, AECOM- Al Dhaher-5, Al Ain, UAE
26	Syed	Hasan-PMP, PMI-SP, PMI-RMP, PSP, P2F	Director, CMCS, UAE
27	Michael	Tanyous	Resident Engineer C1 - AECOM, UAE
28	Nazmi	Al Hamshari	Resident Engineer, AECOM, Al Dhaher Infrastructure Project, Al Ain, UAE

## EOT claim & delay analysis techniques in construction industry

Exit this survey

### Preface

In absence of specific or definitive judicial ruling regarding the method by which delay assessment can be made in a construction industry in UAE, an attempt is made to collect the opinion of experts in the field to find out the most common practices to deal with EOT & delay claim analysis. It is not doubted that delay claims characterize as the most complex and litigious issues in construction projects, even though the practitioners are aware of the various delay analysis methods and their methodologies. The entitlement to EOT is not simply a matter of preparing a list of the delaying events in a project; rather, all parties concerned must agree on how the listed events caused the so-called delay or impact and the corresponding duration of disruption of a valid critical path.

---

### About the survey originator:

A post graduate Engineer in construction law from Kingston college, Eng.Abdurrahman Y Rahhal is working as Manager & Head of Planning and Cost Control Dept.for CGC (Abu Dhabi, UAE). He has been actively involved in the delay analysis and is a member of Dubai International Arbitration Centre.

---

### \* 1. Please indicate the number of years you have been working in this field.

- |                                         |                                          |
|-----------------------------------------|------------------------------------------|
| <input type="radio"/> less than 5 years | <input type="radio"/> 10 to 15 years     |
| <input type="radio"/> 5 to 10 years     | <input type="radio"/> more than 15 years |

### \* 2. Which of the following describe your role?

- ☐ Contractor
- ☐ Claim evaluator/expert for the Contractor
- ☐ Engineer
- ☐ Client/Employer
- ☐ Claim evaluator/expert for the Employer
- ☐ Other (please specify)

### \* 3. Please specify the region of experience for the delay analysis

- ☐ UAE
- ☐ Gulf
- ☐

UK

☐ Europe

☐ South Africa

☐ Australia

☐ USA

☐ India

Other (please specify)

**\* 4. Which of the following delay analysis techniques was more often accepted in your projects by all parties concerned?**

☐ Global Impact Technique

☐ But For Technique

☐ Snapshot Technique'

☐ Net Impact Technique

☐ Time Impact Technique

☐ As Planned method

☐ Adjusted As-Built CPM Technique

☐ Other (please specify)

Next

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## EOT claim & delay analysis techniques in construction industry

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Delay analysis(page2)

**\* 5. Do you consider different techniques for different delay events?**

- ☐ Yes, delay analysis method is depending on the type of delay event.
- ☐ No, delay analysis method is not depending on the type of delay event.

**\* 6. Are you dependent on society of construction for practicing delay analysis and determination?**

- ☐ Yes
- ☐ No

**\* 7. Is it acceptable/possible to monitor the delay without having a programme of work?**

- ☐ Yes
- ☐ No

**\* 8. Who owns the float in the programme? and why?**

- ☐ Project (both whoever consumes first)
- ☐ Employer/Engineer
- ☐ Contractor

Please brief your answer

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## EOT claim & delay analysis techniques in construction industry

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Delay analysis (page3)

**\* 9. Please provide your opinion if the approved baseline can be challenged(eg. changing relations, links, durations for what in your opinion is reasonable) for determining EOT?**

☐ Yes

☐ No

Please breif your answer

**\* 10. How was the claim finally settled?**

☐ By amicable settlement

☐ By arbitration

☐ By substantiating the delay events with proper records

Other (please specify)

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Default Report

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: 110050@student.buid.ac.ae	Name: Iryna Akulenska
Custom Value: Assistant Project Manager-Atkins	IP Address: 131.117.172.99
Response Started: Saturday, March 16, 2013 1:45:51 PM	Response Modified: Saturday, March 16, 2013 1:50:01 PM

1. Please advise on the number of years of experience in EOT claims.

less than 5 years

2. Which of the following describes your current role?

Engineer

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Other (please specify) - n/a

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

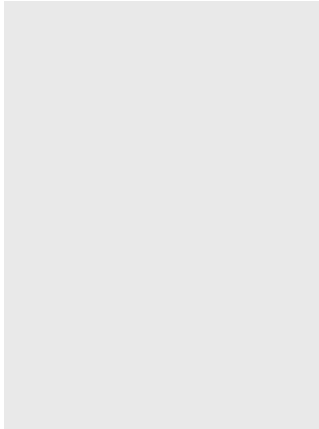
7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an



approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

N/a

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- Italiano
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- 日本語
- Norsk
- Português
- Русский
- Suomi
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- 中 (繁體)



- View Summary
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Default Report

Displaying 11 of 28 respondents

Response Type: Normal Response	Collector: list (Email Invitation)
Email: 110076@student.buid.ac.ae	Name: Lotfy AbdelKader
Custom Value: Planning Manager-Al Rajhi Construction LLC	IP Address: 94.201.232.98
Response Started: Monday, March 18, 2013 11:47:26 AM	Response Modified: Monday, March 18, 2013 11:56:07 AM

1. Please advise on the number of years of experience in EOT claims.

5 to 10 years

2. Which of the following describes your current role?

Contractor

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Impacted As Planned Method

As Planned vs As Built Method

But For Collapse As Built Method

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Dominate Cause Approach

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?



Yes, formulas as given below

A & B

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Float is mostly consed by the E/E in earlier stages ofthe project, and this leads to unavoidable concurrent delays after consing the remaining float.

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: abdulla.g@efecouae.com	Name: Abdullah Al Gherbawi
Custom Value: Sr. Planning Engineer-EFECO (L.L.C.)	IP Address: 194.170.166.114
Response Started: Tuesday, March 19, 2013 9:06:19 AM	Response Modified: Tuesday, March 19, 2013 9:09:48 AM

1. Please advise on the number of years of experience in EOT claims.

5 to 10 years

2. Which of the following describes your current role?

Engineer

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

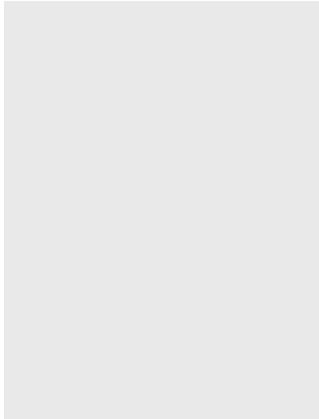
7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

No

8. Are you referring to certain formula for determination of prolongation and contribution costs?

Yes, formulas as given below

ACTUAL COST ACCOUNTS



9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: adnan.rahhal@hydraproperties.com	Name: Adnan Rahhal
Custom Value: Projects Manager-Hydra Properties	IP Address: 83.110.18.123
Response Started: Sunday, March 17, 2013 7:16:31 AM	Response Modified: Sunday, March 17, 2013 7:22:07 AM

1. Please advise on the number of years of experience in EOT claims.

10 to 15 years

2. Which of the following describes your current role?

Client/Employer

3. Please specify the region of your experience.

UAE

Gulf

USA

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Impacted As Planned Method

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Dominate Cause Approach

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

No

8. Are you referring to certain formula for determination of prolongation and contribution costs?

Yes, formulas as given below

A

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: ahmed.soliman@ali-sons.com	Name: Ahmed Soliman
Custom Value: Planning Director -Ali & Sons	IP Address: 2.50.162.77
Response Started: Saturday, March 16, 2013 10:51:27 AM	Response Modified: Saturday, March 16, 2013 10:57:20 AM

1. Please advise on the number of years of experience in EOT claims.

more than 15 years

2. Which of the following describes your current role?

Contractor

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Other (please specify) - As Planned & Window Analysis

5. Do you consider different techniques for different type of delay events?

No, delay analysis method is not depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

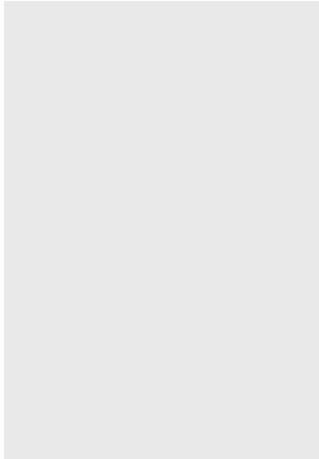
Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

Yes, formulas as given below

A





9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Whoever take it first as per SCL protocol

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Response Type: Normal Response	Collector: Eng Abdurrahaman Rahhal (DIAC Expert Member) (Email Invitation)
Email: a.rahhal@cgcuae.ae	Name: Eng Abdurrahaman Rahhal
Custom Value: CGC	IP Address: 213.42.131.6
Response Started: Thursday, February 28, 2013 1:44:13 PM	Response Modified: Thursday, February 28, 2013 1:54:04 PM

1. Please advise on the number of years of experience in EOT claims.

more than 15 years

2. Which of the following describes your current role?

Contractor

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Impacted As Planned Method

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Dominate Cause Approach

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

No

8. Are you referring to certain formula for determination of prolongation and contribution costs?

Yes, formulas as given below

Hudson's Formula

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Contractor

the float is simply to indicate what is critical and what is not for the contractor to allocate his resources accordingly. however consume the float may not affect the project completion date but it will affect the budget of the contractor.

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: chris.rigney@hepher.com	Name: Chirs Rigeny
Custom Value: Contract Administrator-Hepher Associates Ltd.	IP Address: 2.50.1.35
Response Started: Thursday, March 28, 2013 7:30:22 AM	Response Modified: Thursday, March 28, 2013 5:04:52 PM

1. Please advise on the number of years of experience in EOT claims.

less than 5 years

2. Which of the following describes your current role?

Claim evaluator/expert for the Contractor

3. Please specify the region of your experience.

UAE

UK

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

Other (please specify) - Windows Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Client delays only

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

Yes, formulas as given below

Depends on situation and information available as to which formula can be used however actual costs are used wherever possible

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

The Employer cannot own the float as he can use this to his benefit by issuing design delays etc as and when he has float and most employer delays are early in the project and so would use the float anyway. A Contractor usually leaves an allowance inside his activity for risk as well as float allowing some leway as to whether it actually needs the float at all. However this is all about how much risk a party is willing to accept and proper management of that risk within the programme.

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: ism_mohamed@hotmail.com	Name: Ismail Mohamed
Custom Value: Contracts Manager-ETA ASCONS	IP Address: 250.173.173
Response Started: Saturday, March 16, 2013 9:56:52 AM	Response Modified: Saturday, March 16, 2013 10:03:01 AM

1. Please advise on the number of years of experience in EOT claims.

10 to 15 years

2. Which of the following describes your current role?

Contractor

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Client delays only

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an

approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Contractor

Float is for the benefit of Contractor to efficiently plan and utilize the resources. After all, Contractor has priced the Project and subsequently secured the project based on competitive pricing and so the benefit to utilize the 'float' to better is margins must be with the Contractor.

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: jay.palmos@trettt.com	Name: Jay Palmos
Custom Value: Delay Expert-Trett Consulting	IP Address: 162.97.99.36
Response Started: Monday, March 18, 2013 7:15:30 PM	Response Modified: Monday, March 18, 2013 7:29:59 PM

1. Please advise on the number of years of experience in EOT claims.

more than 15 years

2. Which of the following describes your current role?

Other (please specify) - Claim preparation (contractor, sub-contractor), evaluator (employer, contractor, court), expert witness.

3. Please specify the region of your experience.

UAE

Gulf

Australia, USA, Africa

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Other (please specify) - Much depends upon the documentation available. Subcontract claims or low value projects will necessarily have smaller project management teams - and usually no dedicated claims staff. To answer the question, most methods are found acceptable during the claims stage (i.e prior to formal dispute resolution) if written persuasively and without obvious bias. Perhaps the most important aspect of an "acceptable" claim during construction is that it shows both parties faults. However, once formal resolution proceedings are initiated: TIA is most acceptable in the UK, Australia, Gulf and UAE. But-for collapsed as-built is most acceptable in the US. As-planned v As-built in Africa (though I have limited experience in that geographical area).

5. Do you consider different techniques for different type of delay events?

No, delay analysis method is not depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Dominate Cause Approach

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

Yes

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Float represents time-opportunity. Any float on a contractor's critical path should be filled in with an activity specifying it as contractor owned float. One acceptable method is to insert an activity which defines the outstanding float duration as "contingency". By using this method the contractor explicitly defines this unaccounted for duration as a period of time which it believes reasonably approximates future risk inherent in the baseline programme. Said another way, the contractor has identified that there are potential risks for delay in the critical path and it is reserving its' right to that time.

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: russell.high@bunya.ae	Name: Russell High
Custom Value: Contracts Director-Bunya	IP Address: 83.111.47.164
Response Started: Wednesday, March 20, 2013 11:25:18 AM	Response Modified: Wednesday, March 20, 2013 11:32:53 AM

1. Please advise on the number of years of experience in EOT claims.

more than 15 years

2. Which of the following describes your current role?

Client/Employer

3. Please specify the region of your experience.

UAE

UK

Far East Asia

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

Yes, formulas as given below

A-C for HQ OH&P only; and actual costs for other elements of prolongation

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

Yes

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Project is most reasonable but it depends on what the Contract says! Russell High russell.high@bunya.ae

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: sumesh.cheeran@amanabuildings.com	Name: Sumesh Cheeran
Custom Value: Sr. Planning Enginner-Amana Buildings	IP Address: 176.205.205.159
Response Started: Sunday, March 17, 2013 8:48:00 AM	Response Modified: Sunday, March 17, 2013 8:53:14 AM

1. Please advise on the number of years of experience in EOT claims.

less than 5 years

2. Which of the following describes your current role?

Claim evaluator/expert for the Contractor

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Impacted As Planned Method

As Planned vs As Built Method

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Client delays only

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

No

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

Yes

10. In your opinion, who owns the float in the programme? and why?

Contractor  
The job was awarded to the contractor with his full authority on his time for completion, so taking out his float in the program program is depriving him of his time.

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: trevor@hepher.com	Name: Trevor Anscombe
Custom Value: Contract Administrator-Hepher Associates Ltd.	IP Address: 217.165.52.34
Response Started: Wednesday, April 10, 2013 12:22:54 PM	Response Modified: Wednesday, April 10, 2013 12:28:05 PM

1. Please advise on the number of years of experience in EOT claims.

10 to 15 years

2. Which of the following describes your current role?

Claim evaluator/expert for the Contractor

3. Please specify the region of your experience.

Gulf

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Impacted As Planned Method

As Planned vs As Built Method

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

No, delay analysis method is not depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Client delays only

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

No

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost



9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

Yes

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: vijucvr@gmail.com	Name: Vijay Raghavan
Custom Value: Planning Manager - Al Futtaim	IP Address: 195.229.69.146
Response Started: Tuesday, March 19, 2013 9:08:30 AM	Response Modified: Tuesday, March 19, 2013 9:12:45 AM

1. Please advise on the number of years of experience in EOT claims.

5 to 10 years

2. Which of the following describes your current role?

Contractor

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

Yes, formulas as given below

9. Is it acceptable to monitor the delay and determine EOT without having an

approved programme of work?

Yes

10. In your opinion, who owns the float in the programme? and why?

Contractor

debatable question and depends on the type of contract also. Being a contractor's representative and working on design and build job, I will argue the ownership to the Contractor.

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: bshraim@ccc.ae	Name: Basil Shraim
Custom Value: Planning Manager-CCC	IP Address: 217.165.93.1
Response Started: Thursday, March 21, 2013 8:52:48 AM	Response Modified: Thursday, March 21, 2013 8:55:19 AM

1. Please advise on the number of years of experience in EOT claims.

10 to 15 years

2. Which of the following describes your current role?

Contractor

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

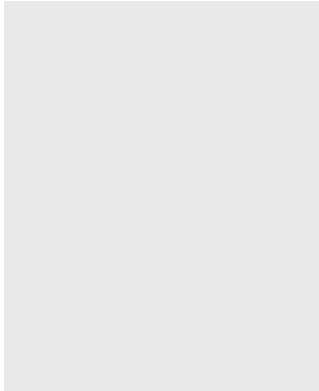
7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an



approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: anand.k@trojan.ae	Name: Anand Porle
Custom Value: Sr. Planning Engineer - PAL Technology	IP Address: 217.165.51.111
Response Started: Saturday, March 16, 2013 10:22:27 AM	Response Modified: Thursday, March 28, 2013 10:53:03 AM

1. Please advise on the number of years of experience in EOT claims.

less than 5 years

2. Which of the following describes your current role?

Other (please specify) - planning engineer - Contractor

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

As Planned vs As Built Method

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

No

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an

approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Anand Porle, Sr. Planning Engineer - PAL Technology, Abu Dhabi

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: gurjia55@gmail.com	Name: Eng Omar Ahmad
Custom Value: Sr.Project Manager-Coffey Projects	IP Address: 175.38.131.70
Response Started: Tuesday, March 19, 2013 11:34:15 PM	Response Modified: Tuesday, March 19, 2013 11:38:58 PM

1. Please advise on the number of years of experience in EOT claims.

5 to 10 years

2. Which of the following describes your current role?

Contractor

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

As Planned vs As Built Method

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Client delays only

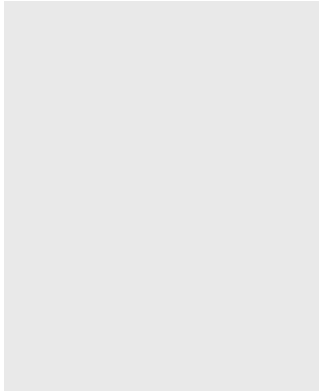
7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an



approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Contractor

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: milav3310@yahoo.com	Name: Milav Dalwadi
Custom Value: Planning Engineer- Al Qudra	IP Address: 217.165.18.166
Response Started: Sunday, March 17, 2013 10:07:51 AM	Response Modified: Sunday, March 17, 2013 10:14:34 AM

1. Please advise on the number of years of experience in EOT claims.

5 to 10 years

2. Which of the following describes your current role?

Client/Employer

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

No, delay analysis method is not depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an

approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Contractor

Because, Programme is Contractor's tool to plan the work and therefore, Contractor always owns the float for the work he is responsible.

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: nouha.bebbers@hotmail.com	Name: Noha Bebers
Custom Value: Planning Engineer-AI Salaam Consultants	IP Address: 217.165.51.111
Response Started: Saturday, March 16, 2013 9:26:48 AM	Response Modified: Saturday, March 16, 2013 12:31:18 PM

1. Please advise on the number of years of experience in EOT claims.

5 to 10 years

2. Which of the following describes your current role?

Engineer

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Dominate Cause Approach

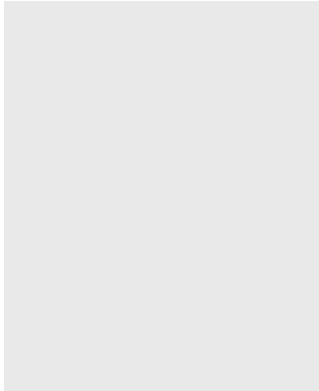
7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an



approved programme of work?

Yes

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: milinddudhe2002@yahoo.com	Name: Milind Dudhe
Custom Value: CGC	IP Address: 86.98.152.226
Response Started: Saturday, March 16, 2013 5:32:14 PM	Response Modified: Wednesday, April 10, 2013 12:22:57 PM

1. Please advise on the number of years of experience in EOT claims.

10 to 15 years

2. Which of the following describes your current role?

Contractor

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Client delays only

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an

approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Both of them can have the right to own the float. It also depends on the owner of the activity. Eg. Float for the Client/Consultant activity to approve the items shall primarily rest with the Client/Consultant, where as the procurement and construction activities where the Contractor is responsible, shall have the right to utilise the float. However the Engineer shall fairly and reasonable utilise the float for approvals and due considerations shall be given by Engineer if he has consumed the approval activity float and left very less float for the Contractor activities.

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: jayurs77@gmail.com	Name: Jaychandran Nair
Custom Value: Planning Manager-Convergent Technologies	IP Address: 176.205.173.128
Response Started: Tuesday, March 19, 2013 7:21:11 PM	Response Modified: Tuesday, March 19, 2013 7:22:58 PM

1. Please advise on the number of years of experience in EOT claims.

more than 15 years

2. Which of the following describes your current role?

Contractor

3. Please specify the region of your experience.

UAE

Gulf

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

No, delay analysis method is not depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Client delays only

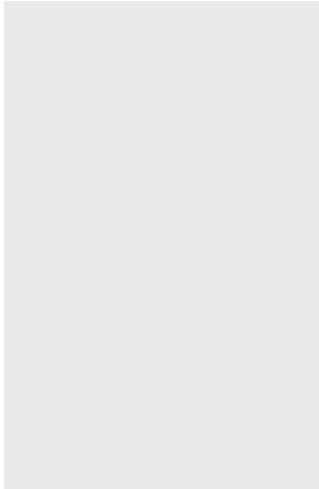
7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

Yes, formulas as given below

HUDSON



9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: tony_regio@yahoo.com	Name: Tony Regio
Custom Value: Principal Scheduler Specialist -S.A.Parsons	IP Address: 112.198.64.27
Response Started: Thursday, March 21, 2013 5:40:47 PM	Response Modified: Thursday, March 21, 2013 5:52:47 PM

1. Please advise on the number of years of experience in EOT claims.

5 to 10 years

2. Which of the following describes your current role?

Claim evaluator/expert for the Employer

3. Please specify the region of your experience.

Gulf

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

No

8. Are you referring to certain formula for determination of prolongation and contribution costs?

Yes, formulas as given below

Royal Commission Work Procedure

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Employer/Engineer

The Royal Commission's CSI provided that ownership of the float belongs to the client. Antonio H. Regio  
tony\_regio@yahoo.com

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Response Type: Normal Response	Collector: list (Email Invitation)
Email: matrixprojects@aol.com	Name: Trimmer M.A.
Custom Value: Managing Director-Matrix Project Management - London	IP Address: 202.82.21.29
Response Started: Monday, April 1, 2013 8:00:21 PM	Response Modified: Monday, April 1, 2013 8:12:34 PM

1. Please advise on the number of years of experience in EOT claims.

more than 15 years

2. Which of the following describes your current role?

Client/Employer

3. Please specify the region of your experience.

UAE

Gulf

UK

far east

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

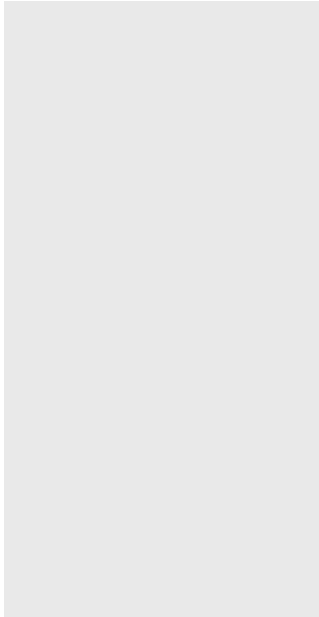
6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Dominate Cause Approach

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and



contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

m a trimmer matrixprojectmanagement@gmail.com

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Response Type: Normal Response	Collector: Eng. Abdurrahaman Rahhal (Web Link)
Custom Value: <i>Eng. Mohammed Hussein</i>	IP Address: 93.88.93.83
Response Started: Wednesday, March 27, 2013 12:52:57 PM	Response Modified: Wednesday, April 10, 2013 6:17:26 PM

1. Please advise on the number of years of experience in EOT claims.

10 to 15 years

2. Which of the following describes your current role?

Engineer

3. Please specify the region of your experience.

UAE

Gulf

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

No

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Mohammed Hussein El Gamal, Resident Engineer-Hyder Consulting, Roads & Infrastructure of Al Dhaher, Al Ain, UAE

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Response Type: Normal Response	Collector: Eng. Abdurrahaman Rahhal (Web Link)
Custom Value: <i>Eng.Ahmad Al Mohtadi</i>	IP Address: 217.165.51.228
Response Started: Monday, April 1, 2013 7:57:15 AM	Response Modified: Wednesday, April 10, 2013 3:04:19 PM

1. Please advise on the number of years of experience in EOT claims.

5 to 10 years

2. Which of the following describes your current role?

Client/Employer

3. Please specify the region of your experience.

Gulf

egypt

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

No, delay analysis method is not depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

Yes

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

non of the above, as each has its pros and cons, so better to agreed on a protocol. Ahmad Al Mohtadi Planning Manager -DEPA aalmohtady@yahoo.com

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Response Type: Normal Response	Collector: Eng. Abdurrahaman Rahhal (Web Link)
Custom Value: Eng.T[ @ { ^ãÄ[ ä ~äää	IP Address: 86.98.147.233
Response Started: Wednesday, March 27, 2013 3:34:52 PM	Response Modified: Wednesday, March 27, 2013 3:51:37 PM

1. Please advise on the number of years of experience in EOT claims.

5 to 10 years

2. Which of the following describes your current role?

Engineer

3. Please specify the region of your experience.

UAE

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Both can own the float.This allows them to manage the sequence and timing of activities,etc as a team. However float should be for the benefit for the employer as he is the one paying for it. And the contractor should not misuse it.  
Mohammed Moizuddin Resident Engineer, Al Dhaher-5, Al Ain Mohammed.Moizuddin@aecom.com www.aecom.com

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Response Type: Normal Response	Collector: Eng. Abdurrahaman Rahhal (Web Link)
Custom Value: <i>Prof. Syed Hasan</i>	IP Address: 92.99.116.185
Response Started: Wednesday, March 27, 2013 12:07:22 PM	Response Modified: Wednesday, March 27, 2013 4:22:13 PM

1. Please advise on the number of years of experience in EOT claims.

10 to 15 years

2. Which of the following describes your current role?

Other (please specify) - Director Professional Services

3. Please specify the region of your experience.

UAE

Gulf

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Impacted As Planned Method

As Planned vs As Built Method

But For Collapse As Built Method

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

Yes, formulas as given below

A, B

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Syed Hasan Syed.Hasan@cmcs-mena.com

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Response Type: Normal Response	Collector: Eng. Abdurrahaman Rahhal (Web Link)
Custom Value: <i>Eng. Michael Tanyous</i>	IP Address: 217.165.53.106
Response Started: Wednesday, March 27, 2013 11:28:37 AM	Response Modified: Thursday, March 28, 2013 10:26:05 AM

1. Please advise on the number of years of experience in EOT claims.

10 to 15 years

2. Which of the following describes your current role?

Engineer

3. Please specify the region of your experience.

UAE

Gulf

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

As Planned vs As Built Method

Time Impact Analysis

Other (please specify) - Window Approach

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Michael Tanyous, Resident Engineer AECOM - C1 Roads & Infrastructure of Al Dhaher, Al Ain, UAE

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Response Type: Normal Response	Collector: Eng. Abdurrahaman Rahhal (Web Link)
Custom Value: <i>Eng. Nazmi Al Hamshari</i>	IP Address: 86.98.147.253
Response Started: Wednesday, March 27, 2013 8:43:22 AM	Response Modified: Wednesday, March 27, 2013 9:00:25 AM

1. Please advise on the number of years of experience in EOT claims.

more than 15 years

2. Which of the following describes your current role?

Engineer

3. Please specify the region of your experience.

UAE

Gulf

4. Which of the following delay analysis techniques were found more often acceptable in your projects by all parties concerned?

Time Impact Analysis

5. Do you consider different techniques for different type of delay events?

Yes, delay analysis method is depending on the type of delay event.

6. Which of the following do you consider for the determination of EOT and Delay Analysis?

Concurrent delays

7. In case of concurrent delay are you considering the Society of Construction Law Protocol for Delays & Disruption for determining EOT (EOT without cost)?

Yes

8. Are you referring to certain formula for determination of prolongation and contribution costs?

No, The Actual Cost

9. Is it acceptable to monitor the delay and determine EOT without having an approved programme of work?

No

10. In your opinion, who owns the float in the programme? and why?

Project (both whoever consumes first)

Both can own the float, depending on the nature of activity. Client/Consultant activities like approvals shall take the ownership of the float, whereas the procurement & construction activities is Contractor's responsibility, & can utilize the float for these activities. Eng.Nazmi Al Hamshari (Resident Engineer, AECOM, Al Dhaher Infrastructure Project, Al Ain, UAE) Email: nazmi.alhamshari@yahoo.com

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