DEALING WITH CONCURRENT DELAY CLAIMS IN THE MODERN ERA

Myths & Reality

How has the global trend of construction claims and disputes getting change over the time in the recent past?

Value of claims and disputes globally sum-ups nearly one third of projects' capital expenditure committed on average in mid-2022, whereas contractors claimed extension of time ("EOT"), schedules were typically over run by more than a year on average and the cumulative value of the sums in dispute exceeded $80 billion together, the extensions of time sought was stretch beyond 840 years, in according to the HKA Consultant's 5th CRUX global annual report 2022.

The HKA's report, further suggested that the re-balancing of risk allocation, collaborative approach, earlier involvement of contractors and sound pre contract administration which would pre-empt many of the design and other conflicts arising on projects. Change in scope, late or incomplete design, routinely missed contractual deadline except to the payment deadline, late approvals, cashflow payments which mostly reason for claims and disputes specially in the Middle East, among other 6 regions. The data gathered via 30 typical causes which were listed for research agenda for ranking over 1,600 projects in 100 countries with the capital expenditure amounting to US $ 2.13 Trillion.

It is obvious among the issues with Covid-19, (including broken supply chain, sanctions, deep recession, crisis and shortages, increased food and energy bills) and previous pipelines of issues were generally outlined in the CRUX report together and therefore, the Concurrent delay ("CD") is generally and specifically in the Middle East and elsewhere is appeared to be a concern topic as the report outline the region which corresponding high over run period among other regions and next to Africa - adding more than 80% of planned schedule.

Therefore, topic like adoption to new modern contracts' adapting five Golden principles of FIDIC and its proper amendment or latest version's terms (2017, second edition), proper contract administration and contract drafting with appropriate risk allocation, enhancing institutionalised and legislated ADR-mediation with either hybrid Arbitration/adjudication and or BIM adoption and proper digitized estimation are raising its own significance to overcome or mitigate these issues, as a middle ground solutions not only for in the Middle east, but other regions as well.

It is crucial that the CDs and delays due to Covid-19 neutral event, hyperinflation, abrupt change of material prices and exchange rate, oil price fluctuation, cashflow issues, prolonged suspension and termination were somewhat substance of the disputes, among others, which raised the question of whether

these must be separate for succinct argument for EOT and delay damages claims and its entitlement.

Most of the emerging economies highly exposure to significant fluctuation during the above said timelines and events due to excessive external capital financing sources and its ramification, like BRI countries.

Whereas, local contractors and sub-contractors and suppliers are much familiar with local customs, norms and standards in such developing countries. Hence, these participant to the project would severely have felt with the financial distress or negative cashflows and would deteriorated their bid price markup and highly exposure to unforeseeable fluctuations of material prices and foreign exchange rate, in particular when involving with the international projects and the procurements perspective.

Furthermore, whether a contractor entitled for price escalation and parity variance (as a result of foreign exchange rate fluctuation) claims, in the absence of the relevant formula or provision and lack of contractual mechanism how to quantify these damages for compensation during the CD would further makes difficulties.

In order to avoid these risks of increment of the final contract price, it must preserve the rights through timely submission of notices and interim claims submission with proper substantiation to be investigated the matters contemporaneously.

If such claims are lacking in details though the Contractor contributed to CD, the question would arise whether can the Contractor tactically invoke argument for non-operation of liquidated damages ("LD") successfully and/or fully or partially entitled to recover the material price escalation and exchange rate currency adjustments as actual damages compensable, in particular when there is no contractual provision or authority which supporting the case?

Similarly, could the employer argue successfully for LD rate and cap and price adjustment (discount) claims together for delay contractually agreed together during the CD, in circumstance where contractor was responsible partly or fully?

Would these situations yet an obverse issue in assessing the CD claims which makes the assessment more difficult at the currency of the issue or after the termination or completion, routes for much debates and arguments unless the clear risk apportion with regards to the provision of CD, EOT, LD and general damages as outset in the contract to allow those risks to the estimation.

How CD is addressed in the new era?

CD generally means both parties simultaneously in delay to completion or the situation where more than one delay affects the projects simultaneously and would likely or actually affect the date of completion.

The issues generally more complex or hard to do deal with apple to apple as neither governing law nor contract principles does not clearly cover this in detail manner and or courts have been employed inconsistence approach in its evaluation, while handling the different nature of issues in connection with the assessment.

This article however, briefly outline the matters which are most closely related and of the interest of the most of the parties, their representatives, tribunals, ADR-practitioners, and of the various stakeholders in the industries. The explanation covers a wide range of practical aspects and raising concerns pave the way to dealing appropriately with various situations and circumstances, notwithstanding in Sri Lanka but an international context too.

The application in few jurisdictions in common wealth countries which mostly do dealt similar issues historically has been outlined, in line with the payment of prolongation and or EOT & LD's claims, where CD issues were at premium during and before or aftermath of Covid-19 pandemic.

The broad sense is that the Covid-19 period is highly likely to be qualified as force-majeure in many jurisdictions in general and would be considered as excusable delay, thus, avenue for EOT relief subject to actual circumstances were, merit of each case, contractual provisions and the applicable law.

However, in order to deal with the delay damages like LD payment or prolongation cost for example, it must be taken to account of the additional estimated amount or any concession agreement which might have considered in the interim or during the course of the progress which should reflected in the final account assessment.

Furthermore, there are established legal principles and tests or theories, case law and the application of the Delay & Disruption Protocol, published by the United

Kingdom Society of Construction Law - SCL[i], illustration from various case laws, books, articles, law magazines, webinars and newsletters from various consultant firms, law firms, institutes and alumni network give assistant in this regard.

In particular, the second edition of the protocol published in 2017, the SCL amended the CD, accepting the ***global claims*** concepts with assisting it to find the best guidance, even though different approaches and ideas maintain by different jurisdictions, various argument often rises by the international construction lawyers, claim consulting professionals, contract managers, ADR professionals, Mediator, Arbitrator and counsels to find the legitimacy of the CD claims by the parties.

Key issues of the CD most common in the construction industry

CD is a more complex matter in the construction contracts and beyond, the application of rules and law is somewhat varied and sometime complex but different approaches employed by cost/claim consultants and experts in different jurisdictions, in order to prove the claims in a dispute.

But, are they competent to accomplish this mission rest on many aspects and relevant approaches which must convince through the factual analysis and evidences put together in order for a tribunal to properly reach conclusions and reasoning for a decision.

These approaches may vary in evaluating the CD due to the sensitivity of each case, nature and complexity of the project and its participants and risk pattern, jurisdiction, established tests and principles and courts' & tribunals' traditional way in dealing with the dispute in order to settle such claims.

The effective evaluation in the context of proving the dominant cause **V** apportioning the responsibility and establishing the time or damages or fault as a result of CD in order to compensate the time and or money claims.

However, contractual provisions and its risk allocation, Critical Path Methods-delay analysis employed, parties' action or omission of contractual obligations, and other connecting factors which influence that the CD claims may not effectively resolved in the new world, especially during the pandemic or unprecedented time, due to the following matters:

- level of standards elects to apply;
- interaction between legal principles in determining the cases in different jurisdictions;
- relative significant of risk events;
- causes link to the delay and EOT provision;
- contractual risk allocation or true concurrency, ownership of float arguments, fair and reasonable claims;
- lack of project documentation;
- criticality of the event causes the delay to completion;
- COVID-19 or force majeure events;
- local and global economics and geo political turmoil and its procedures;
- political or governmental spheres and tactics; and
- investment priorities, energy issues and trade and earth tensions and Russian-Ukraine war.

However, how well the contractual provisions stipulated clearly about the method of evaluation of CD and its risk allocation, in particular regarding to the discretion to exclude or limit to grant or consider EOT due to CD.

Despite, the interaction between these discretionary clauses which may undergone for scrutiny either by the question of operability of LD clause or by alleviated argument for forfeited claim due to the failure of notices and claim submission due to contractual time bar provisions, as these might contrary to the applicable law i.e., established general principles such as prevention principles, unjust enrichment and of the mandatory obligation of civil law such as good faith obligation and delay damages.

Following matters are considered as relevant to the contractual provisions which room for argument in CD situation:

- how to apportioning the responsibilities to consider whether finding the basis of fault or time or damages- either actual or liquidated, are allocated in the contractual context;
- tests used to prove the proximate or dominant cause or other theories or case law authorities to find who is responsible for the entire delay and or if any additional payment for prolongation (loss & expenses or cost and/or

profit) which offset the employer's delay damages;
- applicable law on LD and actual damages;
- contending argument on prevention principle;
- improper risk allocation of CD;
- condition precedent and time bar clauses; and
- definition of float and its utilisation.

In addition to that, extent of the parties' actions or inactions, omission, and lack of project documentation also contribute to the choice of approach and effect on the relief in the context of failure to comply with obligation and lack of procedural documentation and submission and contract administration, for example:

- ruling out the ideas to forming an opinion as to fully or apportioned way in compensation for delay;
- causal link proving the respective cause and effect, via different delay analysis methods within a jurisdiction and its accountability, credibility, applicability, accuracy and relevancy;
- point of time at which the claim arises, claims submitted & dispute triggered;
- lack of information or limited contemporary records such as no programs of whatsoever types produced;
- lack of and or failure of notices;
- proper interim EOT and particulars submission;
- extent of any failure in performing by the parties on their contractual obligations which substantially undermined the previous ruling and contractual obligations or pace of delay;
- parties' responsibilities or burden to prove the case which may have failed to follow the best international standard and practice, especially in a termination or delay damages triggered situations are potentially/actually occurs - either with a chain of CDs or a single lengthy CD;
- facts and evidences and its weightage and credibility in proving the fraud or cross negligence;
- capacity of the party and way of act in good faith and dealing fairly; and
- appointing competent claim consultants and nominating experts and mediators, Alternative dispute resolvers and Arbitrators.

How to assess or dealt with CD when defect and termination are the substance of the issue which separate the parties?

Confrontations generally arise at the progress of the works where the critical delays would have hindered the productivity potentially or possibly and could have actually affect the contractual time for completion, due to changes on sequence of works.

But, the real cause to the delay could not be able to establish dynamically for many instances. This is most common when there is a CD situation which may be relied by each party equally caused or contributed to, but there were neutral events such as COVID-19 delay and governmental restrictions or regulations which might have disrupted the regular progress of work.

For example, in case of a termination prior to contractual completion and appointment of a different or new sub-contractor by replacement for a defective work to be carried out is potentially triggered.

Whilst the main contractor would reluctant to engage the remedial work, likely to contend an argument that the default attributable to employer or employer's representatives and thereby the subsequent work getting delay or critical in meeting the contractual date of completion.

The employer may engage a new sub-contractor to complete the rectification, and later on would demand for the defective works' contractor's payments recovered from the main contractor's final account settlement by engage an argument for improper workmanship or fail to comply with the correction notice through exchange of various correspondences.

On the other hand, the main contractor would contend for the loss of profit for remaining works and bring counter argument of the design fault or late design or material delivery and may or may not argue for wrongful termination or failure of a notice.

Despite not to correct the errors or defects notified by the employer but for many other reasons which may include their own delays and workmanship default probably might have contributed for the overall project's delay.

After the termination, the question would arise at what extent the responsibility is attributable and under

whose fault were the delay contributed might not have been established, during the course of the progress of the works or at the time of the anticipatory breach may have opted by the employer.

Even at the worst case after the completion of the whole of the works but the final account statement claims may become with non-comprehensive delay analysis could be another scenario for potential arguments at the mediation table and among expert's evidence session.

Therefore, under whose fault the delay was attributable and at what extent an employer prevented or Relevant Event cause the delay, for example, late approval of drawing or late delivery of design or design fault were equally prevent the contractor in completing a subsequent critical work which shifted the completion date require to investigate.

It may obvious that a contractor would relax any procurement and may let the employer to choose for termination as a remedy for anticipatory breach and later on may challenge to find the validity of the remedy or invoke argument for wrongful termination and of the notice.

It may be less productive in case if an expert is not finding that he/she identified whether design failure or poor workmanship at the currency of the issue, however upon completion of the whole of the works including the replaced sub-contractor and final account statement produced therefore, the claims may be raised for loss of profit, if the termination was wrong and proved to be only erroneous design was the matter for defect.

Where the circumstances of termination occur prior to completion - if a party in default, then the other party may entitle to terminate contractually but could not have been issued a relevant notice to that effect and thereby the other party took no action against and kept quit by not engaging the work regularly and diligently, contending that the reason as design fault or something else which cause the delay.

Therefore, apportioning the responsibility for the delay and any EOT or actual cost or loss incurred or likely to incur as a result of such CD should have investigated contemporaneously in order to establish the quantum and the entitlements. Failing which, it could not establish only based on the correspondences to conclude whose fault is the CD is and at what extent exactly they have contributed to delay, in case of termination or upon completion, which led the tribunal unable to reach the reasoned decision.

Then the solutions rest on how to distinguish the substance of the issue which separate the party by consensus of expert evidences and common-sense approach for the productive judgment by extinguishing the quantum for each and every dispute raised!

How ADR practitioners or Arbitrators approach the CDs where there are many disputes which cause the overall delay to the project?

Arbitral tribunal and Judges would decide the dispute on claim for EOT, loss & expenses (additional payment) & LD, based on the contractual provisions and its effectiveness for its enforcement.

The tribunal try to balance the responsibilities of default/failure of conduct/performance of each party according to their contractual obligations, at what extent or rational that they comply with a contract in each related terms and conditions in consistent with the contract and how comply they were with the applicable governing law in performing the works and their secondary obligations if any non-performance or breach cause the damages.

In case of any onerous terms or no contractual provision therein and amendment of standard EOT clause for CD, in particular with the payment for LD, the tribunal focus may turn to which extent the common law-prevention/condition precedent general principles and civil law-good faith obligations were overridden or followed, in any reasonable argument for CD claims arises.

In order to evaluate the facts and arguments of the parties' representative and counsels, the following might be investigated, in order to decide to award EOT and or additional payment whilst look at the point of time at which, the LD was triggered for payment on the employer's delay damages- which set-off contractor's loss and expenses or prolongation claim, in view of the following matters:

- standard EOT provisions and risk allocation;
- any amendment for exclusion of EOT specified precisely;

- interpretation of governing law of the contract to find the effectiveness of the contractual terms;
- contemporary records and a comprehensive delay analysis if any produced without errors;
- the admissibility of the evidence, extent and the scope of proofs required, weightage of evidences and its appropriateness;
- identifying the extent of the responsibilities of each party who caused the CD;
- proving through approaches, tests and ideas which separate parties' culpability; and
- proving the cause and effects and the casual link established for the delay.

Therefore, when deciding the settlement, the tribunals and or judges would consider in the proceedings, whether to decide with or without proper delay analysis, contemporary records and correspondences, facts and law point on issues raised by either parties' claims or counter claims to find the submission and arguments, other evidential expert testimony for succinct reasoning for the decision.

"Only in circumstances where impractical in finding the credibility of the effective/dominant cause of a CD or inappropriateness of its contractual risk allocation, in broad view of the length of judgment is disproportionate or impractical which led a lengthy judgment or less productive outcome is highly likely, then the judge or arbitral tribunal may consider common-sense approach or outline the substance of dispute which separate the parties for succinctly reasoning for decision, rather than evaluating each identified dispute in the correspondences and noncomprehensive delay analysis method contended for is thereby not a sufficient evidence supporting the claims, viz-versa."

Different approaches for CD evaluation

There are established test, theory and approaches such as Malmaison, But-for, first line, Delvin, dominant cause, heller approach and apportionment theory are widely used to evaluate the CD.

A brief detail of each is illustrated below which are considered for in what circumstances were EOT been granted/not granted; where the additional cost was considered/ not considered; where an EOT been granted thus no prolongation cost (expenses and losses) were considered and at which point of time the LD payable offset by the prolongation cost was likely triggered at once.

Some of the drawback implanted in each of these methods outlined and therefore, the concentration for choosing a better method is depend on sensitivity or nature of each and every case and the factors in connection with.

But for test often **s**eek to argue for reasonable EOT claim or causation test where for instance an instruction or variation caused over-run which would not have occurred '*but for*' the event (dominant cause/effective cause) complained, which is affected to complete in a longer period. Questions arises suitability for two or more events whilst independently sufficient to cause the delay then difficult to use this concept.

Firstline approach attracted in common law principles, which allows a cause to be prevalent over the other on the basis that it occurred first. the liability establishes merely in the point of order in time and in line with the *first event* cause of the whole delay but not account the other legal principles and connecting factors or equal potency or competing events.

Delvin approach considers *two competing* events, one was employer's risk event (Relevant Event per JCT contracts) and other was Contractor's risk event, co-operating *equal efficacies* sufficient to judge the loss, breach of contract comes the whole burden of the loss is not just reasonable enough.

Heller (dollar for dollar netting)
When the competing delays are truly concurrent a schedule extension is considered and the net value of loss is calculated equivalent to LD valued less any loss and expenses incurred by the contractors. This approach does not take into account relief of liability for fault during the CD.

Dominant Cause
Either claimant's claim or defendant's counter claim would succeed for entire delay. One cause is proved to be the reason for the entire delay and thereby the party proved to be responsible for the delay. This approach seriously disregards where relatively equal

potency of the causes occurs but still the dominant cause approach ruling, prevailing, affective, influential in court and tribunals in England. If the Contractor is not responsible for CD, then no LD would operate only EOT claim would be admissible.

Apportion

The relative potential causation may be based on time or fault or damages. Whereas, absence of contractual provision as to the apportioning the time or fault or damages the court most commonly apportion the time. In the *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH_68, unless there is no dominant cause is proved, the apportion approach was a common sense to establish the responsibility of a party.

Malmaison

This approach referred that the Contractor get full EOT but burden to prove any loss and or expenses incurred for the said period. In order for this to happen, there should be a Relevant Event, which cause the delay to completion, whilst the contractor may responsible for the portion of delay. Although, it is creating root for avoiding the time at large situation, but this proposition nullifies employer's claim for delay damages for Contractor's breach or fault.

Panoramic view of court Case laws of CD

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [1999] 70 Con. L.R. 32A

Ruling from this case law is when determining the delay caused by an employer's risk event under a contract, the existence of a contractor risk event is irrelevant to the assessment of an EOT.

In the **Malmaison** case, EOT has been granted for the period of delay caused by a Relevant Event under clause 25 of the JCT Standard Form of Building Contract, Private with Quantities, 1980 edition, notwithstanding the concurrent effect of another delaying event caused by the contractor. Notably, no provision in the contract to cover CD and the Contract was not amended to refer to the risk allowed for CD.

Royal Brompton Hospital NHS Trust v Hammond (2001) 76 Con. L.R. 148

Event must be on critical path needs to be sufficient. If event not on critical path, then no EOT for completion would be granted. Narrow definition of concurrency, also known as "true" concurrency, used in The Royal Brampton, where the two events in question should start and finish at the same time, was subsequently criticized as too narrow in terms of reality.

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

A useful working definition of CD can be found in this case. Whereas, Adyard entitled to argue Prevention principle. Although it is theoretical to argue, at least to establish Relevant Event was a concurrent cause, but those two relatively small variations do not.

De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC).

The contractor was entitled to an extension of time where there was a delay caused by the employer, because although the contractor must complete within a reasonable time, he must have a reasonable time within which to complete practically.

Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC)

Malmaison approach was taken in this case, however, there was nothing in the wording of the clause 25 of the JCT Standard Form of Building Contract, Private Without Quantities, 1998 edition, which expressly suggested that there was any proviso to the effect that an EOT should be reduced if the causation criterion was established. The Contractor was entitled to a full EOT nevertheless one of them was a Relevant Event.

North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744

No EOT has been considered as parties could free to agree and thus where a crystal-clear wording included therefore allocated risk under the contract was apparent to deal with the CD. Hence, common law prevention principle may have been excluded by contractual provision, although the parties had amended clause 2.25.1.3(b) of JCT Design and Build Contract 2005 to include the following, to that effect:

(a) the Contractor has made reasonable and proper efforts to mitigate such delay; and (b) any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible, EOT shall not be taken into account.

Weeks v Little (1882) 89 N.Y. 566

When there is no critical to completion then no means of concurrent.

Peak Construction v McKinny Foundations (1970) 1 BLR 111

It was not equitable to retain benefit of LD basis on the prevention principle whereas the Employer's delay was 58 weeks but the Contractor delay was just 6 weeks.

Jefferson Hotel Co. v. Burmbaugh, 168 F.2d 867 (4thCir.1909)

The Employer applied LD, however, Contractor argued that the source of delay was that the works largely depended with major materials supplier and independent Contractor. Court was reluctant to apportioned the delay as the causes have been mutual, whereas the Contractor's responsibility was relatively higher whilst Employer for few days.

Parties were failed to provide sufficient evidence to allow the courts to apportion the competing delay claims, even doing so, the judicial policy is to not perform for as a matter of law. The court considered the extent of practical conditions surrounding working nature as to what was happened, it is wholly a question of simulation from details that are scattered and vague!

Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd (2000)1 MLJ 621

The project prolonged for various reasons, however, High Court did not assess the EOT with CD principles whereas the Arbitration was favored to Contractor, thus not considered Contractor's own actions which caused the delay. It was held that the Owner needs to show that the Contractor would have been able to meet the original schedule, If there was no Principal caused delay. If Principal's has established that the contractor causes the delay, then the question turns to how much of the overall delay is the Contractor was responsible.

Mather Well Bridge Construction Ltd v Micafil Vakuumtechnic ((2002) 81 ConLR 44, [2002] AII ER (D) 159 (Mar)

Complex issues on the design changes and delay in a claim by Sub-Contract has been the matters were raised to solve the issue. Court applied test of common sense and fairness to grant EOT. Apportionment approach is taken in this case where a full EOT can be granted, if it is fair and reasonable to do so.

City Inn Ltd v Shepherd Construction Ltd [2010] ScotCS CSIH_68

It was held in this case, that the substructure and roof cladding variations in the gas membrane, the late instruction caused 11 weeks over run, due to 11 events where employer was responsible and 2 events where Contractor was responsible but altogether 9 weeks EOT had been granted by the Engineer and Adjudicator.

The appeal was heard at the Scottish Inner House and Judge accepted common sense approach with Contractor's expert's As Planned v As Built analysis which has been focus on: (1) reasonableness/ completeness of original programme (2) examines the factual evidence for where time on the project was critically lost (3) identifies the cause of the loss of time. As Built critical path via computer programme by the employer's expert not been considered due to logical errors.

United Constructors, LLC v. United States, 95 Fed. Cl. 26 (2010)

Courts in USA historically took the approach, where each party proximately contributes to the delay neither party was entitled to recover damages for delay. As there were no reliable means to distinguish between the causes and effects of various delays. In the absence of a contractual provision governing the issue, courts most commonly apportion the time rather apportion the fault or damages basis.

United Constructors, LLC v. United States, 95 Fed. Cl. 26 (2010)

Courts will consider expert testimony and evidence and determine whether the responsibility for each day of delay can be allocated between the parties. This

analysis is fact intensive and highly dependent on competent expert testimony.

Essex Electro Engrs., Inc. v. Danzig, 224 F.3d 1283 (Fed. Cir. 2000).

If the delays are intertwined and cannot be separated, the court will deny recovery to either party.

Great American Ins. Co. v. E.L. Bailey & Co., Inc., 641 F.3d 439, 448 (6th Cir. 2016)

Both federal and other state courts in USA, however, have been shifted away from the strict application of non-apportionment. allowed LD to be apportioned when faced with damages that are in fact distinguishable.

The latest CD Cases dealt in UK

The latest case laws where CD dealt with in **North midland** & **Thomas Barnes** ("TBSP")

***North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744:**

CD dealt in the wording of the contract which gives effect to a clear provision prevailed over the long-established prevention principles.

In *North Midland*, the contractor brought an application for interpretation of an EOT clause in an amended JCT Design and Build Contract 2005. The EOT clause provided that the contractor could claim an EOT if delay was caused by a Relevant Event, but with: 'any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account'.

The contractor sought two declarations from the English TCC:

firstly, that the effect of the clause was such that time would be "at large" where there was a cause of delay for which the contractor was responsible which was concurrent with a Relevant Event;

Secondly, with these circumstances the contractor was required to complete within a reasonable time, and the LD for delay should be void. Contractor relied on the 'prevention principle'. If this act of prevention causes critical delay to the works, time is rendered 'at large'; the contractor must complete the works within a 'reasonable time'; and the employer cannot levy LD for delay. The court rejected this argument, Instead, found that the case turned on the interpretation of the EOT clause which the court described as "crystal clear".

Court found that there was no authority to support the contention that where parties had agreed that EOT be dealt with in a specified way, such agreement would (or could) render an otherwise operable LD clause inoperable. There was also nothing in the contract to support a differentiation between acts of prevention (which were included in the definition of a Relevant Event) and any other Relevant Event.

The judgments recognizes that the legal effect of the common law 'prevention principle' may be modified or even exclude by agreement. Accordingly, if a contract excludes any entitlement to an EOT where there is a CD, the employer will be able to recover delay damages for periods of concurrency even though preventing default may have caused at least some of the delay to completion.

This conflicts with the approach to CD taken by the Society of Construction Law's Delay and Disruption Protocol 2nd Edition (See SCL Delay and Disruption Protocol 2nd Edition, paragraphs 10.12 – 10.16).

However, it is in line with the position taken in the cases in other Commonwealth jurisdictions. See, for example, in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 at [117] implied good faith obligation to grant EOT to DDI was emphasis as that the clause suggested 'although no claim raised by DDI discretionary EOT clause suggested to grant EOT for variation' and the rationale application of prevention principle re-emphasis in the case as it operation can be modified or excluded by contract, i.e., via EOT clause.

Whilst this case may lead to clauses which allocate the '**risk'** of CD becoming even more common, this case confirms that parties are free to agree to deal with CD as they choose and that such an agreement (where clearly worded, of course) will override the prevention principle.

***Thomas Barnes & Sons Plc (in administration) v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TBSP):**

This case related to a construction of a new bus station in Blackburn where Thomas Barnes & Sons

plc ("TBSP") had been appointed by Blackburn with Darwen Borough Council ('Council') as the main contractor in 2014 in respect of the construction of the transport hub under an amended JCT standard form of building contract with quantities, 2011.

The original contract price was of some £4.4 million but the project has been suffered with significant cost increases and delay. The administrators commenced proceedings against Council for breach of contract, seeking damages amounting to approx. £1.79 million. Council in turn denied the claim in whole and claimed that TBSP was liable under the final account for approx. £1.87 million to cover the cost - which it was entitled to under the contract or general law - of having to employ the new contractor to complete the work.

TBSP subsequently entered into administration, which it claimed had been caused by the joint effect of Council's failure to make interim payments and the wrongful and repudiatory termination of its employment and appointed a new contractor in June 2015 to compete the works.

Although the Council did not pursue a counterclaim on the basis that the company was in administration and the administrator's reports had made clear that there were no prospects of recovery for unsecured creditors.

His Honour Judge Stephen Davies, sitting as a High Court judge, dismissed TBSP's claim. While it had established an entitlement to prolongation and delay-related damages for 27 additional days beyond the EOT already granted to it under the contract, Council had been entitled to terminate the contract and/or accept TBSP' repudiatory breach due to TBSP's serious and significant breaches of contract in failing to proceed regularly and diligently with the works and substantially suspending the works unless or until Council agreed to TBSP's demands for a significant further EOT.

In the circumstances, the Judge concluded that it was not necessary for him to consider the quantum of TBSP's claim, whereas the CD has been dealt with several disputes relates to it, however the Court would need have considered whether the hub steel deflection issue and the roof coverings issue were concurrent causes of delay as one possible consequence of the diverging view of the court from the evidences heard and the closing submission made.

It was held in his judgment that the claimant was entitled to an EOT of 119 days, i.e., the 133 days in respect of the steel frame deflection causing delay to the concrete topping, less the 2 days mitigated by the early completion of the concrete topping and less the 12 days delay in commencing the remedial works. However, it also follows that the TBSP was only entitled to recover for prolongation for the lesser period of **27** days net of the concurrent delay due to the steel frame deflection.

He applied the proposition of Keating on Construction Contracts 11th edition ("Keating") at 9-105, and re-emphasised that the law is settled and is accurately summarized by the editors; depending upon the precise wording: if the event is effective cause then the Contractor entitled to EOT even concurrent cause of the same delay occurs; a contractor is only entitled to recover loss and expense where it satisfies the "but for" test. Thus, even if the event relied upon was the dominant cause of the loss, the contractor will fail if there was another cause of that loss for which the contractor was contractually responsible.[ii] However, LD was not a substance key issue in this case, due to the termination.

As such, Council was entitled to recover and set off the cost of the replacement contractor. Any claim which TBSP might have would therefore be extinguished by Council's entitlement.

Consequences amending the standard EOT clauses and CD?

The Concurrent delay addressed in according to the final paragraph of the FIDIC 2017 (Red, Yellow & Silver), 2nd edition, where the Sub-Clause 8.5 stipulates that "*If a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the* ***Special Provisions*** *(if not stated, as appropriate taking due regard of all relevant circumstances)*

In order to preparing the Special Provisions, therefore, FIDIC strongly recommended that the Employer be advised by a professional with extensive experience in construction programming, analysis of delays and assessment of extension of time in the context of the governing law of the Contract.

An Employer generally be entitled to delay damages when they offset the contractor's payment and only after contractual completion date is passed, and other stipulated conditions are met as per the terms and conditions.

However, when the standard forms are amended with EOT clauses which is most common in the construction industry which opted to exclude liability for employer's risk events and include various condition precedents and provisions for consequence of concurrent delay and its method of evaluation, include delay analysis method for example time impact analysis.

It must be given due care for if any changes made on standard EOT clause and include special provision for time bar and price adjustment, concurrent delay, if any delay occurs (even inclusion of sometime stringent deadlines for notices) and this drives argument for disproportionate claims against the own defaults and of the minor obligations related to comply for instance a mere notice for valuable cause.

In broad view of the dispute, unless and otherwise grave loss incurred or likely to be incurred by an innocent party who proving their case that the aggrieved party unduly benefitted despite to their own default which would seriously disregards well established legal principles such as unjust enrichment or equity concept in many jurisdictions, due to late or failure to notice and claim submission.

Another argument also possible as it's not uncommon in the Construction contracts which are commonly used in Hong Kong is usually silent on the entitlement of EOT in case of CD. It may lead to disputes which have to be resolved by ADR or Arbitration/litigation. Employers and their consultants may consider adding a similar clause in their construction contracts to put the question beyond doubt and the apportion approach suggested as most suitable, but this again depend on the nature of the contract and merit of the case.

However, it would not always in the case of CD situation. Henceforth, it must be thoughtful that the amendment of EOT clauses, where other provisions in the contract unaltered, parties conduct - either bad or good and the applicable governing law of the contract affects the validity of the EOT or damages claim due to CD, especially with the surrounding facts and circumstances.

Application of laws and rules of CD in various jurisdictions

Ever since, there is no uniform or codified approach to investigate causes of delay and strict consensus to evaluate time and money consequences of CD, **Malmaison**[iii] approach has been the most dominant case law authority in England-UK, since over the last two decades.

North midland's authority is not the current ruling in England or Scotland, but highly persuasive by the courts in Northern Ireland and rest of the UK. Controversial argument raising where the Covid-19 qualified as a Relevant Event category whereas the Contractor is being contributed to delay defaults, which create challenges on choosing the best approach for the evaluation.

John Morrin QC emphasis that the ruling is not contrary to the express intention of the parties under the terms of JCT's fair and reasonable EOT and the burden to prove the claims incurred lies on the party who invoke argument of the causation 'But-for' test which not require to relax for money claim but only for the time claim.

Morrin QC, further outlined three reasons for the continuation of **Malmaison** approach over the apportionment approach. Firstly, this approach design to overcome the common law prevention principle by allowing the EOT. Secondly, there would be no obverse issue with this approach. Finally, this require relaxation of but-for causation test for appropriate circumstances-for time but not for money, otherwise the test requires a party to show that it is more likely than not that the harm suffered is caused by a breach of duty by the other party.

Conversely, common-sense apportion approach taken in the **City Inn case in** Scotland, where there was no dominant cause had been identified, thus consequences of allowing the prolongation claim and LD still appeared to be an obverse issue, when these are a considerable point in the argument to choose a correct method.

Although, apportion the responsibility followed by the Scottish court is widely used to evaluate CD as a viable option in the common wealth countries like Australia, USA, Canada and New Zealand as well as in Hong Kong, but apportioning the time or fault or damages is of quite concern consequent to obverse

issue with the prolongation cost, if the Contractor's allowed with EOT portion whilst LD allowable theoretically to the balance portion, which would logically not make sense, during the progress of works.

The subtle differences in dealing with these matters are observed in construction contract in various Middle eastern jurisdictions regarding CD and delay damages in constating English or Scottish or Iris law. This is also due to the good faith obligations and interaction with other mandatory CIVIL codes on delay damages and other provisions, extensive application of previous version of FIDIC contracts which perhaps amended to suit the employers' requirements and also parties' action or omission and lack of documentation and lack of contract administration or awareness.

Therefore, it's necessary to close review of those related codes and contractual terms such as time-bar provisions for its effectiveness should be scrutiny amid the failure to serve timely notices for claim also a matter for consideration under the CD, where there is highly likely to incur grave loss due to own prevention or delay, then it must consider the late notice fairly and reasonable to do so based on the circumstances.

It is also worth to look at the Danish law in this context, whereas the employer is not allowed to claim LD for interim delays and LD cannot be claimed if the employer fails to give notice, even though the contract does not impose any notice requirement.

Thus, entitlement of claim would be admissible despite that the failure of notice may waived for extraneous/grave loss incurring situation but for fact finding and proper administration of contract, the notice is however always crucial for mitigation and other agreements or consequences should contemporarily be recorded.

This is why timely submission of notices and claims, both by the contractors and employer is time barred and always emphasis by the Claims consultants and institutes to serve the **Notice** timely, which may overcome the CD issues some extent with respect to delay damages.

The well-known common law 'genuine pre-estimate rule' has been adopted by a number of civil law jurisdictions including Germany, China, Switzerland, Qatar & Egypt where it exists in the form of rules limiting the amount of maximum LD to a percentage of the contract sum.

Conversely, in UAE and Oman, the law allows[ed] the court or tribunal to reduce the level of LD contractually agreed, however, if the loss and damages sustained is more than that of an agreed LD, upon application, it is the employer burden to prove the actual loss or damages incurred in spite of contractually agreed compensation. [iv]

In Saudi Arabia, LD clauses are permitted but subject to Sharia law where the delay damages enforceable if accurately reflect the actual and direct damages incurred. Articles 48 and 49 of the Public Procurement Law stipulate that delay penalties should be subject to 10% liability cap for all tenders and procurements undertaken by government entities and a 6% cap for supply contracts.[v]

However, latest position of English law regarding to the LD dealt within the UK Supreme Court case where the long-established rule has been replaced by the 'legitimate commercial interest' in lieu of 'genuine pre-estimate' and the loss should not exorbitant or disproportionate or unreasonable in assessing whether to a clause is penal or not, in *Cavendish Square Holding BV v Makdessi : ParkingEye Ltd v Barry Beavis (2015).* It had been found that both clauses not found as penal in nature.

In the absence of the pre-estimated delay damages agreed in the contract, in **Cavendish,** it was found that the clauses 5.1 and 5.6 were primary obligations and not subject to the penalty rule. The clauses were price adjustment clauses and had a legitimate function that related to achieving Cavendish's commercial objective in acquiring the business and protecting its goodwill, thus not a penal in nature.

However, the extent of this application to the construction contract is somewhat different implication from that of a share purchase agreement with the enforceability of the price adjustment clause perspective and the risk pattern in contrasting legitimate interest of the business and the rate of LD ***V*** overall liability cap for delay damages.

Whereas, a claim for general damages would still apply if the LD clause in operable or unenforceable but subject to the overall cap on LD, if there are circumstance arises for which otherwise the contract expressly provided to reduce such negotiated and agreed rate or cap of LD.[vi]

In particular the nature of commercial transaction and its financial consequences or time of the essences at the outset and the risk pattern acquiring businesses substantially different in contrasting with construction contract, especially with shareholders agreement. Therefore, the risk of LD must be under the construction contract in effect relatively less percentage to the contract sum must be bear in mind.

In contrast, Indian courts only allow the agreed LD for delay but likely to reject together with price reduction for concession clause in a construction contracts. Although there is another contractual intention for parties in adjustment of prices-reduction for the contractor causing delay, the court generally not allow to reduce the price as well as allow LD together, when allowing both is appeared to be penal in nature and against public policy, therefore such clauses would be treated as more onerous or unenforceable. [vii]

Whereas, Construction Industry Development Authority in Sri Lanka regularly publishes details for price indices for the price adjustment every month. if the provisions allowed for material fluctuation and currency fluctuation, the issue is minimal, however, in the absence of such provision, it must reasonably to have taken in to account all the facts and circumstances in order for the adjustment claims by a competent Consultant to be taken up during the concurrent delay period, whether to fully or equally apportioned in between parties, or at ratio of fault and or actual damages incurred or likely to incur, at the currency of the issue or upon completion, considering the fact that the scale of loss sustained.

Consider a CD hypothetical scenario, where the dispute appeared to be more complex upon termination/completion or even replace by another contractor in the event of design deficiencies and or poor workmanship for instance or in case of liquidation, which concurrent cause of unrelated employer's preventing delay causes such as late payment or late design.

In this situation in order to determine the final account settlement for such instance, it's not uncommon concentrating on ***substance*** which divide the party and desired reasoning succinctly for the decision. For example, rather not consider all the dispute raised in the correspondences which is deemed not a substance, solution for determining whether a contract terminated validly - which make the project continue without any loss of profit liable to be paid by the employer and the payment for completed work upon the termination is triggered. [viii]

If these reasons are not sufficient then it is suggested that a common-sense approach, towards a global claims attempt should made, saves not for the purpose to re-calculate all the costs on a total cost basis, which incurred for the project by the contractor, as emphasized in the ***Water Lilly*** *case*, but for the real time or actual loss or expenses incurred for the delay for which the Employer is responsible must be determined.

how the case is getting proved successfully with one or more principles and rules is depend on the circumstances of each case and for the proper finding, different non-exhausted approaches and principles may be opted as an option for Claim or Contract - Managers and parties representative or counsel in order to determine at the outset.

However, the effectiveness of an approach is depending on the nature of the project or dispute, risk allocation of the CD through contractual provisions either with clear or unclear wording which may compromise the general legal principles for example prevention principle, condition precedent such as time bar clause, application with unjust enrichment or equity concept, obverse issue, duty to follow the good faith obligations and fair and reasonable assessment, and most importantly competent assessors.

These matters must be considered by an **Engineer/Contract Administrator** and or **Adjudicator** during the interim or final assessment of the EOT and or evaluation of liquidated or actual damages incurred by the parties or any modest agreement between the parties with the help of a **Mediator / Contract Manager/ Estimator** to way forward the progress, which let the parties timely agreed to settled amicably in principles and any further evidential documentation to open up by the **Arbitrator**, in case a further argument raised in the respective issue upon completion.

[i] https://www.scl.org.uk/resources

[ii] *Thomas Barnes & Sons Plc (in administration) v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TCC) at [118 (i)-(ii)]

[iii] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con. L.R. 32A

[iv] *Qatar Civil code No. 22/2004, Art. 265-267, Oman Royal Decree 29/2013, Art. 267 (1)-(2), Federal Law No. (5) of 1985 On the Civil Transactions Law of the United Arab Emirates, Art 390*

[v] See the Procurement Law, issued by Saudi Arabia Royal Decree No. M58/1427, Art 48-49

[vi] *Eco World - Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd* [2021] EWHC 2207 (TCC)

[vii] Indian Contract Act 1872, Section 73-75

[viii] *Thomas Barnes & Sons Plc (in administration) v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TCC) at [14 (e) - (f)

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