Construction Delays
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Course Description - This one hour course will teach the basic principles of construction delays. Contractors often encounter unexpected delays, and the risk of encountering these delays may be dealt with by contractual clauses that allocate risk to the owner or the contractor. This course will discuss how contracting parties deal with construction delays, giving actual and hypothetical examples, including references to actual court decisions describing the principles discussed.

Learning Objectives

- To understand the concepts of contract time and delay.
- To review the contractual methods used to allocate risk of construction delays.
- To understand the difference between excusable, compensable, and concurrent delays.
- To assess the need for giving notice of construction delays.
- To understand the owner’s rights to limit liability for delay and assess liquidated damages for the contractor’s delay in completion of the project.

Note: This course is for educational purposes and discusses legal principles and concepts with references to court opinions. It is not to be construed or relied upon as legal advice. The views expressed in this course are solely those of the author in his capacity as a private citizen, and do not represent the views of any entity by which the owner is or has been employed.

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I. The Concept of Contractual Relief

Before we discuss our topic of construction delays, we need to understand the general concept of contractual relief. Contractual relief is used often in construction contracts to allocate risk of specific contingent events to one of the contracting parties. This is done by including a clause in the contract that states the type of contingent event, the risk that is allocated, the conditions under which the risk is allocated, and the party to whom the risk is allocated. If the contingent event occurs, the party to whom the risk is allocated bears the cost and compensates the other party for the cost the other party incurs.

As we will see, construction delays are a contingency whose risk is often allocated to the owner under certain circumstances. Other risks that are often the subject of contractual relief are changes in the work and differing site conditions. Contractual relief clauses usually afford the contractor relief in the form of an \textit{equitable adjustment} - an increase in time to perform the contract and an increase in contract price, if the contingency encountered delays performance and increases the cost to perform.

It is beneficial both to the owner and the contractor to include contractual relief in construction contracts. Contractual relief allows contractors to base their bid on information contained in the solicitation for work without including additional amounts in the bid for unknown conditions or occurrences. The owner then receives bids that are based solely on known conditions without additional amounts included for contingencies and theoretically the owner therefore receives bids that are all based on the same assumptions.
II. Contract Time, Substantial Completion, Final Completion, and Delay

Most construction contracts contain a completion date. Construction contracts are supposed to be finished on time - owners expect them to be, and contractors usually agree that they will be completed in a timely manner.

AIA Document A 201 General Conditions of the Contract for Construction (2007) defines Contract Time as follows:

8.1.1. Unless otherwise provided, Contract Time is the period of time, included authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

*Substantial completion* is usually defined as the date upon which the work can be used for the intended purpose, i.e., the move-in date. *Final completion* may follow thereafter upon completion of punch list items that do not prevent the project from being occupied and used.

While most construction contracts contain a date for substantial completion and final completion, contractors often experience delay and disruption which may postpone completion of the project until after the agreed-upon dates. To protect the contractor against the effects of delays and disruptions in the work, construction contracts may contain clauses which allow for contractual relief in the event problems are encountered during the course of performance. This course explains these clauses and discusses various circumstances where a contractor can avail itself of the relief stated in the clauses. We will also discuss clauses that provide relief to owners.

III. Excusable Delay

As a general rule, parties to a construction contract can include anything in their agreements they want. When disputes arise, courts or arbitrators initially refer to the contract the parties signed as a memorial of their agreement and attempt to enforce the agreement as the parties intended. Whether or not a delay in the performance of the work is excusable or inexcusable depends to a large extent upon whether or not the owner and the prime contractor agree in the contract that certain delays are considered the risk of the owner or the contractor.

General Condition 8.3 of AIA Document A-201 (2007) is a good example of a contract clause that addresses excusable delay.
8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in the progress of the Work by an act or neglect of the Owner or the Architect, or by any employee of either, or by any separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, or any causes beyond the Contractor’s control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes that the Architect determines may justify the delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

As the clause indicates, the contractor’s relief in the event of excusable delay is only an extension of time for completing the work. While the delays are excusable because they are not the fault of the owner, no additional expenses caused by these delays are awarded the contractor. Therefore, these delays are also referred to as “non-compensable” delays, as the contractor is not compensated for the additional costs of the delay.

Note that paragraph 8.3.3 of the clause does not exclude recovery of damages for delay by either party under other provisions of the contract. These situations are discussed later under the topic of owner-caused delays.

The following are some typical examples of excusable delay. Contractors should include these in any contract to allow them to request extensions of time in the event that these circumstances occur.

A. Acts of God

An act of God is a natural occurrence caused directly and exclusively by natural forces without any human intervention, which could not have been reasonably foreseen, nor could have been prevented. Earthquakes, landslides, tornados, hurricanes, lightning, floods, etc., are all examples of acts of God. Note, however, that mere bad weather does not qualify as an act of
In *Shea-S&M Ball v. Massman-Kiewit-Early*, 606 F.2d 1245 (D.C. 1979), a contractor involved in the construction of the Washington Metropolitan Area Subway System sought to recover for damages arising from recurrent overflows of water from another contractor’s site onto its construction site. The court noted that heavy rainfalls, unless they are unusual and extraordinary, are not considered acts of God:

We take judicial notice that rains of heavy intensity and average duration are occurrences of common experience. This event was described as a flash flood. People often use that expression in describing accumulations of rain water running off along natural or artificial contours of the ground; but that imports no particular legal significance. Such events, though infrequent, are to be expected. They do not create the widespread devastation commonly associated with earthquakes, tornados, hurricanes or extraordinary floods. The occasional filling of low-level or basement areas by rain water is a probable and foreseeable result of the heavy rain. To classify it as an act of God is an unwarranted extension of that doctrine not supported by the authorities.

The court found that there was insufficient evidence to show that the rains that caused the damages were extraordinary or unusual. Accordingly, the court concluded the rainfall in this case did not constitute an act of God and rejected Shea’s argument.

In *Tombigbee Constructors v. United States*, 420 F.2d 1037 (Ct.Cl. 1970), a contractor sought to recover costs resulting from an alleged changed condition due to the flooding by heavy rains of a pit designated by the contract for backfilling. Plaintiff, who received a time extension, sought its increased costs for having to keep equipment idle and for having to enlarge the borrow pit in an unflooded direction.

In denying the contractor’s claim for costs, the court noted:

Bad weather such as unusually heavy rainfall is ordinarily an act of God. Neither party to a contract is responsible to the other for the damages caused by an act of God, where the contract is silent as to the allocation of the loss to one or the other party.

The contract only entitled plaintiff to an extension of time because of the flood and the
court saw no reason to shift the loss caused by the rain and flood to the owner.

While acts of God involve only unusual conditions, it is advisable that all contracts contain such clauses. Example of the dangers of failure to include acts of God as an excusable delay in a construction contract was established early in the last century in the case of Prather v. Latshaw, 188 Ind. 204, 122 N.E. 721 (1919). A contractor agreed to construct a drainage ditch and levee, and failed to include in the contract a provision excusing it for delay in the event of acts of God. After a large percentage of the contract had been performed, the site was completely inundated by flood. The contractor claimed that it was excused from completing the contract within the specified period of time. The court rejected the contractor’s argument because the contract contained no provision excusing a contractor from late completion as the result of acts of God. Therefore, even though the flooding may have been an unusual condition, the contractor was held to the original completion date.

B. Strikes

Strikes and labor unrest are frequent causes of delay on construction projects. Note, however, that not all strikes are considered excusable delays. Generally, a contract clause listing strikes as an excusable delay also carries a qualification that the cause for the delay must have been unforeseen and beyond the control of the contractor. Strikes that are foreseeable at the time of signing the contract are not considered excusable causes of delay. For example, if a strike is in progress when the contractor prepares its bid, and is still in effect when the contract is awarded, delays caused by the strike are clearly foreseeable and not beyond the contractor's control.

If a strike is not in progress during the bid stage, but the contractor knows that one is imminent, the contractor should take steps to acquire any needed materials that may be affected by the strike, as well as alternative sources of labor. Otherwise, courts may hold that the labor and material shortage was foreseeable and the contractor did not take adequate steps to alleviate the problem.

If an action by the contractor causes the strike, the strike is deemed within the contractor's control and therefore not excusable. For example, suppose during the course of performance, a contractor discontinues paying travel time from the labor assembly point to the site of the work. If a strike results over this pay issue, the contractor is not excused from the resulting delay, as the contractor’s actions were the cause of the strike.

C. Unusually Severe Weather
AIA Document A-201 General Conditions of the Contract (2007) includes a clause requiring documentation of excusable delay to “adverse weather conditions.” This clause reads as follows:

15.1.5.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

As in the case of all causes of excusable delay, unusually severe weather must be unforeseen at the time of contracting. Weather conditions that cause delay on a job site make that delay excusable if the types of conditions which occur are unforeseeable and unusual for the particular place. If the weather conditions that occur are the normal conditions for the place in question, then the delay is not excusable, no matter how severe. Thus, a snow fall in Florida of one inch may be considered sufficient excuse for a delay in construction, while a ten inch snow fall in Chicago may not be considered a sufficient excuse for delay.

No matter how severe or destructive the weather is, it must be considered unusually severe to offer an excuse for delay. Merely showing that weather delayed or interfered with the work is not sufficient. Variations in weather are always expected, if the variations are typical of the locale, the delay caused is not excusable.

A contractor could not establish unusually severe weather in Baughman, Inc. v. N.Y. State Thruway Authority, 316 N.Y.S.2d 407 (1970). The contractor sought to postpone a portion of the work until the spring, but the owner ordered the contractor to perform during the winter. Though the contractor performed less efficiently in the winter, he could not show that the weather had been unusually severe. Therefore, he was not permitted any relief as a result of the weather.

D. Other Causes of Excusable Delay

Note that AIA General Condition 8.3.1 includes the phrases “any causes beyond the Contractor's control, . . . or by other causes that the Architect determines may justify delay.”

This language is included as an indication that the specific causes of delay that are listed should not be construed as the exclusive causes of delay, but rather they are illustrative examples and the architect has the power to issue a time extension if he determines that delay is caused by
factors beyond the control of both parties.

E. Notice Requirements

To be entitled to a time extension because of excusable delays, the contractor generally must give the owner notice in writing of a delay and its causes within a specified period from the beginning of the delay. The contract should be read carefully to ascertain the proper notice provision, as various clauses contain their own notice provision.

The notice provision contained in AIA Document A-201 General Conditions of the Contract for Construction (2007) appears below:

15.1.2 Notice of Claims

Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

15.1.5. Claims for Additional Time

15.1.5.1 If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor’s Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

IV. Compensable, Owner-Caused Delays

In the preceding sections, we discussed examples of excusable delays that entitle a contractor to an extension of time to complete a contract. Because neither party is at fault, excusable delays do not entitle the contractor to any damages or increased costs as a result of the delay. However, if the owner causes certain delays, the contractor is entitled to not only a time extension, but also additional monetary relief. Accordingly, owner-caused delays are also referred to as compensable delays.
The contractor’s right to recover delay damages from the owner in the event of owner-caused delays is implied in every construction contract and need not be specifically stated in the contract, although it is always wise to do so.

A typical example of the owner’s implied obligation not to delay the contractor is found in the case of Northeast Clackamas County Electric Cooperative, Inc., v. Continental Casualty Company, 221 F.2d 329 (9th Cir. 1955). In this case, the contractor was awarded a contract to construct 17 miles of power transmission lines. When the construction was about one-third complete, the contractor began experiencing various owner-caused delays. The owner failed to make timely and proper clearance of the right-of-way and failed to properly trim or fell trees ahead of the contractor, which both contributed to delay. The court noted that the owner’s duty to cooperate and to refrain from hindering the contractor in its work is implied by law, and stated:

In every express contract for the erection of a building or for the performance of other constructive work, there is an implied term that the owner, or other person for whom the work is contracted to be done, will not obstruct, hinder, or delay the contractor, but on the contrary, will always facilitate the performance of the work to be done by him...That an implied, if not express, covenant is contained in this contract, requiring defendant to furnish and deliver the site in a condition to permit the work to be done, and that a failure so to do is a wrongful breach of the contract for which the contractor may recover damages, is well settled by numerous cases.

Failure of the owner to make timely progress payments may be the basis for a delay claim. If a contractor is delayed in the execution of its work by the owner’s failure to make payments as required by the contract, the contractor is entitled to recover damages from the owner. Orange, A. and M.R. Co. v. Placide, 35 Md. 315 (1872).

Similarly, bureaucratic delay incident to procedures imposed on a contracting officer by higher authority entitled the contractor to recover for delay because it is considered an owner-caused failure to act within a reasonable time. Merritt Chapman & Scott Corp. v. U.S., 192 Ct.Cl. 848 (1970).

In Bowman v. Santa Clara County, 315 P.2d 67 (Cal. 1957), the owner’s failure to make proper payments, failure to supply enough men and materials to brace the ditch behind subcontractor’s excavation equipment, and issuance of a flurry of change and stop work orders was deemed an owner-cause delay.
In *V.C. Edwards Contracting Co., Inc. v. Port of Tacoma*, 514 P.2d 1381 (Wash.1973) the owner’s failure to furnish materials, failure to make decisions within a reasonable time, and issuance of an addendum to the plans which misrepresented the rights-of-way required by other contractors were found to be compensable, owner-caused delays.

In *City of Seattle v. Dyad Construction, Inc.*, 565 P.2d 423 (Wash. App. 1977) the owner’s delays in correcting inaccurate specifications protracted sewer line construction when work on the revised specifications could only proceed during low tides was determined to be a compensable delay.

**V. Concurrent Delays**

In many instances it is not easy to determine which party is the cause of the delay. Often both parties are at fault, and it is difficult to determine the proportion of blame assignable to each party. In such cases of “concurrent” delay, *the law does not provide for the recovery of a portion of damages to either party.*

The case of *J. A. Jones Construction Co., v. Greenbriar Shopping Center*, 332 F.Supp. 1336 (N.D. Ga. 1971) presents a classic example of concurrent delay. The general contractor caused delays through the failure of its subcontractors and materialmen to perform. At the same time, the owner caused delay by constantly changing the design and the late completion of drawings by its architect. There were approximately 150 change orders issued on the job, most of which were executed after the work had begun. Substantial changes were made to the work even after the scheduled completion date. Overriding the entire situation was a mutual paving dispute and delay caused by the dispute, as well as punch-lists and mechanical adjustments of varying magnitude. The court was *unable to assign the blame for the delay* exclusively for either of the parties, nor was it able to segregate out proportionately the blame to each of the parties. Thus, *neither party* could recover damages for delay against the other.

**VI. Suspension of Work**

In most construction contracts, the owner has the right to order the contractor to stop the work, either because of a failure on the contractor’s part to perform or for the convenience of the owner. AIA Document A-201 General Conditions of the Contract (2007) contains the following provisions pertaining to the owner's right to suspend the contractor's work:
14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by the suspension, delay or interruption as described in section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

1. that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or

2. that an equitable adjustment is made or denied under another provision of the Contract.

An early example of the operation of suspension of work clause occurred in the case of Johnson v. City of New York, 181 N.Y.S. 137 (1920). In this case, the contract for the construction of a sewer system contained the following clause:

The president of the borough may suspend the whole or part of any part of the work herein contracted to be done, if he shall deem it for the interest of the city so to do, without compensation to the contractor for such suspension, other than extending the time for completing the work as much as it may be, in the opinion of the president, delayed by such suspension.

After the work had commenced, the engineer in charge notified the contractor to cease work on account of the failure of the owner to appropriate sufficient funds to pay for the engineering and inspection necessary to complete the project. Work was accordingly suspended for almost two months, when the requisite appropriation of funds was made. The contractor brought suit to collect its increased costs incurred by the suspension of work, and the owner claimed that under the suspension of work clause included in the contract it would grant only a time extension. The court held otherwise, stating that it was an obligation of the owner to provide
the necessary funds to complete the project, and any suspension of work ordered because of the owner’s failure to provide such funds entitled the contractor to its increased costs incurred.

In the case of *Contracting and Material Company v. City of Chicago*, 20 Ill. App. 3rd 684, 314 N.E.2d 598 (1974), the owner suspended work for 46 days and thereafter refused to extend the completion date on the project. (This amounted to a “constructive acceleration” which will be discussed in the next section). The contractor sued the owner for its increased costs caused as a result of the suspension of work and the accelerated performance caused by the failure to grant a time extension. The court held that the contractor was entitled to a time extension for the suspension of work and also for its increased costs as a result of its accelerated performance.

**VII. Acceleration**

Acceleration occurs when an owner directs a prime contractor or a prime contractor directs his subcontractor to complete all or a certain portion of the work prior to the dates specified in the contract for its completion. Ordinarily, the party directed to accelerate incurs increased costs for extra manpower, overtime, increased equipment rental, and other costs.

Acceleration arises in two types of situations. The first is known as “actual” acceleration, and occurs when a prime contractor or subcontractor is directed to complete work prior to the actual completion date. In this instance there is no doubt that the party is being directed to complete work in an accelerated manner. The second situation is known as a “constructive” acceleration, and not quite as clear-cut. This occurs when a prime contractor or a subcontractor suffers an excusable delay but is not granted a time extension for the delay. Rather, it is instructed to complete performance within the originally specified completion date. As the contractor is entitled to a time extension, which was not granted, it is being forced to complete the work in a shorter period than it requires, and is therefore actually being asked to accelerate the work.

The concept of acceleration has its origins in Federal Procurement Law and the decisions of the Boards of Contract Appeals at the Government agencies that resolve disputes arising out of Government contracts. However, this concept has gained recognition in Federal and State courts as a viable theory in construction contracting.

In the case of *Elte, Inc. v. S. S. Mullen, Inc.*, 469 F.2d 1127 (9th Cir. 1972), a subcontractor contracted to quarry rock for a prime contractor. The prime contractor first directed the subcontractor to quarry in a place where the owner had designated that suitable rock
was unlikely to be found. After quarrying there for three months without finding suitable material, the prime contractor directed the subcontractor to quarry in another spot, but insisted that the subcontractor complete according to the original schedule. Thus, the subcontractor was constructively accelerated. The court held that the subcontractor was entitled to its excess costs incurred due to the acceleration, as the acceleration effort had been required because of the prime contractor's initial failure to provide a suitable source of rock.

Another example of constructive acceleration occurred in *Contracting and Material Company v. City of Chicago*, 20 Ill. App.3rd 684, 314 N.E.2d 598 (1974). A contractor erected a large public building for the city. During the course of performance, the owner issued a written order suspending the contractor from work for a total of 46 days. Later, the contractor experienced a 58 day delay as the result of a strike, and again was denied a time extension. The contractor then presented a claim for $150,000 for its acceleration costs. The court held that the contractor was entitled to its acceleration cost because the owner failed to grant a time extension. It should be noted that the court in this case emphasized that the concept of contract acceleration had not been dealt with in Illinois courts prior to this time.

Another case which recognizes the novelty of the concept of acceleration is *Siefford v. Housing Authority of the City of Humboldt*, 192 Neb. 643, 223 N.W.2d 816 (1974). In this case, a contractor sought acceleration costs because the owner repeatedly demanded that it finish the project on schedule after the contractor had suffered various delays; a classic example of constructive acceleration. In discussing the concept of acceleration, the court stated:

> We have been unable to find any Nebraska cases discussing or applying the doctrine of “acceleration”, at least by that name. The contractor points out in its brief, however, that Federal authorities have recognized the obligation of the Government to compensate construction contractors for undue acceleration of their work, and cites in support thereof (various cases).

In this case, the court denied the contractor its acceleration costs, because the contract contained a “no damage for delay” clause which stated that “no payment or compensation of any kind shall be made to the contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable.” The court held that the language of this “no damage for delay” provision was so strong that even if the owner had caused the delay in question, which the trial court had found was not the case, the contractor would therefore not be entitled to its delay damages and thus could not recover under an acceleration theory.
VIII. “No Damage for Delay” Clauses

In a preceding section we discussed the owner’s duty not to hinder or delay a contractor in the performance of its work. However, many construction contracts contain clauses which attempt to limit the owner’s liability for hindrances and delay. These clauses are referred to as “no damage for delay clauses.”

The initial problem in the interpretation of these clauses is the definition of “delay.” Court decisions have made a distinction between “delay” situations, in which the actual period of performance is prolonged past the completion date, and “disruptions, interferences, and hindrances” which impact the contractor's performance but do not ultimately extend the overall period needed to perform the contract. In the case of “delay,” damages usually include: increased overhead and job site costs, equipment standby costs, and possible wage escalation during the extended period. In the “disruption, interference and hindrance” situation, the resulting damages stem from inefficiencies created by the disruption and increased manpower placed on the job to compensate for these inefficiencies.

The importance of this distinction is clear when a typical example is considered. Suppose that a contractor experiences disruptions and interferences in its work, with the resulting inefficiencies, and seeks to hold the owner liable for damages. The owner replies that because of a “no damage for delay” clause in the contract, the owner is not liable for these damages. The contractor can argue that the “no damage for delay” clause merely applies to situations where the contractor has experienced delay in the overall completion of the contract, and does not apply in disruption/interference situations. The distinction between “disruption” and “pure delay” is that a “no damages for delay” clause will bar claims based upon “pure delay” but not for disruption. Therefore, even with a “no damage for delay” clause in the contract, a contractor may still assert a claim for disruption.

It should also be noted that a “no damage for delay” clause is strictly interpreted by the courts, and will not be given effect in instances where the owner actively caused the delay to the contractor. The “no damage for delay” clause is intended to protect the owner from damages for delays caused by others, and also intended to protect the owner from damages for delays caused by the owner itself if such delays were due to the owner’s negligence. But, a “no damage for delay” clause will not relieve an owner of damages for delay if the delay was caused by the owner’s active interference in the performance of the work.
In Housing Authority of the City of Dallas v. Hubbell, 325 S.W.2d 880 (Civ. App. Tex. 1959), the following examples of active interference by an owner were found to not be covered by a “no damage for delay” clause. The contractor therefore was entitled to its increased costs as a result of these owner-caused delays:

- Failure to plan development and construction of the whole project;
- Failure to furnish a master progress schedule;
- Failure to coordinate work of various prime contractors;
- Failure to proceed with underground utilities contract within a reasonable time;
- Failure to proceed with sidewalks contracts within a reasonable time;
- Failure to expedite flow of information;
- Failure to decide on type of water heaters;
- Failure to deliver water heaters;
- Arbitrary and capricious requirements of architects;
- Refusal to accept the buildings within a reasonable time after completion.

In E. C. Ernst, Inc. v. Manhattan Construction Company of Texas, 551 F.2d 1026 (5th Cir. 1977), a subcontractor sought to recover damages for delays caused by four other parties performing work on the same site. The contract contained a form of “no damage for delay” clause which permitted time extensions for any delays caused, but waived any other possible claims. The court noted that, given the harsh effect of “no damage for delay” clauses, it would strictly construe such provisions but generally enforce them absent delay:

- not contemplated by the parties under the provision,
- amounting to an abandonment of the contract,
- caused by bad faith, or amounting to active interference.

The court concluded that Ernst was not entitled to recover damages because none of the above exceptions to the “no damage for delay clause” applied.

In Martin Mechanical Corp. v. P.J. Carlin Construction Co., 518 N.Y.S.2d 166 (1987) the court held that even where a contract contains a “no damage for delay” provision, damages may be recovered when the delay was:

- caused by the bad faith or willful, malicious, or grossly negligent conduct of the party seeking enforcement of the clause;
- not contemplated by the parties;
● so unreasonable that it constitutes an intentional abandonment of the contract by
the party seeking enforcement of the clause; or
● the result of that party’s breach of a fundamental obligation of the contract).

the contract contained a typical “no damage for delay clause.” The contractor was given a
formal notice to proceed but the work site was not available until nearly six months later because
another contractor was on the site. The court held that the owner could easily foresee that the
contractor would suffer delay because another contractor was on the site. Because the owner
issued the Notice to Proceed with full knowledge that the contractor would be delayed, this
amounted to active interference by the owner and the “no damage for delay” clause did not
apply.

IX. Liquidated Damages

For the owner’s protection, most construction contracts contain a provision that fixes a
specific amount of damages to which the owner is entitled in the event that the contractor fails to
complete the project by the specified substantial completion date. These types of clauses are
generally referred to as “liquidated” damage clauses, as the clause liquidates, i.e., makes certain,
the amount of damages recoverable by the owner in the event of delay.

Note that liquidated damages are calculated from the failure to meet the substantial
completion date, since at that time the project should be ready to be used for its intended purpose
and occupied by the owner. Liquidated damages are compensation for the inability of the owner
to occupy and use the project.

Liquidated damages clauses are included because it is usually difficult to ascertain the
exact amount of damage caused by delay. It is therefore wise to specify a reasonable amount of
damages recoverable by the owner, which puts the contractor on notice as to its liability in the
event it fails to substantially complete the project on time. Courts regularly uphold liquidated
damages clauses, as long as there is a finding that it would otherwise be difficult to ascertain the
exact amount of delay damages, and the specified amount is reasonable under the circumstances.

A provision imposing liquidated damages will be enforced even if no actual damages
were sustained by the owner. In Southwest Engineering Co. v. United States, 341 F.2d 998 (8th
Cir. 1965), the government sought to impose liquidated damages in the amount of $8,300 upon
the contractor. In order to avoid liquidated damages, the contractor argued and the government agreed that no actual damages were incurred. The court, in enforcing the liquidated damages provisions reviewed the two requirements for enforcing such provisions. First, the amount of liquidated damages fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach of contract. Second, the harm that is caused by the breach must be one that is incapable (or very difficult) of accurate estimation. These two requirements must be viewed as of the time the contract was executed, rather than when the contract was breached at a later date. Thus, the fact that the owner did not suffer actual damages was not an impediment to the court enforcing the liquidated damages clause against the contractor!

If a contractor can show that the liquidated damages clause constitutes a penalty, the clause will not be enforced. In order to show that the clause is a penalty, the contractor must demonstrate that the amount of money stated as damages is so unreasonably large as to be a penalty. The first factor is the anticipated or actual loss caused by the breach. The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches. The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty the easier it is to show that the amount fixed is reasonable. A determination whether the amount fixed is a penalty turns on a combination of these two factors.

The contractor should be alert as to the specific liquidated damages provision in his contract. If the provision provides for the same penalty whether the contractor is one day late or one thousand days late, it is likely the provision will be construed as an unenforceable party. Most liquidated damages provisions in construction contracts are based upon a fixed amount per day which obviates the possibility of the provision being cast aside as a penalty.

In situations where concurrent delay exists, there has been discussion over whether liquidated damages provisions should apply.

In *E.C. Ernst, Inc. v. Manhattan Construction Company of Texas*, 387 F.Supp. 1001 (S.D. Ala. 1974), the court considered the application of liquidated damages clause. A construction contract for the construction of a hospital provided for a payment by the prime contractor to the owner of the sum of $250 per day for each day the completion of the project was delayed beyond the date specified in the contract. The court found that the sum of $250 per day for each day of delay was reasonable and therefore binding upon the parties. There was a 453 day overrun on the project, and the owner attempted to hold the contractor liable at the $250
per day sum for the entire period. However, the court found that the owner itself was chargeable with 163 days of the delay, and it therefore could not recover liquidated damages from the prime contractor for that portion of the overrun.

In *Acme Process Equipment Company v. United States*, 171 Ct.Cl. 324 (1965), the Court of Claims refused to recognize a liquidated damages provision where concurrent delay by the contractor and the government were present. Where delays are caused by both parties to the contract, the court will not attempt to apportion the delay but will simply hold that the provisions of the contract with reference to liquidated damages will be annulled and the owner will be allowed to seek its actual damages. The owner’s remedy, therefore, is to seek recovery of actual damages caused by the contractor's delay. The owner merely loses the right to insist on an artificial measure of damages agreed upon by the parties for a situation in which the contractor alone is responsible for damages.

Under certain circumstances is possible that despite the inclusion of a liquidated damages clause in the contract, the court will hold the clause void and instead award the owner its actual damages caused by the delay, rather than a sum specified in the liquidated damages clause.

For instance, in the case of *Continental Realty Corp. v. Crevolin*, 380 F.Supp. 246 (S.D.W. Va. 1974), a contractor abandoned a building project and refused to complete the work. The liquidated damages clause provided for $1,333.33 per day and for each day past the completion date when the project was not completed. The contractor’s surety claimed that it was liable to the owner only in that amount. The owner claimed, and the court agreed, that its actual damages were far in excess of the sum specified in the liquidated damages clause, because it had to engage another contractor to complete the work. In instances where the contractor actually abandons the work, the court held that such abandonment is a breach of contract, and the liquidated damage clause therefore becomes void. Thus, the owner is entitled to its actual damages incurred in completion of the project. The court reasoned that a liquidated damages clause is only meant to apply if the contractor ultimately completes the work, and does not contemplate a situation where the contractor walks off the job and the owner must have another complete the work.

In *Boston v. New England Sales & Mfg. Corp.*, 438 N.E.2d 68 (Mass. 1982), the city of Boston contracted to have certain traffic control cables replaced. The contract contained a liquidated damages clause which provided that the city would deduct $40 for every calendar day that completion of work was delayed. A dispute arose and the contractor abandoned performance. The city sued pursuant to the liquidated damages clause. The court held that under the liquidated
damages clause, the city was entitled to recover reasonable liquidated damages beyond the date the contractor abandoned the work. The court reasoned that to hold otherwise would (1) permit a party to limit its liquidated damages liability by simply totally abandoning the work, and (2) deny the injured party those damages which were agreed to as fairly measuring damage caused by delay.

An interesting situation arises when delay in completion of the work is the fault of a subcontractor, and the owner assesses liquidated damages against the prime contractor. The prime contractor may then seek to recover its loss from the subcontractor. The subcontractor may argue that its liability is limited to the liquidated damages paid by the prime contractor to the owner. In United States f/u/b H&S Industries, Inc. v. F.D. Rich Company, Inc., 525 F.2d 760 (7th Cir. 1975), a general contractor built a 200 family housing project at an Air Force base in Indiana. The liquidated damages provision of the general contract between the owner and the contractor specified $280 per day in liquidated damages. Because of the subcontractor’s delay, the project was not complete until 76 days after the specified completion date, and the owner was awarded liquidated damages against the general contractor for this period. The subcontractor who was responsible for the entire delay period was also held liable to the contractor for the entire liquidated damages assessed against the contractor by the owner. However, the general contractor sought more than that specified amount as delay damages against the subcontractor, and the subcontractor argued that its damages were limited to the amount of liquidated damages specified in the prime contract. The court disagreed and found the subcontractor’s contention “totally frivolous. The court found that the liquidated damages the owner may have been willing to accept by virtue of being delayed in utilizing the facilities had no relationship to the damages which the general contractor suffered as a result of the subcontractor’s delay. Therefore, the general contractor was entitled to recover its actual damages, not limited to the liquidated damages specified in the prime contract.

X. Summary

Most contracts contain a provision setting the time period for performance. Various contractual provisions provide protection to the contractor and the owner for delayed performance, depending on the causes of the delay. Delays that are neither the fault of the owner or the contractor, such as acts of God, strikes, and unusually severe weather, are usually considered “excusable delays,” for which the contractor is entitled to additional contract time to perform but not entitled to additional compensation.

Various owner-caused delays are considered “compensable delays” which entitle the
contract to both increased contract time and increased costs incurred. Suspension of work and acceleration are specific types of owner-caused, compensable delay.

When both the contractor and the owner cause delay, delay is considered “concurrent” and neither party may be entitled to recover for the delay caused by the other.

Owners often attempt to limit their liability for delays by including “no damage for delay” clauses, and also seek to assess hold contractors responsible for late performance throughliquidated damage clauses.

The parties to a construction contract should carefully review the contract to assess the risk apportionment and relief afforded by various contractual clauses that deal with contract time and delayed performance by both parties.

**XI. Quiz**

1. A contract’s substantial completion date is the date
   a. when the contractor is paid the final contract balance.
   b. when the project is ready for its intended purpose and can be occupied and used by the owner.
   c. when substantially all of the work is performed so that the contractor may direct its forces to work on other projects.

2. Excusable delays are generally those
   a. that are not the fault of either party.
   b. caused by the Architect.
   c. for which the owner decides to pay the contractor additional costs.

3. A five inch rain fall and resulting flooding is considered an unusually severe excusable delay
   a. regardless of where and when it occurs.
   b. if it occurs during the winter.
   c. only if it is unusual for the geographic area where it occurs.

4. Owner-caused delays are compensable delays
   a. because the owner is at fault and the contractor is entitled to payment for increased costs.
   b. because the contractor is entitled to increased costs even if the contractor
caused delay at the same time.
c. because the American Institute of Architects had decided that the contractor must be paid for such costs.

5. Concurrent delays occur  
a. when there is an excusable and compensable delay.
b. when both substantial completion and final completion are delayed.
c. when the owner and the contractor both cause delay at the same time.

6. A suspension of work clause usually  
a. allows the contractor to stop work at any time if it cannot find sufficient personnel to man the project.
b. allows the owner to suspend the work without cause.
c. allows the owner to suspend the work and not pay the contractor for its increased costs.

7. Acceleration of the work occurs  
a. when the contractor is ordered to complete the work before the completion date.
b. when the contractor is denied a time extension to which it is entitled and ordered to complete the work by the completion date.
c. under the circumstances described in a. and b. above.

8. “No damage for delay” clauses  
a. are used by the owner to limit its liability for delay.
b. are illegal and unenforceable.
c. allow the owner to actively interfere with the contractor’s performance without paying a penalty.

9. Liquidated damage clauses  
a. are used by the contractor to charge the owner with suspensions and acceleration of work.
b. are used by the owner to assess damages against the contractor for failing to substantially complete the work in a timely manner.
c. contain a damage amount that can be negotiated after the delay occurs.

10. Liquidated damages clauses can be held to be unenforceable  
a. if the contractor decides it wants to complete the work after the substantial completion date.
b. if contractors working on similar contracts do not have such clauses in their contracts.
c. if the amount of damages are so unreasonable that the court finds that they are considered a penalty.