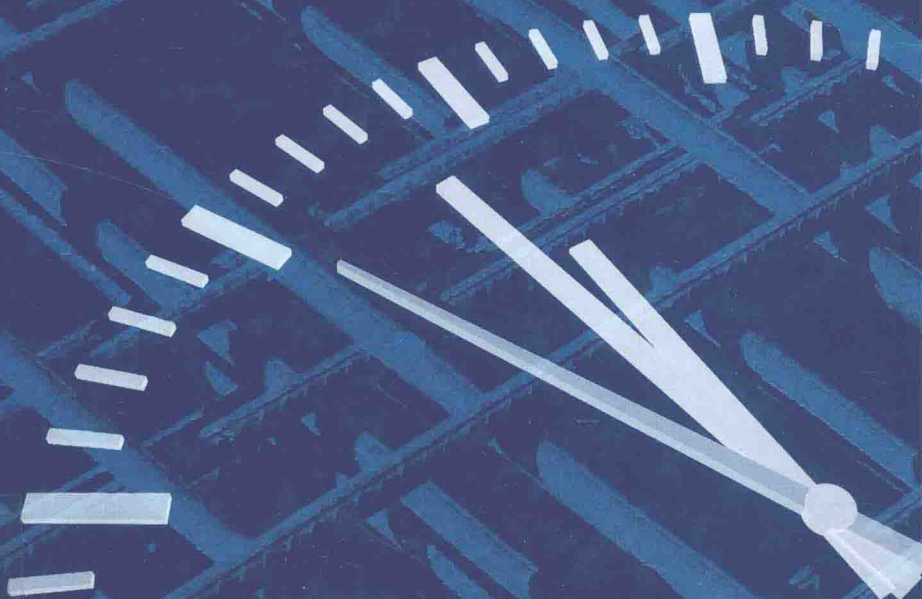


KLUWER LAW INTERNATIONAL

Delay Clauses in International Construction Contracts

Edited by **Jacob C. Jørgensen**



Wolters Kluwer
Law & Business

KLUWER LAW INTERNATIONAL

Delay Clauses in International Construction Contracts

Edited by

Jacob C. Jørgensen



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The information published herein is provided for general reference purposes only. Whilst every effort is made to ensure that it is accurate, Kluwer Law International and the International Alliance of Law Firms do not warrant, nor do they accept any responsibility or liability for, the accuracy or completeness of the content or for any loss which may arise from reliance on information contained in this publication.

Printed on acid-free paper.

ISBN 978-90-411-2672-6

© 2010 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.
Email: permissions@kluwerlaw.com

Printed in Great Britain.

Delay Clauses in International Construction Contracts

About the Authors

Bulgaria

Galina Eneva is a Bulgarian freelance attorney at law. She has worked as a lawyer since 2008 and is specialized in civil and commercial law, property and construction law and banking and insurance law. She holds a Master's degree in law from Sofia University 'St Kliment Ohridsky' (2002). She began her career as a legal advisor at Euro Ins AD Insurance Company in Sofia, Bulgaria (2003–2004), then worked as a legal advisor at D Commerce Bank AD, the former Demirbank (Bulgaria) AD, in Sofia (2004–2008) and was an associate of Kalaidjiev, Georgiev & Minchev Law Firm in Sofia (2008–2009).

Contact details: The author may be contacted at galina.eneva@yahoo.com.

Canada

Gregory D. Hersen is a partner of Torkin Manes LLP. He is certified by The Law Society of Upper Canada as a Specialist in Construction Law. He is a past chair of the Ontario Bar Association's (OBA) Construction Law Section and continues to be an executive member of both the OBA and Canadian Bar Association (CBA) Construction Law Sections. Greg practices exclusively in the area of construction law, on behalf of public and private owners, general contractors, sureties, subcontractors, suppliers, financial institutions and design professionals. His practice includes all aspects of construction document drafting and construction claims, defences and surety bond work, employing alternative dispute resolution and advocacy at trial and appellate levels. He was the first lawyer appointed a member of the Canadian Construction Documents Committee (CCDC), on which he participated in the revision and development of standard CCDC construction contracts, including the CCDC 2 2008 Stipulated Price Contract and other documents, and was a

member of the CCDC and its Surety Subcommittee from 1998 until 2008. Greg regularly presents seminars to clients, educational institutions and professional groups, including design professionals, and speaks at Continuing Legal Education Programmes presented by the OBA, CBA and The Law Society of Upper Canada on a variety of construction law topics.

Contact details: The author's contact details are available at <www.torkinmanes.com>.

China

Karin Grauers is the head of Vinge's business in China and resident partner and chief representative of the Vinge Shanghai office. Karin has been with Vinge for more than 29 years. She specializes in mergers and acquisitions, intellectual property, international trade and technology and has been rated one of the leading lawyers in international trade and technology law areas for many years. She has also served as an arbitrator in international trade and intellectual property disputes.

Michael Li is an associate of Vinge Shanghai office. He holds an LL.M. in international business law from the East-China University of Politics and Law (2003). He began his legal career in Deacons' Shanghai office (2003) and then worked in Huangshan & Co. (2004–2006), a Chinese local law firm. He has also served as an in-house counsel for SPG Land (Holdings) Ltd. (2007–2008) and as a Hong Kong listed real estate developer, with considerable experience in land acquisition, real estate development, hotel branding and construction contract drafting and negotiation.

Contact details: The authors' contact details are available at <www.vinge.se>.

Denmark

Jacob C. Jørgensen is a partner at the law firm Philip in Copenhagen, Denmark. He is a qualified Danish attorney and holds an LL.M. in international commercial law from the University of Cambridge, as well as a BA and an MA in Law from the University of Copenhagen. He specializes in international arbitration and construction law, which were also his main areas of practice during his years as an associate with the law firms Plesner in Copenhagen (2001–2003) and Lalive in Geneva (2004–2006). Jacob is also a former legal counsel to the Swiss Institute of Comparative Law in Lausanne, where he advised on all aspects of Scandinavian law (2003–2004). He is a member of the Danish Arbitration Association and one of the co-founders of the Nordic Arbitration Association. He is also the author of several articles in the fields of international dispute resolution, construction and real estate law.

Contact details: The author's contact details are available at <www.philip.dk>.

England

Anna Rabin is a consultant with Jeffrey Green Russell. Anna is a respected authority on law relating to construction and engineering. Acting for a broad range of clients – developers, contractors, sub-contractors, consultants, purchasers, tenants and funds – she advises on all aspects of the documentation used in construction projects. She has written for construction, engineering and legal journals and is a key contributor to the 2004 reissue of Volume 5 (Building and Engineering Contracts) of the *Encyclopaedia of Forms and Precedents* and to the 2006 reissue of Volume 38(1) and the 2007 reissue of Volume 38(3) (Sale of Land) of the same publication (LexisNexis Butterworths). Anna is a member of the Society of Construction Law and the Technology and Construction Solicitors Association. She is also retained by the College of Law to teach construction master classes to junior construction lawyers.

Contact details: The author's contact details are available at <www.jgrweb.com>.

Germany

Stefan Illies is a German qualified attorney and has worked as an associate with the law firm Melchers in Heidelberg, Germany since 2007. He specializes in construction law and completed his legal studies at the Universities of Erlangen and Heidelberg.

Contact details: The author's contact details are available at <www.ibr-online.de>.

Hong Kong

Colin Cohen is a partner of Boase Cohen & Collins in Hong Kong. He was qualified as a solicitor in England and Wales and in Hong Kong in 1981. He holds an LL.M. from the University of Cambridge (1978). He was appointed a Notary Public in November 1991. Colin has extensive experience in corporate litigation arbitration and dispute resolution matters. He has been in Hong Kong since 1981. Between 1983 and 1988, he was a Lecturer at Law at The University of Hong Kong and has been appointed as an Honorary Lecturer.

Contact details: The author's contact details are available at <www.boasecohencollins.com>.

Malaysia

Loong Caesar, the Chief Executive Partner of Raslan Loong, is a senior legal practitioner with extensive experience in all areas of corporate and commercial law, including mergers and acquisitions, capital markets, corporate banking,

About the Authors

corporate restructuring, construction and engineering, power and investment and infrastructure projects. He supervises the litigation team at Raslan Loong, which presents relevant and effective commercial arguments for clients in a broad range of commercial litigation and dispute resolution. He trained at Raffles Institution, Singapore, the London School of Economics and Political Science and Caius College, Cambridge University. He was admitted as a Barrister of the Middle Temple, London in 1983 and as an Advocate and Solicitor of the High Court of Malaya in 1985. In 1994, he was admitted as an Advocate and Solicitor of the Supreme Court of Singapore.

Contact details: The author's contact details are available at <www.raslanloong.com>.

New Zealand

Chris Moore is a partner at Meredith Connell and President of the Auckland Branch of the New Zealand Law Society. He was admitted to the bar in 1978 and holds an LL.B. degree from the University of Otago. He has worked extensively with a wide range of business clients in respect to commercial property, construction, commercial and contract law matters for nearly 30 years and has been involved in major infrastructure projects. Chris is also the New Zealand legal advisor to various substantial overseas investors who have acquired interests in commercial and industrial properties or have developed property in New Zealand. In addition to acting for contractors and owners in construction issues, Chris has written papers on the Building Act and Construction Contracts Act, as well as lectured on those subjects on behalf of the New Zealand Law Society. Chris was one of three keynote speakers at the 2004 New Zealand Law Society Property Law Conference and is the current chair of the New Zealand Law Society Property Law Section Executive.

Nick Williams is a Partner in the General Litigation Team at Meredith Connell. His practice focuses on civil and criminal litigation in New Zealand courts arising from commercial regulation, in particular proceedings under the Fair Trading and Securities Acts. He also has broad experience in general commercial disputes and has acted in domestic and international arbitrations, including construction disputes. He holds an LL.M. from the University of Chicago Law School, LL.B. (Hons) and BA degrees from the University of Auckland and the Chartered Financial Analyst® designation.

Contact details: The authors' contact details are available at <www.meredithconnell.co.nz>.

Switzerland

Sylvie Cavaleri Jørgensen is a Swiss and Danish qualified attorney, specializing in international arbitration and litigation, as well as construction law. She is a PhD

fellow at the University of Copenhagen, where she teaches private international law and international commercial arbitration. Sylvie is a former associate of Lalive in Geneva, where she worked in the fields of litigation and international arbitration for three years after having completed her two-year traineeship with Schellenberg Wittmer in Geneva and Zurich. Sylvie completed her legal studies at the Universities of Geneva and Bern and holds a Master's degree in law. She is a member of the Danish Arbitration Association and the Danish Society of Construction Law.

Contact details: The author's contact details are available at <www.jura.ku.dk>.

United Arab Emirates

Adrian Cole is a partner at Simmons & Simmons in Abu Dhabi. He is a construction law specialist advising on energy and infrastructure development and leads Simmons & Simmons' Middle East construction and dispute resolution practices. His work includes both contentious and non-contentious matters. Before becoming a lawyer, Adrian qualified as a quantity surveyor and has first-hand experience in the practical issues in the engineering and construction industries. Adrian is a trained and experienced mediator and arbitrator, a member of the Chartered Institute of Building and a Fellow of the Chartered Institute of Arbitrators. He has worked both in-house (International Counsel to Vinci in Hong Kong and Paris) and in private practice in the United Kingdom, Singapore, Hong Kong and the Middle East. *Who's Who UAE Legal: 2008* describes Adrian as a 'Grade A lawyer with fantastic clients', praised for his contentious and non-contentious work on behalf of public and private companies. *Legal 500* describes him as 'highly regarded' and states that that 'infrastructure and construction partner Adrian Cole leads an impressive team'. Adrian is 'highly recommended' by *PLC Which Lawyer 2008*.

Contact details: The author's contact details are available at <www.simmons-simmons.com>.

United States of America

Thomas M. Wolf is a partner in, and chair of, the Construction Industry Practice Group of LeClairRyan, a firm of more than 300 lawyers headquartered in Richmond, Virginia, with offices throughout the United States. Mr Wolf has taught Construction Law at the University of Richmond, T.C. Williams School of Law since 1986, has authored numerous articles and books on construction law and is recognized by *Best Lawyers in America* for his expertise in construction law.

Robert J. Windle is a former associate in the law firm of LeClairRyan.

Contact details: The author's contact details are available at <www.leclairryan.com>.

Acknowledgements

First of all, I would like to thank all of my co-authors for their hard work and dedication. They are all outstanding lawyers and it has been a privilege to work with them in relation to this publication project. The authors from England, Canada, USA, Germany, Malaysia and Hong Kong are all members of the International Alliance of Law Firms¹, which is a global network of law firms. Without the assistance and hard work of this network this book would never have been written. I would also like to thank our publisher, Mr Simon Bellamy of Kluwer Law International, for his patience and hard and competent work. I would also like to thank Fédération internationale des ingénieurs-conseils (FIDIC) for having permitted us to use citations from the FIDIC Red Book in our chapters. The FIDIC Red Book (Conditions of Contract for Construction, 1st edn 1999) can be purchased on FIDIC's online bookshop at www.fidic.org. Last but not least, I would like to thank my family for tolerating the many weekends and evenings I have spent working on this book.

Jacob C. Jørgensen
General Editor
Copenhagen, 5 January 2010

1. <www.ialawfirms.com>.

Introduction

The construction industry is notoriously dispute-prone. There are several reasons for this, the main ones being that construction projects usually involve large amounts of money and a large amount of complex activities that can easily go wrong and result in financial loss.

Defects, design errors, adverse soil conditions and variations are factors well-known to trigger disputes that regularly send employers, contractors, engineers and other parties involved in construction projects into years of legal battle. However, project delays give rise to some of the most complex, and from a legal point of view, most interesting disputes. As opposed to defects, design errors, problematic soil conditions, etc. that can usually be examined physically by the parties (or their experts) as soon as they are discovered, or subsequently in the context of dispute resolution proceedings, in order to obtain reliable proof as to their causes and costs, a project delay is merely a period of time that has passed – an historical lapse of an agreed deadline rooted in often untransparent and interconnected problems, which have to be examined and assessed in retrospect in order to find out who is liable. Moreover, the damages, which project delays give rise to are often equally or even more difficult to evidence and quantify.

The inherent, evidentiary uncertainties surrounding the causes and effects of project delays render them not only difficult to resolve when a dispute arises, but also difficult to regulate contractually in a clear and adequate manner. Therefore the governing law of the contract often plays a key role when it comes to interpreting and applying contractual clauses dealing with delays, such as liquidated damages clauses and time extension clauses – or ‘delay clauses’ as we have called them in this book.

The governing law of the contract appears to play a role in three main groups of situations:

First of all, where the contract leaves an issue unregulated or unclearly regulated, the governing law can be used to fill out the gaps. For instance, the need for

gap filling interpretation arises in relation to clause 2.5 of the FIDIC conditions, which does not specify what the consequences are if the employer fails to give notice of claim to the contractor. The absence of clauses concerning the important issues of concurrent delays and ownership to float are also examples of contractual gaps, which the governing law of the contract can be used to fill.

Second, the governing law sometimes imposes mandatory rules, such as unfair contract terms rules, that can fully or partly disable certain contractual clauses. For example, one could mention the common law rule that partly renders a liquidated damages clause unenforceable if the liquidated damages are not a genuine pre-estimate of the loss that is likely to be suffered by the employer in the event of a delay. The Danish rule invalidating a liquidated damages claim if the employer fails to give notice to the contractor is another example. The Chinese rule rendering liability limitation clauses, such as FIDIC clause 8.7(2), null and void is yet another example.

Third, general principles and rules of interpretation of the governing law of the contract will always affect the application of the contract in different ways – sometimes subtly, sometimes dramatically. For example, Canadian law appears to influence FIDIC clause 15.2(c)(i), which clearly allows the employer to terminate the contract, if the contractor, ‘without reasonable excuse fails . . . to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension]’, by implying an additional condition, namely that the delay must be substantial or have frustrated the contract in order for the employer to terminate it. As another example the precise meaning of the term ‘reckless misconduct’, which is used in FIDIC clause 17.6, has to be determined in accordance with the governing law of the contract.

Accordingly, as will be seen from the following chapters, even when it comes to seemingly clear and detailed contractual clauses governed by the law of a country, which lends strong protection to the doctrine of *pacta sunt servanda*, the governing law’s influence on how the contract will be applied and interpreted in practice should never be underestimated. This is particularly the case when it comes to the impact of the governing law on delay clauses.

Complex commercial relationships call for complex contracts. In the construction industry standard contract forms have been used for decades, and they have grown in volume and detail over the years. In regard to construction projects involving parties from different countries the standard contract forms published by the Fédération internationale des ingénieurs-conseils (FIDIC)¹ have dominated the market for several years. In particular, the *FIDIC Conditions of Contract for Construction*, first edition, 1999, (also known as the ‘FIDIC Red Book’), has gained widespread popularity all over the world in relation to nearly all types of construction projects.

In writing a book on delay clauses in international construction contracts it therefore makes sense to refer especially to the FIDIC Red Book condition.

1. <www.fidic.org>.

However, although these conditions are specifically referred to in the following chapters, the book is also relevant in regard to other types of model contracts used in the construction industry, both internationally and nationally, because the delay clauses found in the FIDIC Red Book are all fairly general and similar to delay clauses found in other standard construction contracts.

This book provides a practical guide to project managers, engineers, consultants and others, who are involved in the administration and planning of major construction projects. The book may also be useful to legal advisors involved in dispute resolution proceedings or the drafting and negotiation of major international construction contracts.

This book contains chapters collected from construction law experts in twelve different jurisdictions across the world – both common and civil law countries are represented. The authors have analysed and responded to the same ten questions regarding the interpretation and application of delay clauses under the laws of their respective countries. In addition, the authors have highlighted the pitfalls and advantages one should be aware of when dealing with a standard construction contract, such as the FIDIC Red Book, governed by the law of their respective countries.

Of course, not *all* legal questions that can arise in regard to delays can be answered here, but we believe that the selected questions are all relevant in respect to the governing law of the contract and that they cover issues, which typically give rise to disputes in relation to delays in construction projects. The questions, which we have addressed, are as follows:

- (1) Is the employer required to demonstrate a loss in order to claim liquidated damages?
- (2) Can the employer claim damages for delay as an alternative or in addition to a claim for liquidated damages?
- (3) Under which circumstances can the employer defeat a clause limiting the contractor's liability for delays?
- (4) Do interim delays trigger claims for liquidated damages?
- (5) How are claims for liquidated damages calculated and enforced?
- (6) Can the contractor claim a reduction of the employer's claim for liquidated damages?
- (7) Under which circumstances can the contractor or the employer claim an extension of an agreed time limit and who owns the 'float'?
- (8) How are concurrent delays dealt with?
- (9) Does the law impose any notice requirements on the employer in regard to claiming liquidated damages?
- (10) Under which circumstances does a delay warrant termination of the construction contract?

There are of course limits as to the level of detail in the answers to these ten questions. For a more thorough analysis of the legal issues addressed, readers are referred to more comprehensive textbooks from the different jurisdictions concerned and are advised to consult with national legal experts. To assist readers

in their further research, the authors have included a brief description of the ‘construction law environment’ of their respective countries in the introduction section of each chapter, which among other things contains references to main text books on construction law, online legal resources, etc.

This book also serves a purely academic purpose. Scholars interested in pursuing legal studies in the field of international construction law will find that the book provides a fairly broad and useful overview of how delays are dealt with in the different legal systems represented, and the book may thereby form a basis for further legal research.

It is, for instance, interesting to see that the important issues of concurrent delays and ownership to float have seemingly not been regulated in any of the standard contracts used in the twelve jurisdictions examined. England is apparently the only jurisdiction where an attempt has been made to regulate these issues contractually in the Delay & Disruption Protocol published by the Society of Construction Law. In my view, further legal research in respect to these particular issues would be welcomed.

It is also interesting to observe how the laws of virtually all of the jurisdictions examined in this book, (although they all claim to protect the parties’ right to contractual freedom), levy a remarkable amount of restraint on the employer’s right to claim liquidated damages even though the contract usually clearly provides for this. Under Danish law, for example, the employer is not allowed to claim liquidated damages for interim delays and, as already mentioned, liquidated damages cannot be claimed if the employer fails to give notice, even though the contract does not impose any notice requirement. The well-known common law ‘genuine pre-estimate rule’ has already been mentioned above. Interestingly, this rule has been adopted by a number of civil law jurisdictions, including Germany, China and Switzerland, where it is seen in the form of rules limiting the amount of liquidated damages to a percentage of the contract sum.

Whether the twelve jurisdictions described in this book are sufficiently representative to allow any conclusions to be drawn in regard to identifying certain common principles of international construction law – a *lex constructionis* so to speak – relative to delays is probably doubtful, but the book may be used as a basis for further academic research also in this regard.

Summary of Contents

About the Authors	xix
Acknowledgements	xxv
Introduction	xxvii
Bulgaria <i>By Galina Eneva</i>	1
Canada <i>By Gregory D. Hersen</i>	25
People's Republic of China <i>By Karin Grauers & Michael Li</i>	57
Denmark <i>By Jacob C. Jørgensen</i>	79
England and Wales <i>By Anna Rabin</i>	121
Germany <i>By Stefan Illies</i>	153
Hong Kong <i>By Colin Cohen</i>	181

Summary of Contents

Malaysia	201
<i>By Loong Caesar</i>	
New Zealand	231
<i>By Chris Moore & Nick Williams</i>	
Switzerland	267
<i>By Sylvie Cavaleri Jørgensen</i>	
United Arab Emirates	307
<i>By Adrian Cole</i>	
USA	339
<i>By Thomas M. Wolf & Robert J. Windle</i>	

Table of Contents

About the Authors	xix
Acknowledgements	xxv
Introduction	xxvii
Bulgaria	1
<i>By Galina Eneva</i>	
1. Introduction	1
2. The Interpretation and Application of Delay Clauses in International Construction Contracts Governed by Bulgarian Law	5
2.1. Is the Employer Required to Demonstrate a Loss in Order to Claim Liquidated Damages?	5
2.2. Can the Employer Claim Damages for Delay as an Alternative or in Addition to a Claim for Liquidated Damages?	7
2.3. Under Which Circumstances Can the Employer Defeat a Clause Limiting the Contractor's Liability for Delays?	9
2.4. Do Interim Delays Trigger Claims for Liquidated Damages?	10
2.5. How Are Claims for Liquidated Damages Calculated and Enforced?	11
2.6. Can the Contractor Claim a Reduction of the Employer's Claim for Liquidated Damages?	14