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**EXTENSION OF TIME AND LIQUIDATED
DAMAGE UNDER DIFFERENT
STANDARD CONSTRUCTION CONTRACT FORMS**

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**I declare that is my original work and I quote
reference advise which I take form other.**

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Acknowledgement

I have no word to express my gratitude to my Lord. He is the one who give me patience to do this work. Without his assistance my life is worthless. So he should be glorified forever Amen.

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Abstract

In principle construction work set out a date in which the particular contractor is obliged to complete the work. The contractor should complete the work on the specified date stated in the contract. However, the practice shows that there are difficulties on the part of the contractor on the specified date to complete the work on the specified date. This might be attributable either to lack of calculation the in estimation of completion date or other factors that threatens the smooth running of the project. It might be the employer fault, the contractor fault or neutral events. Given the fact that there is potential for delay to occur in construction industry it is perhaps surprising that any construction work is even completed on the specified contract time.

It is already stated that the contractor might encounter several delaying circumstances during of the course of the work. This might justify the inclusion of the mechanism that deals with delays which likely to affect the completion date. This is the concept of "extension of time" clause. It allows the party to revise the contract period under the specified grounds.

'Extension of time' clause has importance for the contractor and the employer. Extension of time might reduce the contractor's risk in relation to delay by entitling him a time for completion. Other wise he will be subjected to liquidated damage. On the part of the employer it preserves the employer's right to liquidated damage due to act of prevention (faults of employers).

It is not untrue that it is only for events stated in the contract as a relevant event justified as a ground for extension of time. It might be neutral events like force majeure of events due to the employer. Most

standard contract forms framed broadly so as to include both events. If the contract period lapsed due to employer's fault and this is not included as a ground then there is a possibility that time will be at large. In this case there is no specific completion date. The contractor is expected to complete in a reasonable time.

The issue as to the link between extension of time and the recovery of loss and expenses or extra cost for extended period is controversial. Most standard form stated that the linkage between the two lies on the fact that whether the delay is due to neutral event or the fault of the employer. If the delay is due to neutral event, the contractor will not recover the loss and cost for extended time. The contractor bears his own cost (the loss lies where its falls). Whereas if the delay is due to the employer fault, the employer is liable to pay for the loss & the costs.

It is also important to note that the inclusion of extension of time clause does not automatically justify extension of time unless the contractor complies with the procedural and substantive element in the contract. The contractor is obliged to give notice for any delay with its details. Moreover the contractor is entitled to extension of time only if there is delay due to relevant events that affect critical path (completion date).

Finally most standard forms widely practiced in Ethiopia recognize liquidated damage as a remedy if the contractor fails to complete a work on time. The inclusion of liquidated damage clause and the existence of certain completion date is a prerequisite. Moreover, the amount of liquidated damage should be a genuine pre-estimate and should be recovered without court proceedings.

Abbreviations

- ADB = African Development bank
- BOQ = Bill of quantities
- CD, = standard form of construction contract that provide the contractor's obligation to design the work
- EDF- European Development fund
- ERA- Ethiopian Roads Authority
- FIDIC – Standard form of construction contract and refers to federation International Des Engineers Conseils.
- GC- General condition of contract
- GW- A standard condition of contract and refers General condition for government works
- GC- General condition of contract
- GW- A standard condition of contract and refers general condition for government works
- JCT 80 – A standard building condition of contract and refers joint contracts tribunals.
- JCT 84 – Type of JCT contract for intermediate works
- MW 80 – Type of JCT contract for minor building contracts
- MW 87 – JCT form of contract for management work
- ICE – Standard condition for civil engineering works and refers Institute of Civil Engineers.
- NEC – standard condition of civil engineering works and refers new Engineering contract.
- SC- Special condition of contract
- WB – World Bank.

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- 1- Contractor's Extension of time claim on Gewane. Mille R.R project Dec 9, 2000.
- 2- Contractor's request for extension of time on Alemketema – Aksta-Tenta R.R project – Mar, 1998.
- 3- Contractor's Claim for extension of time financial claim on Alem Gena Road upgrading project, may 2003.
- 4- Engineer's Claim Analysis of extension of time on wegeltea Dawnt R. R project, April 2003.
- 5- Engineer opinion on contractor's claim for extension of time on Addis Ababa – Ginchi – Ambo R.R project, June 2005.
- 6- Engineer's Review of contractors extension of time claim on Kulbi-Dengego R-R. Project, Jan 2002.
- 7- Claim Analysis of woldiya-Adigrat-Zalambessa Road upgrading project, July 2, 2003.
- 8- Engineer determination on extension of time claim on Debre Markos- Merhawi Road upgrading project, Aug 2004.
- 9- Preliminary Assessment of extension of time by engineer on Addis Ababa – Modjo – Awassa R.R project, Jan 2001.
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- 11- International court of Arbitration (ICC) Award on salini constrottorI S.P.A VS ERA case no /06/9/AER/ACS
- 12- Federal Hgh court decision on Zeta construction vs Anbesa Bus Enterprise (case no 32976) on 22-09-98. E-C

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- 1- Standard condition of contracts for construction of civil works projects, by FDRE Ministry of works and urban development, Dec, 1994
- 2- FIDIC (Federation international Des Engineers) standard condition of civil works (4th ed)
- 3- General condition for Works Contracts Financed by European Development Fund (EDF), 1990.
- 4- JCT 80 (Joint contract Tribunals) on Standard Condition of Building contract.

Introduction

It is not untrue that with the advent of new economic transition in Ethiopia (1993) the construction sector has been remarkably increased. It has been undertaken by either government funded, through private body by donor or financier assistance. The newly flourished construction industry needs proper legal of contractual framework, regulation and supervision. The construction contract period is one important area to be properly regulated. This study tries to give an overview as to the contract period in general and extension of time in particular. The effect of failure to complete on time is also dealt under the title of liquidated damage. The discussion is held in the context of the most important standard construction contract forms.

The first part is primarily deals with the background, the statement of the problem, objective and methodology of the study. This part mainly tries to give an overview as to the study in general.

The second part is devoted to give a bird eye view about construction contract in general. It deals with what construction contract is and with its main features. Moreover it describes the main participants to the construction contract with their roles. Various contract documents in a construction contract and different types of construction contract is also dealt.

The third part mainly tries to deal with “time in construction contract”. It deals with what contract period (commencement and completion date) mean in under different standard condition of contract. Extension of time with its widely accepted principles and relevant event for extension of time is also discussed. It is primarily dealt in view of different standard construction condition of contract. Primarily, FIDIC (4th ed), standard condition of contract for construction of Civil work project (Dec. 1994) by FDRE MWUD, general condition for works contracts financed by European Development Fund (EDF) (1990) and JCT (80) is dealt. The concept of “time at large’ is also threatened in

the final part. A brief look at is made as to the nexus between extension of time and financial claim.

The fourth part mainly tries to deal with the procedural and substantive requirement for extension of time. Notice is the most important procedural requirement for entitlement of extension of time. The assessment as to the amount of extension of time to be granted is also dealt. The assessment might end up with an award by the engineer (architect).

Finally, damage for late completion and the concept of liquidated damage is dealt. In this part the study the nature, the purpose, principles and procedures for liquidated damage is dealt. It is made in view of different standard construction contract forms. Defense against liquidated damage is also briefly dealt. Bonus granted for the contractor in case he completes before completion date is also discussed.

CHAPTER ONE

The Problem and its Approach

1.1 Background of the study

The Construction industry can justifiably claim to be one of the most important operation in the national and international economics, both because of the large proportion of national and world income devoted to construction and also on account of the vital role played by the construction industry in Maintaining the infrastructure which under pins our current civilization.¹ Here the term “construction industry” refers a wide range of activities which involve construction. It might be either building work like construction of building or civil engineering work including the construction of road, rail road, airports and water dams.

Construction works require the technical as well as managerial skill to undertake it. Mostly the owners of the work do not possess the required technical as well as managerial skill to do it. Thus they contract out the works to a contractor, specialized on the work. This involves the adoption of construction contract between the employer and the contractor.

In principle construction contract constitutes bulky documents. The condition of contract is an important document of the construction contract. It sets the terms and condition of the contract. Moreover, it is common practice that standard construction forms are included as a condition of contract. This might have an important effect in that it saves time and cost in drafting new condition.

Various kind of standard construction forms are recognized both domestically and internationally. FIDIC (4th ed), JCT (80) Ministry of works and Urban Development’s Standard Condition of Contract for Construction of Civil Works projects (Dec, 1999), and General Condition For Works for Contract Financed by the EDF can be cited as instances. The stated standard forms are widely practiced in Ethiopia. Thus, the study make an emphasis on those form.

1. Micheal patric O’Reely, principles of construction law, Longman, 1993, pp.3

In principle all standard construction forms set out the contract period. If they clearly stated commencement and completion date, the contractor is under strict duty to complete the work in line with the contract period. However, the contractor might not complete the work timely due to several incidents. The delay might be caused by the client, or other neutral events. Should these incidents happen; most standard construction forms envisaged the remedy of extension of time. The relevant events that justify extension of time might be clearly stated. Moreover, the substantive and procedural requirement for entitlement of extension of time is also set out.

Finally, liquidated damage is envisaged as an employer remedy if the contractor fails to complete the work on time. This is incorporated in most standard form of contract.

1.2 Statement of the Problem

It is not untrue that the construction industry has been increased in our country. Currently, so many construction projects underway in the country. This might demand strong legal as well as contractual framework so as to govern and regulate the existing contractual relationship. However, the legal & contractual framework is not much developed. This is especially true in relation to locally tailored standard construction form. Moreover, the existing contractual and legal framework is not widely practiced. Lack of awareness on the terms and conditions might be taken as a major factor for this. Having said this, the following research problems will get resolution in the study.

1) It is not untrue that much research has not been made on issues related to construction contract. Moreover, the public at large, including the stakeholder is not much conversant with terms and condition related to construction contract in general and time claim in particular. Thus, the study tries to give awareness concerning terms related to construction contract.

- 2) It is also true that the public at large, including the stakeholders, are not much conversant with the terms and conditions of standard construction forms. They are the most important. Instrument is setting out the rights and obligations of the parties. This includes their terms with regard to time claims.
- 3) Currently, though the construction sector has been increased in our country, the legal framework especially standard forms are not developed to couple up with the newly flourished sector. Except the 1994 MOUD standard form, there is no locally tailored standard forms. Moreover this standard forms is not updated.

1.3 Objectives of the Study

The study has the following specific objectives:

- 1) It might give awareness as to the meaning of some key construction contract terms related to “time claim”. This may avoid misunderstanding of the factual and legal position of specific contractual terms.
- 2) The study might give awareness to the stakeholders the terms and conditions different standard. Construction forms that is widely practiced in Ethiopia. This is especially true in relation to time claim. This might assist the stakeholder in knowing the specific procedural & substantive element required to be entitled for time claims.
- 3) The study tries to show the actual practice in relation to time claim on construction dispute.
- 4) The study tries to make recommendations to policy makers in relation to the standard constructions forms. This includes in developing new standard form and makes an update for existing ones.

1.4 Methodology of the Study

The study would conduct intensive review literature and case studies from international and domestic sources. Moreover construction industry members would be interviewed as far as it is relevant. When selecting standard forms of contracts those

forms, which have been actually used and tested in Ethiopian would be given priority. For instance FIDIC (4th ed) by the general conditions for works contracts on projects financed by the EDF and MOWUD (Ministry of Work and Urban Development) standard condition of contract (Dec 1994) might be cited. As there is no building standard form in Ethiopia, JCT 80 is also included in the study. Amongst the forms of contract used in foreign countries the English forms such as ICE condition of contract, NEC would be used to some extent because of their special significance. Several constructions contract cases would be dealt. This might show the existing practice.

CHAPTER II

Construction Contract in General

Construction works involve the carrying out of building and engineering work. Any person technically competent may carry out construction works using his own forces, if he so wishes. Most people however do not possess the required technical and managerial capability sufficient to undertake construction. Therefore they contract out the works to a contractor specialized in the kind of works. In large and/or complex constructions, a consultant must also be appointed by the owner by a separate contract in order to design and supervise the works on behalf of the owner. The focus of this research paper is on the making and implementation of the construction contract between the employer and the contractor as well as the problems inherent in the process of the works.

The research involves key role players in construction, the various alternative types of construction contracts, the standard contract documents for a widely used type of contract known as the “re-measurement contracts” how that type of contract works in real situations, the time for completion the works, the procedures for claims and disputes.

2.1 Construction Contract and Its Features

One scholar, Stephen B. Smith defines construction contract as “an agreement under which one party, in return for a valuable consideration, undertakes to perform building or engineering work for another”.¹ This definition indicates that construction contract primarily tries to govern the relationship of contractor and employer. In traditional method of construction, which is the most widely used in Ethiopia, a contractor has an obligation to provide labor, materials, superintendence and ultimately the works for the benefit of the owner, who pays the price.

Construction industry is an umbrella term representing one sub sector of the economy that participates directly and indirectly in wide range of engineering and building works. Civil engineering project involves work associated with the basic

1- Stephen B, Butterworth's Construction Manual, Butter Worth 1993, pp1.

infrastructure including roads, tunnels, bridges, harbors, coastal and river engineering, water supply, sewerage and power station. Much of the work in the civil engineering sectors tend to be large scale in terms of the capital value of the projects, the volumes of materials involved and the expected working life time of the completed works. Whereas the focus in building works tends to be on building details services and finishes provided within the building.²

Construction contract primarily serves the following main specific purposes:

- It describes, by drawings and specifications, the scope of the works to be undertaken, and the methods of construction,
- It establishes conditions of performance by setting out detail rules governing the performance, supervision, remedies for problems arising during the works,
- It fixes the contract price, the timing and procedures for payment,
- It allocates the risks which each party assumes under the contract.³

Construction contract has common features with other kinds of contract. However the following might be cited as its distinctive features.

In the first place several construction contracts are drafted not for the purpose of individual contract but incorporate standard forms of contract drafted by institutions specialized in drafting standard forms. Special conditions of that standard form are also prepared to suit particular situations of each individual contract. This is one of the most important features of construction contract.

Secondly there are a series of other contracts entered into and implemented in the course of implementing construction contracts. These other contracts include, among others, consultancy agreement, sub construction contract, supply contracts, financing agreements, bonds, guarantees, and others. This is also another important feature of construction contract.

2- Ibid

3- Micheal O' Reely, Principles of construction Law, London, 1993, pp.4

Thirdly, construction contract comprises a bundle of technical documents- specifications, drawings and bill of quantities, material and ground condition study report, etc. This is also another peculiar feature of construction contract.

2.2 Major Participants in the Construction Industry

Construction project involves various kinds of parties in its lifetime. There is no universally accepted limit on the number and type of participants. It varies from one type of project to another. However, it is widely accepted that the following participants are worth mentioned:

- Client/employer
- Architect/engineer
- Service consultants
- Quantity surveyors
- Local authorities
- Main contractors
- Sub contractors⁴
- Project manager
- Financers
- Insurers
- Banks

Contractor, client and design and supervision consultant is dealt. This is based on the fact that they are the most important participants to construction industry.

2.2.1 Employer

The term employer denotes a party to a construction contract that employs a contractor to carry out the works, pays for it and ultimately takes delivery of the completed works, be it building, road railway, dam or other. There is a wide range of terms in current usage to describe the employer - who is also referred to as “owner”, “promoter”, “developer”, etc...

4- Ibid

Basically the employer is interested on the following three key points:

- The performance of a contractor in terms of quality, function and durability.
- Time available for completion by the date agreed in the contract document and
- Cost as determined in the budget estimate and the contract sum.⁵

The roles of the employer in the construction project can be classified in two major stages of the project - pre-contract and post contract stage. In the pre-contract stage, the duty of the employer is to prepare design for the works. The pre-contract stage is the moment when the employer deals with the following issues:

- How the project is to be organized?
- Who will be the participants?
- What will be their responsibilities?⁶

During the construction contract period, the role of the employer may vary from contract to contract. However, the traditional role of the employer can be summarized as follows.

On the first hand, the employer has the obligation not to interfere with the contractor's progress of work. This obligation is depicted in *Bargue Quipne* case (1904). Lord Justice Vougham Williams pointed out:

There is an implied contract by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it. I agree that such a term is by law imported into every contract.⁷

Secondly, the employer has also a duty to give prompt access of site to the contractor. This obligation is recognized in every construction contract. Even some scholar argued that this is an implied term as follows:

Since a sufficient degree of possession of the site is clearly a necessary pre-condition of the contractors performance of his

5- Allan, Ash worth, *Contractual Procedures In the construction Industry*, Longman, London, 1993 p.155

6- *Ibid* p 156

7- R.K. Corrie, *project Evaluation*, Thomas Telford Ltd, London, 1993, p3

obligation, there must be an implied term that the site will be handed over to the contractor within a reasonable time of signing the contract.⁸

Thirdly, the drawings and instructions available at the project are often insufficient to construct the works, detailed drawings and information's will be required as the work progresses. Thus, there will be an implied obligation upon the employer to supply this material in sufficient detail and time to enable the contractor to build the works.⁹

Fourthly, it is already stated that the contractor is performing his obligation for consideration. This implies the employer has the obligation to effect payment timely for the work accomplished by a contractor in accordance with the contract.

Finally, the contract will often require or envisage that the employer will appoint a certifier who is to administer the contract. The contract is unworkable if a certifier is not in place and there will normally be implied obligation for the employer to nominate some one to act in reasonably quickly.¹⁰

It is important to note that the role of the employer stated above is appropriate for the traditional general contracting type of contract.

A typical traditional condition of contract might be FIDIC (4th ed). It provided the duty of the employer as follows:

- The employer has a duty to give possession of site to the contract so as to commence its work as per the contract (clause 42)
- The employer has a duty to appoint engineer to undertake a number of duties on behalf of employer including giving notices and instruction (clause 1.1(1) V))
- The employer has duty to effect prompt and timing payment for the contract for the work done (clause (60)

8- Duncan Wallace I-N, Hudson's building and civil engineering contracts, sweet and Maxwell, London, 1970, 10th ed, p 318

9- Micheal, Supra note 3, p 133

10- Ibid

Generally, the employer has liability for those risks which experienced contractors could not reasonably be expected to foresee or anticipate and make allowance for in their tenders, or which are beyond the control of the parties¹¹

2.2.2 - Contractor

The contractor (contractors) can be simply defined as the organization which undertakes the construction at site.¹² It undertakes its activity after having a contract of construction with the employer. Moreover it fulfilled a need by employing all the necessary skills providing all the materials, plant and equipment in accordance with its contract. The term contractor refers what is traditional called “general” or “main contractor”.

The role of the contractor varies from contract to contract. In case of “design and build” contract, the contractor has an active role in the design process. Whereas management contract, the contractor focuses not only in fabrication but also towards management and co-ordination of other (trade contractors).¹³ However, in traditional general contracting the basic premise is that the employer (engineer) takes the responsibility for design and the contractor takes the responsibility for fabrication. This paper mainly deals with the traditional type of construction contract.

The main obligation of the contractor is to carry out the works in accordance with the contract documents and the instructions from the engineer. This kind of obligation is incorporated in most modern standard condition of contract. FIDIC (4thed) condition of contract stipulated this obligation as follows:

- The contractor shall, with due care and diligence, design (to the extent provided for by the contract), execute and complete the works and remedy any defects therein in accordance with the provision of the contract. . . (clause 8.1)
- Unless it is legally or physically impossible, the contractor shall execute and complete the work. The contractor shall comply with and adhere strictly to the engineer instructions . . . (clause 13.4).

11- Mark Lane, An introduction to the FIDIC (Red Book) unpublished pp5

12- Mark, Supra note 11, p 12

13- Micheal, Supra note 2, p 3

Similar wording is stated in the ICE condition contract (clause 8.1 and clause (13.4)

Finally, the contractor's detail obligation is stated in different condition of contract. But it can be summarized as follows.

- Compliance with engineer's instruction
- Compliance with the standard described
- Responsibility for faulty workmanship
- Limitation on assignment and subletting
- Duty to proceed diligently with the works.
- Liability in the event of non completion
- Duty to inform the engineer any events under the contract
- Procedure for certification of payment.¹⁴

2.2.3- Design and/or Supervision Consultant

Consultants comprise all those who provide advice in relation to the construction work.²⁰ It includes architects (engineers), surveyors, engineers representative or else. In this paper, primarily architects (engineers) will be dealt.

The term "architects" refers to a person who provides overall advice on building works, scheme designs, detailed of building works, coordination of services and supervision of building works, whereas "engineers" may undertake a variety of roles and provide the same services as an architect in respect of civil engineering works. Most building standard condition of contract including JCT 80 use the term "architect" whereas the civil engineering standard condition of contract including IEC, FIDIC (4th ed) use the term engineer for the consultant.

Traditionally there is a consultancy service agreement between the employer and the engineer. This agreement envisages both the design and supervision consultancy. In case of design agreement, the engineer is responsible for design preparation and tender assessment between the employer and the engineer. Moreover, the employer may conclude another supervision agreement with a view to supervise the work during its execution.

14- Micheal, Supra note 2, p 5.

It has already stated that the engineer has the responsibility for two separate functions; translating the employer's need into drawing and specification through the process of design and supervising the work of actual construction.¹⁵ However, the role of engineer is primarily determined in the type of contract. An instance may be turnkey contract. In this case, the engineer might not have power to design the project. It is the duty of the contractor.

The engineer's supervisory power can be categorized primarily into two. That is its role as an agent of the employer and as independent body as a decision making organ as between the contractor and the employer. It is customarily accepted that the following duties of the engineer is considered as an agent of the employer,

- Issuing instruction to the contractor
- Giving information to the contractor
- Inspection and supervision of the work executed by the contractor.¹⁶

Whereas the engineer has a significant part to play in exercising judgment and reaching decisions on various matters including.

- Issuing certificate
- Issuing interim certificate
- Issuing final certificate
- Serving as arbitrator¹⁷

Finally, it is interesting to discuss the role of engineer under FIDIC (4thed) condition of contract. It sets out in broad terms the engineer's duties and authorities (clause 2.1). Moreover, it stated in detail the role of the engineer. This can be summarized.

- Duty to issue supplementary drawing and instruction (clause 6and7)
- Duty of giving instruction relating to adverse physical obstruction (clause 12.2)
- Duty to give instruction of variation (clause 51.1)
- Duty to give instruction and tests on material (clause 36.1)
- Power to fix rating for variation (clause 52(1))

15- Ibid p. 256

16- Ibid p 265-266

17- Ibid 2 p 270

- Duty to certify payment to the contractor (clause 60.2)
- Duty to issue a taking over certificate (clause 48.1)
- Power as adjudicator (clause 67)

The engineer's role as designer and quality controller is deemed to be serving as an agent of the employer. Whereas, its role as certifier and adjudicator is acting as independent capacity.¹⁸ Moreover, clause 2.6 expressly requires the engineer to act impartially and to do so where he is so required to exercise his discretion.

In general the traditional role of the engineer is divided into four:

- project manager
- designer
- supervisor of construction
- adjudication of dispute

The first three functions are carried out on behalf of the employer the final one is carried out independently.¹⁹

2.3 Construction Contract Documents

Construction contracts in the distant past consisted of a document of about five pages long. They are generally concluded with a hand shake, but underlying such agreements were an essential set of values of competence, fairness and honesty²⁰. At present things are different. Today a construction contract incorporates a variety of documents. It may be bulky. These are not limited to documents expressed in words. Drawing appears in most contracts.

The issue might arise as to how these documents fits together which (if any) are to have precedence, and what is to happen if they conflict. Different contracts redress this issue differently. It is important to discuss some standard condition of contracts. The ICE condition provide that these discrepancies are to be explained and adjusted by the engineer²¹ secondly, FIDIC (4thed) provide that the contract documents shall have an

18- Duncan, Supra note 8, p 7

19- P.D.V Marsh, contracting for engineering and construction projects, Gower, London 4thed, p 190

20- Miciheal, Supra note 3, p 35

21- Jhon uff, Construction Law, Sweet and Maxwell, London, 1999, 7thed p 251

order of proceeding, i.e. a conflicting requirement in the documents is to be resolved in favor of that having the higher priority. Thirdly, JCT form provide that the quality and quantity of the work to be carried out is that contained in the contract bills (or in case of a contract with out quantities in the specification).²²

In principle, the contract document under any construction project should include as a minimum the following information:

- the work to be performed
- the quality of work required
- the contractual condition
- the cost of finished work
- the construction programme ²³

On the other hand, the ingredient elements in which the construction contract constitutes varies from contract to contract. However, most construction contracts include the following documents.

- Condition of contract
- General condition of contract
- Special condition of contract
- Articles (forms of agreement
- Bill of quantities
- Specification
- Drawing
- Letter of acceptance
- Tender document
- Addenda to the tender
- Memorandum of understanding

22- Miciheal, Supra note 3, p. 232

23- Stephen, Supra note 1, p 121

2.3.1. Condition of Contract

Condition of contract includes all the important terms of that contract.²⁴ It primarily governs the relationship between employer and contractor and to define explicitly what is to happen should that relationship be disturbed by the failure of either party to fulfill their obligation.²⁵

The primary object of the condition of contract is to facilitate the efficient control and administrations of the works, while at the same time providing certainty so that for examples quarries as to the nature of work to be done are dealt timely.²⁶

The essence of condition of contract greatly varies from one type of contract to another. However typically it deals with:

- 1) General obligation to perform the works;
- 2) Provision for instructions including valuations
- 3) Variation and payment
- 4) Liabilities and insurance;
- 5) Provisions for quality and inspection;
- 6) Completion, delay and extension of time
- 7) Role and powers of the certifier or project manager, and
- 8) Dispute²⁷

The condition of contract constitutes general condition and special condition of contract. In case of discrepancy, there might be rule of construction in the document. Mostly it is adopted in standard condition form. Having the standard condition of contract has the following merit:

- It is most economical to have standard condition of contract than draft a contract for a project
- It builds contractor's confidence than wasting time to check contract document
- It avoids error in drafting.²⁸

24 - C.D wood, civil engineering procedures, contracts and the planning, programming of construction works, presented in wabishelle hotel for ERA staff, un published pp 2,

25- Micheal, Supra note 3, p 173

26- Jhon, Supra note 21, p. 233

27- Ibid

28-Ibid

At present various kind of standard condition of contract is practiced. This is either in international or domestic level. They are mostly categorized either civil engineering standard or building standard condition of contract. There are instances to be mentioned as civil engineering standard condition of contract. The following might be worth noted.

- ICE (issued by institute of civil engineers, the association of consulting engineers and federation of civil engineers)
- NEC (new engineering contract)
- FIDIC (issued by federation international des engineers conseils)
- And other

Whereas the following is worth noted building standard form of condition of contract,

- JCT (joint contracts tribunal standard form of building contract) (JCT 80)
- JCT Intermediate form of contract (JCT 84)
- JCT Agreement for minor building works (MW 80)
- JCT standard form of building contract with contractor's design (CD 1)
- JCT management works (MW 87)
- General condition of government contracts for building and civil engineering works (GC /work/and GC works/2

Finally, it is important to mention that standard condition of contract is widely practiced in our country. The following might be worth noted:

- FIDIC (4th ed) condition of contract
- World bank modified FIDIC
- African development bank (ADB/ modified FIDIC
- World bank conditions of contract for smaller works
- General condition of contracts for works contracts financed by the European development fund.
- Standard condition of contract for construction of civil work project (Dec. 1994) by Ministry of Urban Development.

2.3.2 Appendix

Appendix to tender sets out some of the terms of the contract. It needs to be completed at the contract. It needs to be completed at the time of the signing of the contract. It includes information on the start and completion date, the period of interim payment and the length of defect liability period as which the contractor is responsible

2.3.3 Specification

Specification is a detailed description of the construction, workmanship, material etc. of work done or to be done and prepared by an engineer.²⁹ It describes the work to be carried out often in greater technical detail. This might differentiate it from bill of quantities. Moreover, the latter includes measured works with price.

The specification has important functions. It helps the contractor to price the work that is required to be carried out and it assists the contractor to determine the requirement of the contract legally, technically, and financially as to the work carried out on site.³⁰

At present there are several standard specification practiced in Ethiopia. The following might be cited as instances;

- The ERA standard specification based on US commission of public works standard and specification.
- COLTO standard specification for road and bridge works for state authority from South Africa³¹

2.3.4 Bill of Quantities

Bill of quantities (BOQ) is a list of the items and quantities of delivered work to be executed for a promoter (employer) under a contract, for instance a quantity of concrete placed to a specified quality.³² Whereas the purpose of bill of quantities vary from one type of contract to another. In re-measurement kind of contract, it serves

29- C D wood, Supra note 24, p 123

30- Ibid p 11

31- Ibid p 128

32- Ibid p.2

primarily two purposes. It can use as the common basis for the tender for their pricing during tender period. Secondly, it can also serve as a basis for recalculating the actual quantity of work carried out for the purpose of final payment.³³

2.3.5 Drawing

Drawing means illustrations of work to be done.³⁴ It might be incorporated into the contract (the contract drawing) or which may be amendments of the contract drawing or, further details necessary for the construction of the work.³⁵ Moreover, it is mainly issued with a specification and bill of quantity.

2.4 Types of construction contract

Construction contracts tremendously vary in type. It can be categorized based on different grounds. It can be classified based on the scope of the contractor's obligation (general contracting and turnkey contracts). Secondly, it can be categorized based on the project organization (management contracting VS management construction). Finally it can be classified based on the method of valuation (lump sum, cost reimbursement, re-measurements contract).

2.4.1 General Contracting Contract

General contracting is the most common form of procurement of construction contract. Sometimes it is designated as "traditional general contracting". This implies it is the most frequently used construction contract type. Sometimes it is referred as "build only" contract. The essence of the general contractor lies in making more or less rigid distinction between design and construction. Design is the task of the engineer or architect³⁶. And the contractor assumes no responsibility for the design of the work. The contractor is given the detailed drawings and specification and must build exactly what is shown.³⁷

33- Ibid p 15

34- Ibid

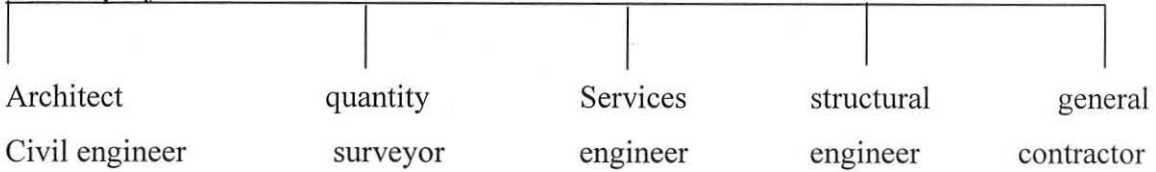
35- Jhon, Supra note 21, p. 251

36 - Ibid

37- Jhon, Supra note 21, p 263

The contractual relationship on general contracting can be described in diagram as follows,

➤ **Employer**



➤ This diagram is taken from the book cited at no 5 pp 30

2.4.2 Design and Build Contract

Design and build contract has several designations. Turnkey contracts, all in one, package deals are some of its designation. Though there might be some differences they convey more or less the same meaning. As its name indicate it is “the turning the key” concept whereby the employer, when the project is completed can immediately start using the project since it will have been fully equipped including furnishings by the turnkey contractor.³⁸

As it is already pointed out, turkey contract assumes the existence of a single contractor who undertakes the entire responsibility and commissioning to the handing over of the project to the employer who has only to “turn the key”³⁹ Here the obligation of a contractor is not only to construct the works but also to design them.

It is important to note that there are peculiar features of design and build contract. Firstly, it provides that the employer approaches a contractor with a set of requirements defining the employers’ wants. The contractor responds with proposal as well as design work.⁴⁰ Secondly, lack of an independent certification role in the contract is an important feature of design and build contract. There is no architect or contract administrator to settle difference between the parties.⁴¹

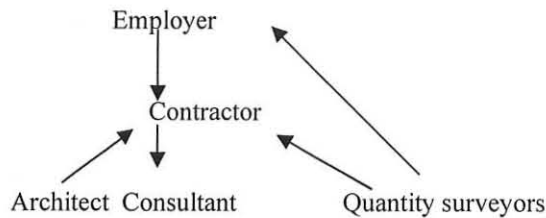
38 - P.D.V. Marsh, contracting for engineering and construction projects, Golder, London, p 19.

39- Micheal, Supra note 3, p 93

40- Ibid

41- P.D.V. Marsh, Supra note 38, p 32

Design and build contract can be depicted in diagram as follows:



➤ Taken from book of cited at 5 p 91

2.4.3- Management Contracting

Management contracting is a kind of construction contract which the employer appoints one contractor who carries out none of the work himself but sub contracts all of it to works contractors responsible directly to himself but under the control of the employer, through his project manager.⁴² The primary role of management contractor is to manage the project on behalf of the employer rather than to construct the works.⁴³

- The employer wishes the design to be carried out by an independent architect and design team
- There is a need for early completion
- The project requirements are complex.
- The project entails, or might entail, changing the employers requirements during the building period.
- The employer requiring early completion wants the maximum possible competition in respect of the price for building works.⁴⁴

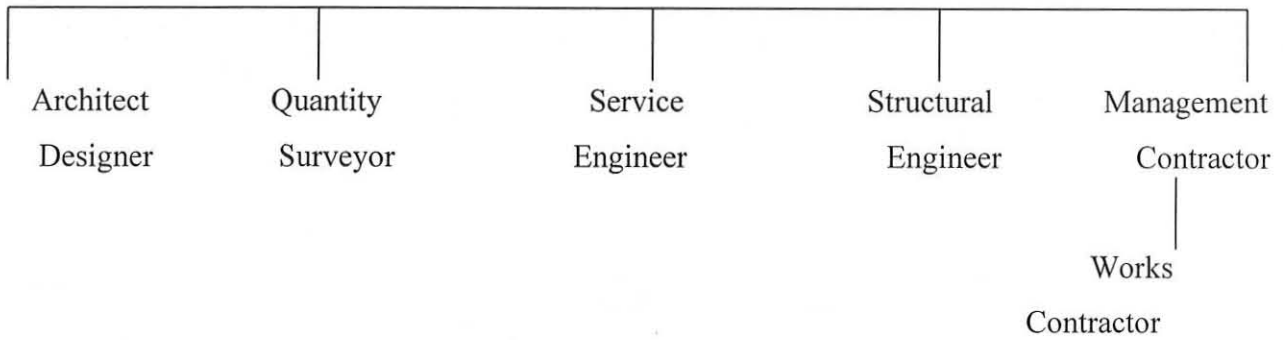
The contractual relationship in management contracting can be described in diagram as follows:

42- Micheal, Supra note 2, p 37

43- P.D.V. Marsh, Supra note 38, p 29

44- P.D.V. Marsh, Supra note 38, p 40

Employer



➤ This diagram is taken from the book cited at no 5 pp 35

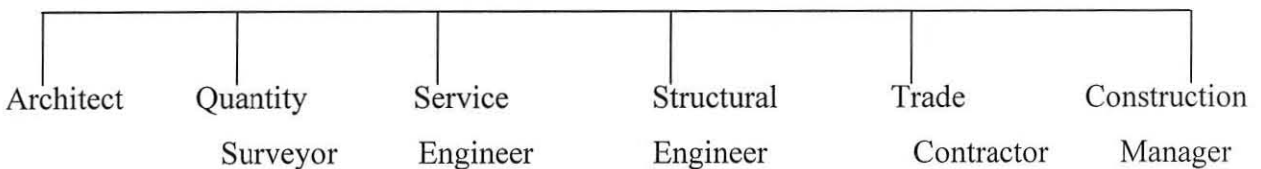
Finally it is important to note that the sub-contracting feature is what distinguishing management contracting from the construction management, which will be discussed later. Under the latter approach the separate work contracts are all made between the employer and the work contractors.⁴⁵

2.4.4- Constructions Management

Construction management is one kind of management contract which the construction manager enters in to a direct contract with the employer for the management of the constructor of the project and may undertake a responsibility relation to time & cost. All other consultant & contractors also inter into direct contract with the employer.⁴⁶

The cost to the employer needs to be competitive but the control of cost in term of securing 'value' for money 'is more important than simply securing the least possible cost.'⁴⁷

Employer



➤ This diagram is taken from the book cited at no 5 pp 35

45 – Stephen, Supra note 23, p 41

46 - C.D wood, Supra note 24, p 28

47 - Ibid p 82

Finally it's important to mention that the single most important distinguishing feature of constructor monument from management contracting, is that the employer places a direct contract with each of the specialist and trade contractors.⁴⁸ In order to coordinate that contracts, the employer buys in the expertise of a construction manager" who acts in the role of consultant.

2.4.5- Lump sum contract

Lump sum contract is a kind of construction contract in which the contractor is paid a fixed price for a fixed piece of work.⁴⁹ That means the contractor agrees to build a project with fixed price.

The nature of lump sum contract varies from contract to contract. There will be usually to be provision in the contract where by the employer can include variation, to the works and here the contractor will be paid an additional or reduced sum relative to the original fixed contract sum depending on the extent to which variation comprise an increase or decrease in the work to be done.⁵⁰ On the other hand, there is lump sum contract that does not provide mechanism for the pricing of Valuation.⁵¹ In this case, the contractor might not have remedy then having the fixed price.

There are points to be considered in order to make on lump sum contract appropriate. They are

- Where the extent of the work to be reasonably clear.
- Where the employer wishes to be reasonably sure of the price in advance of construction
- Where the employer wishes to use the design – build format it is usual to agree to a lump sum remuneration system.⁵²

2.5.6 – Re- measurement Contract

The term "Re- measurement contract" have different designation Re-measure & vary, Re- measure & values ad measurement and measurement are some of its designation. It refers one means of payment for the work of the contractor it primarily

48- C.D wood, Supra note 24, p. 78

49- Micheal, Supra note 2, p 38

50- Ibid

51- C.D wood, Supra note 24 p 222

52- Micheal,, Supra note 2, p 38

refers to rates in terms of money per unit of work for work which falls with a particular classification.⁵³ It deals with calculation of the actual quantities of work ordered on the contractor in order to certify the payment to a contractor.

A re-measurement contract requires a schedule of rates” or bill of quantities. Bill of quantities (BOQ) is to mean a list of the items and quantities of delivered work to be executed for an employer under a contract for instance a quantity of concrete placed to a specified quality.⁵⁴

Payment to a contractor is based on this multiplied by the quantities of work done. Whereas schedule of rates are statement by the contractor rates per unit of items on the basis of indication of possible total quantities. This schedule is similar to a bill of quantity but with out any quantities being included.⁵⁵

In case of bill of quantity if the quantities change significantly from those in the bill then those rates are rendered inapplicable and the certifier or other named person will need to re-rate that is to determine a new rate. In case of a schedule of rates contracts, a list of quantities of not usually provided schedules of rates contracts are typically used for contracts were the scope of work is unknown.⁵⁶

2.4.7 Cost Reimbursement (Cost plus Contract)

Cost reimbursement contract is a contract under which an employer pays (reimburses) all a contractor’s actual cost including employees on the contract (payroll burden) and materials, equipment and payments for managements financing overheads and profits.⁵⁷

Here the contractor is reimbursed for all his or her reasonable expenses on going costs in connection with the scheme together with an additional sum representing the contractors fee.

53-Ibid

54- Micheal, Supra note 2, p 39

55- P.D.V. Marsh, Supra note 38, p 2

56- Mark, Supra note 11, p 82

57- Ibid

Cost Reimbursement contract presents few risks for the contractor and in addition, makes the employer vulnerable to cost & time overruns. Thus it is only used in special circumstances as follows:

- Emergency work projects, where time is not available to allow the traditional process to be used
- when the character and scope of the works cannot be readily determined
- where new technology is being used
- where a special relationship exists between the employer and the building contractor.⁵⁸

Cost reimbursement contracts can take many different forms but the following are three most popular type in use:

- 1- Cost plus percentage (the contractor receives the costs of labors, materials, plant, sub contractor & over heads & to the sum is added a percentage to cover profit)
- 2- Cost plus fixed fee (in to addition costs; the contractor's fee is agreed).
- 3- Cost plus variable fee (a target fee is set for the project).⁵⁹ Among these the target contract is the usual one. It puts the employer in more protected position. Here there is a target out turn price & a target completion date. If the contractor exceeds the cost or time target he pays a penalty, on his fee. If he performs the work at kneeler price or faster.⁶⁰ than the target he receives a bonus on his fee.

In this point of the paper attempts made to make some introduction about construction industry. Thus it is time to assess the cornerstone of the paper i-e "time in construction contract". The next part is devoted for this purpose.

58- P.D.V. Marsh, Supra note 38, p 7

59- - Mark, Supra note 11, p 83

60- - Ibid

CHAPTER III

Time in Construction Contract

In God said unto Noah, the Ark shall be finished within seven days. And Noah saith, it shall be so. But it was not so. And the Lord said, what seemeth to be the trouble this time? And Noah said, mine subcontractor hath gone bankrupt. The pitch with thou commandest me to use has not arrived. The plumber hath gone on strike. And the glazier departees on holiday to majorea, even I did offer him double time¹ (Christopher Taylor, Engineering manger, shell U.K)

The above quotation clearly depicts that “time” (contract period) in construction project is not certainly predicted in advance. Various events might delay or disrupt the contract period. This makes it necessary to establish the mechanism to review the causes of delay, and if justified, to extend time for completion of the works. If the contract fails to deal with a situation of delays in the works and does not address the remedies to delays by way time extension and liquidated damage, then it would be difficult for the parties to complete the works without dispute. The concept of “time extension” evolved from the need to implement contract within an agreed time, subject to flexibility that authorizes the owner or his agent to extend the contract time, for reasons clearly set out in advance.

“Time is an extremely important issue in construction. Together with cost and quality, it is a primary objective of project management and a major criterion by which the success of a project is judged”². In the context of time, the project is deemed successful if completed earlier or within the contract time.

The significance of “time” in construction project might be described by the following examples: firstly, an employer of a building project who had planned to vacate his premises to move to the new building within a fixed date, delays in completion of the building works would inevitably disrupt his plan and may expose him to loss of anticipated business in the new building.

1- Allan Ash worth, Contractual Procedure in the Construction industry (3rd ed) Longman, London 1993 p.35.

2- Jhon Mardoch & et, Construction Contracts, Law and Management (3rd ed) E & FN spon, London, 1992, p 193

Secondly, if a road project is delayed the social and economic benefit of the society that depends on transportation of goods and services on the road would be affected. Thirdly, if completion of a railroad leading to the site of a newly discovered oil or gas reserve is delayed, access to such site and exploitation of the reserve would be delayed.

Thus, the causes of the delays must be accounted for, and the party responsible for the delay must bear its consequences in order to protect the interests of the innocent party.

3.1 Contract Period

Generally, any construction project would have a pre-determined duration of beginning and end. The period between the two is known as contract period.³ However; the completion date might be changed subject to extension of time.

Contract period may be fixed either by reference to specified date or by reference to a construction period. However, if the latter method is opted, it is essential that it should avoid ambiguity regarding holidays and other non working days.

Contract period is specified in different standard condition of contract in different manner. Usually building form of standard condition of contract specify a date for completion in the appendix whereas civil engineering forms specify a time for completion, leaving the date for completion to be calculated from the date for commencement given by the engineer.⁴

3.1.1 Commencement of Contract Period

It is not untrue that completion of a project presupposes a date of commencement. Commencement date is the date in which the contract period is begun. The exact date is which the contract period commences is treated differently in different standard condition of contract.

3- Allan, *Supra* note 1, p 218

4- Brain Eggleston, *liquidated Damages and Extension of time in Construction Contracts* (2nd ed) Victoria 1997 p.21

FIDIC 4th ed stated the commencement of project as follows:

The contractor shall commence the works as soon as it is reasonable possible after receipt by him of a notice to this effect from the engineer, which notice shall be issued within the time stated in the appendix to tender after the letter of acceptance.⁵

The above clause tries to define the commencement of a project. After the tender has been accepted the employer has a period set out in the tender, to give notice to proceed the work by the contractor when the contractor has received the notice time might run and is obliged to commence the works as soon as reasonably possible, the procedure for the commencement of work in the FIDIC (4th ed) is as follows:

- i) The employer decides how much time he needs after choosing a contractor to do everything necessary to enable the project to begin i.e. secure possession of the site, obtain necessary planning and approval, organize import license, etc. The required time is inserted in the appendix to tender.
- ii) The letter of acceptance is issued by the employer to the contractor.
- iii) Within the time period inserted in the appendix to tender the engineer issues a notice to commence.
- iv) Receipt of the notice by the contractor is the date defined at clause *1.1 (c) (1) as the commencement date from which the time runs*⁶

On the other hand, JCT 80 described commencement date as:

“...Possession of the site shall be given to the contractor who shall thereupon begin the work.”⁷

This provision implies that the date of possession is the most important event in deciding the commencement date for a construction work. Moreover it requires the possession of site to be given to a contractor in order to commence the construction works.

5- FIDIC (4th ed) Clause 41.

6- E.C Corbett, FIDIC (4th) A practical Legal Guide (A commentary on the international construction contract sweet and Maxwell, London, 1991 p. 236

7- JCT 80 Clause 23.1

In JCT 80 form of contract the date of possession of site should be recorded in the first site meeting. This is due to the fact that it determines the commencement date and contract period. Moreover if the contractor is allowed on the site early in order to set up site huts it is important to have record this fact. This is due to the fact that this might determine the commencement date.

Finally, the General Conditions For Works Contracts Financed by the European Development Fund (EDF) provided commencement date as follows:

The contracting authority shall fix the date on which performance of the contract is to commence, and advise the contractor either in the notification of award of contract or by administrative order issued by the supervisor.⁸

This provision indicates that the contracting authority has vested power to fix commencement date. This may be either in the award of the contract or administrative order by supervisor (engineer). Unless there is special agreement, the commencement date shall not be latter than 180 days following the notification of award of contract.⁹

3.1.2 Progress of the work

In principle the contractor has an obligation to maintain reasonable progress while he is constructing the work. Most standard conditions of contract included due diligence and expedition obligation on the part of the contractor during the progress of the work FIDIC (4th ed) provide that the contractor to proceed with due expedition and without delay".¹⁰ Whereas JCT 80 imposes an obligation on the contractor to proceed with the works regularly and deligently.¹¹ Breach of these obligation might entail liability on the part of the contractor.

It is already stated that most construction contract included due diligence and expedition obligation on the part of contractor however there is an issue as to whether this term is generally accepted as an implied term in the absence of inclusion of these obligation in the contact. There are different views on this issue, let us see Keating on building contract in this point It stated that.

8- General Condition For Works Contracts Financed by the European Development Fund clause 33

9- Ibid Clause 33-2

10- FIDIC clause 41-(2)

11- JCT 80 Art 23 (1) (1)

It has been suggested that where there is no express provision as to progress. Business efficacy requires the implication of a term that the contractor will proceed with reasonable diligence and progress. It is thought that while such a term may have to be implied in some Cases each contract and its surrounding circumstance must be considered and that there is no such rule of general application. Sometimes the contractor's only duty is to complete by the due date.¹²

3.1.3 Completion Date

In principle full and complete performance is required to discharge contractual obligation. A party to a contract will be discharged only where he has performed precisely his obligation under the contract. However, in construction contract, absolute precision cannot be attained. For example in the manufacture of a product, the production might herald the completion of the contract. Due to the peculiar nature of construction contract, minor and latent defects will frequently remain.¹³

The above discussion clearly shows that the meaning of "date of completion" is very much different in construction contract. In construction contract, the term "completion" refers the event in which all the necessary construction work specified in the contract has been performed and the employer might take possession of the work and allow the contractor to leave the site. The employer has a right to claims after the completion date if there is latent defect and may retain some proportion of the contract sum. It is for this reason, most standard forms do not refer simply to completion but use terms to indicate something slightly different terms. JCT 80 stated it as "practical completion" whereas FIDIC (4th ed) put it as "substantial completion"

The effect of completion (substantial) completion varies from contract to contract. However, it has primarily the following effects.

12- Allan, *Supra* note 3, p 104

13- Stephen Bickford smith & et, *Butterworth's Construction Law Manual*, Butterworth's, London, 1993 p 92

- The employer is entitled and obliged to take possession of the contract works,
- The contractor's responsibility (if any) for insuring the contract works comes to end;
- Any liability of the contractor to pay damages for the late completion ceases
- The contractor usually becomes entitled to the release of one half of the accumulated retention money.
- The defect liability period begins¹⁴

It is important to note that most standard condition of contracts draws a distinction between “date for completion” and the “completion date” The date for completion is defined as the date which is fixed and stated in the appendix.¹⁵ It is set in advance in the contract. It cannot be changed. The completion date, on the other hand, is defined as the date of completion or any other date fixed by extension of time. This may be as per clause 25 of JCT 80 or clause 44 of FIDIC (4th ed).

Finally most construction contract allows the contractor to complete the building or civil engineering work on or before the completion date FIDIC (4th ed) requires the works to be completed within the time for completing stated in the appendix or such extended time as may be allowed.¹⁶ This implies the contractor has a right to complete the work prior to the contract period.

3.2 Extension of Time and Its Principle

In principle an employer could impose an absolute obligation on the contractor to complete by a certain date whatever delaying circumstances arose during the course of contract.¹⁷

In other words the contractor is expected to complete the contract works by a specified date.¹⁸ However, most construction contract allows this date be revised of under a specific ground. A contractual provision which allows such revision is referred as “extension of time clause.”¹⁹

14- Allan, Supra note 2, p 197

15- Ibid

16- FIDIC (4th) clause 4

17- Gillian Birkby and et, Extensions of time Explained, Riba Publication Ltd, London, 1993 p 25.

18- Issaka Endekugri, the JCT 98 building contract. Law and administration, Arneld, London, 2002 p 218

19- Gillian, Supra note 17, p 25

It is already stated that the time for completion construction project is not certainly predicted in advance. There are several factors that make the predication impossible. Contractor might be at risk for penalty in case of non completion of strict completion is expected. Thus, the inclusion of extension of time clause in the contract allocates and reduces the contractor's risk in relation to delays by entitling him to extension of time for completion in various circumstance.²⁰

Extension of time clause has primarily three purposes. On the first hand, extension of time clause might retain, a defined time for completion.²¹ It is quiet evident that there are several incidents either neutral or (employer fault) that prevents the contractor from complying the specific contract time. If not extension of time clause, the contractor might be without specific completion date if delay is occurred due to these events.

Secondly, extension of time clause has important purpose in preserving the employer's right to liquidated damage against acts of prevention. Acts of prevention mean the acts of employer that prevent the contractor from complying the contractual obligation to complete by a certain date.²² Thus if the acts of prevention included as a ground in extension of time clause then it will serve as a ground for extending completion period.

This has an effect that maintains specific completion period in which liquidated damage can count on. Unless the extension of time clause is there, time will be at large.

Finally, extension of time might give the contractor relief from his strict duty to complete on time in respect of delays caused by designated neutral events.²³ It is already stated that the contractor is obliged to comply with contract period Breach of contract period entails Liability. However the time extension clause might exempt from liability if delay is occurred due to specified neutral events.

It is important to note that the existence of time extension clause will exonerate the contractor from all liability for delay. It is only the specified events are subject to

20- Brain, Supra note 4, p 162

21- Ibid

22- Ibid

23- Brain, Supra note 20, p 29

entitlement. Moreover, delay due to the contractor or he is responsible might not entitle him for extension of time. On the other hand, primarily delay due to neutral events and delay due to employer is incorporated as qualifying events for extension of time.

Neutral events are events which have not been caused by either party and where the contract provides that the contractor may be entitled to an extension of time thereby relieves him of liability for liquidated damage but not to any further payment for losses arising out of that delay.²⁴ Force major, exceptional adverse weather, civil war, commotion falls under these category. Whereas employers delay covers a variety of events such as failure to give the site²⁵. This is due to the act of the employer.

The terms and condition, in which the time extension clause applies, vary from one condition of contract to another. However, the following principles are common to most standard condition of contract.

In the first place, in principle there should be extension of time clause in the contract to claim extension of time for delay due to specified incidents. The terms and condition of a construction contract should include the extension of time clause. Otherwise, the contractor could not claim extension of time and be bound by the strict adherence of contract period.

Secondly, as a rule the contractor is the one who can initiate extension of time claim. This is especially true for delay due to neutral events. Most standard condition of contract stipulate express requirement for notices and application as condition precedent to neutral events.²⁶ to claim extension of time.

Thirdly, usually extension of time is granted by the architect or engineer having considered specific case. The engineer or architect is vested to assess and grant the appropriate extension of time.

24- Ibid

25- Brain, Supra note 4, p 163

26- Issaka, Supra note 18, p 223

Fourthly most standard condition lists down the cause of delay (Relevant events) for which the time for completion is extended. These grounds are enumerated exhaustively in the contract. The contractor is entitled to claim extension of time for events stated in the contract only.

Fifthly, the extension of time presupposes the specified completion date. The extension of time clause applies only if the specific completion date is ascertained. Otherwise, it is not possible to assess extension of time. It is only granted if the specific completion date is ascertained.

Sixthly, where the delay is partly or wholly attributable to an event for which the employer is responsible the liquidated damage may be kept alive only by the existence in a contract of an extension of time clause, which covers the cause of delay.²⁷ This implies the inclusion of delay due to the act of the employer as qualified ground for extension of time has importance to the employer. If not, time will be at large. This might deprive the employer right to have liquidated damage for delay due to his act.

Finally it is important to note that the existence extension in the contract is not itself operational. The engineer should act in line with the contract. If the engineer does not grant timely in accordance with the contract, there might be time at large. This will be further discussed latterly.

3.3 Relevant Events for Extension of Time

It is already stated that time for completion can only be extended where the specific contracts allow doing so. The specific event should be specifically stated as a ground for extending the contract period. If delay is caused by some event which the contract does not cover, then the contractor could not claim an extension, nor can the employer insist in giving one (in order to keep alive claim for liquidated damage).²⁸ Thus, identifying the relevant events for extending contract period is the most important point to be dealt.

²⁷ Jhon , Supra note 2, p 193

²⁸- Issaka, Supra note 18, p 26

Different approaches are followed in different standard condition of contract in describing the relevant grounds for extension of time.

The JCT 80 form of contract sets out a long list of specific events which may entitle the contractor to extension of time.²⁹ whereas the GC/work form clause which lists certain events in very general terms including “the act neglect and default of the Authority” or the project manager (PM) and then contain a ‘sweep up’ clause as

any other circumstances (other than weather conditions) which are out side the control of the contractor or any of his subcontractors and which contractor or any of his subcontractors responsible and which could not have been reasonably contemplated under the contract.³⁰

On the other hand, FIDIC (4th ed) form of contract tries to enumerate the relevant events for extension of time. It also includes “Catch up” provision so as to include various events to entitle the contractor for extension of time.

The following is described as a qualified ground for extension of time under FIDIC (4th) condition of contract:

- a) The amount or nature of extra or additional works;
- b) Any cause of delay referred to in those conditions;
- c) Exceptionally adverse climatic conditions;
- d) Any delay, impediments or prevention by the employer; or
- e) Other special circumstance which may occur, other than through a default of breach of contract by the contractor or for which he is responsible³¹

Extra works

“Clause 44(1) (a) the amount or nature of extra or additional works”

FIDIC (4th ed) prescribed that the engineer has a power to order variation of work. This might be in terms of form quality or quantity of work.³² As per these provision, the contractor might do;

29 - Ibid

30 - FIDIC (4thed) Clause 44

31- FIDIC (4thed) Clause 51.1

32 - Ibid

- Increase or decrease the quantity of work or omit any such work
- Change the character or quality of work
- Change the levels, position and demission of any part of the work
- Execute the additional work.
- Change any specified sequence of timing³³

It is quiet evident that the clause under discussion covers the increase in quantities (clause 51.1(a) and the additional of new work (clause 5)(1) (e) Thus, delay due to increased or extra work which is not part of the contract work, will entitle the contractor for extension of time.

Finally it is important to note that though delay, due to omission of the contract work is not covered under the clause in discussion; it might serve as a ground for extension of time in the following sub clause.

Any cause of delay referred to in this condition

“Clause 44 (1) (b) “any cause of delay referred to in those condition”

This clause primarily refers events that are cited as a ground of extension of time in different part of condition of contract. The relevant provision should clearly state that the contractor is entitled to extension of time if delay occurs due to the specified event. Express references to clause 44 can be found in the following clauses:

- Clause 6.4 (delays and cost of delay of drawings)
- Clause 12.2 (Adverse physical obstruction or conditions)
- Clause 27 (fossils)
- Clause 36.5 (engineer’s determination where tests not provided for)
- Clause 40.2 (engineer’s determination following suspension)
- Clause 42.2 (failure to give possession)
- Clause 69.4 (contractor’s entitlements to suspension of works)³⁴

33- E.C Corbett, Supra note 6, p 249

34-Ibid

On the other hand, there is unresolved issue in the clause under discussion. The issue is that does this clause only refer to clauses where there is express reference to clause 44 (as it is discussed above) or could it also refer to clause which deal with events which frequently cause delay but no reference to extension of time? An instances of these might be clause 17.1 (setting out) or clause 20-3 losses of damage due to the employer risks).

Exceptionally Adverse Climate Condition

Clause 44 (1)(1) exceptionally adverse climatic condition

This clause is clear in that mere adverse climatic condition is not enough to be entitled extension of time on the part of the contractor. Rather unusual severity (exceptionally) condition is required. This varies from cases to cases. For example heavy rainfall during the winter months would not fit the definition of exceptional unless it is abnormal.³⁵

On the other hand, it is not an easy task to determine the climate conditions are exceptionally adverse. This might be judged from public research on weather charts covering a long period and relevant to the particular area where the work is to be carried out³⁶. The term “exceptionally” is fairly dealt:

The word “exceptionally” is clearly the important one and it will be considered according to the time of year and the conditions envisaged in the contract documents. Thus if it were known at the time that a contract was let that the work was to be carried out during the winter months, and if that work is delayed by a fortnight of snow and forest during January, such a delay could not be regarded as due to exceptionally inclement weather. If however, such work was held up by a continuous period of snow and frost, from January until the end of March an extension of time would clearly be justified under this clause³⁷

35- Allan Ashworth, contractual procedures in the construction industry, Longman, London 1993 p 224

36- Vincent p. smith, problems in construction claims, BSP professional books, London 1990 p 67

37- Ibid

Finally, Fidic (4thed) use the term “climatic” as opposed to the more usual “whether” in these sub clause. This may a broadening effect on the ground for extension of time.³⁸

Any delay imperilments or prevention by the employer.

Clause 44. (1) (d) any delay impediments or prevention by the employer

This clause primarily addresses delay by the employer in breach of contract. The inclusion of delay due to employer as a ground for extension of time, has double importance. Firstly, the employer will be projected from being time at large if delay is caused by him. Secondly, the contractor is protected from being liable to damage due to the employer.

On the other hand, issue might be raised as to whether delay due to the engineer is covered in this clause. Some argue that if the engineer performed his activity as an agent of the employer, his act should be covered in the clause. This is on the assumption that the principal is bound by the act of the agent (engineer). Therefore if the act of the engineer delay the work they argue that the contractor is entitled to extension of time as per this clause. Whereas there are argument that since the clause has no reference of “servants or agents. The delay due to engineer is not included.

Other Special Circumstance which may Occur other than a Fault of or Breach of Contractor or for which he is Responsible

Clause 44.(1) (e) –other special circumstances, Which may occur, other than through a default of or breach of contract by the contractor or which he is responsible.

This clause encompasses all special circumstances, that may occur except due to the fault of the contractor or he is responsible. The latter might be subcontractor. This provision seems catch all clause. The rational for having this kind of very widely framed extension of time clause might be the need to retain an ascertainable time for completion.

38- E.C Corbett, Supra note 6, p 249

On the other hand, among the various building standard condition of contract, JCT 80 might be cited as important ones. It listed the relevant events for extension of time in more detailed manner. It described the events under clause 23.4 as follows:

- 1) Force majeure (clause 25.4.1)
- 2) Exceptional adverse weather condition (clause 25.4.2)
- 3) Loss (damage due to the specified perils) (clause 25.4.3)
- 4) Civil commotions, strikes or lockouts, etc (clause 25.4.4)
- 5) Compliance with an architect instruction (clause 25.4.5)
- 6) Failure of the architect to comply with information release schedule (clause 25.4.6)
- 7) Failure of the architect to provide further drawings and details that have become necessary (clause 25.4.6.2)
- 8) Delays on the part of nominated supplier (clause 25.4.7)
- 9) Delay due to execution or non execution of works directly by the employer or his other contractor (clause 25.4.8.1)
- 10) Delay caused by failure to the employer to supply materials and goods or the manner in which he supplied them (clause 25.4.8.12)
- 11) Statutory intervention (clause 25.4 (a))
- 12) Unforeseen shortages of labor and materials (clause 25.4.10)
- 13) Delays caused by local authorities and statutory undertakers (clause 25.4.11).
- 14) Failure to give ingress to, or egress from the site (clause 25.4.12)
- 15) Deferment of giving possession of site (clause 25.4.13)
- 16) Execution of work covered by approximate quantities in Bill (clause 25.4.-14).
- 17) Change in statutory requirement (clause 25.4-15)
- 18) Terrorism (clause 25.4.16)
- 19) compliance with obligation in respect of CDM regulation (clause 25.4.17)
- 20) Suspension of performance for non payment by the employer. (Clause 25.4.18).

It is important to further explain some of the above events in brief. The next part is devoted for this purpose.

Force Majuere

Clause 25.4.1 Force majuere

The term “force majuere” is not defined in the JCT 80. It is assumed that its origin is French law. It is used to describe situation where an unforeseeable event makes execution of the contract wholly impossible.³⁹ Some scholars argue that the inclusion of “force majuere” as a ground for extending the contract period in JCT 80 is odd. In the first place, many of the events which might conceivably come within the definition are already specifically covered under JCT 80 by other grounds.⁴⁰ The following might be cited as instance war, strike, storms fire and exceptional weather. Secondly, any event which made execution of the contract wholly impossible might be a worthy candidate for determining the contract, but it is difficult to see how extending the contract duration could be any assistance unless the event merely delayed completion, in which case, execution of the contract is not wholly impossible but merely temporally impossible.⁴¹

It is worth to note that FIDIC (4thed) and ICE include force majuere as a relevant event for entitling extension of time.

Exceptionally adverse Weather Condition

Clause 25.4.2 – Exceptionally adverse weather condition

JCT 80 includes exceptionally adverse weather condition as a relevant event for extension of time. It gives emphasis on the adverse weather condition be exceptional.

Loss or damage occasioned by any one or more of the specified events.

Clause 25.4.3–loss or damage occasioned by one or more of the specified perils.

The specified perils referred to in this clause are generally those items which are insurable risks. The complete lists might be described in clause 1.3 (definition clause). It includes fire lightening explosion, storm, tempest, etc. Thus if there has been delay

39- Jhon, Supra note 2, p 203

40-Ibid

41- Ibid

due to occurrence of a specified peril (which is covered in the definition of specified perils in the contract), the contractor might be entitled for extension of time (assuming all other conditions are satisfied).

Civil commotion strikes or lockouts, etc

Clause 25.4.5 civil commotion, local combination of workmen, strike or lockout affecting any of the trade employed upon the works or any of the trades engaged in the preparation, manufacture or transportation of any of the good or the materials required for the work.

JCT 80 does not define what civil commotion or strike mean. However, the scope of this clause is very wide.

The phrase affecting any of the trades employed upon the works or any of the trades engaged in the preparation, manufacture or transportation of the goods or materials required for the works... implies that this clause applies not only strike to the site of the work but also applies to the sub contractor and supplier.⁴²

Compliance with an Architect Instruction

*Clause 25-4-5 1- compliance with the architect's instruction under clauses 2.3
13.2, 13.3, 23.2, 34 35 or 36.*

The architect instructions are those relating to:

- Clause 13,2-variation
- Clause 13.3- the expenditure of provisional sums
- Clause 23.2 – The post payment of any work to be executed under the contract.
- Clause 34-any action to be takes concerning fossils, antiquities, and other objects of interest of value
- Clause 35- nominated subcontractors
- Clause 36- nominated suppliers

42- R.K. Corrie, Supra note 7, p 185

Therefore delay due to the above instruction might serve as a ground for extension of time in JCT 80.

Late Information

clause 5.4.6- *the contractor not having received in due time necessary instructions, drawings, details or letters from the architect for which he specifically applied in writing provided that such application was made on a date which having regard to the completion date was neither unreasonably distant from nor unreasonably close to the date it was necessary for him to receive the same.*

In principle most of the design will be completed before the work starts on site. However, the contractor may require further information or detail during the course of the contract. The contract administrator is required to submit the information timely. If there is delay, the contractor might claim extension of time in view of the clause under discussion.

Nominated Subcontractors or Suppliers

Clause 25-4-7- Delay on the part of nominated sub contractors or nominated suppliers which the contractor has taken as practicable steps to avoid or reduce.

It is quite clear that the employer has a role in the selection of nominated subcontractor or supplier. The employer should give its consent. Then the employer will share the risk of delay on the part of the nominated subcontractor or supplier. This clause has its own qualification. It is expected to take practicable steps to avoid or reduce the delay.

Worker Employed Directly by the Employer

Clause 25.4.8.1

The execution of work not forming part of this contract by employer himself or by person employed or otherwise engaged by the employer as referred to in clause 29 or the failure to execute such works.

Clause 25.4.8.2

The supply by the employer of materials and goods which the employer has agreed to provide for the works or the failure so as to supply.

Clause 29(JCT 80) allows the employer to undertake parts of the works, either directly or through another contractor, where this is stated in the contract bills, such work will not form part of the contract but because of this clause, a delay in that part of the work will entitle extension of time for contractor.

In the same manner, the employer may choose to supply materials or goods for the work. This might be clearly stated in the bill. Delay in supply of materials may also be a ground for extension of time.

Shortage of Labour, Goods and Materials.

Clause 25.10

The contractor's inability for reason beyond his control and which he could not reasonably have fore seen at the base date to secure such labor as is essential to the proper carrying out of the works.

Clause 25.2

The contractor's inability for reasons beyond his control and which he could not reasonably have foreseen at the base date to secure such goods or materials as are essential to the provide carrying out of the works.

This clause include both labor and goods or material shortages. Mere shortages of these resources is not sufficient grounds. The contractor must be able to show that the shortage was not reasonably foreseeable at the time of tender and that circumstances responsible for the shortages are beyond his control.⁴³

Deferment of Possession of Site

Clause – 25.4.13- where clause 23.1.3 is stated in the appendix to apply, the deferment by the employer of giving possession of site under clause 23.1.2

43- Brain, Supra note 4, p 234

This clause applies to delay due to deferment in giving the contractor possession of site within the maximum period of deferment (six weeks) any delay beyond this default period is not covered in this provision.

Terrorism

Clause 25-4-16- The use or threat of terrorism, and/or the activity of the relevant authorities in dealing with such use or threat.

This clause deals with the fact that there were threats or acts of terrorism and the act of relevant authority that caused the delay. This clause is pertinent at present time as this is due to terrorism is prevalent contemporary agenda.

Finally, General conditions for works contracts Financed by the European Development Fund (EDF) also described the ground for extension of time. It enumerates the following grounds:

- Exceptional weather condition in the state of the contracting authority.
- Artificial obstructions or physical conditions which could not reasonably have been foreseen;
- Administrative orders affecting the date of completion other than those arising from the contractor's default;
- Failure of the contracting authority to fulfill his obligation under the contract;
- Any suspension of the works which is not due to the contractor's defaults
- Force majeure;
- Any other causes referred to these general conditions which are not due to the contractor's default.⁴⁴

3.4. Time at Large”

In principle, the contractor has an obligation to complete the work by the specified date. This date must, first be stated in the contract document, but may be extended by the engineer or architect if the contractor submits a claim for extension of time in accordance with the contract.

44- General Conditions for Works Contracts Financed by the European Development Fund (EDF) clause 35.1

In some situations, however, the contract may not have completion time from the beginning, in which case, it would be impossible to talk about specific date for completion. If this were the case, the employer would face serious problem in regard to applying pressure on the contractor to get his facilities completed for its purposes. In another situation, the contract may have completion date, but the works may not be completed within that date for different reasons, some of which being actions or inactions on the part of the engineer or the employer. Generally, contracts authorize employers to be paid damages by the contractor if he failed to complete the works within the agreed time. Though standard forms of construction contracts are quite exhaustive in several respects, they do not address a situation of “time at large.”

“Time at large’ is a situation where a contractor is entitled to complete the works within a reasonable time. The authority to define ‘time at large’ is a matter of law. In administrative contract, Article 3174 of the Ethiopian Civil Code provides that:

“3174 –Time. - Principle

- (1) Each contracting party shall perform his obligation within the time fixed by the contract.
- (2) Failing a specific provision in the contract, each contracting party shall perform his obligations within a reasonable time.”

The position of the law in contracts of works and labour between private parties is as stated in Article 2619 of the Civil Code:

“Article 2619 - Where no time limit has been fixed

(1)Where no time limit has been fixed in the contract, the contractor shall immediately begin the execution of his task and complete within a reasonable time in accordance with the custom”

As understandable from the above provisions of the Civil Code Ethiopian law recognizes “time at large” only where the contract failed to stipulate completion time. This leaves open for debate numerous situations in which completion time has been stated defectively. In jurisdictions of well-developed legal regime, there are several situations where “time at large” may occur, for instance, when an act of prevention by the

employer creates delay and that delay is not covered by an extension of time provision.⁴⁵ In this case, the specified completion date no longer applies.

Further, time might be also at large in case where the provision for extension of time have not been properly administered or have been misapplied. This especially occurs if the contract administrator fails to grant an extension of time within the period set down in construction contract.⁴⁶

In any event, the issue of whether the completion date is at large a matter decided on each specific case. This is reflected on the following quotation.

“Whether the completion date is set at large by a delay in granting an extension must depend upon the particular circumstances”.⁴⁷ It is already stated that the phrase “time at large” refers there is no time for completion. However, this does not mean that the contractor has as much as time as he wants to finish the works, rather the contractor has an obligation to complete in reasonable time.⁴⁸ In order to decide what is “reasonable” all the circumstances of the particular project must be taken in to account.⁴⁹

Some scholar agree that even where the delay caused by the employer is very small part of the overall delay, the employer cannot claim liquidated damage for remainder.⁵⁰ This is due to the fact that claims for liquidated damage fails altogether.

If time is at large, the employer loses his right to deduct liquidated damage from monies due to the contractor, where the contractor fails to complete within the time completion. However, the employer’s right for general or non- liquidated damage remains unaffected. But proof of such damage is difficult, particularly, in road contracts, where the measure of economic and social benefits of the public lost as a result of delay in completion requires considerable estimation and documentation.

45- Brain, Supra note 4,

46- Issaka, Supra note 18, p 70

47- Ibid

48- Micheal partic O’ reely, principles of construction law, Longman, 1993 p 105

49- Jhon, Supra note 2, p 20

50- Ibid

3.5- The Nexus between Time Extension and Financial Claim

It is important to hold some discussion what time and financial claim mean prior to dealing with their relationship. Time claim includes claims for liquidated damages by the client for late completion by the contract or as well as claims by the contractor for extension of time to increase contract period.⁵¹

Whereas financial clause include, claims for higher work rates due to changes or revised circumstances, increased preliminary costs due to a longer contract period, disruption costs or else.⁵²

Though there are some common features between time and financial claims, there are some distinguishing features of their own. Firstly, an extension of time will be granted where the contract administrator believes that the completion date of the works is likely to be delayed whereas compensation for disruption does not depend on any such delay.⁵³ Secondly, claim which deal with extension of time for completion frequently apply to various neutral event.⁵⁴ Whereas financial claim basically relate to disruption costs caused by the employer.

The link between extension of time and financial claim (extra cost) by the contractor is most controversial issue. Some contractor cited the simple maxim “get the time first and the money will follow”.⁵⁵ However, this maxim is not necessary true. Rather, the above linkage could not be expressed in simple phrase as stated in the above maxim.

It is not untrue that the main purpose of extension of time clause is to relief the contractor from paying liquidated damage from the date stated in the contract.⁵⁶ whereas financial claim focuses in reimbursing or demanding money either for loss or expense. The above assertion clearly indicates that the contractor is not necessarily entitled to any compensation because the engineer has determined an extension of time.

51- W. French Frics, claims and claims avoidance (ACPD study pack) college Estate Management, London, 1999, p 17

52- Ibid

53- Jhon, Supra note 2, p 229

54- Ibid

55- EC. Corbett, Supra note 6, p 172

56- Vincent power smith, problems in construction claims, BSP professional books, London, 1990 p

It is already stated that though there is no direct link between extension of time and financial claim, there are some linkage between the two. It is generally accepted that there are two kinds of time extension:

- 1) Reimbursable extension which are based on employer's fault and
- 2) Non-reimbursable extension, which is based on neutral events.⁵⁷ This is based on the risk allocation. In case of neutral events, the loss lies where it falls whereas if the fault is the employer he will bear the loss or expense, for the extended period. The above assertion is dealt in *Hennery foot construction Ltd VS central Lancashire new town* (1980) decision as follows:

There are cases where the loss should be shared, and there are cases where it should be wholly born by the owner. There are also cases which do not fall within either of these cases where the fault is not that of the contractor, the scheme is clear in that the loss is to be shared; the loss lies where it falls. But in other cases the employer has to compensate the contractor in respect of the delay, and that category, where the employer has to compensate the contractor, should one would think clearly be composed of cases where there is fault up on the employer or fault for which the employer can be said to bear some responsibility.⁵⁸

In relation to standard condition of contract JCT 80 provide the time and monetary claim in subsequent way (clause 25 and clause 26). More over, it tries to collect financial clause provision in a single clause (clause 26).

This provision provided two points:

- 1) The contractor has incurred or is likely to incur direct loss and /or expense which would not otherwise be reimbursed under the contract and
- 2) The above losses arise either.
 - a) from defined possession of site under clause 23.1.2 or
 - b) Because the regular progress of the works or any part thereof has been or is likely to be materially affected by one or more of the matters referred to clause 26.2.

57- Brain, *Supra* note 4, p 172

58- *Ibid* p 173,

Basically clause 26.2 (JCT 80) deals events attributable to employer. Therefore JCT 80 primarily covers reimbursable extension of time attributable to the employer. On the other hand, FIDIC (4thed) makes no attempt to put financial claim in one clause; rather it provided in each clause for a ground for financial claim. There are clauses that allow both extension of time and financial claim or extension of time only.

CHAPTER IV

Procedures for Entitlement Extension of Time and Its Assessment

Different standard forms provide different procedures for entitlement an extension of time. However, none of them left out the notice requirement on the part of the contractor in case delay occurs during the project life time. Moreover they obliged the contractor strictly to comply some procedure so as to entitle an extension of time. Thus, discussion of these issues are important ones.

It is also important to note that different forms requires different substantive element to be met by the contractor in order to be entitled an extension of time. Moreover, the assessment and calculation method also varies. Thus, this part might deal these issues.

4.1 Notice Requirement

It is already stated that most, if not all, standard forms of construction contract imposes an obligation on the part of the contract to give written notice to an architect (engineer) in case of delay happened during the construction project life time. The purpose of notice requirement might vary form one form of contract to another. However, it primarily serves the following specific purposes:

- It gives the architect the opportunity to take all reasonable steps available to him to minimize the effect of the delay;
- It alerts the architect to watch out for the reasonableness of the contractor's endeavor to prevent or minimize delays in completing the works;
- It alerts the architect to the effects of the delay as they occur;
- It allows the architect to advise the employer of likely delays so that can rearrange his affairs accordingly¹.

1- Issaka Endekugri, the JCT 98 Building Contract Law and management Arleld. London, 2002 pp 231

On the other hand, the issuance of notice on the part of contractor is deemed to be a beginning of extension of time proceeding. Most standard form of contract recognizes that the issuance of notice by the contractor in accordance with the contract is as a beginning point. From this time on ward, the engineer (architect) is expected to assess or consider the extension of time claim. However, in practice most contractors give a consolidated extension of time claim. Up on the receipt of this claim, the engineer is required to respond the issues in it.

In relation to the specific construction contract forms, JCT 80 provided on notice requirement as:

If and whenever it becomes reasonably apparent that the progress of the works is being or is likely to be delayed, the contractor shall forthwith give written notice to the architect of the material circumstances including the cause or causes of delay and identify in such notice any event which in his opinion is a relevant event²

JCT 80 required a written notice and should address to the architect. Thus, a letter to the quantity surveyor doesn't therefore qualify nor does oral report by the contractor at a site meeting, even minuted by the contract administrator³. Moreover, the contractor has obligation to give written notice of any delay whether or not seeking an extension of time and whether or not the cause of delay is relevant event⁴.

The above sub clause (JCT 80 25.2.1.1) stated that "the contractor shall forthwith give written notice ---". This implies that the obligation of the contractor to give notice should be made immediately and promptly. Moreover, it provided the time in which it is issued. Moreover, it provided the time in which it is issued. It stated that the contractor must give notice if and whenever it becomes reasonably apparent that the progress of the

2- JCT 80 Clause 25.2.1.1

3- Gillian Birkby and et, Extension of Time Explained, Riba publication Ltd, Loudon p 53

4- Gillian, Supra note 3, p 225

works is being or is likely to be delayed. This implies that the contractor's requirement to give notice applies not only to current delays but also to those which can be reasonably foreseen (future delay).

JCT 80 also tries to state the content in which notice constitutes. It stated as "material circumstances including the causes of delay of relevant event" --- In other words, notice must set out;

- a) The material circumstances,
- b) The cause or causes of delay
- c) Any event which in the opinion of the contractor is a relevant event i.e. one for which the contract administrator is entitled to grant an extension of time
- d) Details of the expected effects of the relevant events, which has identified and his estimate of the extent of the delay in completion which he anticipates, whether or not this is concurrent with delay from any other relevant event.⁵

The above (a-c) points should be incorporated in the notice. Whereas the last point (d) required latterly.

JCT 80 required detail information with the notice, if practicable, given as soon as possible⁶. This detail information might give further information or detail regarding the delay. This might make the assessment simple on the part of the engineer concerning the delay. However, detail information requirement is only in respect of relevant events. The contractor has to give further details of the effects and an estimate of delay beyond completion date with regarding delay of relevant event⁷.

The details of information by the contractor might constitute the following factors:

- a) Details of the material circumstances
- b) Cause of the delay

5- Gillian, Supra note 3, p. 49

6- JCT 80 clause 25-2.2.

7- Close reading of JCT clause claim 25.2.2

8- Gillian, Supra note 3, p-227

- c) Identification of any relevant events;
- d) Effects of delay by relevant events and
- e) Estimates of delay beyond the completion date from relevant event.⁸

Finally, it is worthwhile to state the most controversial issue regarding notice requirement. The issue is that whether the contractor's obligation to give notice is a condition precedent for granting an extension of time. Some scholar answered the issue in affirmative. Where as other scholar argue that the contractor's obligation to give notice and the engineer obligation to grant an extension of time were related but independent. They extended their argument that the engineer had an obligation to grant an extension if the other condition in the clause are met, even if the contractor had not already served notice of delay⁹.

The above issue are dealt in Merton case Mr. Justice vine ott stated that.

The case for Merton is that the architect is under no duty to consider or form an opinion on the question whether completion of the works is likely to have been or has been delayed for any of the reasons set out in clause 25 unless and until the contractor's has given notice of the cause of delay that has become "reasonably apparent" or as it has put in argument the giving of notice by the contractor is a condition precedent which must be satisfied before there is any duty on the part of the architect to consider and form an opinion on these matter. The arbitrator's answer to this question was that "a written notice from the contractor is not a condition precedent to the granting of an extension of time under clause 25"¹⁰.

To conclude, most scholar argues that notice requirement under JCT 80 is directory ones. In other words, the engineer should not be refrained from considering extension of time event if the contractor doesn't comply with the notice requirement.

9- Gillian, *Supra* note 3, pp 48

10- Brain Eggeleston, *Liquidated Damage and Extension of time in construction contracts* (2nd ed), Victoria, 1997 p 16

In similar manner, FIDIC (4th ed) form of contract provide the contractor's obligation to give notice as:

Provided that the engineer is not bound to make any determination unless the contractor has:

- a) within 28 days after such event has first arisen notified the engineer with a copy to the employer,
- b) within 28 days, or such other reasonable time as may be agreed by the employer after such notification submitted to the engineer detailed particulars of any extension of time to which he may consider himself entitled in order that such submission may be investigated at the time.¹¹

FIDIC (4thed) provide that the contractor has obligation to notify to the engineer if the relevant events (stated in clause 44 -1(a-e) delays the work. Moreover, it obliges the contractor to give notice within four weeks and to submit detailed particular four weeks later. The purpose of giving detail information is to facilitate the investigation and decision engineer's on time extension.

On the other hand the issue whether notice requirement is a condition precedent for granting extension of time is also raised in FIDIC (4th ed) makes it clear that the engineer is not obliged to make any assessment unless notice is given. However this does not bar the engineer to act under his own initiative.¹² Thus it is wise and important to give notice on the part of the contractor in case delay happens that give rise to extension of time.

Finally, General Condition for Works Contracts Financed by the European Development Fund (EDF) form of contract also provide notice requirement on the part of contractor. It provided that;

The contractor shall, within 30 days of becoming aware that delay may occur, notify the supervisor of his intention to make a request for extension of the

11- FIDIC (4thed) clause 44-2

12- Gillian, *Supra* note 3, p 296.

period of performance to which he may consider himself entitles, and shall, as soon thereafter as is reasonable in the circumstances, deliver to the supervisor full and detailed particulars of the request, in order that such request may be investigated at the time.¹³

The above sub clause is abundantly clear in that it provided a time limit in which the contractor should give notice i.e. 30 days of his becoming aware of the delay. Thus notice on part of contractor implies an intention to request of extension of time. The notice applies to the relevant event stated in sub clause 35-1 (a-g). Moreover, it requires the contractor to give full and detailed particular as soon as possible after the notification of delay. However, it does not impose a time limit on the contractor but refers to “as soon thereafter (the giving of notice) as is reasonable in the circumstance.”

It is already stated that the purpose of giving detail particular is that it facilitates the engineer’s assessment on extension of time. However the engineer has right to request further detail if the contractor does not provide with sufficient manner. This is depicted in Supervisor’s representative Review of contractor’s claim in Addis Jima R.R project as:

... Notwithstanding the fact that the “full and detailed particulars” were lacking in original submission content; . . . It is the supervisor Representative view that the contractor has now presented such additional documentation that has enabled a further entitlement to an extension to the period of performance to be considered¹⁴.

4.2. Entitlement, Assessment and Award of Extension of Time

In principle, the contractor is required to meet not only procedural requirement but also the substantive requirement under the contract to be entitled an extension of time. Moreover, its assessment should be in line with the contract. Thus the engineer

13- General condition for works contracts financial by the European development fund (EDF) clause 35-2-

14- Supervisor’s Representatives Review of contractor’s consolidated claim clam II Addis Ababa – Jima road Rehabilitation project
Mar 2006, pp 1 (unpublished)

(architect) should take in to consideration the contract term while it makes its award on extension of time. In this part, the following points is dealt:

- Analyze the contractual basis for the principal causes of delay claimed by the contractor (entitlement of extension of time)
- Determine valid and critical occurrence resulting in delays that influence the contract completion date (entitlement of extension of time)
- Assess or quantify time extension of the critical occurrence! and
- Determine extension of time to be granted to contractor by engineer interim and final award,

4.2.1 Entitlement of Extension of Time

It is already dealt that the contractor is required to notify the engineer (architect) in case delay occurs that may lead to request for extension of time. Moreover, it is required to establish that the event occurred is entitled to extension of time as per the specific contract. This may be by providing detailed supporting evidence and particulars in line with the contract. However it is universally accepted that the following, points should be met to be entitled an extension of time:

- There should be an event that delay the work;
- The delay is caused by the relevant event stated in the specific contract;
- The delay should affect the critical path or completion date of the contract and
- The delay should not be due to the fault of the contractor.

It is not possible to conceive the concept “extension of time” with out an event occurred that delay the construction work. Thus, the existence of an event (s) that delay the work should be established before any consideration for extension of time is made. This is also recognized either implied or expressly in most construction forms. Both JCT 80 (clause 25) and General Conditions for Works Contracts Financed by the European Development Fund (EDF) (clause 35.1) recognize it expressly. Whereas FIDIC (4th ed) impliedly required the existence of delay as prerequisite for entitlement of extension of time.

On the other hand, it is not sufficient for the contractor merely to state that he is being delayed but also he should state the relevant events for the delay. In other words, the relevant events stated in the specific form of contract are exhaustive. The contractor might not be entitled an extension of time for events than stated as a relevant event (s) (ground) (s) in the specific contract. The statement as to the cause of delay should be stated in the notice given to the engineer or in practice a claim by the contractor.

Most of the standard form recognize that notice due to delay by the contractor should constitute or state the relevant event or causes of delay, JCT (80) Clause 25) requires the notice of the contractor should state the material circumstances including the cause or causes of delay. This implies that the contractor should indicate that the cause of delay should be covered under the specific relevant event in the specific contract. Moreover, sometimes the practice shows that the statement as the cause of delay stated in their claim is not sufficiently clear. Some engineer assessment shows that the engineer assessed the contractor's ground of claim is not relevant and assessed based on his own discretion.

In Gewane _ Mille Road Rehabilitation project, the contractor's (LTA) claimed that it has been delayed by four events. It claimed extension of time under claim No 3, it claimed that a delay due to problems in the supply of bitumen which were the result of the diversion of trucks by government of Ethiopia for famine relief and following hostile incursion by Eritrea. The claim makes reference to clause 12.2, clauses 44.1. (b) and clause 53.1. Moreover, the contractor has also stated that the situation constitutes one of force majeure.¹⁵

15- Gewane - Mille Road Rehabilitation project, contractor's delay claims, Dec, 9, 2000, pp 1.

The engineer assessed the LTA'S claim as:

The contract contains no specific force majeure clauses as such but GC clause 65 does provide for special risks.” The contractor has made no reference to this clause in its submission so it is not considered.

Clause 12.2 which is referenced by the contractor concerns “Not foreseeable physical obstruction or conditions” it is specifically intended to protect the contractor from adverse physical conditions such as unexpectedly bad ground or physical obstructions such as encountering previous foundations within an excavation.

The double relevant to physical and not foreseeable render this clause irrelevant to the situation simply arise for the claim, in the opinion of the engineer.

Clause 65 does provide for special risks. The contractor has made no reference to this clause in its submission so it is not considered.

The engineer does accept that the contractor was delayed by a special circumstance for which he and his suppliers should not be considered responsible and which the contractor would not have been expected to correct immediately.

Therefore we consider it appropriate to grant a time extension of 28 days on account of bitumen supply problems - - -¹⁶

The above case shows that the contractor's claim is based on several relevant provisions. It is important to identify a relevant provision rather than citing several provisions as qualifying provision for extension of time. Moreover, the engineer's assessment does not locate the appropriate relevant event provision.

On the other hand, it is not an easy task to establish whether an event is a cause for delay. This is especially true when several factors are prevalent at the time of delay.

16- Gillian, *Supra* note 15, p 6

There are several approach to identify the proximate cause for delay. The “dominant cause approach” is widely used. It stated that the ruling, prevailing, most influential cause is the one should be a cause for delay¹⁷. In other words, where there are more than one cause of delay, the extension had to be granted for dominant cause.

Most construction standard forms recognize that the engineer/architect has power either to accept or reject the contractor’s request for extension of time based on whether delay is caused by the relevant event in the contract

This is also reflected in some practical cases. In Addis Ababa Mojdo Awassa R.R. project, the contractors request for extension of time due to several cause of delay. Among these; the following might be cited:

- Detailed design work not ready in good time for contractor’s needs and
- Unobstructed possession and access to site, borrow pits and quarries

The engineer assessed the request and makes an interim award as:

- None of contractor’s delays are due to late design and/ or supply of documents by the contracting authority¹⁸
- None of contractor’s delays are due to non provision of possession of and access to sites, borrow pits and quarry by the contracting Authority¹⁹.

This case shows that the engineer might reject the request for extension of time if the delay is not caused by the relevant event in the specific contract.

Thirdly, mere delay due to relevant event is not sufficient to be entitled extension of time on the part of the contractor. Rather the delay should affect the overall contract completion date. In other words, the delay should affect the critical path of the work. The critical path is made up of a number of main activities in the contract that determine the contract duration period²⁰. The critical path may be shown in the contractor’s programme

17- Brain, Supra note 10, p 201.

18- Addis Ababa – Modjo-Awassa R.R, project, preliminary assessment of Time Extension, January, 2001, pp. 10 (unpublished)

19- Ibid

20- Brain, Supra note 10, p .18

or method statement report and updates²¹. An activity at the beginning of the work may be critical but not an end of contract period. For instance, clearing, sub grade, preparation and sub base construction have been critical over a very short period of time to allow for the construction of the base layer to take place²².

The essence of “critical path” can be expressed as the sequence of stages in building programmes which must follow each other sequentially. Each of which depends on the completion of the previous stage, and all of which are essential in order to achieve practical completion by the date of completion²³ In case of road construction, the main series activities consists of:

- Earth works, including removal of unsuitable and filling;
- Sub base;
- Base,
- Asphalt courses²⁴

Each of the above activities cannot be finished until its predecessor is finished. The time it requires to complete a section of road is dictated by the time needed for individual critical activity for the section of work.²⁵

On the other hand, the critical activities are activities that should be during the contract period. There is a practical case dealing with this issue.

In Wegel Tana-Dawint road project, the contractor (Berta cons. plc) claimed extension of time based on several grounds. It claimed under claim No 3 that Due to delay of advance payment, it claimed 157 calendar days.²⁶

The engineer assessed the claim and makes an award to the effect that the delay in advance payment, during the mobilization period, will affect the mobilization activity. However, from the contract document of the project the contractor is not granted any

21- Ibid

22- Ibid

23- Gillian, Supra note 3, p 1

24- Addis Ababa, Supra note 20 p 9

25- Ibid

26- Wegel Tena Dawnt Road Project Time Extension Claim Analysis Report April 2003 p 4 (unpublished).

time for mobilization before the contract period. --- Hence, the contractor is expected to mobilize and execute the work under the contract time only. Moreover, the contractor was paid the advance payment before the date of the commencement of the project, i.e. Dec 21, 2000. Thus, the contractor is not granted any time extension due to a late advance payment which has occurred before the commencement date²⁷.

The above quotation shows that delay, even if critical, prior to commencement of work does not entitle extension of time.

It is already stated that delay on the critical path is justifiable event to make the contractor entitle extension time. This is on the assumption that delay that affect the critical path activity will influence on the overall completion date.

Thus unless the delay affects the critical path, the contractor might not be entitled for extension of time. Delay due to non critical path is excluded.

Different standard forms are patently clear on the issue of critical delay. JCT 80 provided that:

“If in the opinion of the architect, upon receipt of any notice . . .

1.2 The completion of the works is likely delayed there by beyond the completion date. . . the architect give extension of time²⁸.

The underlined phrase indicates that the contractor is required to show that critical delay that affects the completion date in order to be entitled extension of time. Unless the delay is assumed to be critical, it will not be entitled extension of time under JCT 80.

In similar manner, FIDIC (4th ed) also provide in its special part as

“In determining the length of any extension of time--- the engineer shall take in to account the controlling operation or operations”²⁹

The underlined phrase implies that the contractor is entitled for extension of time for delay that influences controlling operation (critical path). Thus, the contractor should prove delay that affects the critical path to be entitled in extension of time in FIDIC (4th ed).

27- Ibid

28- JCT 80 clause 25 3.1.

29- FIDIC (4th ed) clause 44,4 (particular Application)

However as this provision is included in special part of the contract, the parties might have option to left out.

There are several practical time extension cases in relation to FIDIC (4thed). In the Addis Ababa Ginchi-Ambo R.R. project, the Sinohydro Corporation (contractor) has requested time extension. It is important to see the contractor's performance programme concerning critical path. It provides that:

Earth works were scheduled to be non critical with 8 months float time with in the contract period.

- Concrete works and metal pipe culverts being undertaken over a period of 2 working moths. These activities are non-critical with 6 months float to pavement works.
- Improved sub grade and GSS, to commence laying in Oct 2003 and to be completed by Oct, 2004, was scheduled to be non critical
- Asphalt works installation of quarry and crusher sites is also considered a critical activity³⁰

The contractor claimed for extension of time of several grounds, among other, the following claimed:

- Under claim no 3.3.2. Extension of time for delay in possession of site km 2400 to km 374 780
- Under claim 3.3.3 – Extension of time for delay in possession of quarry and crusher sites.
- Under claim 3.3.4- Extension of time for disturbance km 3+000 to km 5+000
- Under 3.3.7- Extension of time for objections to blasting at Holeta Quarry, km 324500
- Under claim no 3.3.8 Extension of time for unforeseen conditions rock excavation³¹

In this paper, the assessment part which is related to critical path, is only dealt

The engineer assessment is as follows. Under claim no 3.2.2, it made its assessment as:

30 - Addis Ababa –Ginchi- Ambo Road R. project An engineer opinion on Contractor's Claim for Extension of Time, June 2005 (unpublished).

31- Ibid

“As per programme of works culverts construction was to follow earth works and not vice versa. Had the contractor intended to commence with culvert construction before earth works construction then he should have requested for possession of culvert sites initially and should not have early mobilized his heavy earth works equipments.

In all of contractor’s requests for an extension of time because of non possession of earth works sites, the contractor failed to illustrate how the disruption to his work sequence has caused a delay to the overall work progress - - -

The earth work are not an activity on the critical path, the extension of time to run concurrent to the below assessed extension of time.

Under claim No 3.3.3, it made an assessment as:

“As the production of aggregates for DBM and AC is on the critical path for project completion the late availability of the quarry sites leads automatically to an equal deferment of the project completion date

By considering only the critical path operations of asphalt works and they incidentals the engineers has takes in to account clause 44-4 of SC. part II (only controlling operations) to be considered for extension of time).

Under claim no 3.3.4, it assessed as:-

Extension of time to compensate for the last time during interruption are to be granted but as earth works are not an activity on the critical path) the extension of time to run concurrent to time for lack of possession of quarry sites.

Under claim no 3.3.7, the engineer assessed that:

“production of aggregates for GSS and concrete is no on the critical path for project completion because as per contractor’s

programme there was a float of some 20 days between end of GCS and end of DBM laying, respectively.

Extension of time 13 days is justified to run concurrent to the 97 days ---.

Finally the engineer assessment on claim no 3.3.8 is as follows:

“- - - Hard excavation is part of earth works and as such is not on the critical path for project completion engineer’s representative has, further, classified that the bills of quantities provide for a total of 32, 200 m³ of rock excavation (fill & spoil) combined) and particular item in isolation. There fore the extension of time request for project completion on account of increased quintets of rock excavation fails³²

The above cases indicate that the delay should affect the critical path to be entitled extension of time. The programme of the contractor may sort out activities that are critical and non critical. Moreover delay that affect non critical path may concur with delay that influence critical path. The latter might be taken for consideration of extension of time.

The General condition For Works Contracts Financed By The European Development Fund (EDF) also provide to the effect that the contractor’s delay affect critical path in order to be entitled extension of time it provided these as:

The contractor may request an extension to the period of performance if he is or will be delayed in completing the contract...³³

The underlined phases give a clue that the contractor’s delay should affect the overall completion period of a contract.

There are practical cases regarding time extension in which General Condition For Works Contracts Financed By The European Development fund is taken as a contract part.

32- Ibid

33- General Condition for works Contracts Financed by the European Development fund (EDF) clause 35

In Addis Ababa Modjo-Awassa R.R. Project, the contractor claimed extension of time on several grounds. Among other, claim no 2.8 is an important one. It claimed that it is entitled to extension of time for additional work for km 70- to 275.

The engineer assessed the claim and made an award as:

“An experienced contractor could not have foreseen this additional base course quantity. As the base course construction has been the main critical activity during the entire project period up to date. It would be fair and reasonable to grant an extension of time to this effect .³⁴

Moreover this award stated important point on the critical path as:

“With respect to additional works ordered the grading operations in producing the additional fill sub base (and base where applicable) quantities have also been identified as critical; by taking away grading equipment from the main activities (as planned and programmed for) the overall progress of the project is affected³⁵.

To conclude, delay due to critical path is recognized in most standard form contract. Critical path is the main activity of the work and determines the overall completion date. If not, it will be delay of non critical path. This is not justifiable to be entitled extension of time.

Finally, it is not untrue that delay due to the fault of the contractor might disentitle extension of time. This is recognized in most standard condition of contract even some standard forms impose obligation to make his best endeavor to prevent delay. JCT 80 clause 25.3.4 imposes this kind of obligation if the contractor breaches this obligation, he might loss or lessen his entitlement of extension of time. FIDIC (4th ed) also excludes circumstances that occur due to the fault of contractor as a ground for extension of time.³⁶ Similar wording is inserted in General Condition For Works Contracts Financed By The European Development Fund (EDF).³⁷

34- Addis Ababa, Supra note 18, p 8

35- Gillian, Supra note 8, p 8

36- Ibid

37- Supra note 13, clause 35

There are cases in which the fault of the contractor might disentitle from extension of time. A case in point is that time extension claim on Wegel Tena Dawn't Road project:

The contractor claimed under claim no 3.5 that:

It claimed extension of time for late start of rock excavation due to approval of dynamite store room location by security men³⁸.

The engineer assessed the claim and makes the decision as follows:

Since the activity is delayed due to the contractor's negligence of the preparatory works, the contractor is not granted any extension of time."³⁹

The above discussion shows that the delay should be free from the fault of the contractor. Should the contractor contribute for the delay either by its negligence or its intention, right for extension of time might be denied.

In this part, the contractual basis for entitlement of extension of time is dealt. The engineer/architect is obliged to check the above points are not prior to deciding a contractor is entitled to extension of time. Then, the quantification or calculation of the amount of time to be granted will be the appropriate issue to be dealt. The next part is devoted for these purposes.

4.2.2- Assessment or Calculation of Extension of Time

In principle, unless a delaying event causes delay to completion it is not relevant to the process of assessment and no need of quantifying extension of time. In other words, as it is stated previously the contractor should be entitled to extension of time as per the contract prior to the engineer (architect) considered the assessment of the amount of extension of time related to the contractor. Once the entitlement issue resolved, the calculation of extension of time to be granted will be assessed.

38- Gillian, Supra note 8, p 7

39- Ibid

There are several methods to be applied in order to assess extension of time. The dotting on or net award method is most widely accepted principle. It provided that the period awarded should be the length of delay to the completion of the contract which is considered fair and reasonable by the contract administrator resulting from the delaying event or events in question and should be added to the current completion date.⁴⁰ This implies the length of delay that affect critical path will be added to the completion date. This might be assessed and granted by the engineer (architect). The amount of delay to be granted is equivalent to amount of time granted as an extension of time.

It is important to note that most construction standard form left out the detailed calculation of extension of time for the engineer. They merely stated that the assessment should be “fair and reasonable”. This is seen in FIDIC (4th ed) clause 44 and JCT, 80 (clause 25). The engineer or architect has discretion in the calculation of extension of time within the qualification of “fair and reasonable” standard.

On the other hand, calculation or assessment of extension of time is to mean assessment of delay affecting critical path. The number of delayed contract period of critical nature is equivalent to number of extension of time. However, assessment of delay is not a simple matter. This is especially true when there is a concurrent delay. This will be discussed latter.

It is not untrue that there is no universally accepted method to quantify the delay of contract completion period. It varies from one ground of claim to another. The writer prefers to show the practice of calculation ground of extension of time.

a) Assessment regarding additional works-

It is quiet true that most extension of time request does not leave out additional works as a ground for extension of time. Most time extension claim bases additional work as a ground for extension of time. Most standard condition of contract also includes it as a relevant event.

40- Gillian, Supra note 3, p 64

In quantifying delay due to additional work, the overall quantity of additional work, productivity rate per hour and number of equipment are the most important variables. This can be seen from the contractor's programme of work or contractor's method statement. Moreover, the additional work should affect the critical path. Delay can be calculated as overall quantity of additional works productivity /hr.

It is important to substantiate the above with practical case.

In preliminary assessment of Time Extension on Addis Ababa-Mojdo-Awassa R.R project, the following assessment is made on contractors claim no 4.14;

Facts

- 1) The contractor has request for extension of time for additional work on customs check point km 23.8 /km 70
- 2) The additional work include sub grade preparation, fill sub base and base course quantities It is identified as being critical
- 3) The contractor method statement expressed that 7 grader teams was used at one time and productivity /hr as $800\text{m}^2/\text{hr}$
- 4) The overall quantities of additional fills, sub base and base course have been converted to a number of square meters to be produced (based on 20cm layers) and hence a number of additional grader hours as follows:

- Fill quantities = 1400 m^3
- Sub base quantities = 1500 m^3
- Base course quantities = 900 m^3
- Total fill sub base quantities = $3,800\text{ m}^3$
- Equivalent area 120 cm layers = $19,00\text{ m}^3$
- Sub grade area preparation = $6,300\text{ m}^3$
- productivity rate localized /urban = $30\% \times 800\text{ m}^3/\text{hr}$ (productivity method statement)

Assessment

Number of grader hours required $(25,300 \times 0.30 \times 800) = 105$ hours

Equivalent number of working hours based on 7 grader teams, 10 hr /day = 1.50 waking days.

Recommended extension to the period of performance $1.50 / 26$ working days per month = 0.06 months⁴¹

b) Delay due to exceptional weather condition

It is quite true that most contractor's request extension of time due to exceptional weather condition. This is also recognized as a relevant event in most standard form of contract. Moreover in order to assess for extension of time, it should be affect critical activity. The delay is assessed by calculating dates that interrupts or lessen the work due to the exceptional weather condition.

In preliminary assessment of extension of time in Addis Ababa – Medjo- Awassa R.R project, the contractor claimed an extension of time.

The engineer assessed the delay based on the metrological date over 1988-1997 against data from 1998 and reports of progress of works in the Modjo area in 1998. It found that 19 days as an extension of time⁴²

C) Delay in the payment

Most contracts clearly specify the time in which the contractor be paid his contractual payment. If the payment is delayed on unjustifiable reason, the contractor may regards for extension of time for delay. The delay may hinder the progress of work due to shortage of capital. This delay may be assessed based on the interruption of work or loss of productivity.

In supervisor's Representative on contractor's claim on Addis Ababa – Jima R.R project, the contractor claimed that the progress of works was seriously disrupted and delays due to failure of the contracting authority to pay certified amount.

41- Addis Ababa, Supra note 18, p 15

42- Ibid

The Supervisor Representative assessed the claim and made its award as:

There should be compared the programmed productivity with the optimum productivity and propose a monthly productivity factor which is the “optimum” monthly production as a percentage of the programmed monthly production.

- Lost production = 2, 655, 155 – 1,626,300-1, 028844 m³

- Target monthly production 221, 262 m³ /month = 121 work⁴³

- Caused delay = 1,028,844/ 221,262 24, 62 works non 121 wording days.

The engineer granted 121 working day as an extension of time.

Finally delay due to late information, late possession of site, force majeure, etc follows the same calculation as stated in b-c above.

Finally, it is already stated that assessment of extension of time due to concurrent delay is the most difficult and complex task of the engineer. Concurrent delay happens when there is more than one cause of delay occurs at the same time. Moreover, in our case concurrent delays only exists when two identifiable delays, both of which affect completion, occur at the same time. That means, the concurrency of delays is only important where both events are critical to completion.

With regard to concurrent delays, there are two main issues raised. First, if two events occur at the same time both of which entitle the contractor to an extension of time, should one or both of them, or part of each, form the reason for the extension of time? Secondly if two events occur at the same time which cause of a delay to completion one being the responsibility of the contractor and the other entitling the contractor to an extension of time, should an extension of time be awarded and if so, of what duration?⁴⁴

It is already stated that the above issue are not clearly dealt in most standard form of contract. However, there are three approaches to deal with it.

- 1) the first in line approach
- 2) the dominant cause approach
- 3) the apportionment approach⁴⁵

43- Supervisor, Supra note 14,

44- Gillian, Supra note 3, p 81

45- Issaka Supra note 1, p 242

The first in line approach assumes that the first event is the cause of the whole delay. If the event is a ground for extension of time the contractor gets the extension even if his subsequent actions compounded the delays. On the other hand if his own delay was compounded by causes for which the employer was responsible, the contractor is not entitled to extension of time⁴⁶.

Whereas the dominant approach attributes the entire delay to the dominant event⁴⁷. Finally the apportionment methods attempt to distribute the total delay to various contributing delays⁴⁸. Most scholars argue that the term “fair and reasonable” inserted in JCT 80 & FIDIC (4thed) implies that the assessment follows the last approach (apportionment approach).

In practice, the engineer assessment shows that it deduct the concurrent period from the total time of delay. In the Supervisor’s Representative’s Review of contractors consolidated claim on Addis Ababa Jima Road Rehabilitation project, the engineer has awarded its assessment on concernment delay as:

“To determine the total preliminary extension of time to be granted all occurrences resulting in delays/ time extension have been graphically set out to highlight any overlap of 7 calendar days has been retained in month of Oct 1999, some of the exceptional weather conditions delays coincided with the unproductive time resulting from the loss of explosive materials due to force majeure event.

The recommended extension to the period of performance is the sum of all occurrence worked out above (i.e. 4.25 month) minus the overlap of 0.23 months (i.e. one week) being 4.02 months.⁴⁹

This kind of engineer assessment is also reflected in other engineer’s awards.

46- Ibid

47- Ibid

48- Ibid

49- Addis Ababa, Supra note 18, p 2

It is important to note that after assessing the extension of time, the engineer has duty to give award (interim & final) on it the next part is devoted for this purpose.

4.2.3- Award on Extension of Time

It is quiet true that the assessment of the extension of time by the engineer (artichet) end up with an award. An award is to mean decision on the part of the engineer (architect) concerning the request of contractor interim or final award.

In this part, primarily discussion will be held regarding the time in which time extension be granted and the essence of an award (both interim and final).

Most standard form of contract give power to the engineer to assess and grant or not of extension of time having considered specific cases. However, all mandatory required the prompt timely assessment and award. Primarily, it has two main purposed. Firstly, timely and prompt decision on the part of the engineer might ensure the effectiveness of liquidated damage provision. Whereas if the extension of time is granted too late, it will not be effective in keeping liquidated damage provision a live. In this case the employer might be the loser. Secondly timely decision has an impact on the programme of the contractor. Late in granting extension of time might hinder the contractor to reprogramme his work. The contractor might be the loser unless he is successful in recovering acceleration costs from the employer.

In other words, there are consequences that might arise due to late granting of extension of time on the part of the engineer. It can be described as:

- 1) If there are express time requirement on the certifier, the liquidated damages provision may be invalidated:
- 2) If there are express or implied time requirement on the certifier and the contractor accelerates to avoid damage he may be entitled to his costs⁵⁰.

It is important to raise the issue that is usually raised while dealing with time for granting an extension of time. That is, is it possible to grant an extension of time

50- Brain, Supra note 10,

retroactively? this issues are important as the primary purpose of time extension is that it give the contractor a date to work onwards.⁵¹ This implies that time should be extended prospectively. Most standard construction forms make this issue clear that an expansion of time can be granted either prospectively or retroactively. JCT 80 (clause 25.3.3) and General Condition For works Contracts Financed by the European Development Fund (EDF) (clause 35.3) can be cited as an instance.

Most scholar argue that in principle extension of time should be granted prospectively. It is only as exception that retroactive grant of extension of time should be valid Mr. Justice Rojer share this idea. He stated that retroactive extension of time is valid only as follows:

- 1) Where the cause of delay lies beyond the employer and particularly where its duration is uncertain although even here it would be a reasonable influence to draw from the normal extension clause that the extension should be given a reasonable time after the factors which will given the engineer's discretion have been established.
- 2) Where there are multiple causes of delay there may be no alternative but to leave the final decision just before the issue of the final certificate⁵² (New Zealand case Fernbroole Trading vs Taggri (1979)).

It is already stated that the engineer award might be an interim or final Interim award, as its name indicate, are provisional one and subject to review. Most standard construction forms recognize that it should be made within a time frame work. The JCT 80 provided that the architect is required to decide on the contractor's application (notice) within 12 weeks of its receipt⁵³. When there is less than 12 weeks between the notice and the completion date, the architect has to act even more promptly and give decision before completion date.⁵⁴

51- Jhon Murdoch & et, construction contracts (Law and management), E& IN Spon, London, 1992, p 21

52- Brain, Supra note 10 p 171

53- JCT 80 clause 25.3.1

54- Ibid

Under JCT 80 form of contract, there are issue as to whether late time extension outside the time framework is valid. There was court of appeal case Traeder Ltd vs Errill properties Ltd (1987) decision on this point.⁵⁵ The court decided that time extension granted outside this period is valid. The time limitation is only directory.

JCT 80 described what the interim award should constitute. This award primarily constitutes whether the contractor is entitled extension of time or not. If the architect decides the contractor should be granted an extension of time, the interim award should constitute:

- The events stated by the contractor notice (request) are relevant events as per the contract;
- The delay should affect critical activity with its assessment & fix the new completion date based on its assessment.

The above description is stated in JCT 80 clause 25.3.1 Moreover, the award should be notified to both the contractor & the employer.

In similar manner, FIDIC (4th ed) provide that if the delaying event is continuous, the interim award should be make without undue delay after the engineer received notice and interim particular⁵⁶. This implies the engineer has obligation to promptly to render its interim award when it receive notice with detail particular, as to the essence of the award, FIDIC (4th ed) does not clearly state it.

The practice indicates that the interim award constitute the relevant event, its assessment and new completion date. In kulbi-Dengego DireDewa Road construction project, the engineer awarded interim award dated Nov 28, 2001 It can be stated as:

“The contractor has presented requesting an extension of time of 14 months and 10 days. The request based on form points Delay on possession of site.

55- Jhon Supra note 51, p 21

56- FIDIC (4thed) clause 44-3

1) Delay on possession of site

.
. .
.

4) Increase on quantities of main BOQ.

We have made a preliminary analysis of these request and reached the conclusion that the contractor is entitled to at least 4 months extension of time. However, it is in our opinion necessary that our claim expert analyzes the request.

Considering that the completion date of the project is Dec 7, 2001, the time to mobilize the claims expert is too short; there fore, we recommend that an interim extension of time of 60 days be granted to the contractor as per clause 44.3 of the General conditions of contract in order to have sufficient time to mobilize the claim expert to review the request and afterwards to determine an over all extension of time.⁵⁷

On the other hand, final award, as its name indicate is a conclusive evidence.⁵⁸ and binding between the contractor and the employer. Even some scholar argue that the final award will be binding on both parties even though it is made carelessly, unskillfully or in accurately. However, the architect or the engineer who acts negligently in certifying will not enjoy immunity from action by either party.⁵⁹

It is not untrue that final award is merely review the interim award. The rational might be that the effect of the delaying event cannot be known at the time the engineer/architect is rendering interim award. This may be become either the event is at the time a continuing one or its effect lie in the future.⁶⁰ It is important to note that as

57- Pulbi- Dengego road construction project contracts, review of contractor's claim Jan 2002 unpublished

58- Stephen B. Smith, Butter worth's construction Law manual, butter worth, lonon, 1993, p 92

59- Ibid

60- Issaka Supra note 1, p 238

final award is rendered at the end of the work, it would give the engineer (architect) better access to appreciate the actual effect of all delaying events for which extension of time is grantable.

Different standard forms provide different time limitation for granting final award. FIDIC (4thed) provide that the engineer has to review the interim award with out undue delay after he receive final particular⁶¹. The engineer has obligation to render final award as soon as he receives final details regarding specified delay. Moreover the engineer has obligation to consult both the employer and the contractor prior to granting its final award.⁶²

JCT 80 also provides that all interim awards on extension of time are subject to review⁶³. The architect must consider all relevant events whether notified or not in granting its final award. There is time limitation to make final award. It is with in 12 weeks of practical completion.⁶⁴

Finally it is important to note that the architect or engineer is vested to confirm or increase the interim award. They have no power to minimize (decrease) the interim award. This is recognized in most standard form FIDIC (4thed) clearly stated that no final review shall result in a decrease of any extension of time already determined by the engineer.⁶⁵ This implies the engineer's power is confined to either to increase or confirm the previous interim award.

JCT provide the architect power to grant final award are as follows

- the architect may fix a latter completion date than fixed in interim award if the later date is fair and reasonable, ⁶⁶
- The architect may fix earlier completion date than the previous date if he instructed subsequently omission work⁶⁷
- The architect can confirm the completion date stated in interim award⁶⁸.

61- FIDIC (4thed) clause 4.3

62. Ibid

63- JCT 80 clause 25-3.3

64- Ibid

65-FIDIC (4h ed) clause 44-3) final sence

66- JCT (80) CLAUSE 25.3.3.1

67- JCT 80 clause 25-3.3.2

68- JCT 80 clause 25-3.3.3

CHAPTER V

Damage for Late Completion and the Concept of “Liquidated Damage”

It is already dealt that most construction project is not completed within the specified contract period. Failure on the part of the contractor to complete on time would entail financial loss and expenses on the employer. These financial effects of late completion can be estimated in advance and in the contract as a certain amount of money for unit of time. This is commonly known as “liquidated damage”

In principle, liquidated damage deals with breach of the contract on the part of the contractor. In our case, it deals primarily in relation to damage for contractor’s failure to complete on time. Thus, this part is devoted for issues related to liquidated damage.

5.1 Nature and Purpose of Liquidated Damage

The term “liquidated damage” refers to all those fixed sums in the contract which are payable upon the breach of the contract by the contractor. This implies that there is ascertained and fixed sums stipulated in advance as a damage. Whereas general or un liquidated damage are subject to proof and assessed after the breach. In other words, liquidated damage are recoverable without the employer having obliged to prove loss and it is irrelevant whether there is loss or not.²

Standard form of construction contracts include liquidated damage clause in the event that the contractor fails to complete within the contract time, as may be extended.³ Liquidated damage clause is for the benefit of both the employer and the contractor: it relieves the employer from the burden of proving his loss,⁴ and it limits the contractor’s liability for late completion to the sum stipulated.⁵

This assertion is clearly depicted in Justice Dip Lock decision on Robaphone Facilities Ltd Vs Bank (1966) as:

1- Micheal partic O’Reely, Principle of Construction Law Longman, London, 1993, pp 4,

2- Vincent p Smith, Problems in Construction Claim, BSP Professional Books, London, 1990, pp 79

3- John Murdoch and Lt, Construction Contracts Law and Management, E& FN spon, London 1992 pp-327

4- Brain Eggleston, Liquidated Damage and Etension of time In Construction Contracts (2nd ed). Victoria, 1997, pp 21.

5- Ibid

The court should not be astute to descry a penalty clause in every provision of a contract which stipulates a sum to be payable by one party to the other in the event of a breach of the former. Such a stipulation reflects good business sense and is advantageous to both parties.

It enables them to envisage the financial consequences of a breach and if litigation proves inevitable it averts the difficulty and the legal costs, often heavy of proving what loss has in fact been suffered by the innocent party⁶.

It is important to note that “liquidated damage” can only be claimed if there is an express provision for this purpose in the specific contract. It is fortunate enough that construction contracts generally provide that a contractor who is guilty of delay beyond the contractual completion date (as extended where appropriate) shall pay or allow a certain amount of liquidated damages for every day or week of delay.⁷ Unless there is clear liquidated damage clause in the specific contract, the employer will not claim or deduct “liquidated damage. Rather he can claim general or un liquidated damage, which is very difficult to prove.

Secondly the incorporation of a liquidated damage clause implies that the maximum remedy fixed by the amount stated as a liquidated damage. The employer will be entitled to claim or deduct the stipulated sum, irrespective of what loss has actually been suffered, or indeed whether there has been any loss at all⁸. This shows the damage is fixed in advance and no new assessment is made.

Thirdly, in order to enforce liquidated damage clause, there should be a definite date fixed by the contract from which the liquidated damage can run. In other words, the completion date should be clearly ascertained. It serves as a beginning date for assessment of liquidated damage. If not, it is not possible to enforce the liquidated damage clause.

6- Brain, Supra note 4, p 31

7- John, Supra note 3, p 337

8- John, Supra note 3, p 330

Fourthly, failure on the part of the contractor to complete on time is a condition precedent to be entitled to liquidated damage. Thus, it is important to raise the issue whether the date of completion passed? If this is answered in affirmative the second important issue is that is the work completed? If this is not answered in affirmative the liquidated damage will be deductible. Completion of the works may be either sectional or whole completion depending upon specified contract. This point is dealt in more detail under Section 5.2.1 below.

Fifthly, liquidated damage is assumed as an exclusive and exhaustive remedy regarding damage due to the contractor's failure to complete on time. This indicates that the employer has no remedy other than liquidated damage for damage due to delays in completion.

In conclusion we can state that liquidated damage is the genuine pre-estimate of the employer's loss due to failure of the contractor to complete on time.

5.2. Principles of Liquidated Damage

It is already dealt that there are some principle in which the employer should adhere to be entitled liquidated damage. In this part, these principles will be dealt in depth.

5.2.1 Failure to Complete on Time

The contractor is expected to complete the work within the last hour of the day for completion.. Mr. Justice Channel defines completion date as:

Completion means completion of the actual work which has to be done although it is possible that some things may have to be done at some future date to keep the work in order.⁹

This explains that completion is the date to handover possession of works to the employer though there might be minor works yet to be done or defects to be maintained within further time specified in the contract. FIDIC refers to such other time as the time

9- - Brain, Supra note 4, p 127

for Final Completion, which is 360 days for road contracts. Completion date always includes the time extended by the engineer or the client.

When time is of essence in a contract, failure to complete by a specified date is a breach of a condition entitling the innocent party to treat the contract as repudiated¹⁰. Completion time is expressly stated in standard forms of contract widely used in Ethiopia - FIDIC (4th ed) (Clause 47) (1), JCT 80 (clause 24) and General Conditions For Works Contracts Financed By the European development fund (EDF) (Clause 36), Standard Conditions of Contracts issued by The Ministry of Works and Urban Development, dated 1994.

Completion may be of the whole works or of a section of the whole works depending on each specific contract. It is important to note that liquidated damage clause is applied not only for failure of the contractor to complete the whole works but also for completion of sectional works. In other words, if a contract is one that is subdivided into sections with their own completion dates, then the contractor is liable to pay liquidated damages if he fails to complete each section within the time specified for that particular section. A sectional completion is to mean it requires not only the contractor to complete the work as a whole by a certain date, but also requires to compete as specified element of the work at dates before the date for completion of the overall contract.¹¹

Liquidated damage for delay is calculated separately for each section where there is delay for the specific section. Sectional completion is clearly provided for in FIDIC (4thed) (Clause 47 (1) and General Condition For Works Contracts Financed By The European development. fund (EDF) (clause36).

5.2.2. Genuine Pre- Estimate Damage

The fact that liquidated damage is the genuine pre-estimate of the employer's loss due to failure of the contractor to complete on time was stated at the conclusion of the

¹⁰- Brain, Supra note 4, p 23

¹¹- Micheal, Supra note 1, p 199

Section 5.1 above. If the amount of damage were in excess of the genuine estimate of loss, it would be penalty. In practice the parties may use the word “penalty” or liquidated damage interchangeably to mean the same thing, but the two are different in concept. However the expression must be determined whether the payment as stipulated is in truth a “penalty” or true “liquidated damage”¹²

The essence of “liquidated damages” is a genuine, covenanted pre-estimate of damage judged at the time of making the contract and not at the time of breach¹³. The term “genuine pre-estimate” is clearly explained in an Australian case of *Malont Ltd vs Brain Ltd* (1981) as follows:

A genuine pre-estimate mean a pre-estimate which is objective of that character, that is to say, a figure which may properly be called so in the light of the contract and the inherent circumstances. It will not be enough mainly that the parties honestly believed to be so¹³.

This decision implies that pre-estimation of damage should be assessed objectively. It covers all (not some) of the employer’s likely damages caused by late completion. It includes loss of rent or delayed profit on sale, additional financing charges and additional supervision and administration costs.¹⁴

On the other hand the essence of a penalty is a payment of money stipulated as “interrorem” of the offending party.¹⁵ It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have been followed from the breach.¹⁶

Finally it is important to note that “penalty” clause is not enforceable. For example, FIDIC (4thed) provided that:

... The contractor shall pay to the employer the relevant sum stated
... as liquidated damage for such default and not as a penalty.¹⁷

12- Hudson, *Hudson’s Building and engineering contracts sweets and Max well*, (vol.2), London, 1995 p 1135

13- Brain, *Supra* note 4 p 14

14- *Ibid*

15- Hudson, *Supra* note 12, p 1135

16- *Ibid*

17- FIDIC (4th ed) clause 47

5.2.3- Exclusive and Exhaustive Remedy

In principle liquidated damage is deemed to be an exclusive remedy for the employer for late completion and he was not entitled to claim general (unliquidated) damage on proving a loss due to late completion.¹⁸ This implies that liquidated damage clause provides the employer's sole remedy for delay.¹⁹ However the liquidated damage should be operative and enforceable. Otherwise there is a possibility for invalidation of liquidated damage clause. A case in point is that if it has penalty effect then it might not be enforceable.

As it is rightly pointed out about liquidated damage is an exhaustive and exclusive remedy for the employer. This principle is clearly depicted in the following point:

- Express terms in liquidated damages exclude the possibility of implied terms for general damages;
- Liquidated damages are an exhaustive remedy for the breach to which they apply;
- The employer has no option of claiming general damages instead of liquidated damage²⁰

This principle is also reflected in modern construction standard form. FIDIC (4thed) is not clear on this point. Rather the last limb of clause 47.1 stated as "monies owed from the contractor and damage shall not relieve the contractor - - - from any other of his - - - liabilities under the contract" This phrase gives the clue that the contractor might be liable to damage other than liquidated damage. However, this kind of interpretation is not sound. It should be interpreted this phrase as the contractor might be liable for any loss other than damage due to late completion.

In similar manner JCT 80 does not clearly provide that liquidated damage clause is an exclusive remedy for employer in case of late completion. However there are several court decisions that confirm that the liquidated damage remedy is an exclusive remedy for loss due to late completion. In *Temloc vs Errill* (1987), Lord Justice Nowse stated that:

18- John, *Supra* note 3 p 33

19- John, *Supra* note 3 p 331

20- Brain, *Supra* note 4 p 40

I think it clear, both as a matter of construction and as one of common sense, that if (1). Clause 24 is incorporated in the contract and (2) the parties complete the relevant part of the appendix, either by stating a rate at which the sum is to be calculated or, as here, by stating that the sum is be nil then that constitute as an exhaustive agreement as to the damages which are or are not be payable by the contractor in the event of his failure to complete the works on time²¹.

In conclusion, it is important to state the fact that the employer's right to maintain or deduct liquidated damage is an exclusive remedy for the loss due to late completion. This is incorporated in most standard form.

5-3 Procedures for Entitlement of Liquidated Damage

Different standard forms lay down different procedure regarding entitlement of liquidated damage. The employer is required to comply with specific contractual procedure in order to deduct or maintain liquidated damage. Thus, it is important to look at the specific requirement to be complied under different standard forms. Moreover, the specific assessment method might also vary. Thus, this part is devoted to analyze these issues.

5.3.1- Condition Precedent to be Entitled Liquidated Damage

As it is rightly pointed out above, the specific procedure required to maintain or deduct liquidated damage varies greatly from one form to another. Moreover, the effect of its non compliance might also vary. In this part, the specific requirement stated under FIDIC (4thed) and JCT 80 is primarily dealt.

JCT 80 provides three elements as a condition precedent to be entitled liquidated damage. They are:

- 1) The contractor shall fail to complete the work on time and architect should issue certificate of non-completion²².

21- Brain, Supra note 4, p 40

22- JCT 80-Clause 24.1

- 2) The employer should state in writing that the damage are to be deducted²³
- 3) Such statement should not be latter than the date of final certificate²⁴.

It is stated that JCT 80 requires the architect to issue certificate of non-completion. This is a condition precedent for deduction of liquidated damage this might serve as a safeguard for the contractor against premature deduction from payment certificates by the employer, and it serves as a positive reminder to the employer that the right to deduct liquidated damage has been activated.²⁵

JCT 80 also requires the employer to give notice to the contractor as to his intention to deduct liquidated damage. The rational of inclusion of these provision might be:

- 1) The deduction of liquidated damage is discretionary and the employer may choose to exercise all, part or none of the entitlement.
- 2) Liquidated damage should not be deducted from the face of the architect's certificate for payment and the contractor needs to know if the employer fails to honor the certificate in full way.²⁶

JCT 80 is clearly provided the procedure to be complied to make deduction of liquidated damage. However it does not clearly state as to the effect of non compliance.

Finally, FIDIC (4th ed) does not state any condition precedent, like notice and certificate of non-completion rather it gives the employer right to deduct liquidated damage if the contractor fails to complete on completion date.

5.3.2- Assessment and Deduction of Liquidated Damage

Having established the fact that the employer is entitled to liquidated damage, the next issue might be as to the assessment or the calculation of the actual amount of liquidated damage for the employer. Most standard form is patently clear as to the calculation of the liquidated damage. They stated that the contract completion date is as a

23-JCT 80 – Clause 24.3

24-JCT 80- Clause 24.2

25- Brain, Supra note 4, p 219

26- Brain Supra note 4, p 220

beginning date for assessment. Whereas the actual practical completion date is the end of the calculation. The time gap between the -----two period might be assessed.

JCT 80 stated that “ - - - the contractor shall pay - - - liquidated damage and ascertained damage at the rate stated in the appendix (for such lesser rate as may be specified in writing by the employer) for the period between the complete date and the date of practical completion”²⁷.

The underlined phrase implies that liquidated damage is calculated for the period gap between the completion date and date of practical completion. The assessment (calculation) is made based on the rate on the appendix or lesser rate specified by the employer.

In similar manner FIDIC (4th ed) provide that “ - - - the contractor shall pay the employer the relevant sum stated in the appendix to tender as liquidated damage for every day - - - of which shall elapse between the relevant time for completion and the date stated in taking over certificate”²⁸.

The underlined phrase indicate that liquidated damage is calculated for the time between the completion date and the date of taking over of the work. It is calculated based on the rate of in the appendix to tender. Moreover, FIDIC (4th ed) stipulate the maximum limit for liquidated damage²⁹. This is stated in appendix to tender. The employer will not be allowed to deduct beyond that limit. The rational might be to protect the contractor from being penalized with excessive damage. This might tantamount to penalty. Similar wording is included in General Conditions For Works Contracts Financed By the European Development Fund (EDF).³⁰

In general, the total amount liquidated damage can be determined by multiplying the rate of liquidated damage inserted in the appendix by the total period of delay. It is already dealt that delay is the difference between contract completion date and actual practical completion date.

27- JCT 80 Clause 24.2

28- FIDIC (4thed) clause 47.1

29- Ibid

30- General Conditions for Works Contracts Financed by the European Development Fund (EDR) clause 36 (1)

It can be illustrated on the following example:

Cellulose acetate silk co Ltd involved a construction contract, liquidated damage were set in the contract at £ 20 per week of delay. Delay of 30 weeks occurred. The actual liquidated damage is £ $20 \times 30 =$ £ 600³¹.

On the other hand, in most standard forms the employer has a right to deduct the specified sum for liquidated damage if the contractor fails to complete the work on time. JCT 80 stated that:

“- - - the employer may deduct the same from any moneys due or to become due to the contractor under the contractor.”³²

The above provision gives a privilege for the employer to deduct the specified liquidated damage from any money due and payable to the contractor. Moreover it implies that the employer rights extends to future debt (to be come due) the contractor. Even the employer can deduct from the contractor’s money than related to the specific contract. However, mostly this liquidated damage is deducted from an interim (final) payment due to the contractor. This is reflected in Tuken vs clarnton (1973) case. It stated that:

“- - - deduction can be made from interim certificates where the contract expressly gives that right and there seems little doubt that phrases such as “from any money due” will be taken to confer it.

It is important to state that JCT 80 does not address the issue whether the employer has remedy to his liquidated damage as a debt than deducting the damage from the contractor’s money due or becoming due. On the other hand JCT Agreement For Minor building works has specific provision on the point as:

“- - - The employer may deduct such liquidated damages from any money due to the contractor under this contract or he may recover than from the contractor as a debt³⁴.

31- Issaka endekugri, The JCT 98 Building contract law and administration, arneld, london, 2002 pp 221

32- JCT clause 24

33- Brain, Supra note 4, p-136

34- Ibid

In similar manner, FIDIC (4th ed) provides that:

- - - the employer may, with out prejudice to any other method of recovery deduct the amount of such damage from any monies due or become due to the contractor - - -”³⁵

This provision is clear in that the employer has power to deduct the specified liquidated damage from any money due or become due to the contractor. It is also important to note that the engineer /architect has no power to deduct it unless he is instructed by the employer.

This issue was raised in Awash – Kulbi-Dengego project. The contractor (China – Road & Bridge co.) claimed that the engineer has no power to deduct liquidated damage. In other words, the contractor contests the deduction of payment certificate by the Engineer. The Engineer responded that:

“- - - The engineer recognizes that under clause 60-2 it is the employer’s responsibility of determining whether to make any deduction for due liquidated damages. However, that decision was so made by ERA and we were requested by ERA to show such deduction on the IPC 3-32.³⁶

Where as the employer (ERA) confirms the above letter. it stated that:

“- - - we come to know that you have considered as the engineer made the deduction of the liquidated damage by himself. However, we would like to confirm you that we are very much aware of the contract provision stated in your letter concerning liquidated damages and how such deduction has to be made - - -”³⁷.

On other hand, FIDIC (4th ed) also clear in that the employer has also right to sue and recover the liquidated damage besides its privilege to deduct liquidated damage. This issue is not addressed in JCT 80 form of contract.

35- FIDIC (4th ed) clause 47-1

36- Engineer (wulbur –smith Associates Inc) Letter dated on Jan 14,2004 (ref, WSA/pac/ME/13364 on kulbi-Dengego-Dire Dwa project. (Un published)

37- ERA (Employer) Letter dated AH. /78 15-100 dated on Jan 15/2004 on kulbi-dengego-Dire Dewa project (unpublished)

Finally General Conditions For Works Contracts Financed By the European Development Fund (EDF) also provide similar provision in different ways as:

“- - - the contracting authority shall without formal notice and without prejudice to the other remedies under the contract be entitled to liquidated damage - - - ³⁸.

The above provision shows that the employer (contracting authority) is entitled to liquidated damage with granting notice and without prejudice of other remedy. This standard the contractor has a right to sue for claiming a debt for liquidated damage. Moreover, the phrase “without prejudice of other remedy” give a clue that the deduction might be taken as an option.

There are practical cases on the local court regarding the issue of deduction of liquidated damage. In case of Zeta construction plc vs Anbessa Bus Service Enterprise, the plaintiff mainly claimed that the defendant unlawfully deducts liquidated damage. The case was brought to Federal high court. The court rendered decision on this point as the defendant (employer) has no power to deduct liquidated damage without court decision³⁹.

In relation to the above case, the contract between the plaintiff and defendant include Ministry of urban Development Standard Condition of contract. This stranded clearly stipulate the employer’s right to deduct liquidated damage (clause 47). However, the court has not considered the contract provision properly.

5.4 - Challenges for Payment of Liquidated Damage

It is quite true that the employer is not necessarily to have liquidated damage upon the contractor’s failure to complete on time. There are defenses raised on the part of the contractor. They make the liquidated damage unenforceable. In this part, primarily four defenses are dealt. They are defense of penalty, defense of no specific completion date, defense of extension of time due and defense of non observance of condition precedent.

38- General condition for works contracts financed by European fund (EDF) CLAUSE 36 (1)

39- Federal high court decision dated 22-09-98 E.C on Zeta cans vs Anbessa Bus enterprise (case no 32976. (Unpublished)

5.4.1- Penalties

It is already dealt that liquidated damage clause should represent the genuine pre-estimate of the likely damages which would normally flow from the breach of contract.⁴⁰. This implies that it should not be sum greater than the genuine pre-estimate damage. If this happens, then it will be penalties. The effect might be that the liquidated damage clause might be invalidated or unenforceable. Mostly the defense of “penalty” is invoked or raised by the contractor. Moreover, if the liquidated damage clause is invalidated, the employer might claim un liquidated damage.

5.4.2- No Specific Completion Date

It is quiet evident that liquidated damage for delay begins to run from some definite contract completion date. If the date in the contract has for some reason ceased to be the proper date for the completion of the works, and no contractual provision exists for the substitution of a new date in the events which have happened, there is such a case no date from which liquidated damage to run and the right to liquidated damage will have been lost.⁴¹ A case in point is that there is a delay caused by the employer and there is no extension of time clause provision to cover the delay. This is dealt in Peak Construction (Liverpered Ltd is mickinney foundation Ltd) case.

In this case, the employer was responsible for some of the over all delay. However there was no provision enabling an extension of time to be granted to compensate the contractor that delay and the court of Appeal decided that the entire liquidated damage become inoperable as the commencement date for liquidated damages could not be established.⁴²

If the contractor invokes the defense of no commencement date for liquidated damage and substantiated with evidence, the employer might claim general damage instead of liquidated damage.

40- Micheal, Supra note 1, p 108

41- Hudson Supra note 12, p 1147.

42- Micheal, Supra note 1, p 109

5.4.3- Extension of Time Due

In principle the liquidated damage clause primarily becomes operational if the contractor fails to complete the work within the specified contract period or the extended period as per the contract. This implies that if the extension of time due, the employer might not deduct liquidated damage. The contractor might raise a defense of extension of time due if the employer tries to deduct liquidated damage.

5.4.4- Condition Precedent not Observed

Most standard form of contract lays down certain condition precedent in order to deduct or retain liquidated damage by the employer. For instance, JCT 80 requires issuing certificate of non completion, and notice of intention to deduct as liquidated damage as a condition precedent. The contractor might challenge the deduction on the ground that non compliance of condition precedent. However, as to its effect, it entirely depends exclusively on the wording of the particular contract.

3.5 Bonus for Early Completion

Most standard form incorporate bonus clause for the contractor's early completion of work. The contractor has a right to be entitled for bonus if he completes the work before the contract completion date. Some scholars forward a proportion that a bonus clause is necessary as a balance to liquidated damage⁴³. In other words, the contractor is entitled for bonus if he completes early while the employer is entitled liquidated damage if the contractor is late in completing the work.

As it is stated above, most standard forms include a bonus clause. However they included it as an optional clause. FIDIC (4thed) provides that:

If the contractor achieves completion of the works prior to the time prescribed by clause 43, the employer shall pay to the contractor a sum of (insert figure) for every day which shall

43- Brain, Supra note 4, p 75

elapse between the date stated in the taking over certificate in respect of the works issued in accordance with clause 48 and the time prescribed in clause 43.⁴⁴

The above subclause is clear that for the purposes of calculating bonus payments the date for completion is fixed and not to be adjusted by extension of time. Thus, the date specified as completion date is the point of reference for calculation of bonus. The extension of time will not be considered. In practice, as the contractor complete the work early; the issue of extension of time might not be raised.

In similar manner, Standard Conditions of Contract for Construction of Civil Work projects by Ministry of Works & Urban Development also provide bonus clause as:

If it is desired to provide in the contract for the payment of bonus in relation to completion of the works or of any part of section thereof shall be set out in projects particular conditions of contract⁴⁵.

This provision gives the parties the discretion to include bonus clause in their particular agreement.

44 - FIDIC (4thed) clause 47.3 (particular application)

45 - Standard conditions of contract for construction of civil works project, by ministry of works and urban development (1994) clause 47 (3)

Conclusion and Recommendation

It is not untrue clear that the construction sector has been very much increased recently in our country. This is both in terms of number and complexity. However, most scholars argue that those construction projects are rarely completed on time. This delay is due to various events. Even some allege that the ascertainment of completion date is not an easy task. Thus the study tries to make a research on construction performance period with special emphasis on extension of time and liquidated damage. Based on this research, the study end up with the following findings and recommendation remarks.

- 1) Construction works primarily refers to civil engineering or building works. It involves construction contracts. These construction contracts incorporate a variety of documents. They are deemed to be one instrument. Primarily the terms & conditions of the contracts are included in the condition of contract. The condition of contract is adopted in the standard forms like FIDIC (4th ed) JCT (80), etc...This is on the assumption that they are more economical and avoid error in drafting. It is important to note that construction contract refers the main construction work contract between the employer and the contractor.
- 2) In principle construction contract vary in type, It can be classified based on different criteria. Classification based on the contractor's obligation (General contracting Vs Turnkey contracts), project organization (Management contracting Vs Management construction) and method of valuation (Lump sum, Cost reimbursement Vs Re-measurement contract) can be mentioned as instances. The focus of the study is that of "General Contracting". The essence of this type of contract is that the contractor is obliged to construct as per the engineer design.
- 3) Time is an important issue in construction contract. It is one factor in which the success of the construction work is judged. Most construction contracts clearly state the time in which the work begins and ends. The time gap between the two is assumed to be contract period.
- 4) The ascertainment of a time in which the work commences is not an easy task. Different standard forms state different methods as to the assessment of the

commencement of the work. FIDIC (4th ed) stated that the date in which the contractor receives the engineer's commencement notice is assumed to be commencement date. Whereas JCT 80 stated the date of possession of site by the contractor is deemed to be a commencement date of the work. Similarly GCC by EDF also stated that notification of commencement notice by contracting authority is a commencement date.

- 5) It is also important to note that the contractor has also an obligation to proceed the work diligently and regularly during the progress of the work. This is incorporated both in FIDIC (4thed) and JCT 80. This might warn the contractor to do his work diligently as per his programme.
- 6) The concept of "completion date" has peculiar nature in construction contract. Date of completion of work is to mean the necessary construction work specified in the contract has been performed even if minor and latent defect remains. This is mostly known as "substantial" or "practical" completion. There is difference between "date for completion" and the "completion date." The former refers the date specified in the contract as a completion date. Whereas the completion date refers either the originally set "date of completion" itself or completion a date adjusted by extension of time. JCT 80 clearly states these distinctions.
- 7) Most construction contract forms incorporate the extension of time clause. In principle extension of time comes in to picture only if the works are not completed on time. Extension of time clause primarily serves the following purposes.
 - It retains a defined time for completion time
 - It preserves the employer right to liquidated damage against acts of prevention.
 - It relieved the contractor from his strict duty to complete on time in respect of delays caused by neutral events.
- 8) Basically, the following principles are universally accepted in relation to extension of time:
 - The inclusion of extension of time clause is a pre requisite to be entitled to an extension of time:
 - The contractor is the one who can initiate extension of time claims.
 - The engineer (architect) is vested with power to grant an extension of time.

- Extension of time presupposes a specific completion date.

- 9) Different standard forms specify different grounds as relevant events for extension of time. The relevant events stated in the contract are exhaustive. FIDIC (4th ed) describes events in which the contractor is entitled for extension of time. It includes “sweep up” clause so as to include any event to entitle the contractor for extension of time. Whereas JCT 80 describe detailed and exhaustive enumeration as a ground of relevant events. In general most standard form framed extension of time relevant events broadly. This is to avert the occurrence of time at large and losing the ascertainment of completion date if there is event that has not been specified as a ground and is due to the employer fault.
- 10) It is also important to note that if the delay has occurred due to the fault of the employer and this event is not a relevant event. Then the contract completion date is lost. Moreover, if the architect /engineer/ does not grant extension of time as per the contract specified time, the same effect might be applied. In other words, time will be at large. The contractor is expected to complete the work on reasonable time.
- 11) The link between time extension and the cost for the extended period is the most controversial issue. Most standard condition of contract clearly state the ground for extension of time and financial claim in distinct and separate manner. FIDIC (4th ed) and JCT (80) can be mentioned as instances. However, it is widely accepted that extension of time due to delay on the fault of the employer is not reimbursable whereas delay due to neutral events might be reimbursable.
- 12) Most standard forms require the contractor to give notice for any delay in order to be entitled an extension of time. This is as soon as the event occurs. Moreover it is required to give detail for the relevant events as soon as possible. This is clearly stated in both FIDIC (4th ed) and JCT (80).
- 13) It is also important to note that most standard form clearly require that the delay due to relevant event should affect the critical path. Unless the delay affects the completion date, it will not be subjected to the assessment for extension of time. This is clearly required in JCT 80. Moreover, the contractor should not contribute for the delay. This is clearly seen is FIDIC (4thed).

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- 14) The actual assessment or calculation of an extension of time is not an easy task. It varies from specific case to case. Moreover, most standard forms do not clearly state as to how to calculate extension of time. However, the dot or net award principle is the most prevalent principle. It states that the period awarded should be the length of delay to the completion of the contract. This will be added to the original completion time.
- 15) Most standard forms incorporate liquidated damage as a remedy in case the contractor fails to complete on time. This is justified on the ground that the parties might know as to their liability in advance and may not resort to assess damage if there is failure to complete on time. FIDIC (4thed) and JCT (80) incorporate it as a remedy.
- 16) Failure on the part of the contractor to complete on time does not necessarily entail liquidated damage. In the first place the contract should incorporate liquidated damage clause. Secondly, there should be an ascertained completion date and the contractor fails to complete on specified the completion date. Moreover, the amount of liquidated damage should be a genuine pre estimate of actual damage and should not be penalty. It is also to be taken as exclusive and exhaustive remedy for damage due to delay.
- 17) It is quiet true that the employer can claim/deduct liquidated damage after it complies the specific requirement in the contract. Moreover, most standard form stated that the employer can deduct as of right the specified liquidated damage with out resorting to the court. As to the calculation it is calculated as the difference of time gap between the completion date and actual practical completion. The time of delay might be multiplied by the rate in which the contract stated. This is seen in both FIDIC (4th ed) and JCT 80.
- 18) There are defense that might be raised against the employer right for liquidated damage if the amount of the liquidated damage is excessive penalty. This might be raised as a defense by the contractor. Moreover, if the completion date is not ascertained or extension of time is due or the procedure is not observed, they it might raised as a defense. These defense might justify the rejection of deduction of liquidated damage by the employer.

19) Some standard forms clearly state bonus for early completion on the part of the contractor. Some scholars argue that it is a balance for liquidated damage. It is included in FIDIC (4th ed) as an optional clause.

20) It is already stated that the construction sector has been increased remarkably in our country. However most scholars argue that awareness on the time and related issue of construction contract is less. Moreover the stakeholder especially the contractor focuses on financial claims than time claim. The employer is not serious enough in deducting liquidated damage if the completion date is lapsed. It is also important to note that except Ministry of Urban Development Civil Engineering Standard form there is no standard construction contract form locally adopted in our country. Even MOUD standard form is not updated. Thus the following points are recommended.

a) As it is stated above, except the MOUD standard form of contract there is no locally tailored standard form on construction contract. Thus it is imperative to have standard construction form is both civil as well as building construction work. This should be prepared for:

- a) Large construction work
- b) Medium construction work
- c) Small construction work separately.

The preparation should consider the prevalent situation of the construction work in the country. This might avoid drafting errors and will be more economical.

b) It is not enough to adopt standard forms. It should be always updated having considered the shortcoming of each form.

This may be periodically.

c) It is also important to note that awareness creation as to standard forms is an important task. The stake holder should have adequate knowledge as to the essence of the standard form. This is the key point is implementing the provision of the standard in the practice.

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**I declare that is my original work and I quote
reference advise which I take form other.**

Student_____

Signature_____

Date_____

Advisor

Micheal Gunta

Signature_____

Date_____