



AMERICAN UNIVERSITY OF BEIRUT

CONTRACTOR'S BEHAVIOR UNDER BIASED CONTRACT  
CONDITIONS COUPLED WITH A DIFFUSED AUTHORITY  
OF THE ENGINEER

by  
HILMI FAHED HANANO

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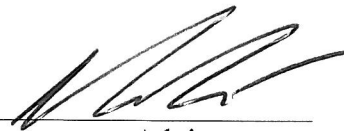
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HILMI FAHED HANANO

Approved by:

Dr. Mohamed-Asem Abdul-Malak, Professor  
Engineering Management



Advisor

Dr. Issam Srour , Assistant Professor  
Engineering Management



Member of Committee

Dr. Bacel Maddah , Associate Professor  
Engineering Management



Member of Committee

Date of thesis defense: April 27, 2015



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## AN ABSTRACT OF THE THESIS OF

Hilmi Fahed Hanano

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Not all owners adopt standard general conditions for drafting construction contracts, and even those who do they end up meddling with such conditions. Eventually, making them biased towards preserving the interest of the owners and giving them the upper hand in respect of the remedies made possibly available for dealing with contractual issues that are bound to surface during the fulfillment of the contract. Such practices by owners can have major implications on the options available to contractors when they are to react to matters and issues that are at the core of what has been prescribed in a biased or a vague manner under the contract conditions. The objectives of this research are to investigate those ways and means that can possibly help contractors react better in contracts that are biased and where the authority traditionally invested in the Engineer is made diffused by owners. The methodology to be followed in this research is a case-based and involve:(1) reviewing the relevant literature, (2)describing the case study selected for the purpose of this research in which the contract was deemed biased and vague, (3) analyzing the case's contract conditions pertaining to the main issues encountered in contrast to the 1999 FIDIC clauses governing the same issues, (4) studying the full chronology of events noting the actions taken by the contractor, if any, versus the actions that would have been warranted under the FIDIC-based conditions, (5) making inferences as the tactics and measures that can be considered by contractors when faced with similar or related circumstances, and (6) offering conclusions and recommendations. The outcome of this research will help shed light on the preparations and actions to be exercised by contractors when dealing with biased and vague contracts. The findings are expected to be an eye-opener also to owners by way of showing that meddling with standard or reasonable contract conditions can have major detrimental implications on the performance of the construction contract, thereby forfeiting the purpose of such contracts.



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# CHAPTER I

## INTRODUCTION

### **1.1. Background**

On a construction project, multiple players commit, through formal agreements, to deliver a facility that meets the requirements of the owner. To this end, the owner representative, the Engineer, and the contractor collaborate towards achieving a successful completion of the project.

Signed agreements/contracts spell out the rights of each party along with each party's expected responsibilities, obligations, and duties. The General Conditions document forms a part of the contract and includes sections dealing with sub-contractors, termination of contract, payments, scheduling requirements, quality of products and installation workmanship, among many other aspects. For instance, the procedure of progress payments related to the progress of an agreed work should clearly be stated in the contract to avoid conflicts (Al-Hammad, 2000). The importance of this part of the contract is prominent especially in international projects because teams from different backgrounds and cultures gather to deliver a project in an unfamiliar environment. The significance of this document emerges from its definition of the relationships between the contracting parties on all projects within an agency or a country (Bubshait & Almohawis, 1994). Furthermore, the document states the general project rules and commercial terms (Bubshait & Almohawis, 1994).

An important aspect of project implementation is the selection of the contract type and project delivery method, the selection of which can be governed by constraints related to cost, time, and/or resources. In some cases, however, the owner is reluctant about establishing new contract conditions arguing that all projects are the same. He would opt for using the content of an agreement from a previous project without any modification for his new project. While this cut-and-paste method may save time in preparing the construction contract, it often leads to problems where documents are not read and prepared relative to the needs of the new project (Vlatas, D. A., 1986) . This fact would result in omitting critical clauses that can ultimately lead to project delays. For example, if a clause related to the handling of variation orders is omitted, the absence of a clear procedure for dealing with any changes on site would result in delays due to disputes between the owner and contractor. Such delays normally result in an increment in cost and time causing claims between both the parties. Negotiation might then be used for solving such problems. In fact, negotiation is the most cost efficient method to resolve construction disputes as it is informal, speedy, and simple in nature (Cheung, Yiu, & Yeung, 2006).

A simple factor that leads to the success of any project is the corporation among all the participants; that is reflected by a good contract administration by both owners and contractors. Each party must know his responsibilities, duties and rights as they are normally defined in the contract. In some cases, a contract might be vague or does not properly address some of the rights, normally the contractor's rights, and it can as such be biased in favor of the owner's interests. In such a case, the contractor is better to

weigh the risks and to prepare himself in advance as to how to approach critical contractual matters as they arise.

A clear understanding of the responsibilities and duties of the contractor shall normally lead to a successful completion of the work. It is the contractor responsibility to become familiar with the contract documents, and to make sure that achieved progress is in accordance with the requirements of the contract (El-adaway, et al., 2013). The engineer is normally required to oversee the work being done by the contractor, but he is not held responsible for the mistakes made by the contractor. His job is to inform the owner about the progress with the works, from the perspective of both the quality and quantity of completed work. One of the engineer's key roles, being the administrator of the construction contract on behalf of the owner, is to act as a communication link between the contractor and owner (El-adaway, et al., 2013). In addition, the owner is responsible for providing the contractor with any information necessary for the proper planning and performance of the contract by the contractor, inclusive of information related to site accessibility and commencement of the work, and for ensuring that timely payments are made in respect of work done and whose due amounts have been certified by the Engineer.

## **1.2. Problem Statement**

Not all owners adopt standard general conditions for drafting construction contracts, and even those who do they end up meddling with such conditions, eventually making them biased towards preserving the interest of the owners and giving them the upper hand in respect of the remedies made possibly available for dealing with

contractual issues that are bound to surface during the fulfillment of the contract. In some cases, a contract might be vague, such that it does not specify who is responsible for what or how the communications among all concerned participants shall take place. Moreover, the owner may prefer to be the one in charge and thus meddles with the authority of the Engineer or transfers such authority to himself.

Such practices by owners can have major implications on the options available to contractors when they are to react to matters and issues that are at the core of what has been prescribed in a biased or a vague manner under the contract conditions. As a result, the severity of the problems faced by the contractor and their associated consequences require of the contractor to resort to very well calculated measures, tactics, and/or actions in an attempt to preserve its interests to any reasonable extent that remains to be possible given the limitations and constraints of the contract language governing the encountered issues.

### **1.3. Objectives**

The objectives of this proposed research are to investigate those ways and means that can possibly help contractors react better in contracts that are biased and where the authority traditionally invested in the Engineer is made diffused by owners. As such, the work is aiming at answering the following questions: (1) what are the steps contractors must necessarily consider, in advance of engaging in such contracts, (2) what are the strategies that must be considered during the construction phase in the case of encountering issues that are at the core of what has been prescribed in a biased or a vague manner under the contract conditions.



#### **1.4. Methodology**

The methodology to be followed in this research is a case-based one and is expected to involve:

1. reviewing the relevant literature, including:
  - a- issues related to contract administration, associated claims, and the roles of the parties involved,
  - b- the detrimental effect of biased or adhesion contracts, and
  - c- ways of meddling with the Engineer's authority under the construction contract,one of the aims of this section being to establish that the literature supports, in theory, the need for contractors to act differently and more wisely under biased and vague contracts;
2. describing the case study selected for the purpose of this research, in which the contract was deemed biased and vague;
3. analyzing the case's contract conditions pertaining to the main issues encountered, in contrast to the 1999 FIDIC clauses governing the same issues;
4. studying the full chronology of events, noting the actions taken by the contractor, if any, versus the actions that would have been warranted under the FIDIC-based conditions;
5. making inferences as the tactics and measures that can be considered by contractors when faced with similar or related circumstances; and
6. offering conclusions and recommendations.

### **1.5. Significance of the Research Work**

The outcome of this research will help shed light on the preparations and actions to be exercised by contractors when dealing with biased and vague contracts. The findings are expected to be an eye-opener also to owners by way of showing that meddling with standard or reasonable contract conditions can have major detrimental implications on the performance of the construction contract, thereby forfeiting the purpose of such contracts.

## CHAPTER II

### LITERATURE REVIEW

#### **2.1. Preamble**

Construction industry, like many other industries, is being transformed to meet the new demands of the twenty first century. Project delivery concepts are changing, in both private and public sectors, to become more efficient in both ways time and money. Relationship between the Employers, the Contractors, the consulting firms and the designers are changings, especially with this new type of contract between all these parties. All of that leads to a more complex industry.

There are several literatures that highlight the development of the construction industry throughout the whole world, showing the importance of its augmentation and its relation with the growth of the economies. According to (Ye, Hassan, Carter, & Kemp, 2009)," the construction industry is one of the most significant industrial contributors to the economy in terms of gross product and employment. As a result, the success of a construction project is a fundamental issue to most governments, users and communities".

The success of these construction projects is the main reason behind the vast development of this industry throughout the whole world. There are several factors that measure or reflect the success of any project. Many literature have highlighted the main area of concentration when it comes to the success of a construction project; traditionally, the success of any project was related to the iron triangle as (Toor & Ogunlana, 2010) clarified "the conventional measures or the so-called iron triangle of

time, cost, and quality has been the dominating performance indicator in construction projects".

Further research showed that there are many new concepts that might reflect the success of a construction project regardless of the "iron triangle"; for example, choosing the appropriate construction contract, the right delivery methods, the cohesive contract administration, the attributes and roles of the parties involved in the contract and many other factors that can be critical in the success of any project.

Normally, a contract should be balanced, preserving the rights of each participant. In some cases, a contract might not be as ethical, if we can say, as it should be. So in this research, through the literature, I will try to explain how a contract might be vague, assaulting one party but on the other hand giving the freedom to the other party to do whatever they think is appropriate.

## **2.2. Contract in general**

Any company that seeks to build anything from residential building to roads bridges and even airports needs to have a documented construction contract that will certify their agreement with the other parties involved in the execution and fulfillment of the required task. This contract will specify the scope of the work, which may require some pre-construction services, bid analysis, and coordination with the architect and the subcontractor. It should also include the payments and project completion schedules. It should even clarify the procedure that must be followed in case of dispute to be able to resolve this disagreement through arbitration. That's why signing a Contract might

protect either one of the parties involved in the project in case of delays, cost overruns, or other general mishaps.

There are several definitions of construction Contract; the International Accounting Standards define the Construction Contract "a Contract specifically negotiated for the construction of an asset or a group of interrelated assets" (International Accounting Standards).

On the other hand, the FIDIC Contract Guide 1999, published four different forms of contract, one of them is the "CONS" Conditions of Construction Contracts. According to the FIDIC, Contract is defined as "the Contract Agreement, the Letter of Acceptance, the Letter of Tender, these Conditions, the Specifications, the Drawings, the Schedules, and the further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance" (FIDIC, 1999).

The benefits of having a Construction Contract from the Contractor's perspective is that it puts both parties' obligations in writing, so you know what your clients expect from you in terms of performance, and your clients know what you expect from them in terms of payments. Despite that, misunderstandings happen on construction projects, but when the details are outlined in a Construction Contract, it makes everyone's lives easier.

Normally, Contracts have standard forms that are used between participants in any construction project. Through several researches, construction contracts play a major role and "the standard form plays a significant role in this process as it communicates the procedures to be adopted in executing the project including the determination of the rights and obligations of contracting parties" (O Reilly, 1966). In

the last eras, several types of standard forms of contract have been used, according to Ibbs and Ashley (1987), "there are many internationally recognized standard forms of contract developed for the construction industry by a number of independent professional organizations and these are intended to be used in different contractual arrangements" (Ibbs & Ashley, 1987).

### ***2.2.1. Benefits of standards forms of Contracts***

Using standard forms of contracts might be beneficial in the industry as its usage is more communes these days. Many benefits were introduced by researchers as proved by (Kwakye, 2000) "they represent a degree of fairness in contracting between the two parties, the conditions having been drafted by experts beforehand and away from the heat of the particular project, with the balanced representation of all relevant industry participants, and representing a fair allocation of risk between the contractor and the employer". Another benefits that (Perry, 1995) discussed "the use of standard forms of contract also helps to manage and mitigate project risks". One of the main profits that standard forms of Contracts provides is what (Jergeas & Hartman, 1994) debated "to reduce the inefficiencies associated with the repeated drafting and reviewing of contracts, and to facilitate a greater sense of partnership between contractors and employers".

The most familiar type of standard forms of contracts is the FIDIC "International Federation of Consulting Engineers" by its newest edition released in 1999. It has been recognized that "most of the countries around the world use the conditions of contract promulgated by FIDIC for use in international construction contracts" (Meopham, 1986).

After the standard forms of Contracts there is the general conditions, which is the next important part of any Contract, as it define the whole scoop of work. Moreover the FIDIC defined the general conditions as "the recommended conditions for building or engineering works" (FIDIC, 1999).

### ***2.2.2. The contract general conditions***

Hill and Solt explained that "The conditions of contract are set down in order that each party to the contract understands what his or her obligations are and that these can be formally agreed upon and recorded. In particular they define:

- The normal performance required from each party (that's the work the contractor must do, the price the purchaser will pay, and how these may be varied within the framework of the contract without recourse to renegotiation)
- How the risks (design, commercial, delivery, etc.) will be apportioned between the parties
- The rules and procedures for conducting the contract and dealing with the problems and disputes that may arise
- The terms of payment

The conditions of contract are therefore fundamental to the execution of the contract." (Hill & Solt, 2010)

One the other hand, "The use of general conditions considers several aspects that are relatively related to the complex nature of construction projects, which dictates the use of lengthy and carefully written contracts in order to describe precisely the legal,

financial, and technical aspects of the project" (Clough, 1986). Bubshait & Almohawis support the importance of the general condition of a contract especially for the international ones by saying "International construction contractors are often faced with the situation of working in an unfamiliar construction environment. Faced with this problem, one of the contractor's basic concerns in bid decision making is the assessment of risk. One potential source of risk is the contractual requirements embodied in the 'general conditions' of international contracts, especially when these conditions are different from FIDIC conditions or other well established ones" (Bubshait & Almohawis, 1994).

That's why the general conditions considered being as "The document spells out the general project rules and relevant commercial terms" (Bubshait & Almohawis, 1994).

A good analysis of the general conditions of a contract might be the hidden reason behind the success of a project. For example, it was described that "those conditions should anticipate the potential trouble spots of the relationship between the contracting parties" (Bubshait & Almohawis, 1994), and "they can aid in ensuring a smoother completion of the construction process" (Currle & Dorris, 1986). O'Reilly supports the same idea by stating that "The pivotal role of the general conditions has important ramifications for the likelihood and degree of project success in terms of cost, time, quality, and the satisfaction of the contracting parties" (O Reilly, 1966).

Another factor that might affect the success of the contract conditions and proved by Claassen is that "Because of technicalities that must be expressed in words in a construction contract, it may not emerge in practice the way it was intended. This



situation called for the simplification of contract documents to make them more comprehensible" (Claassen, 2008).

That's why "the general conditions should be fair to the contracting parties and the responsibilities should be assigned to the party that can perform most efficiently and least expensively" (Groton, 1986). "The best principle for allocating responsibility is that controllable risks should lie with the party who is in control, and that a risk which cannot be controlled should be allocated to the party best able to protect against or absorb the risk" (Sweet, 1989).

Furthermore, "one of the main advantages is the potential for improvement by using the same standardized conditions over a long period of time and the familiarity of the contracting parties with the relevant provisions of the contract" (Bubshait & Almohawis, 1994). "The advantage of this is that standard conditions of contract are better conditions than those concocted by individuals or international forms of contract in that they have become known and understood over the years and a considerable body of case law has been built around them" (Claassen, 2008). Nonetheless, "The general conditions, whether standard or not, need to be viewed by both the project owner and the contractor as a source of project risk that needs to be assessed" (O Reilly, 1966) .

As a result, to be able to describe the general conditions of a contract as successful one, there are several elements that need to be evaluated. For example, the clarity of the general conditions, there fairness toward the contracting parties, the workability of the rules described in the general conditions, there effects on the safety, quality, schedule, and cost of the project. In addition to many other elements that need to be consider to realize that "success".

At the end, "it is worth remembering that, conditions of contract and specifications notwithstanding, in most legal systems the contractor must supply goods that are fit for purpose, and conditions of contract that are deemed unfair by a court are not enforceable in law" (Hill & Solt, 2010).

### **2.3. Contract administration**

Construction contracts are the main issue during any project; they are considered the legal relationship among the contractual parties. All contracts are administrated through several contract administration processes. Thus, the contract administration is one of the major roles played throughout the project. Many researches and studies were done to understand the concepts of contract administration, the way these administrating processes work, and the project risks considered.

The aim of this paragraph is to explain the risk allocation by examining the rights and responsibilities of the Architect/Engineer, the owner and the contractor. Hopefully, it will be a contractual manual, or guideline, to be used by the contractor to gain more contractual managerial skills in future projects.

### **2.4. Contract's participants**

All the parties united to make the project happen can be considers part/participants in the contract. Generally, there are three main participants in any project: the owner/employer, the engineer, and the contractor. In some cases, the employer might assign an in-house team to help him during the construction phase.

Moreover, "The completion of a project requires input from a variety of groups including the client, the project team, the parent organization, the producer and the end user. Each party has a role in defining and determining success. They all have specific tasks and responsibilities that they must fulfill in order to achieve success" (Kumar, 1989). According to (Chan, 2001), "assert inter-organizational teamwork as a major factor in ensuring project success". That's why "Project participants are the key players for making the project a success" (Chua, 1999) , especially the relation between the contractor and the owner, it should be conciliatory rather than confrontational in order to avoid claims or any other disputes from arising.

Furthermore, several studies showed that "the attributes, coordinating ability, commitment and competency of project participants are being given the importance due to the fact that most of the times their contribution can have far reaching implications on project success" (Tabish, 2010). As well, "Cooperation/ participation, task/team conflict and goal commitment are the critical factors influencing the final outcome (satisfaction) in the complicated management process" (Leung, 2004).

According to the Red Book, the employer "is the procurer of the civil engineering works in question". The contractor is "the person whose tender has been accepted by the Employer". The engineer is defined as "the person appointed by the employer to act as the engineer for the purposes of the contract" (FIDIC, 1999).

#### ***2.4.1. Right and responsibilities of the owner***

The employer, the client, or the owner many terms used to describe the person or the party who owns the project in the construction contract. According to the FIDIC

definition, the "Employer means the person named as employer in the Appendix to Tender and the legal successors in the title to this person" (FIDIC, 1999). The employer plays several roles throughout the project and the contract gives the employer the authority in practicing and taking the lead to make several decisions.

Moreover, Employers have many expectations, and they are very sophisticated regarding the project works and values. Most of the time, employers are not satisfied with the works that are done which causes a lot of time extensions and extra costs of the works. As it is known, "if client values are not fully understood in a construction project it is likely to result in either low fulfillment of client expectations or multiple design alterations during the project process which lead to additional costs and frustration among the project participants" (Thyseen, 2010). According to (Chinyio, 1998), he considers that "the problem is that clients' needs may not remain constant over time but may, instead, vary according to circumstances, with different procurement preferences for different projects or different preferences for similar projects at different times" (Chinyio, 1998).

The owner is required to designate a representative who shall be the responsible for all the matters that require the approval or authority of the owner and make sure that these matters are binding with the contract. Normally, it is written in the contract who that person might be. In some cases, the engineer/ architect act as a client representative, other cases the owner might assign this task to an outside/external party aiming for the fairness of their decision.

It's the owner responsibilities to provide the contractor with any information needed and related to the contract and may affect the assessment of the contract or work progress/ productivity. The owner response should be within a time limit agreed upon

by both parties in the contract. As it was proved by El-Adaway "It is the owner's responsibility to provide the contractor with any information necessary and relevant for the contractor to evaluate, give notice of or enforce mechanic's lien rights" (El-Adaway, Fawzy, Cody, & Fast, 2007).

Another owner responsibility is to deliver any necessary permit, fees, surveys to the contractor, unless it is otherwise stated in the contract. One of the main rights of the owner is the ability to stop the work whenever the owner senses that the contractor's work is not being completed in accordance with the contract documents.

#### ***2.4.2. Right and responsibilities of the Contractor***

The Contractor as defined under the FIDIC (1999), "means the person named as contractor in the Letter of Tender accepted by the Employer and the legal successors in title to this person" (FIDIC, 1999).

The contractor upon being awarded the contract is expected to present the construction and submittals schedule. That's why "It is the contractor's responsibility to make himself familiar with the contract documents and the site." (El-Adaway, Fawzy, Cody, & Fast, 2007). Furthermore, a sound understanding of the contractor duties and responsibilities will lend itself to the effective and efficient completion of the work.

Another responsibility assigned to the contractor is to supervise and direct the work on site, making sure that everything is done properly as mentioned in the contract documents. One way the contractor shall use is by "Continued comparisons of the contract documents to the ongoing work will assist the contractor in coordinating the progress, as well as in avoiding errors" (El-Adaway, Fawzy, Cody, & Fast, 2007).

"Construction projects and their success are closely related to contractors. They start their main duties when the project reaches the construction or execution stage where the actual work of the project is accomplished" (Alzahrani, 2012). One of the key sign of a successful contractor is "Reported that a contractor's experience in similar projects is one of the most important factors for ensuring a contractor's success in projects" (Sing, 2006). Another study done by (Doloi, 2009) "the result of his model showed that technical planning and controlling expertise of contractor is key in achieving success on projects" (Doloi, 2009). Finally, the relation between the contractor and the owner should be conciliatory rather than confrontational in order to avoid claims or any other disputes from arising.

Furthermore, in case of errors reporting to the architect/engineer is essential to redress the problem as soon as possible.

#### ***2.4.3. Right and responsibilities of the engineer/architect***

Normally the architect/engineer work as a contract administrator accordance with the contract, and acts as a client representative during the construction until the release of the final certificate of payment. According to the FIDIC99 "the Employer appoints the Engineer to administrate the contract throughout the project" (FIDIC, 1999). Moreover, El-Adaway mentioned in his article another responsibility of the engineer/architect by saying that "The architect is not actually a party to the contract between the owner and the contractor, but he does assist in the preparation of the contract documents" (El-Adaway, Fawzy, Cody, & Fast, 2007).

Moreover, the engineer/architect is required to do some site visit during the construction to make sure that the work is done properly, and to be able to track the progress and quality of the work. There is no time interval or restriction between the site visits. In some cases, the owner may assign the engineer to work for an additional year, the 1-year correction period, depending on the relevant clause mentioned in the contract.

Furthermore, it is very important for the A/E to have construction knowledge. There were several studies to investigate whether designers and architects have the knowledge to deal with construction because of the importance of this knowledge for the success or failure of a project (Yates, 2003). Studies' investigations showed different results and how important for designers to know about construction methods, though designers should be required to obtain field experience and this would reduce the amount of claims against design errors and omissions (Yates, 2003).

El-Adaway added in his article that "the architect will not be responsible for the actions of the contractor or his agents. Although, the architect is required to keep the owner reasonably informed about the progress and quality of the portion of the work completed, report any known deviations from the contract documents and from the most recent construction schedule submitted by the contractor, and report observed defects and deficiencies in the work" (El-Adaway, Fawzy, Cody, & Fast, 2007)

We notice from what El-Adaway mentioned that the engineer/architect will not be held responsible for the contractor's mistakes or failure of performing the work in accordance with the contract. One of the key roles of the engineer/architect in this situation is to be the communicator between the owner and the contractor except otherwise if it's mentioned in the contract.

Another main role of the engineer/architect is the authority to reject any work performed by the contractor that is not consistent with the contract documents. His decision must be; balanced not showing any tenderness toward any party, written and supported by the drawings that show the defects.

The architect/engineer has the right to request an inspection, or a special test to make sure that the contractor's work is consistent with the contract documents, and if not the engineer/architect has the right to postpone, or withhold, the certification of payment until changes are made.

Another responsibility assigned to the engineer/architect, "It is the architect's responsibility to review and certify payments that are owed to the contractor. The architect is required to take appropriate actions upon submittals according to the submittal schedule in the absence of an approved submittal schedule, the architect is required to take such actions with reasonable promptness, to help avoid claims for delay" (El-Adaway, Fawzy, Cody, & Fast, 2007).

To summarize the role and responsibility of the engineer/architect both the (FIDIC, 1999) and (Lina, 1997) mentioned that "The engineer has two categories of function. One is those "duties" specified in the contract, which he or she "shall carry out". The other entails the "authority" specified in or necessarily to be implied from the contract, which he or she "may exercise." The engineer has broad spectrum of decisional powers to resolve most of the day-to-day differences of opinion that frequently occur in multimillion or multibillion dollar projects involving years of work by multiple subcontractors. The engineer's decision, which seriously affects the rights



and duties of the contractor and the employer, once accepted, binds both parties."

(FIDIC, 1999) (Lina, 1997 ).

In some cases the responsibility and rights of the engineer/architect might be vague, unclear, under the desire and the request of the owner. This act of meddling with the normal authority of the engineer/architect might be presented by several arrangements.

#### 2.4.3.1 Ways of meddling the authority of the engineer/architect

As we know, the employer is the one to appoint the engineer throughout the project who shall carry out the duties assigned to him in the contract especially on matters he is not qualified to judge. While at the same time, the employer gives himself the right to intervene in several matters by not allowing the engineer to take decisions without his approval. However, the Engineer doesn't represent the employer for all purposes; for example, he is not authorized to amend the contract but he is deemed to act for the employer.

This would give the employer the reason to interfere in some of the roles handled by the engineer. Nonetheless, there are those instances where it is clear that the general conditions of the contract on their own have given the employer ways of interfering.

To clarify the idea even more, if the engineer is required to obtain the approval of the employer before exercising a specified authority. The requirements shall be as stated in the particular conditions, and whenever the engineer exercises a specified authority for which the employer's approval is required, and then the employer shall be

deemed to have given approval. This shows a stipulated limitation of authority by the employer and could be a reason for him to interfere in specific roles handled by the Engineer.

The work presented by Layal masters' thesis (NAEEM, 2013) give a fully detailed information regarding the employer's ways of meddling with the engineer's authority. It had established that there are four main ways used by the employers:

- Transferred Authority:

The engineer acts in an advisory capacity to the employer who has maintained to himself through the explicit contract language the right to decide on final determinations in respect of certain aspects of the contract and to instruct the same to the contractor.

- Limited Authority:

The engineer's determinations and instructions of the same to the contractor in respect of certain aspects of the contract are made conditional to obtaining the prior explicit approval of the employer.

- Challenged Authority:

The engineer's authority in respect of making determinations, giving opinions, rendering judgments, etc. is exercised under the indirect influence of the employer.

- Impartial Authority:

The engineer is afforded freedom in exercising his authority in an unbiased manner.

Loyal's work added that "in some cases, the employer meddles in particular roles of the engineer that are not mentioned under the particular conditions and usually they are supposed to be handled only by the engineer. However, the employer would ask the engineer to consult with him about different issues and will force him not to take any decision or make judgment without his approval. The employer would put pressure on the engineer to accept his intervention by warning him of not being a party on future projects, so this would force the engineer to mingle with the situation" (NAEEM, 2013).

## **2.5. Adhesion contract**

"Contracts of adhesion are not uncommon in the construction industry. The term "contract of adhesion" means that one party controls the terms of the contracts. Two factors are present in many adhesion contracts:

- 1) The stronger party drafts the contract, and the weaker party has no opportunity, either personally or through an agent, to negotiate the terms of the contracts;
- 2) The weaker party lacks any realistic opportunity to look elsewhere for a more favorable contract; he must either adhere to the standardized agreement or forego the needed service." (Abdulaziz, 2002)

Holder supports the same idea by stating that "A contract of adhesion is a contract which may be invalidated because one party, in an inferior bargaining position, is required to waive some legal right to obtain an urgently needed service from the party in the superior bargaining position".(Holder, 1991)

Moreover, "For present purposes, freedom of contract has two distinct meanings: first, the freedom to enter into agreements and secondly the freedom from interference with a contract once made" (Wilson, 1965). Nevertheless, what Wilson mentioned in his article about the freedom of contract, as a concept, is not available in the adhesion type of contract. That's what makes a big debate, if they were both mentioned separately, we can say that these terms are normal and well known by primitiveness by each parties evolving in a contract, but when they are mentioned together it creates conflict due to their contrary effect.

The only benefit of adhesion contract is the reduction of administrative work that both parties had to follow, as all the procedure are known, no objection and had to be done by the owner rules.

### ***2.5.1. What makes a contractor enter such an agreement?***

- 1- First, the compulsory contract which arises when one has no option but to enter into the contract with the offeror, partly because the services offered are so essential as to be in the nature of a public utility, and partly because there is no rival concern with which the offeree can do business even if he wishes.
- 2- The need of work
- 3- The benefits that the contractor might get after the project is done; on the long terms, a future partnership or maybe a sequential project.

### ***2.5.2. What makes a contract an unbalance contract?***

When superior party forces a contract to a destitute contractor with no restriction on the freedom to contract would legally or generally leads to a contract of slavery or what is now known as the contract of adhesion. Thus, all the power, privileges, and rights are in the hands of the owner. The only choice, freedom, given to the contractor is to obey.

Normally, this kind of contract where inevitably drafted by the owner; thus presenting himself with an extended tool that will provide him protection on the expenses of the hapless offeree.

Moreover, there are those contracts which fall within the realm of what has been termed as "contractual dirigisme"-a state of affairs in which certain terms of specified contracts are prescribed and others proscribed by legislation (Wilson, 1965).

### ***2.5.3. How the court looks to this type of contract?***

"The customary technique by which the courts consciously or unconsciously seek to effect justice in such cases is well known to every law student. By a process of strict construction against the offeror, such clauses are excluded where the document did not appear to be contractual in nature, where the offeree's attention was not adequately drawn to the conditions, or where notice of them was given after the contract was concluded" (Wilson, 1965). Thus means that normally, in adhesion contract, there is the superior party whom has all the control over the rights and responsibilities, and the inferior party whom has to obey and agree without any conciliation.

In general, the court looks toward the adhesion contract as a bias contract as it works in favor of the party who wrote it. They claim that the second party participating in the contract had no choice but to obey or to leave; and by obeying we mean, in some cases, they were forced to forget several rights that might let them fall into deep trouble while construction is still ongoing.

## **2.6. Research methodology "case base research"**

"Case research must be made transparent by demonstration of what one has done, not by declaration that a formalized process was followed"(Holton, 2007). The aim of case research is not to produce theories for others to test.

In order to achieve our objective, we discuss three different methodological approaches to case research:

- 1- Theory generating
- 2- Theory testing
- 3- Theory elaborating

For my research, I have a real case that is used before to establish the idea of diffused authority of the engineer. My part would be to elaborate to this case by validating that the contract used in this case study is adhesion. Moreover, the aim of my research is to use this case study, which have these two major issues, and come up with actions that might help the contractor to secure himself.

Figure 2.1 shows the case research decision tree that I used to analyze the methodology available when using a case study in research. "Theory elaboration focuses

on the contextualized logic of a general theory" (Ketokivi, 2014). "There are many ways in which theories can be elaborated: one can introduce new concepts, conduct an in-depth investigation of the relationships among concepts, or examine boundary conditions" (Whetten, 1989).

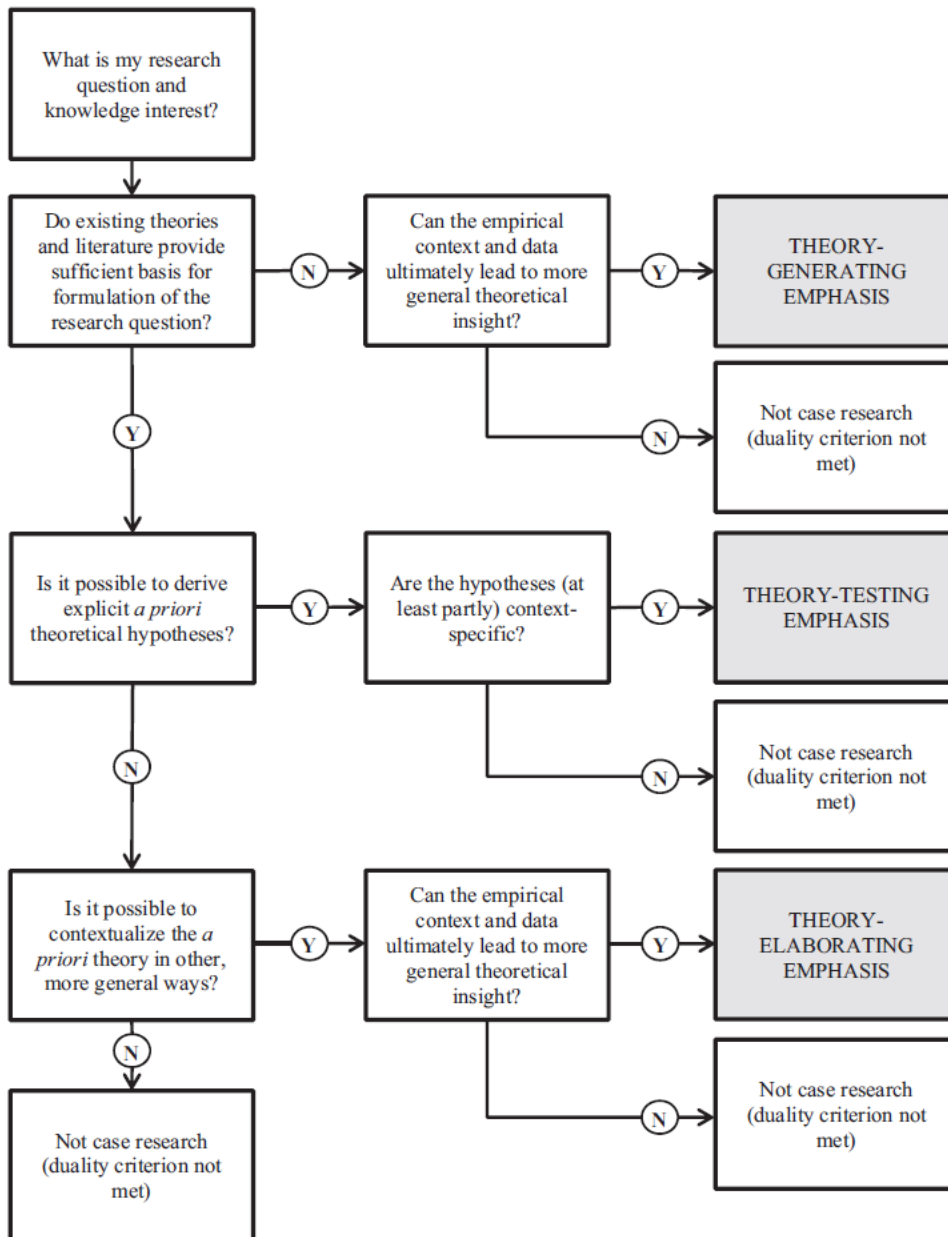


Figure 2.1 Case research decision tree

The three approaches differ chiefly in the relative emphasis given to theory and empirical facts. In Figure 2.2, arrow thickness denotes degree of emphasis.

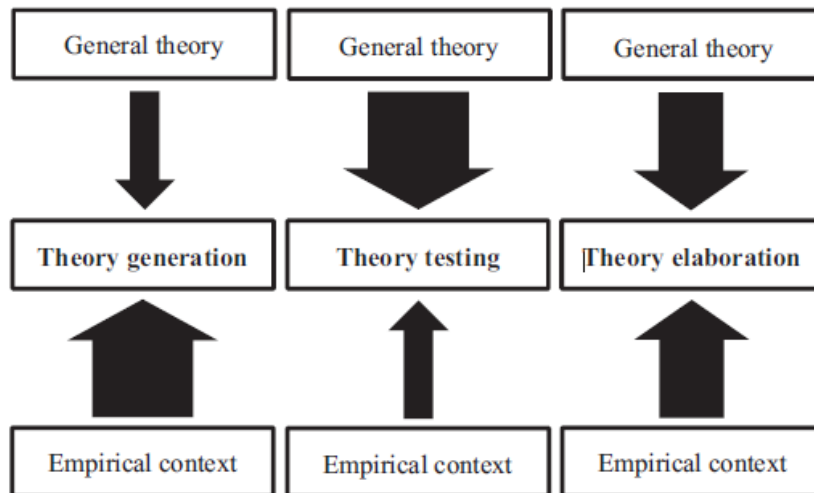


Figure 2.2 Three modes of conducting case research

As my case had already been used to prove a new general theory, and at the same time it can be considered to have an empirical context results, it has a 50% for both approaches, that's why the theory elaboration is more convenient research.



## CHAPTER III

### THE CASE'S PARTICULARS OF DELAYED PAYMENT CASE

#### **3.1. Preamble**

This chapter will address the actual case that my thesis was built upon. It will reveal the actual contract that was signed between the Employer and the main Contractor.

In addition, this chapter will include a brief description of the project with the organizational structure. Moreover, it will also include all main clauses in the unbalanced contract coupled with the diffused authority of the Engineer. These clauses made by the employer will be explained in detail in order to reveal the loopholes that the employer used to secure himself in case of any occurring accident. In addition I will comment on the disequilibrium of the contract, plus I will highlight the parts that were missed or skipped in the contract. Hopefully, it will show/prove to us the reasons why we consider this contract an adhesion contract.

The Contract that was signed between the main Contractor and the Employer was vague and incomplete. This is because it misses a lot of small details related to some specific circumstances that may occur during the work, which is what actually happened. There were several clauses that did not explain the procedure that the contractor should follow if such problems occurred.

Clearly, the contract was written rapidly to line up with the nature of fast track projects that is adopted in the Middle East and Africa (MENA) region in order to finish the project as soon as possible.

### **3.2. Project Description**

This is a residential project in the Middle East and Africa (MENA) area with a budget of \$250,000,000 approximately. It consists of 300 blocks of medium rise buildings with luxurious facilities. The project was divided into several zones. Building a new zone will begin when the previous one is delivered. The first zone that they begin with was the residential project that I used for my thesis. After that part was done, the project was paused and the work was postponed as a result of some complications.

The time schedule for this project was two years but it faced different issues. There were two main additions to the original contract, through memorandum of understanding and an addendum signed between the employer and the contractor agreeing on new payment schedule and new time of completion. The project went through several claims and reached an amicable resolution phase.

### **3.3. Project Organizational Structure**

The project consists of different participants. The main parties in the contract are: the employer, the contractor, and the engineer. The employer has an in-house team to act on his behalf, it consists of: cost consultant, Project coordinator/manager and technical control.

The condition of contract stated the definitions and roles handled by each party. For example, it stated who the employer considers as the participants he hired to act on his behalf. It is mentioned that the employer can appoint a person other than the original engineer. This person is appointed by the employer, who then notifies the contractor in writing, to act as the designated engineer. The project manager shall act on behalf of the employer, and details of his/her role shall be defined by him.

### **3.4. Major Issues Encountered**

At the beginning of the project, the work was running smoothly; there were no delays or problems, and everything was going as expected until the Employer made some modifications. This was the first problem that occurred since the project began, as the modifications were major and changed the entire work schedule of the project. This would cause the cost of the project to increase if these changes were going to be accepted. Luckily, these modifications were settled under the variation orders clause with an amicable agreement.

This stable situation did not last for long, as the main problem lay ahead and the heat increased between both the employer and the main contractor. It all began when the contractor did not receive one of his monthly payments; even though that the Engineer did certify an interim payment for the Employer, in accordance to the agreement. Normally, the contractor would consider this payment as a delayed payment and would continue his work as he cannot do anything about it, hoping that the employer will pay him eventually. Ten days after the incident, there was a phone conversation between the employer and the contractor that assured the contractor of getting a partial payment

shortly. Four days after the phone conversation, the contractor received a partial amount of the first delayed payment as well as a notice from the Employer. This notice ensured that the workforce strike on site would not be repeated, even though it was caused by the delayed action of the employer.

Thirty days had passed after the interim payment certificate had been issued by the engineer, and the employer did not settle his payment. This gave the contractor the right of sending the employer a written notice, with a copy sent to the engineer, informing him of the contractor's right to consider the employer in default under the default clause. While all of that was happening, the second payment was due and the employer did not pay the contractor the next interim payment. This made the contractor entitled to two delayed payments.

The employer refusal to pay continued for five consecutive payments reflects that the contractor had monetary problems however the work on the site was still ongoing. In addition to all of that, the employer claimed that he was delaying the payments rather than refusing to pay.

### **3.5. Contract Conditions**

The Contract of this project is between the Employer and his in- house team, the Engineer and the Project Manager, with the main Contractor. The Contract itself listed many clauses as general conditions, in addition to the particular conditions. The Conditions covered most of the issues that might face the contractual parties throughout the project.

This paragraph will consist of the related clauses to the major issue encountered, the delayed payment by the Employer, as they were mentioned in the Contract, hoping to reveal all the procedures that might be used by the Contractor to face such action.

### ***3.5.1. Payment***

“Within fourteen (14) days after the date of issue by the Engineer of an interim certificate in accordance with the sub-clause of the issue of interim certificates The Employer shall pay to the Contractor or the Contractor shall pay to the Employer (as the circumstances may require) the net amount or the final net amount(s) shown by the relevant interim certificate or final certificate.”

### ***3.5.2. Termination, default of the Employer***

“If the Employer Has failed to pay to the Contractor the net amount or final net amount shown by any interim certificate or final certificate within fourteen (14) days after expiry of the period of fourteen (14) days under sub-clause of the time of payment and such failure is not due to the making by the Employer of any deduction or recovery from the Contractor which the Employer may be entitled to make under the contract or otherwise Then, subject (in any case where the event concerned is remediable) to the contractor giving fourteen (14) days prior written notice to the Employer with a copy to the Engineer and the event concerned not having been remedied before expiry of that notice, the Contractor may

within (14) days after such expiry give a further notice to the Employer which shall be effective to terminate the contract immediately.”

### ***3.5.3. Extension of time***

“After due consultation with the Engineer and the Contractor, the Employer shall grant and notify to the Contractor and the Engineer such extension, if any, of the Time of Completion of the whole of the Works as may in his opinion be reasonable in respect of such part of any delay in completing the whole of the Works is caused solely by the following events:

- any variation of the Works made pursuant to a Variation Order as defined under the Variation Order clause,
- any Suspension Order as defined under Suspension Order clause,
- any of the expected risks as defined under the Risk and Care clause.”

### ***3.5.4. Suspension Order***

“The Contractor shall, under a written order of the Engineer specifying the date of the suspension and the reason bearing the written consent of the Employer, suspend the progress of the works or any part thereof for such time or times and in such manner as the Engineer may consider necessary and shall during the suspension properly protect, store and secure the works or such part thereof against any deterioration, loss or damage to the satisfaction of the

Engineer. The extra cost incurred by the Contractor in giving effect to the Engineer's instructions under this clause shall be borne and paid by the Employer unless such suspension is;

- a) Otherwise provided for in the contract, or
- b) Necessary by reason of some default of or breach of contract by the Contractor, or
- c) Necessary by reason of an occurrence of the forces of nature which an experienced contractor should have foreseen and provided for insured against
- d) Necessary for the proper carrying out of the works or for the safety of the works or any part thereof insofar as such necessity does not arise from any act or default by the Engineer or the Employer or from any of the excepted risks ( as defined in the Risk and care clause ).

Provided that the Contractor shall not be entitled to claim recovery of any such extra cost unless, within twenty eight (28) days after receipt of the suspension order, it gives to the Engineer written notice of its intention to make such claim. If such notice is duly given extra cost recoverable by the Contractor shall be determined by the Engineer and paid to the Contractor in accordance with the clause related to the interim and final certificates.”

### ***3.5.5. Claims, Notice of Claims***

“if the Contractor intends to make a claim against the Employer for any additional payment in connection with or arising out of the

contract or the works other than a claim for a payment of or on account of any variation order issued pursuant to the Variation Order clause, the Contractor shall give notice in writing thereof to the Engineer, with a copy to the Employer, as soon as possible and in any event within twenty eight (28) days after the event or circumstances giving rise to the claim has first occurred. Such notice shall contain full and detailed particulars of and information concerning such claim insofar as those particulars are or that information is then known to it or reasonably available to it. Such particulars and information shall without limitation include the grounds upon which such claim is based, the Contractor's then estimate as to the amount of the aforesaid claim and details of the build-up of such estimate. The claims to which this clause applies shall without limitation include any claims for extra cost under the Suspension Order clause and in those cases the notice given under the claim clause shall provide it is given within the period of twenty eight (28) days referred to in the Suspension Order clause fulfill the requirements of that clause concerning notice of intention to claim.”

#### ***3.5.6. Dispute Resolution Amicable settlement***

“if a dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the carrying out of the Works, whether during the carrying out of the Works or after their completion and whether before or after any termination of the Contract, including any dispute as to any decision, opinion, instruction, order,



certificate, determination or valuation of the Engineer or of the Employer it shall first be referred to a director of each party and those directors shall endeavor to settle the Dispute amicably. If the Dispute cannot be settled within twelve (12) weeks of the Dispute being referred to the respective directors then either the Employer or the Contractor may give notice to the other party of his intention to commence arbitration in respect thereof may be commenced unless such notice is given.”

### ***3.5.7. Arbitration***

“any Dispute in respect of which an amicable settlement has not been reached in accordance with the Amicable Settlement Clause shall be finally settled by arbitration. Unless otherwise agreed by the Employer and the Contractor.

- The Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;
- The Dispute shall be settled by one or more arbitrators appointed in accordance with the said Rules of Arbitration;
- The place of arbitration shall be in the existence country of the project;  
and
- The arbitration shall be conducted in the English language.

The said arbitrator(s) shall have full power to open up, review and revise any decision, opinion, instruction, order, certificate, determination or valuation of the

Engineer or of the Employer relevant to the Dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the said arbitrator(s) on any matter whatsoever relevant to the Dispute.

The award rendered by all or a majority of the said arbitrator(s) shall be final and judgment may be entered upon it in any court having jurisdiction. In no event shall this Clause be construed as conferring upon any court authority or jurisdiction to enquire into or review such award on its merit.

Arbitration shall not be commenced prior to the date of issue of the Taking Over Certificate to be issued under the Taking Over Certificate Clause, the date of any termination of the Contract or the date of any expulsion of the Contractor from the Site and the Works under the Definition of Default Clause.”

#### ***3.5.8. Continuation of Obligations***

“ Neither the existence of any Dispute as mentioned in the Dispute Clause nor the commencement of any arbitration shall relieve either party to the Dispute from its obligation to continue to observe and perform each and every term, condition and provision of the Contract on its part to be so observed or performed, including without limitation in the case of the Contractor its obligation to proceed with the carrying out and completion of the Works and the remedying of defects therein and to do so in accordance with the decision, instructions and orders of the Engineer and of the Employer even if the Dispute concerns any of such decisions, instructions or orders.

These clauses will show the interactions between all the parties involved in the contract in all cases, whether in an agreement or disagreement. In addition, it explains

the procedures that the contractor has to follow when facing the main issue. Even though the procedure that might be followed by the contractor, in case of delayed payment by the Employer, is limited, we sense that the interaction between the clauses is weak and limited. In addition, this contract misses different essential clauses, for example, there is no clause that discusses the issue of substantial completion. The contract goes directly to the taking over certificate when the whole of the works is done. Another missing part is related to the authority of the in-house team of the employer. The in-house team is mentioned as client representative while its role is unclear, as the only member mentioned in the contract clauses is the engineer. These missing parts show the unbalance in this contract, and in Chapter 4 will verify more why we consider this contract as an adhesion one by comparing it with the FIDIC 1999 (standard form of contract).

### **3.6. Authority Assignments**

Regarding the authority assignment, the contract that was signed between the general contractor and the employer was not that much clear in the way of communication between parties. Even though the Contract did mention the responsibilities, duties, and rights of some of the participants, it still lacked some small details. These details make the difference in such a partnership and they might end up sabotaging such a project.

While going through the contract, for example, the employer's in-house team, you won't be able to describe the exact role of the Project Manager, the Cost consultant, and the Technical Controller as. They are part of the project as client representative but

their job description and their roles in the project are unclear. Moreover, It's mentioned in the Letter of Acceptance that all communication regarding Works carried out should be addressed to three main parties: the Employer himself, the Engineer, and the Project Manager/ Coordinator, but the time frame and the method are not specified.

If we continue through the Contract, the notice clause mentioned that the address referred in any notice should be marked for the attention of the Project Manager/Coordinator. Whereas in the Contract itself, none of the clauses mentioned that the Contractor should send or inform the Project manager about anything. Almost all the notices sent by the Contractor should be addressed to the Engineer with a copy to the Employer, and vice versa.

Moreover, concerning the Suspension Order, it is the responsibility of the Engineer to inform the Contractor to suspend part or whole of the Works. The engineer isn't the one to make the decision, as the consent of the employer is essential. In case the Suspension Order exceeded 90 days, it is the contractor's responsibility to inform the engineer through a written notice of his intention to proceed with the work, bearing in mind the consent of the Employer. Clearly, the Engineer's part in this clause is a middle man; he plays the role of communicating and his authority is limited or transferred to the Employer.

Concerning the extension of time, the employer is the one to grant it, after due consultation with the Engineer and the Contractor in case the delay is caused by a Variation Order, Suspension Order, expected risks, and if the Employer or any of his representatives are the reason behind any delays. It's the Contractor responsibility to send a written notice within 28 days after any event, with a copy to the Employer, with

full detailed particulars, and it's up to him to keep track of the concurrent events. On the other hand, if the Contractor's alleged right of Extension of Time got rejected, there is no clear next step in which the Contractor can claim his right.

On the subject of notice of Claims, the Contractor shall send a written notice to the Engineer, with a copy to the Employer, while the previous notice clause states in the particulars that any notice related to the Works should be addressed to the Project Manager. This creates a conflict: to whom should the Contractor send the claim notice. Moreover, the Sub-Clause did not mention to which party the Contractor shall respond is it to the Employer, the Engineer, or the Project Manager?

As an example of the missing part of communication between the participants, there was a letter sent from the Contractor to the Project Manager asking him about his entitled amount of money related to 10 months of the 13 months amended Variation Order. The response was unclear and not conclusive. Shockingly, the Employer responded by stating that the Project Manager is not entitled to that action, as his opinion represents a third party and not the Employer's. This makes a conflict with the Letter of Acceptance.

Another missing part of the Contract is the issue of substantial completion. The Engineer is the one who issues the Taking Over Certificate. It is his responsibility either to accept or reject the whole Work and ask for modification, certainly while informing the Employer of his reasons. He is not entitled of certifying a substantial completion of part of the Work until the rest of it is done and usable for the benefit of the Employer.

All of the above shows the absence of communication between the in-house team and the Contractor, in addition to the chaotic way of assigning the authority

between all involved parties. From the Contract point of view, there is no clear conclusion that the in-house team has a clear role in the Contract Administration (it seems that the Employer is the only one in charge of the entire decision making).

## CHAPTER IV

### BENCHMARKING WITH STANDARD CONTRACT CONDITIONS

#### **4.1. Preamble**

This chapter will be a comparison between the Case's Contract conditions and the FIDIC1999. It will emphasis on the main issue encountered in the project, which is the delayed payment process, and how both Contracts deal with it. It also shows the clauses that the Contractor shall use while facing such problem, in both Contracts, in addition to the consequences related to these actions. Moreover, this chapter will highlight the main clauses missing in the Case's conditions while paralleling it to the FIDIC.

Furthermore, this chapter will provide us with the reasons behind choosing this Case by validating the two main matters of this thesis: the adhesion Contract, and the defused authority of the Engineer.

#### **4.2. Delayed Payment Process via FIDIC 1999**

This paragraph shows what the main clauses that a Contractor shall use when facing the issue of delayed payment by the Employer if the Contract is FIDIC 1999.

The figure 4.1 shows all the main clauses that the Contractor shall use when the Employer refuses or delays any payments. Theses clauses will be explained more in details through the coming paragraphs.

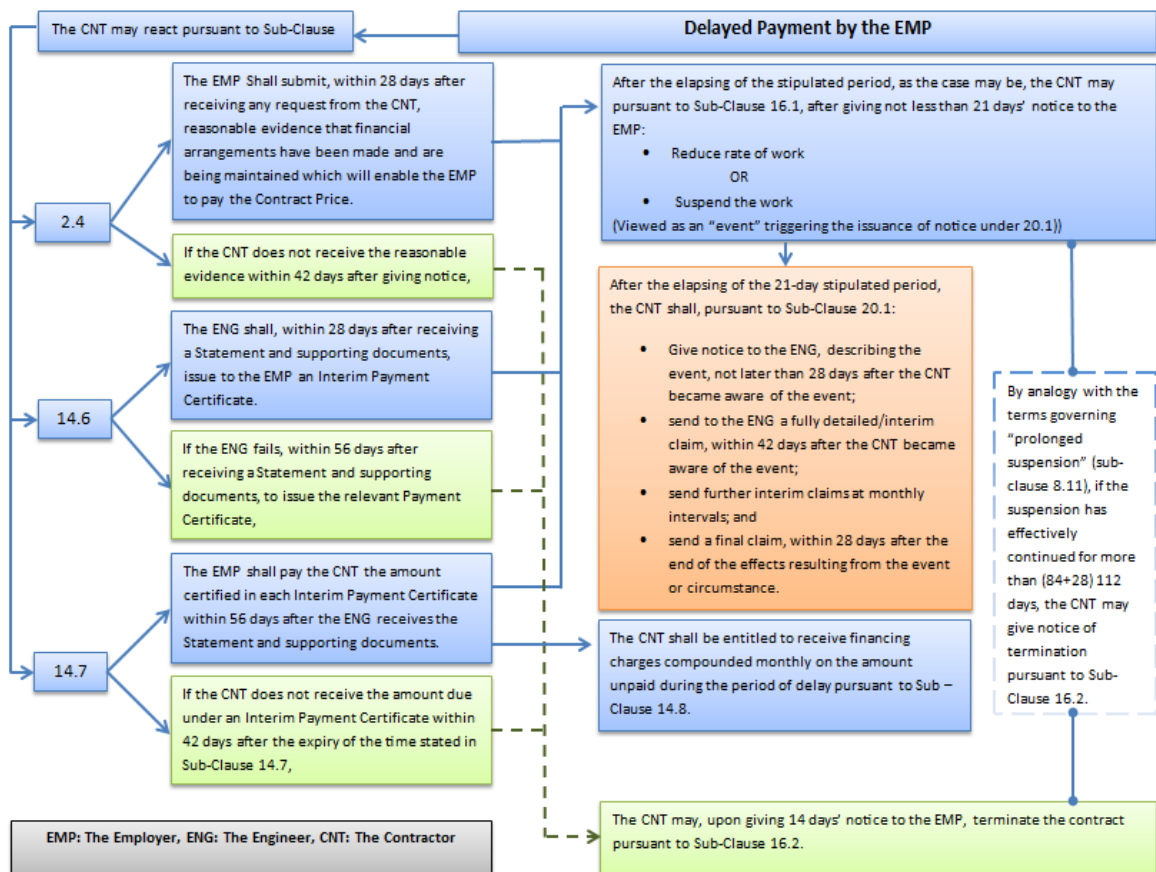


Figure 4.1 delayed payment process via FIDIC99

#### 4.2.1. Sub-Clause 2.4 the Employer's Financial Arrangements

This is the first sub-clause that the Contractor shall use when facing a delayed payment by the Employer. It gives the Contractor the right to ask for a proof regarding the Employer's ability to pay his dues to the Contractor.

“The Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable



the Employer to pay the Contract Price (as estimated at that time) in accordance with Clause 14 (Contract Price and Payment). If the Employer intends to make any material change to his financial arrangements, the Employer shall give notice to the Contractor with detailed particulars.”

If the 28 days given notice by the Contractor have elapsed and the Employer did not respond, the Contractor shall react under the Sub-clause 16.1(Contractor’s Entitlement to Suspend Work).

#### ***4.2.2. Sub-Clause 14.6 Issue of Interim Payment Certificates***

This is the second sub-clause that the Contractor shall use when dealing with a delayed payment by the Employer. It is the Contractor’s responsibility to provide all the documents related to the work completed during each month to the Engineer. These documents will be the base upon which the Engineer will issue his Interim Payment Certificate.

“The Engineer shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with supporting particulars.”

If the Engineer fails to certify an Interim Payment Certificate after the specified time, although he received all the required documents, the Contractor has the right to proceed in accordance with the Sub-Clause 16.1(Contractor’s Entitlement to Suspend Work).

#### ***4.2.3. Sub-Clause 14.7 Payment***

This Sub-Clause shows the normal process of payment, when all the requirements from the Contractor, the Engineer, and the Employer are met.

“The Employer shall pay to the Contractor the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents.”

If the Contractor does not receive the amount mentioned in the Interim Payment Certificate within the 56 days, he shall also react in accordance with the Sub-Clause 16.1(Contractor’s Entitlement to Suspend Work).

Moreover, the Contractor shall be entitled under the Sub-Clause 14.8(Delayed Payment) to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date of payment specified in Sub-Clause 14.7(Payment).

#### ***4.2.4. Sub-Clause 16.1 Contractor’s Entitlement to Suspend Work***

This Sub-Clause provides the Contractor with the right to reduce the rate of Work and/or to suspend the Work depending on the situation. This Sub-clause is related to the Sub-Clause 2.4(Employer’s Financial Arrangement), Sub-Clause 14.6(Issue of Interim Payment Certificate), and Sub-Clause 14.7(Payment). It is used after the stipulated period has elapsed, as the case may be. The Contractor may pursuant to this Sub-Clause, after giving a 21 days' notice to the Employer, reduce the rate of Work or suspend the Work.

“If the Engineer fails to certify in accordance with Sub-Clause 14.6(Issue of Interim Payment Certificates) or the Employer fails to comply with Sub-Clause 2.4(Employer’s Financial Arrangements) or Sub-Clause 14.7(Payment), suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment, as the case may be and as described in the notice.”

By considering the Contractor's action an "event", it will trigger the Claim Sub-Clause 20.1, as this suspension or reduced rate of work will affect the Time of Completion of the Project and will increase the cost of construction. The Contractor, by norm, has the right to claim for his loss since the Employer is the reason behind these variations.

“If the Contractor suffers delay and/or incurs Cost as a result of suspension work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1(Contractor’s Claims) to:

- a) An extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4(Extension of Time for Completion),  
and
- b) Payment of any such Cost plus reasonable profit, which shall be included in the Contact Price”

Moreover, by analogy with the terms governing "prolonged suspension" (Sub-Clause 8.11), if the suspension has effectively continued for more than (84+28) 112

days, the contractor may give notice of termination pursuant to Sub-Clause 16.2(Termination).

On the other hand, if the Contractor did suspend the Work or reduce the rate of Work, but he did not send a termination notice to the Employer, and at the same time he received the delayed payment, the Contractor shall proceed with the Work normally.

“If the Contractor subsequently receives such Payment Certificate, evidence or payment (as described in the relevant Sub-Clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.”

#### ***4.2.5. Sub-Clause 16.2 Termination by Contractor***

There are several factors that allow the Contractor to trigger this Sub-Clause and terminate the Contract. The Employer’s action is one of the main reasons behind the Contractor's decision of terminating such a contract. For example, if the Contractor does not receive reasonable evidence (under Sub-Clause 2.4 Employer’s Financial Arrangements) within 42 days after giving a notice, he will be entitled to terminate the Contract. Moreover, the same action shall be used regarding the Issue of Interim Payment Certificates and Payment, but with a difference in the time period regarding each Sub-Clause notice.

“The Contractor shall be entitled to terminate the Contract if:

- a) The Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1(Contractor’s

Entitlement to suspend Work) in respect of a failure to comply with Sub-Clause 2.4(Employer's Financial Arrangements),

- b) The Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate,
- c) The Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.7(Payment) within which payment is to be made (except for deduction in accordance with Sub-Clause 2.5(Employer's Claims)),
- d) A prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11(Prolonged Suspension),

In any of these events or circumstances, the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract.”

Surely, the Contractor's election to terminate the Contract shall not prejudice any other rights of the Contractor under the Contract or otherwise.

#### ***4.2.6. Sub-Clause 20.1 Contractor's Claims***

When the Contractor uses the aforementioned clauses and reduces the rate of the Work or even suspends the Work, the Employer shall normally expect an increment in the Cost of the Project, in addition to serious delays in the Time of Completion of the Project.

By norm, the Contractor will claim for compensation regarding the extra cost, and an extension of time regarding the wasted time due to the reduced productivity.

These Claims will fall under the Contractor's Claims (Sub-Clause 20.1). The FIDIC text below is a summary of the Contractor's Claim Sub-Clause 20.1.

“If the Contractor considers himself to be entitled to any extension of the Time of Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed.

If the event or circumstance giving rise to the claim has a continuing effect:

- a) This fully detailed claim shall be considered as interim;
- b) The Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

- c) The Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.”

We notice that the result of a claim is either an extension of time or an additional payment. Both decisions are in the hand of the Engineer. The Figure 4.2 shows more of the related Sub-Clauses regarding the procedure that the Contractor shall use after submitting a claim.

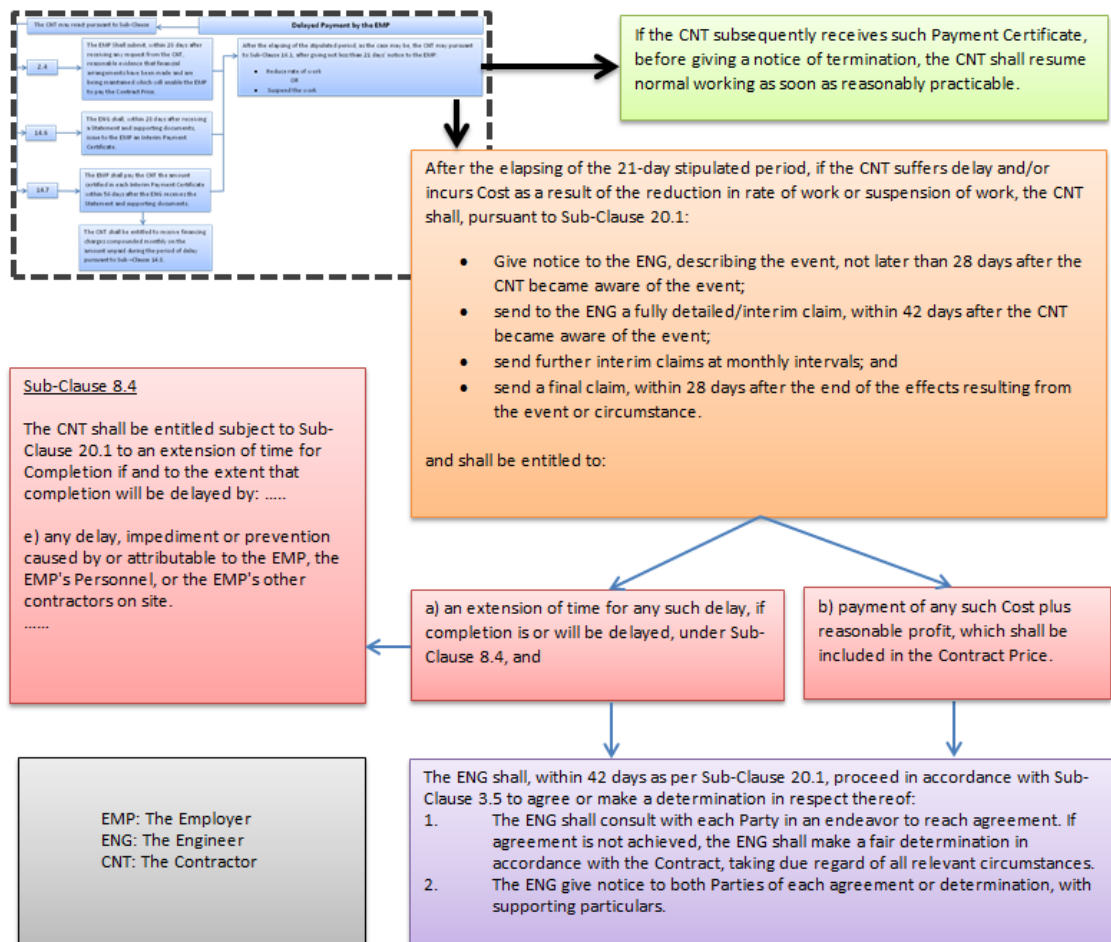


Figure 4.2 Claim Process via FIDIC99

#### 4.2.7. Sub-Clause 8.4 Extension of Time for Completion

As mentioned before, one of the Claim result is an extension of time. There are several reasons why a Contractor might claim for an Extension of Time, and one of them is if the Employer or any of his representatives is responsible for such delay.

“The Contractor shall be entitled subject to Sub-Clause 20.1 (contractor’s Claims) to an extension of the Time for Completion if and to the extent that completion for the purposes pf Sub-Clause 10.1 (Taking



Over of the Works and Sections) is or will be delayed by any of the following causes:

- (e) Any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site.

If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 (Contractor's Claims). When determining each extension of time under Sub-Clause 20.1, the Engineer shall review previous determinations and may increase, but shall not decrease, the total extension of time.”

A delayed payment by the Employer that leads to suspension of the work or reduction of productivity will normally have an effect on cost and time. Normally, the Contractor shall claim for extension of time under this Sub-clause as it's one of his rights.

#### ***4.2.8. Sub-Clause 3.5 Determinations***

Whether it's an additional payment claim or an extension of time claim, the Engineer is the one who is responsible to determine the time or payment to be given to the Contractor, after due consultation with the concerned party. Normally, it takes the Engineer 42 days to answer on the Contractor's request of claim.

“Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavor to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.”

The Engineer's decision is not binding, which gives the Contractor the right to accept or reject the Engineer's decision.

#### **4.3. Delayed Payment Process via the Case Documents**

The next couple of paragraphs will discuss the delayed payment process via the case documents that this thesis is built upon. It will also show the clauses that the Contractor shall use when facing such a problem. Hopefully, it will pave the road for the comparison between the Case Documents and the FIDIC99.

Moreover, Figure 4.3 explains more about the process that the contractor shall use when facing such a problem.

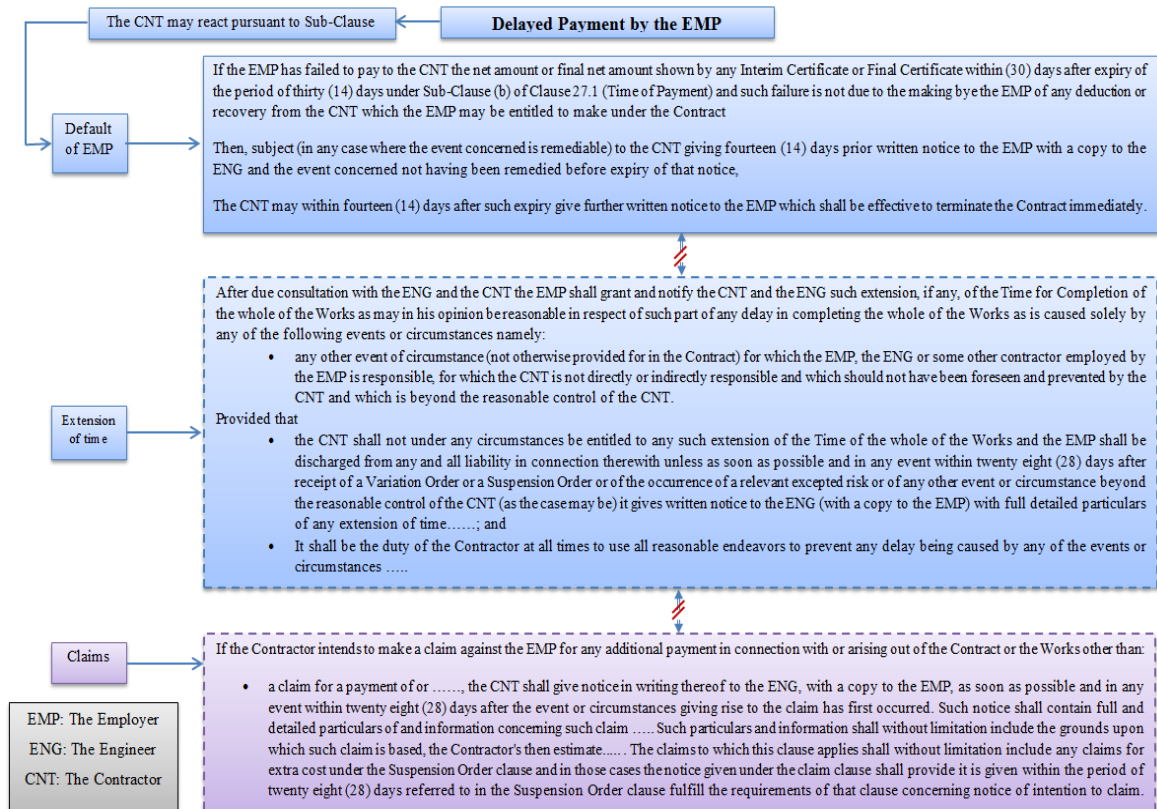


Figure 4.3 Delayed Payment Process via the Case's Conditions

#### 4.3.1. Sub-Clause termination, Default of Employer

In this Case, when the Employer does not pay the Interim Payment after 14 days of the issuance of the Interim Payment Certificate by the Engineer, the Contractor shall respond by sending a 14 days' notice to the Employer regarding the missing payment. After the elapsing period of the first notice, coupled with the rejecting of payment by the Employer, the Contractor may terminate the contract within the following 14 days. This consideration shall be effective as soon as the notice expires.

“If the Employer Has failed to pay to the Contractor the net amount or final net amount shown by any interim certificate or final certificate within fourteen (14) days after expiry of the period of fourteen

(14) days under sub-clause of the time of payment and such failure is not due to the making by the Employer of any deduction or recovery from the Contractor which the Employer may be entitled to make under the contract or otherwise Then, subject (in any case where the event concerned is remediable) to the contractor giving fourteen (14) days prior written notice to the Employer with a copy to the Engineer and the event concerned not having been remedied before expiry of that notice, the Contractor may within (14) days after such expiry give a further notice to the Employer which shall be effective to terminate the contract immediately.”

After the elapsing of the 14 days period, where the contractor is alleged to terminate, and the termination of the contract was executed under the Default by Employer Clause, the Contractor has the right to claim for the unpaid money that he deserves. Moreover, if the contractor does not terminate within the stipulated period, the case's conditions do not specify if the contractor loses his entitlement for termination or not.

#### ***4.3.2. Sub-Clause Extension of Time***

This Sub-Clause shall be responsible of all the cases that give the Employer the chance of extending the Time of Completion of the whole project or a part of it. It also shows that the only way the Contractor may claim for Extension of Time is if the Employer or one of his representatives is the reason behind the delay. Moreover, it

demonstrates the main responsibilities that the Contractor shall ensure when such delays appear.

“After due consultation with the Engineer and the Contractor the Employer shall grant and notify to the Contractor and the Engineer such extension, if any, of the time of completion of the whole of the works as may in his opinion be reasonable in respect of such part of any delay in completing the whole of the works as is caused solely by any of the following events or circumstances namely;

- Any other event or circumstance (not otherwise provided for in the contract) for which the Employer, the Engineer or some other contractor employed by the Employer responsible, for which the Contractor is not directly or indirectly responsible, and which should not have been foreseen and prevented by the Contractor and which is beyond the reasonable control of the Contractor.

Provided that;

- 1) The Contractor shall not under any circumstances be entitled to any such extension of the time for completion of the whole of the works and the Employer shall be discharged from any and all liability in connection therewith unless as soon as possible and in any event within twenty eight (28) days after receipt of a variation order or a suspension order or the occurrence of a relevant excepted risk or of any other event or circumstances beyond the reasonable control of the Contractor (as the case may be) it gives written notice to the Engineer (with a copy to the Employer) with

full and detailed particulars of any extension of time which it may consider itself entitled together with any other notice required by the contract and relevant to such event or circumstance; and

- 2) It shall be the duty of the Contractor at all times to use all reasonable endeavors to prevent any delay being caused by any of the events or circumstances mentioned in paragraphs (a) to (d) inclusive of this clause, to minimize any such delays as may be caused thereby, and to do all that may be reasonably required, to the satisfaction of the Engineer, to proceed with the works.”

We notice from this clause that the Contractor has limited authority when it comes to claiming for an Extension of Time. The only reason that he is able to use such a clause is when the Employer is responsible for the delay. It also illustrates that it is the Contractor's responsibility to avoid delays, to provide the Employer or the Engineer with the particulars related to any delays, and to send a written notice informing the Engineer about the appearance of any delay with a copy to the Employer.

#### ***4.3.3. Sub-Clause Claim, Notice of Claims***

This Sub-Clause contains the main reasons that allow the Contractor to apply for a Claim or to send a Notice of Claim to the Engineer. Moreover, it shows that the Contractor has only 28 days to send a notice of claim, or otherwise he shall lose his right for what he is claiming for. Furthermore, it obliges the Contractor to prepare a fully detailed particular to be presented simultaneously with the Notice of Claim.

“Notwithstanding any other provision of the contract, if the Contractor intends to make a claim against the Employer for any additional payment in connection with or arising out of the contract or the works other than a claim for a payment of or on account of any variation order issued pursuant to the variation order clause, the Contractor shall give notice in writing thereof to the Engineer, with a copy to the Employer, as soon as possible and in any event within twenty eight (28) days after the event or circumstances giving rise to the claim has first occurred. Such notice shall contain full and detailed particulars of and information concerning such claim insofar as those particulars are or that information is then known to it or reasonably available to it. Such particulars and information shall without limitation include the grounds upon which such claim is based, the Contractor's then estimate as to the amount of the aforesaid claim and details of the build-up of such estimate. The claims to which this clause applies shall without limitation include any claims for extra cost under the suspension order clause and in those cases the notice given under the claim clause shall provide it is given within the period of twenty eight (28) days referred to in the suspension order clause fulfill the requirements of that clause concerning notice of intention to claim.”

#### **4.4. Comparison of Delayed Payment Process**

This Paragraph will compare the delayed payment process between the FIDIC99 and the Case's conditions. It will show the differences between these two contracts in the parallel clauses, in addition to the responsibilities assigned to each participant of the contract in the related clauses. There will also be the essential clauses that the Contractor shall use when dealing with a delayed payment by the Employer in both Contracts.

The first Sub-Clause that the Contractor shall use when dealing with a delayed payment in the Case's conditions is the Default of Employer. It gives the Contractor the right to send a 14 days' notice after the elapsing of the 14 days period wherein the Employer should have paid the Contractor the Interim Payment Certificate issued by the Engineer. Then, if no payment is due by the Employer, the Contractor may terminate within the following 14 days under the Default of Employer Sub-Clause.

The Second Sub-Clause is the Extension of Time. It is mentioned that if the Contractor is not responsible of any delays, and the Employer or any of his representatives are the main reason behind such delays, then the Contractor has the right to claim for an Extension of Time within 28 days of the occurred event. He also needs to use all the endeavors to protect the Time of the project from expanding due to any delays.

While a delayed payment may affect the productivity of the Contractor as a reason for shortage of money, the Contractor isn't entitled neither to suspend the Work nor to reduce rate of work. Both actions are in the hands of the Employer; he is the only one who has the power to use such action to his benefits.



A final act by the Contractor is to submit a Notice of Claim. In the Case's conditions, the Contractor has the right to submit a notice of claim coupled with fully detailed particulars within 28 days of the concurrent event. After submitting a Claim, the Case's conditions do not show when the Contractor shall expect an answer regarding his Claim nor the official party that should respond.

A simple conclusion from the Case's Contract is that all the aforementioned Clauses are not related to each other, the only clear procedure the Contractor may use when dealing with delayed payment is the first one(14 days' notice and then termination of Contract).

When comparing with the FIDIC99, the first Sub-clause to be used by the Contractor is 2.4(Employer's Financial Arrangements). When the Employer fails to pay an Interim Payment Certificate, the Contractor has the right to send a notice to the Employer asking for financial evidence regarding his ability to fund the project. The Employer should respond within 28 days after the issuing of the notice. If the Contractor does not receive a convincing answer from the Employer within the 28 days, he has the right to act in accordance with Sub-Clause 16.1(Contractor's Entitlement to Suspend Work) by either reducing the rate of work or by suspending part or whole of the Work.

Another Sub-Clause to be used by the Contractor is 16.1(Issue of Interim Payment Certificates). It is used when the Engineer is the reason behind delaying the payment. When the Engineer does not issue an Interim Payment Certificates within 28 days after receiving the proper evidence and documents from the Contractor, the

Contractor has the right to act in accordance with Sub-Clause 16.1(Contractor's Entitlement to Suspend Work).

Moreover, if the Employer does not pay any Interim Payment Certificates within the 56 days after its issuing, the Contractor shall also act in accordance with Sub-Clause 16.1(Contractor's Entitlement to Suspend Work). He also has the right to receive financing charges compounded monthly on the amount unpaid during the period of delay pursuant to Sub-Clause 14.8(Delayed Payment).

Furthermore, if the Contractor does not receive a convincing evidence within 42 days after the Contractor request in accordance with Sub-Clause 2.4(Employer's Financial Arrangements); if the Engineer fails to issue an Interim Payment Certificate within 56 days after receiving the related document from the Contractor in accordance with Sub-Clause 16.1(Issue of Interim Payment Certificates); and if the Contractor does not receives the amount due in the Interim Certificate within 42 days after the normal payment period (56 days), the Contractor may, upon giving a 14 days' notice to the Employer, terminate the Contract in accordance with Sub-Clause 16.2(Termination by Contractor).

The next step the Contractor shall do by means of FIDIC99 is to submit a claim. The Contractor shall, within 28 days of the occurring, submit a notice of claim. Then within 42 days he shall submit a fully detailed particular regarding the claim. The Engineer shall give his opinion within 42 days after receiving the detailed particulars and his decision might be as an extension of time or as an additional payment.

## 4.5. Dispute Resolution Process via FIDIC 99

The second step after submitting a claim, getting a decision by the Engineer, and if this decision got rejected by the Contractor, he shall use one of the three dispute resolution methods mentioned below.

The next couple of paragraphs will go through the dispute resolution process as described in the FIDIC 99 documents. There will be a summarized description of each method, in addition to some comments related to each Sub-Clause.

The Figure 4.4 shows how the Contractor shall use the Sub-Clauses mentioned in the FIDIC99 when dealing with one of the dispute resolution methods.

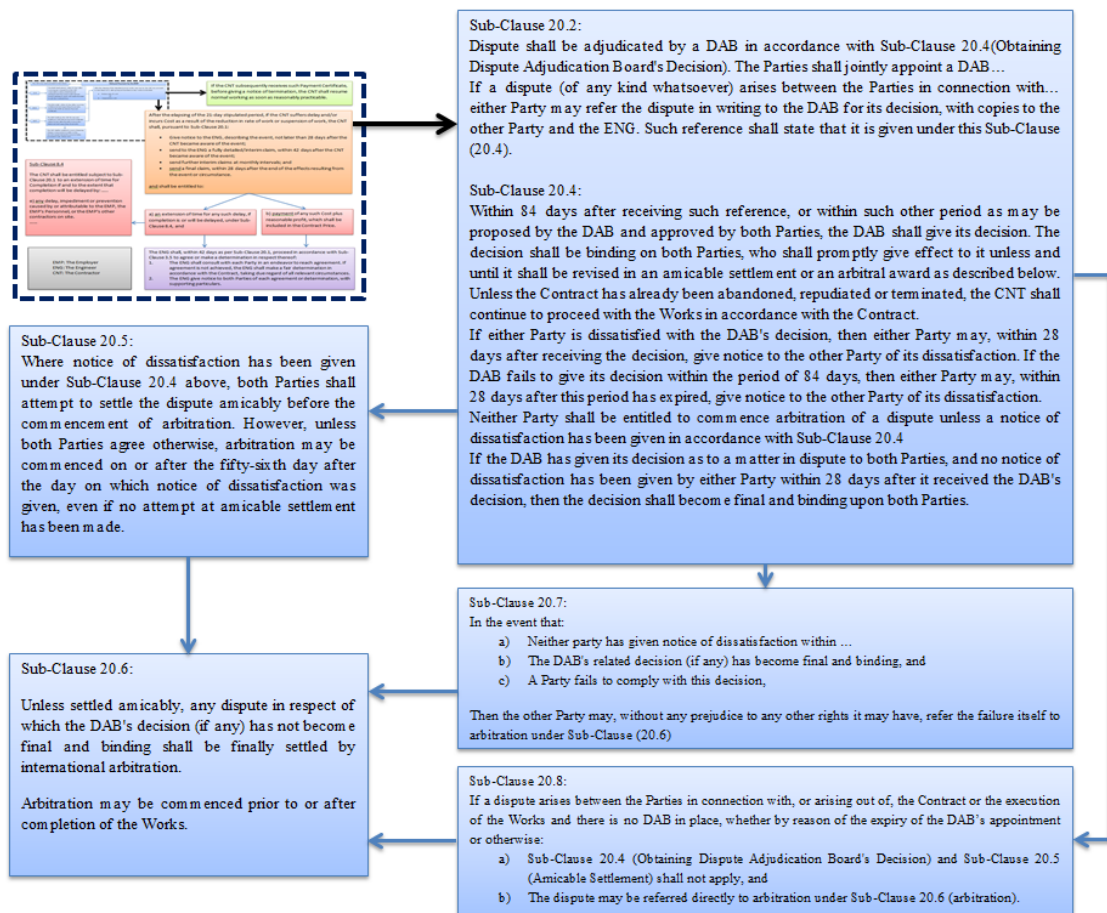


Figure 4.4 Dispute Resolution Process via FIDIC99

#### ***4.5.1. Sub-Clauses 20.2/20.3/20.4/20.7/20.8 Dispute Adjudication Board Process***

##### ***(DAB)***

The first method to be used in the Dispute Resolution process is DAB. Normally, DAB members are assigned at the beginning of a project to be able to keep track of all events and to provide the contracting parties with their advice when needed. Some Contracts prefer that DAB members will be assigned only when a problem arises. In both ways, the main reason of DAB is to resolve the problem between the contracting parties.

In the next sub-paragraphs there will be a summarized explanation regarding how DAB works, how their members get assigned, how the decision shall be taken, when the decision is binding and when it's not, and when the differed parties shall move to the next method.

##### **4.5.1.1. Sub-Clause 20.2 Appointment of the Dispute Adjudication Board**

This Sub-Clause is a summary of the procedure that both disputed parties shall follow when naming the DAB members.

“Dispute shall be adjudicated by a DAB in accordance with Sub-Clause 20.4(Obtaining Dispute Adjudication Board's Decision). The Parties shall jointly appoint a DAB by the date stated in the Appendix to tender.

The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons (“the members”). If the

number is not stated and the Parties do not agree otherwise, the DAB shall comprise three persons.”

There is more information regarding the procedure that should be followed by the contractual parties, while what is mentioned here is just a summary that shows the fairness of assigning the DAB. Moreover, it indicates the importance of assigning the right person by both parties hoping to solve the disagreement as soon as possible.

#### 4.5.1.2. Sub-Clause 20.4 Obtaining Dispute Adjudication Board’s Decision

One of the main duties of DAB is to give their decision after analyzing the problem and gathering all the correlated information from the disputed parties. This decision is binding until one of the disputed parties issues a dissatisfaction notice within 28 days after the release of the DAB decision. Moreover, by sending this notice, the party who is dissatisfied with the decision of DAB states its desire of going to use the next method of Dispute Resolution which is Amicable settlement. On the other hand, if both parties remain silent against the DAB decision, it means that they agreed upon its conditions, and if the 28 days period elapses then neither party shall be entitled to commence Arbitration.

“If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the ENG. Such reference shall state that it is given under this Sub-Clause (20.4).

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the CNT shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

Neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with Sub-Clause 20.4

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.”

What is mentioned before is the way the DAB take its decision. It's just a summary of what might happen during this process.

4.5.1.3. Sub-Clause 20.7 Failure to Comply with Dispute Adjudication Board's Decision

This Sub-Clause describes the situation when both parties kept silent toward the DAB decision and none of the disputed parties issued a notice of dissatisfaction.

“In the event that:

- a) Neither party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 (Obtaining Dispute Adjudication Board's decision)
- b) The DAB's related decision (if any) has become final and binding, and
- c) A Party fails to comply with this decision,

Then the other Party may, without any prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 (Arbitration). Sub-Clause 20.4 (obtaining Dispute Adjudication Board's decision) and Sub-Clause 20.5 (Amicable Settlement) shall not apply to this reference.”

The result of this Sub-Clause is that the only way both parties may meddle with the DAB decision is by going to Arbitration. Note that Amicable Settlement shall not apply in this stage of dispute.

#### 4.5.1.4. Sub-Clause 20.8 Expiry of Dispute Adjudication Board's Appointment

This Sub-Clause shows that delaying the appointment of DAB by either party is resolvable. This delay might just be a tool to buy more time, or to show the intention of denying a fast solution as a result of imagining being the upper member.

“If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- a) Sub-Clause 20.4 (Obtaining Dispute Adjudication Board's Decision) and Sub-Clause 20.5 (Amicable Settlement) shall not apply, and
- b) The dispute may be referred directly to arbitration under Sub-Clause 20.6 (arbitration).”

Normally, if the disputed parties couldn't appoint DAB members, then getting a decision by them would be impossible. Moreover, by norm the Amicable Settlement would be inapplicable, as one or both parties couldn't agree on DAB members and resolving a problem amicably sounds impossible.

#### ***4.5.2. Sub-Clause 20.5 Amicable Settlement***

This is the second dispute resolution method that shall be used after the DAB. It shows the good intention between the disputed parties by trying to sort things out before involving with arbitrators and Arbitration.



“Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.”

This Sub-Clause might be skipped if both parties agreed upon and knew that the dispute can't be solved amicably.

#### ***4.5.3. Sub-Clause 20.6 Arbitration***

This is the final method used to resolve a dispute Via the FIDIC99 conditions. Its decision is binding, final, and forcible by the law.

“Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- a) The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
- b) The dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
- c) The arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4(law and language).

The arbitrator(s) shall have the full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works. ”

It is essential to pin point that the Arbitration is conducted under the International Law of Arbitration, the arbitrator(s) get full power to access all the related information regarding the dispute, and that Arbitration might be commenced while the project is in progress or when it's completed.

## 4.6. Dispute Resolution Process via the Case's Documents

In the next paragraphs there will be a description of the dispute resolution process mentioned in the case's conditions. It includes the main methods mentioned in the Case's Contract, its order, and its usage.

The figure 4.5 shows the path that the Contractor shall follow when using one of the dispute resolution methods, in addition to the main rules mentioned in each method, to be carefully followed by the Contractor.

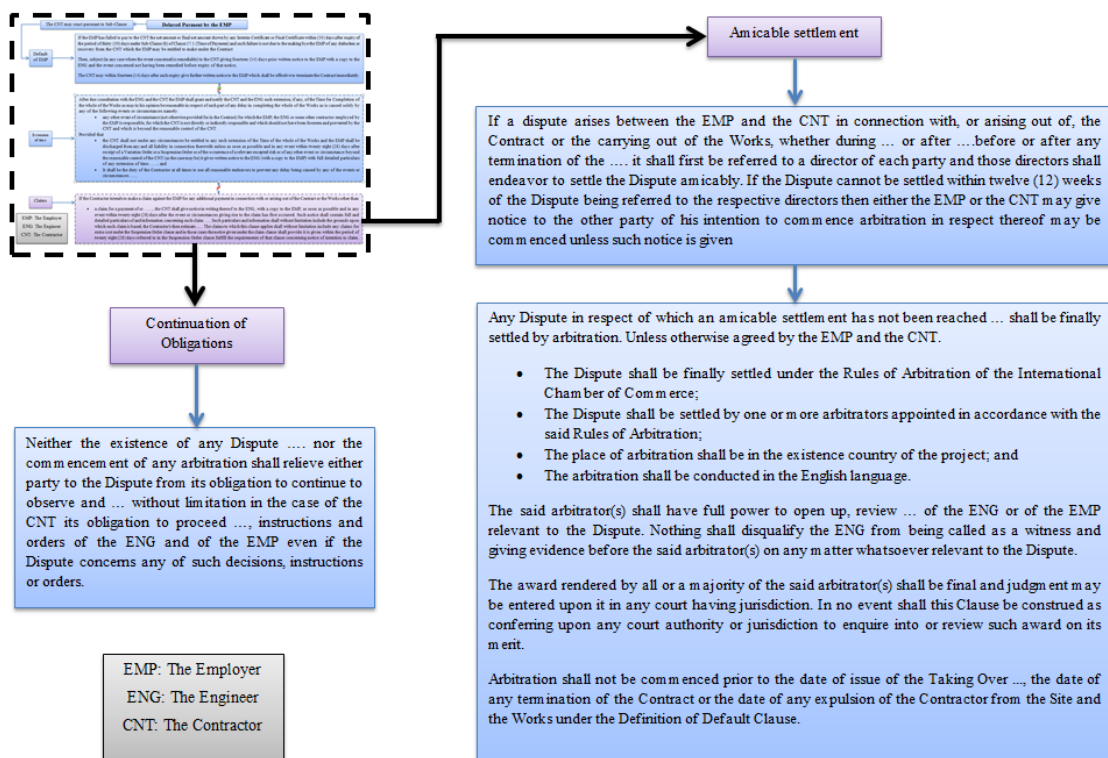


Figure 4.5 Dispute Resolution Process via the Case's Conditions

#### ***4.6.1. Sub-Clause Amicable Settlement***

The Amicable Settlement is the first method to be used by the Contractor when trying to solve a dispute. In this stage the tension between the disputed parties is minimal and the possibility of resolving the problem amicably is high.

“If a dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the carrying out of the Works, whether during the carrying out of the Works or after their completion and whether before or after any termination of the Contract, including any dispute as to any decision, opinion, instruction, order, certificate, determination or valuation of the Engineer or of the Employer (in this Clause referred to as a “Dispute”) it shall first be referred to a director of each party and those directors shall endeavor to settle the Dispute amicably. If the Dispute cannot be settled within twelve (12) weeks of the Dispute being referred to the respective directors then either the Employer or the Contractor may give notice to the other party of his intention to commence arbitration, as hereinafter provided, as to such Dispute and no arbitration in respect thereof may be commenced unless such notice is given.”

We notice that the amicable settlement method might be used while the project is still ongoing or while it's completed. Each participant shall provide one director as a representative and those directors shall attempt to solve the argument. If no settlement is met then both parties may refer the dispute to Arbitration.

#### ***4.6.2. Sub-Clause Arbitration***

This Sub-Clause represents the arbitration method to resolve a dispute. It explains the main rules that both disputed parties shall follow when solving a problem. It also provides the arbitrator(s) with permissions to collect, interview, and ask for any information that might help with the decision.

“Any Dispute in respect of which an amicable settlement has not been reached in accordance with the Amicable Settlement Clause shall be finally settled by arbitration. Unless otherwise agreed by the Employer and the Contractor.

- The Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;
- The Dispute shall be settled by one or more arbitrators appointed in accordance with the said Rules of Arbitration;
- The place of arbitration shall be in the existence country of the project; and
- The arbitration shall be conducted in the English language.

The said arbitrator(s) shall have full power to open up, review, revise any decision, opinion, instruction, order, certificate, determination or valuation of the Engineer or of the Employer relevant to the Dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the said arbitrator(s) on any matter whatsoever relevant to the Dispute.

The award rendered by all or a majority of the said arbitrator(s) shall be final and judgment may be entered upon it in any court having jurisdiction. In no event shall this Clause be construed as conferring upon any court authority or jurisdiction to enquire into or review such award on its merit.

Arbitration shall not be commenced prior to the date of issue of the Taking Over certificate to be issued under the Taking Over Certificate Sub-Clause, the date of any termination of the Contract or the date of any expulsion of the Contractor from the Site and the Works under the Definition of Default Clause.”

A significant remark regarding this Sub-Clause is that Arbitration shall not be commenced until the project is done.

#### ***4.6.3. Sub-Clause Continuation of Obligations***

This Sub-Clause is to show that the Contractor is obliged to finish the Work even if there were several problems related to work. It also shows that dealing with any dispute resolution methods won't make the Contractor lose any of his obligations.

“Neither the existence of any Dispute as mentioned in the Dispute Clause nor the commencement of any arbitration shall relieve either party to the Dispute from its obligation to continue to observe and perform each and every term, condition and provision of the Contract on its part to be observed or performed, including without limitation in the case of the Contractor its obligation to proceed with the carrying out and completion

of the Works and the remedying of defects therein and to do so in accordance with the decisions, instructions and orders of the Engineer and of the Employer even if the Dispute concerns any of such decisions, instructions or orders.”

#### 4.7. Comparison of Dispute Resolution Process

In this paragraph there will be a description of the main differences related to the dispute resolution process between the FIDIC99 conditions and the case’s conditions. It will also show the main clauses that the Contractor shall use when using one of the dispute resolution methods available.

The following figure 4.6 shows the methods available to the Contractor in accordance with the case’s contract conditions.



Figure 4.6 Case’s Dispute Resolution Process Timeline

When the contractor faces a problem, the first action he shall take in accordance with the case’s contract conditions is to submit a notice of claim with all the particulars related to the problem. The submission of the notice should be within no more than 28 days after the occurrence of the issue. Otherwise, the contractor will lose his right to claim for anything related to the problem. In addition to the aforementioned

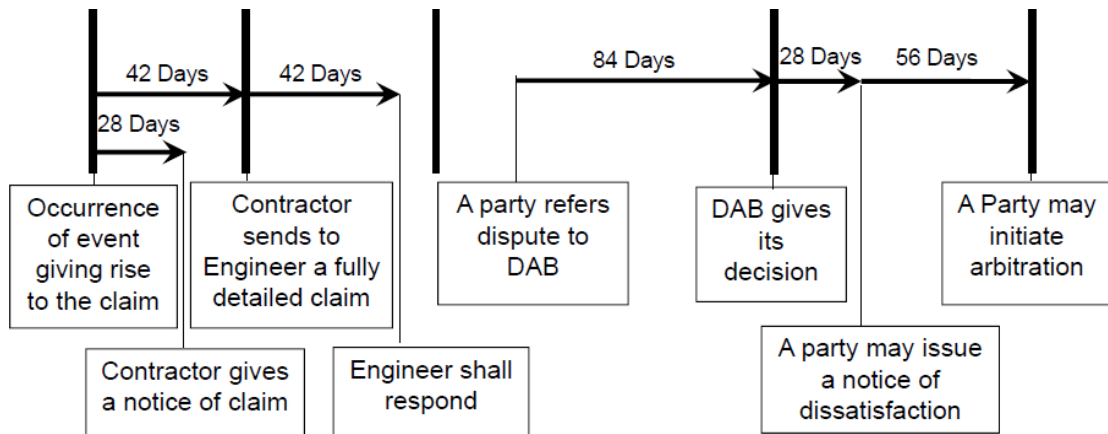
information, the contract does not specify when or who shall respond to the contractor claim.

Moreover, while the construction is ongoing, both parties have the right to solve any problem amicably by assigning a director from each party, who shall represent the interest of the represented party. If both directors achieve a neutral solution that both parties agreed upon, the decision will be binding but otherwise the method used will be considered as a failure and they shall move to the next method available in the contract, which is arbitration.

Arbitration, as mentioned in the case's conditions, shall not be commenced until the project is complete, and the taking over certificate is issued by the engineer. That means the contractor shall complete the work even if there were several problems during the construction. On the other hand, the rules of arbitration used in the case's conditions are the same ones used in any standard form of contract and they also follow the international rules of arbitration.

The figure 4.7 shows the methods available for dispute resolution under the FIDIC99 conditions. It shows all the available clauses that the contractor shall use when facing a problem.





**Figure 4.7 FIDIC99 Dispute Resolution Process Timeline**

As the FIDIC declared, the first action the contractor shall consider while facing a problem is submitting a notice of claim. It should be within 28 days of the issue's occurrence. Then, within 42 days from the date of submitting a notice, the contractor shall submit fully detailed particulars that support his claim. The engineer shall respond to the contractor claim within 42 days after the submission of the particulars.

Thereafter, there is a gap between the engineer decision and the Dispute Adjudication Board (DAB) procedure, which is the second dispute resolution method. It should begin when one of the disputed parties refers the problem to the DAB. The DAB will announce their decision within 84 days. Its decision will be binding if no notice of dissatisfaction is submitted within the following 28 days.

The third method is Amicable Settlement, which shall take no more than 56 days. Any party may suggest using this method to settle the problem with the least

possible complication. If amicable settlement is to fail, then both parties might refer the problem to arbitration.

Finally, it is important to pinpoint that all methods used via FIDIC99 (DAB, Amicable Settlement, Arbitration) may be commenced while the work is ongoing.

#### 4.8. Comparison of termination clause

In this section, there will be a summary regarding the termination process via the case's condition and via the FIDIC99 conditions.

It can be seen from figure 4.8, the only procedure available for the contractor to use to terminate the contract. The whole procedure takes no more than 44 days until the contractor may terminate the contract, and only if he uses his right directly after considering the employer in default under the payment clause. On the other hand, the case's conditions let the contractor unrestricted by not stating when he should send the notice of termination, which gives the contractor a window of patience during which he expects the employer's payments.

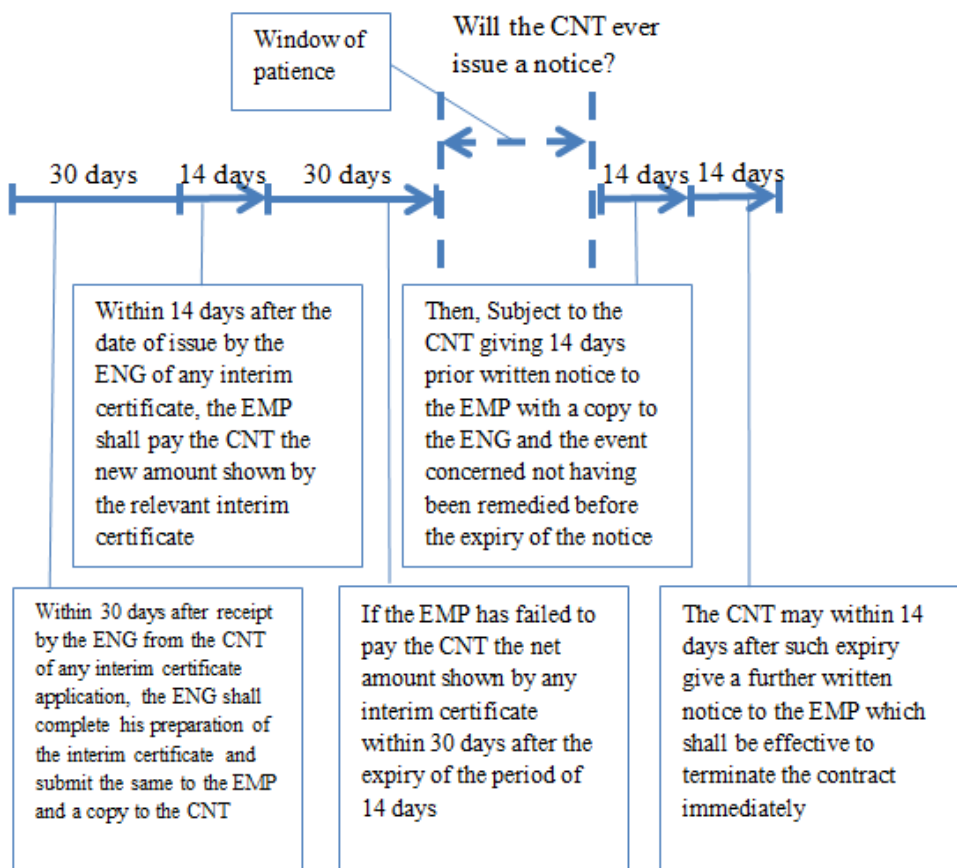


Figure 4.8 Termination Timeline via Case's Conditions

On the other hand, it can be seen in figure 4.9 that there are several clauses that the contractor might use that lead him to termination. The earliest one is under the payment clause, as the termination can be executed in 56 days (42+14). While the longest one may take the contractor 84 days (24+42+14). It can be notice that the procedure used in FIDIC's conditions takes more time than the one validated in the case's conditions.

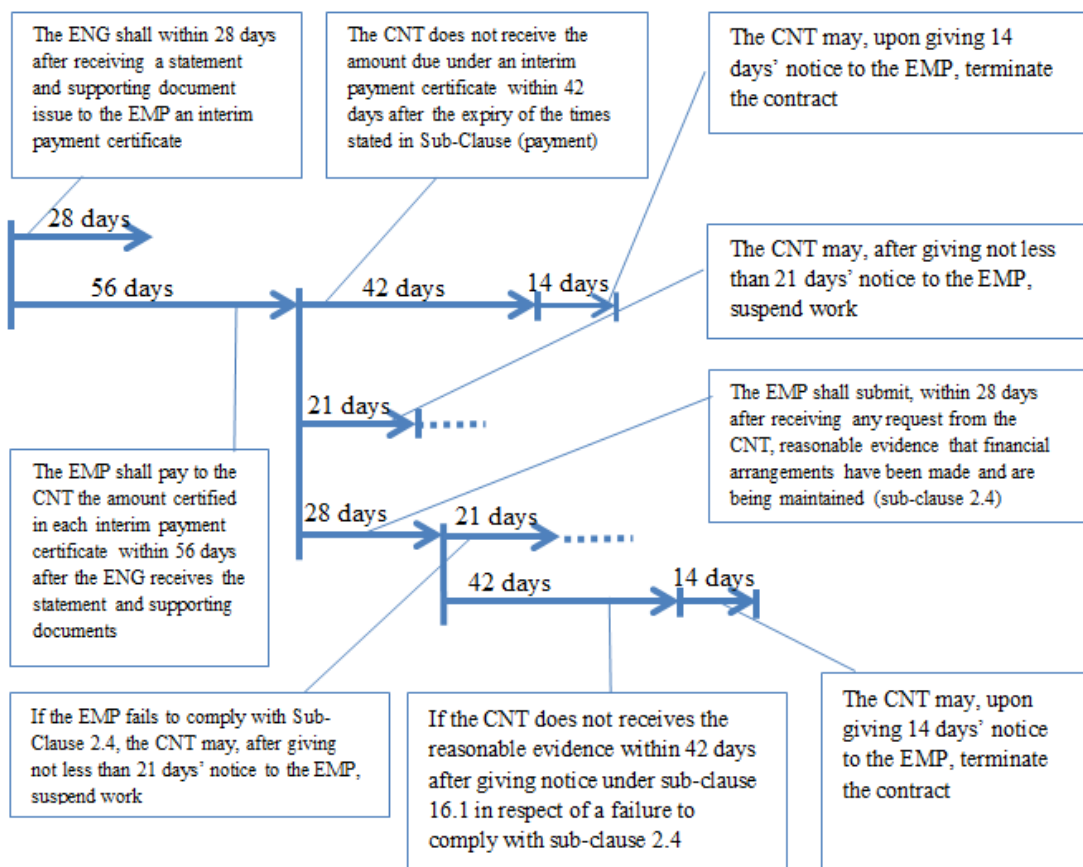


Figure 4.9 Termination Timeline via FIDIC 99's Conditions

#### **4.9. Adhesion's characteristics of the case's contract conditions**

In this section, there will be a summary of the comparison between all the case's contract conditions with the relative clauses from the FIDIC99 to show the unbalance of the case's conditions and to prove the reason why we consider this contract as an adhesion contract.

Table 4.1 shows the comparison between the main relative conditions in both contracts. In the comments column, it highlights the main differences in addition to the missing information in the cases' conditions.

For example, the table shows in the claim section that the contractor shall submit a claim within 28 days to the engineer, but on the other hand it does not specify when he should expect a response regarding his claim. Another unbalance condition is the suspension order clause; it shows that the employer is the only member of the contractual parties to suspend the work. The contractor authority does not authorize him to suspend the work neither to reduce the rate of work, even if there were any arising issue that might trigger the suspension order clause in a balance contract conditions.

Table 4.1 Adhesion’s Characteristics of the Case’s Conditions

Clause Subject	Standard Conditions (FIDIC99)	Case’s Conditions
<b>Payment Lag Time</b>	Payment by Employer is linked to date of submittal of a payment application by Contractor.	Payment by Employer is linked to <u>date of certification by Engineer.</u>
<b>Payment Default</b>	<ul style="list-style-type: none"> <li>• Entitle Contractor to: <ul style="list-style-type: none"> <li>○ Request evidence of Employer’s financial arrangements;</li> <li>○ Reduce rate of work;</li> <li>○ Suspend work; and</li> <li>○ Terminate contract.</li> </ul> </li> <li>• Establish eligibility for the Contractor to request a time extension and/or an additional compensation in case work rate reduction or suspension has been exercised.</li> </ul>	<ul style="list-style-type: none"> <li>• Entitle Contractor to: <ul style="list-style-type: none"> <li>○ <u>N/A</u></li> <li>○ <u>N/A</u></li> <li>○ <u>N/A</u></li> <li>○ Terminate contract, while setting a <u>time boundary</u> for contractor’s right to exercise termination.</li> </ul> </li> <li>• Give <u>no reference to eligibility</u> of contractor to request a time extension and/or an additional compensation.</li> </ul>
<b>Time Extension Claims</b>	<ul style="list-style-type: none"> <li>• List causes of delay to be: <ul style="list-style-type: none"> <li>○ a variation or substantial change in a work item’s quantity;</li> <li>○ a cause of delay giving entitlement under any sub-clause (including suspension by Contractor);</li> <li>○ exceptionally adverse climatic conditions;</li> <li>○ Unforeseeable shortage in materials and personnel; and</li> <li>○ Any impediment or prevention attributable to Employer or his personnel.</li> </ul> </li> <li>• Contractor to notify within 28 days from date of event.</li> <li>• Contractor to submit particulars within 42 days from date of event.</li> <li>• Engineer to respond within another 42 days, at least on the principle of the claim.</li> </ul>	<ul style="list-style-type: none"> <li>• List causes of delay to be: <ul style="list-style-type: none"> <li>○ a variation;</li> <li>○ Suspension <u>by Engineer</u>;</li> <li>○ Defined expected risks;</li> <li>○ Any other event or circumstance <b><u>(not otherwise provided for in the contract)</u></b> attributable to Employer or his personnel.</li> </ul> </li> <li>• Contractor to <u>notify and to submit</u> particulars to Engineer within 28 days.</li> <li>• <u>Authority to issue a time extension rests with Employer</u>, with no time bar set for responding.</li> </ul>

<p style="text-align: center;"><b>Additional Compensation Claims</b></p>	<ul style="list-style-type: none"> <li>• Contractor to notify within 28 days from date of event.</li> <li>• Contractor to submit particulars within 42 days from date of event.</li> <li>• Engineer to respond within another 42 days, at least on the principle of the claim.</li> </ul>	<ul style="list-style-type: none"> <li>• Contractor to <u>notify and to submit</u> particulars to Engineer within 28 days.</li> <li>• <u>Authority to issue a time extension rests with Employer</u>, with <u>no time bar set</u> for responding.</li> <li>• <u>No mention of party (Engineer, Project Manager, or Employer) responsible or authorized</u> for issuing a response to Contractor.</li> </ul>
<p style="text-align: center;"><b>Disputes and Amicable Settlement</b></p>	<ul style="list-style-type: none"> <li>• Dispute can be “of any kind whatsoever” in relation to all actions made by Engineer.</li> <li>• Period triggered upon issuing a notice of dissatisfaction in respect of Engineer’s or DAB’s Decision.</li> </ul>	<ul style="list-style-type: none"> <li>• Dispute can be in relation to all actions made by Engineer or Employer, <u>but excluding those by Project Manager</u>, and is <u>not described to include non-payment</u> by Employer.</li> <li>• <u>No stipulation of Engineer’s or DAB’s Decision</u>.</li> <li>• Period triggered at any time upon the arising of a dispute, as prescribed above.</li> </ul>
<p style="text-align: center;"><b>Arbitration Proceedings</b></p>	<ul style="list-style-type: none"> <li>• May be commenced prior to or after the completion of the works.</li> </ul>	<ul style="list-style-type: none"> <li>• May be commenced <b><u>only upon the issuance of the Taking-Over Certificate</u></b> in respect of the works.</li> </ul>

All that is mentioned above show the reasons why we are considering this case’s contract conditions as adhesion. The idea of acting differently against such contract was born, which means in a way that protects the contractor, reduce the effect of disequilibrium of the contract, and maybe help the contractor to claim for some of his rights. It is hoped that, this research will come up with some recommendations that might advise the contractor while dealing with similar contract. These actions acting as tactics might be beneficial before or while being part of such an agreement.

## CHAPTE V

### ANALYSIS OF CONTRACTOR ACTIONS AND RECOMMENDED TACTICS

#### **5.1. Preamble**

As a result of all the information mentioned in the previous chapters regarding the case's contract conditions, its weaknesses, and its unfairness, and after comparing this case's conditions with the FIDIC99 and proving that it is an adhesion contract, this chapter will be the analysis regarding all the events that occurred during the construction of the project. It will also highlight all the actions made by the contractor during the main issue, comparing them with action available via the case's conditions, and analyzing them in accordance with the relative conditions mentioned in the FIDIC99. Moreover, it will include all the actions missing in the case's conditions and are available in the FIDIC99, these actions that might have saved the contractor from his immense loss.

Furthermore, there will be a timeline that shows the character that the employer was entitled to during the five consecutive delayed payments, a list of the chronological event that all the analysis was built upon.

Finally, at the end of this chapter, there will be the actions that the contractor should use when facing such adhesion contract, in addition to recommendations that hopefully might be generalized to be used or even be considered by contractors that put themselves in a similar environment.



## **5.2. Evolvement of delay events**

In this section, there will be several timelines/grant charts that show the duration that each delayed payment took, and the procedure that the contractor might have used using the case's condition or the FIDIC99. Moreover, there will be a grant chart that shows the five consecutive payments, their interference, and their overlapping.

Figure 5.1 shows the five delayed payments presented in a real time scale to be able to analyze the interaction between them. In addition to that, the purpose of this grant chart is to show the normal procedure that the contractor could have used, in accordance with the case's conditions, when dealing with these payments. On the other hand, it also presents the milestones that reflect the date the employer had settled each delayed payment. Each milestone shows the period between when the payment was due and when the employer settled the payment.

Apr 2015				May 2015				Jun 2015				Jul 2015				Aug 2015				Sep 2015				Oct 2015				Nov 2015				Dec 2015				Jan 2016					
5/4	12/4	19/4	26/4	3/5	10/5	17/5	24/5	31/5	7/6	14/6	21/6	28/6	5/7	12/7	19/7	26/7	2/8	9/8	16/8	23/8	30/8	6/9	13/9	20/9	27/9	4/10	11/10	18/10	25/10	1/11	8/11	15/11	22/11	29/11	6/12	13/12	20/12	27/12	3/1	10/1	17/1
<b>1st delayed payment</b>																																									
Employer to be considered in breach of 1st payment ( in default )																																									
1st 14 days' notice regarding the 1st delayed payment																																									
14 days' period the contractor may terminate the contract																																									
◆ Employer settled the 1st delayed payment																																									
◆ 2nd delayed payment																																									
Employer to be considered in breach of 2nd payment ( in default )																																									
1st 14 days' notice regarding the 2nd delayed payment																																									
14 days' period the contractor may terminate the contract																																									
◆ Employer settled the 2nd delayed payment																																									
◆ 3rd delayed payment																																									
Employer to be considered in breach of 3rd payment ( in default )																																									
1st 14 days' notice regarding the 3rd delayed payment																																									
14 days' period the contractor may terminate the contract																																									
◆ Employer settled the 3rd delayed payment																																									
◆ 4th delayed payment																																									
Employer to be considered in breach of 4th payment ( in default )																																									
1st 14 days' notice regarding the 4th delayed payment																																									
◆ Employer settled the 4th delayed payment																																									
◆ 5th delayed payment																																									
Employer to be considered in breach of 5th payment ( in default )																																									
1st 14 days' notice regarding the 5th delayed payment																																									
14 days' period the contractor may terminate the contract																																									
◆ Employer settled the 5th delayed payment																																									

Figure 5.1 Evolvement of delay events

As it will be shown later, the sequence of events depicted in figure 5.1 facilitates the deductions as to the status of the employer in terms of his fulfillment of contract conditions in respect to payments, whether in the form of being held in breach and or in default, and the options that were at the disposal of the contractor during such periods.

It can be noticed from figure 5.1 that the contractor, by simply following the available action by the case's contract, could have used his entitlement of termination several times easily. For example, the contractor could have terminated the contract in the first, second, third, and fifth payment. On the other hand, he could have issued a notice of termination in the fourth delayed payment. It can also be noticed that the available actions for the contractor to be used are very limited.

Moreover, Figure 5.1 shows the synchronization of the employer being in breach of a payment while at the same time he is in default under another payment.

From figure 5.1 the interaction period between each payment can be extracted to come up with figure 5.2.

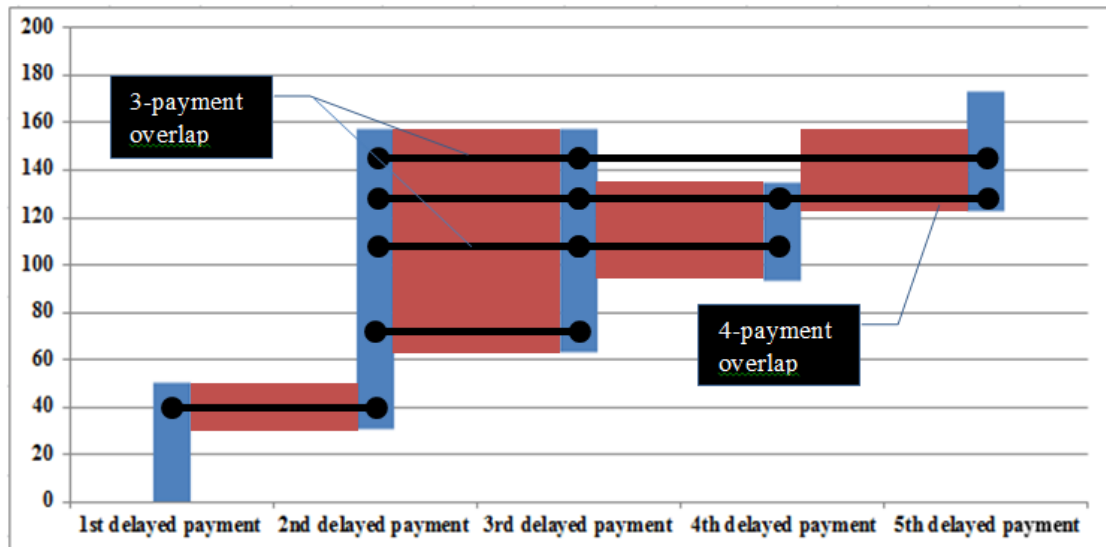


Figure 5.2 Overlapping of the Delayed Payments

It can be readily seen that an overlap in varying lengths exists between the delay periods of every two consecutive payments with the longest overlap being between the delay periods of the second and third payments.

Furthermore, two three-payment overlaps can be observed among the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> on one hand, and 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> on the other. In between these two overlaps, one overlap in delay over a short period of time existed among the delay periods pertaining to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> payments.

It can be further deducted that no stoppage of work was affected by the contractor as evidence from the fact that billing for work done continued for five consecutive payment cycles.

Finally, it can obviously be concluded that the financial restraints faced by the contractor were at their peak at the start of the delay corresponding to the 5<sup>th</sup> payment, which signifies a point in time where the amount included in a total of then four payments certificates have become overdue.

### **5.3. Benchmarking delays with FIDIC99' conditions and case's conditions**

In this section there will be a comparison between the facts related to the events during the five consecutive payments with the FIDIC99's conditions and the case's conditions. This benchmarking will address the available actions via the case's conditions and the FIDIC99's conditions and period of each delayed payment in a timely manner.

#### ***5.3.1. Benchmarking delays with the case's conditions***

In this section, I built two scenarios in accordance with the available action for the contractor. The first scenario (figure 5.4) shows that if the contractor was dealing with any of the five consecutive delayed payments when the notice of termination for each payment is over, the contractor could have had terminated the contract from the first day of the 14 days available for termination (best case scenario). As the figure 5.4 shows, the contractor had the chance to terminate the contract in the first, second, third,

and fifth payment, while on the second payment, the notice of termination had two more days until the contractor could have had the chance to terminate the contract.

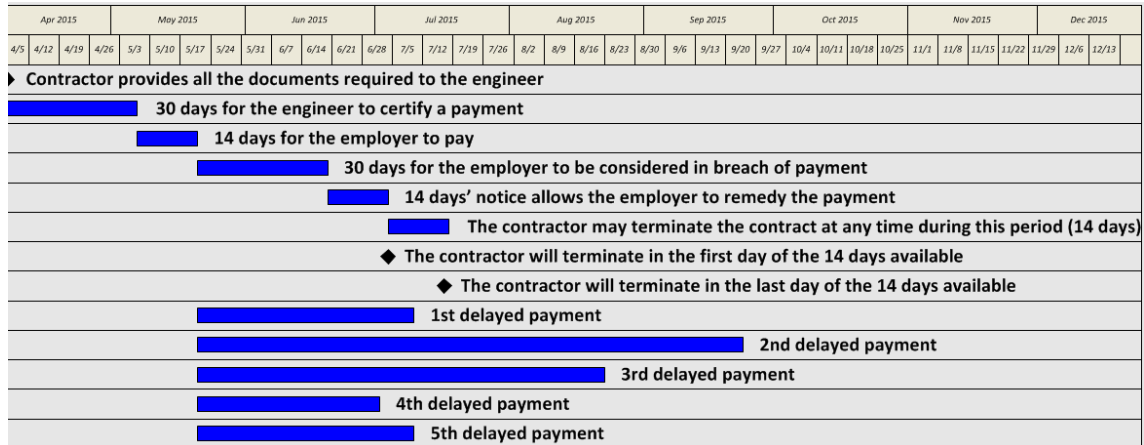


Figure 5.3 Best/Worst Contractor's Scenario

Figure 5.4 also shows the second scenario (worst case scenario for the contractor). It shows that if the 14 days' notice of termination were over, and the contractor were to terminate in the last day of the 14 days that the contractor may within terminate the contract. We notice that the contractor could have had terminated the contract in just the second and the third payments.

### 5.3.2. Benchmarking delays with the FIDIC99' conditions

In this section, delayed payments are examined in relation to FIDIC99's conditions. This way we can do a simple comparison regarding the available actions via FIDIC and the action described in the case's conditions.

Figure 5.3 shows the timeline regarding each payment with the corresponding action available via FIDIC.

Apr 2015			May 2015			Jun 2015			Jul 2015			Aug 2015			Sep 2015			Oct 2015			Nov 2015			Dec 2015			Jan 2016			Feb 2016			Mar 2016															
4/5	4/12	4/19	4/26	5/3	5/10	5/17	5/24	5/31	6/7	6/14	6/21	6/28	7/5	7/12	7/19	7/26	8/2	8/9	8/16	8/23	8/30	9/6	9/13	9/20	9/27	10/4	10/11	10/18	10/25	11/1	11/8	11/15	11/22	11/29	12/6	12/13	12/20	12/27	1/3	1/10	1/17	1/24	1/31	2/7	2/14	2/21	2/28	3/6
▶ Contractor provides all the documents required to the engineer																																																
Engineer to certify a payment																																																
56 days for the employer to pay																																																
42 days for the employer to be considered in breach of payment																																																
21 days' notice of suspension																																																
◆ The contractor may suspend the work																																																
14 days' notice of termination																																																
◆ The contractor may terminate the contract																																																
Contractor request reasonable evidence regarding financial arrangement under Sub-Clause 2.4																																																
◆ Employer did not respond for the contractor request																																																
21 days' notice of suspension																																																
◆ The contractor may suspend the work																																																
If the employer does not respond on the contractor request within the 42 days after receiving the notice under 2.4																																																
14 days' notice of termination																																																
◆ The contractor may terminate the contract																																																
1st delayed payment																																																
2nd delayed payment																																																
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4th delayed payment																																																
5th delayed payment																																																

Figure 5.4 FIDIC 99 Process Regarding the Five Delayed Payment

These conditions would have allowed the contractor to exercise suspension of the work after 21 days from the start of a payment breach by the employer and to effectively terminate the contract after 56 days from the start of such a payment breach. This 56 days (42+14) period offers an earlier chance to exercise termination as oppose to the other opportunity after the elapsing of the 84 (28+42+14) days pertaining to the option of termination due to employer's unfulfillment of the conditions related to disclosing financial arrangements.

Although these conditions afford the employer 12 (56-44) additional days before termination may be exercised by the contractor, the contractor would have had the option of suspending the work after 21 days, as mentioned earlier, an option that did not exist under the case's conditions.

Based on the 56-days' time bar, the contractor could have terminated the contract in respect of the default of the employer under the 2<sup>nd</sup> and 3<sup>rd</sup> delayed payments only.

We notice that in all payments the contractor had the choice of suspending the work in accordance with the contractor's entitlement to suspend work sub-clause. Moreover, if the contractor have had used his right of asking the employer for a financial proof in accordance with sub-clause 2.4 (employer's financial arrangements), and by assuming that the employer will neglect the request, the contractor could have had terminated the contract in just the second and third delayed payment.

We can conclude from this figure that the process via FIDIC takes more time than the case's contract conditions. It gives the employer more time to pay, while on the other hand it gives the contractor several actions to make. That's why a balance type of contract is always represented by FIDIC99.

#### **5.4. Breach/default/notice/termination statuses**

In this section, there will be the analysis related to the employer status, during the delayed payment period related to the five consecutive payments. Moreover, a scenario that was built using the knowledge of date of payment by employer and the relative clauses using the case's conditions. It will also include the latest period where the contractor could have used his entitlement of terminating the contract.

### 5.4.1. Concurrency in prevailing status

This section describes the employer status during the delayed payments. The timeline shown in figure 5.7 defines the employer title regarding each period. Moreover, it shows that the contractor is exercising his right the earliest possible.

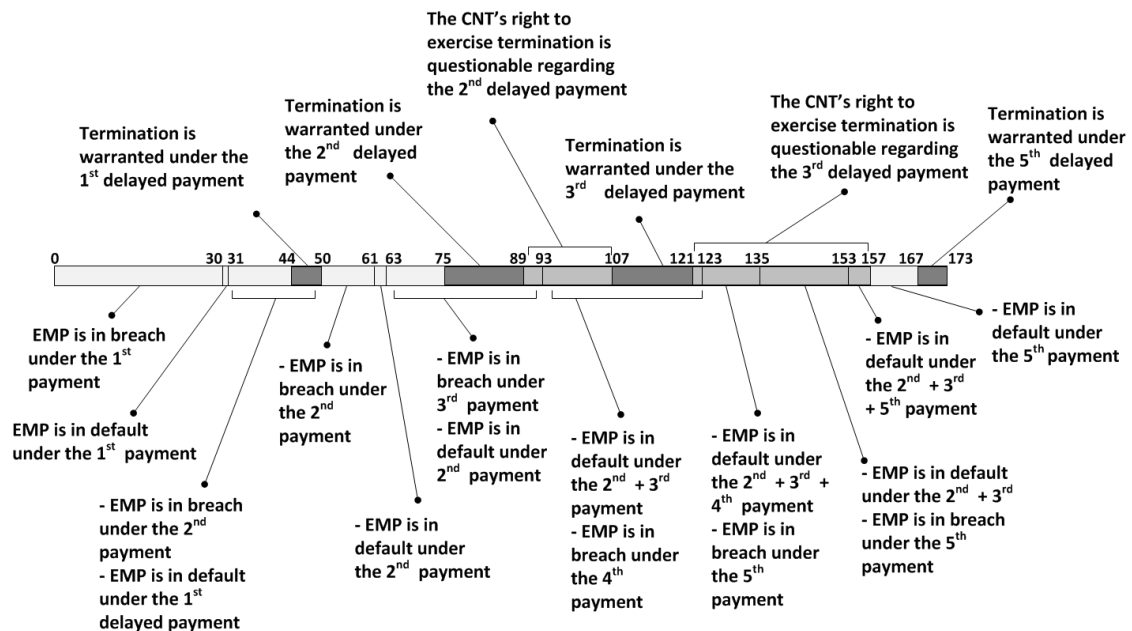


Figure 5.5 Employer's Statuses

From the figure 5.5 we notice that the employer's status changes during the construction of the project. During the period related to the five delayed payments, the employer's status was either to being in breach of a payment or being in default in another payment. Moreover, in various situations the employer was in breach and in default in respects of several payments. A proof of what is mentioned before is the duration shown in the previous timeline between the 93 and 123 days, the employer was in default in accordance with the 2<sup>nd</sup> and 3<sup>rd</sup> payments while being in breach regarding



the 5<sup>th</sup> payment all at the same time. On the other hand, the employer's most critical situation was between the 123 and 135 days when he was in default regarding 3 payments and in breach of one payment.

Furthermore, as we know the contractor, after considering the employer in default, is entitled to send a 14 days' notice of termination, and then terminate the contract within the next 14 days (as it's mentioned in the case's conditions). In the 2<sup>nd</sup> and 3<sup>rd</sup> payment, there were sufficiently time after the last day of termination and the contract conditions do not specify what happens after the elapsing of this period. Does the contractor lose his right of termination? Does he have the ability to terminate whenever he wants during this period? All of that makes the contractor's right questionable.

#### ***5.4.2. Backtracking contractor's opportunities for termination***

In this section, by using all the known periods of delays related to each payment, a scenario of the contractor exercising his right of termination the latest possible was established. As we know, the contractor needs a 14 days' notice of termination that gives him the ability to terminate the contract after it. By knowing the date of each payment, a backtracking regarding the 14 days' notice of termination was met and the minimum period needed to terminate was provided. The results are shown in the figure 5.6.

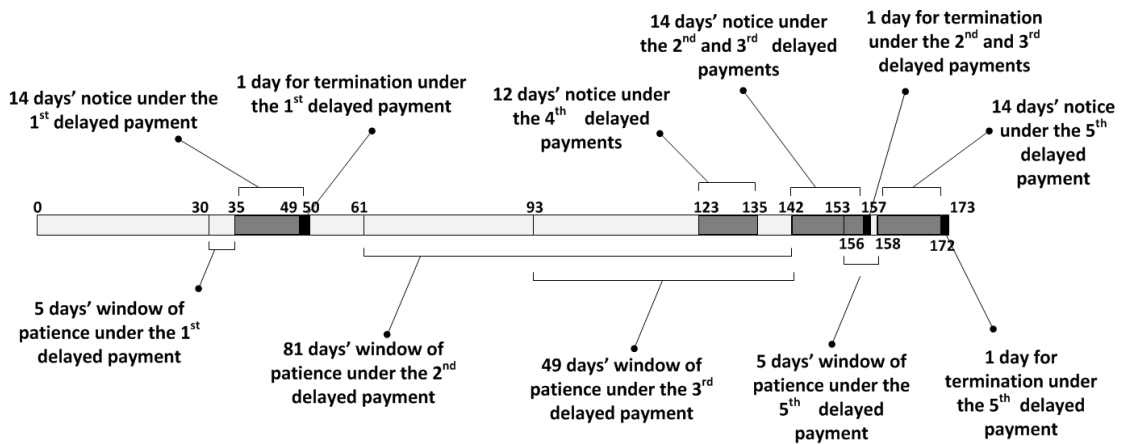


Figure 5.6 Backtracking contractor's opportunities for termination

Figure 5.6 shows that in the first delayed payment, the contractor had the possibility to terminate the contract within 1 day after the fulfillment of the notice, which gives the contractor a patience window of 5 days. The situation in the fifth delayed payment is exactly the same of the first delayed payment, while in the second and third payment both the notice period and the termination period were realized. This situation, in 2<sup>nd</sup> and 3<sup>rd</sup> payments, shows that the contractor by having one day to terminate and 14 days' notice, he would have had a 81 days as a window patient period for the 2<sup>nd</sup> payment, and a 49 days for the 3<sup>rd</sup> payment. Moreover, the contractor had plenty of time to make any action during the patient period. On the other hand, the notice of termination regarding the fourth delayed payment was not fulfilled, as it needed two more days to be completed.

All of that shows that the contractor in both second and third payment had the time to terminate, or even make a move against the employer, while in the first and fifth payment, time was not in favor of the contractor as he had fewer time to make an action.

### **5.5. Action taken/warranted on the part of the contractor**

This section shows a list of the chronological events that occurred during the construction of the project. It will also show all the communication between the contractor, the employer, the engineer, and the project manager. Based on these facts, an assessment was established on the table to show all the actions that the contractor could have made via the case's condition. In addition, it will highlight the available actions via FIDIC99 in a timely manner. The same table will include remarks regarding both FIDIC99 and case's conditions actions. By making this table, we will be able to prove the number of action limited to the contractor as a result of the case's conditions. It will also show the multiple actions accessible via the case's conditions and the FIDIC99's conditions to be used by contractor while dealing with the main issues encountered.

Table 5.1 Action Taken/Warranted on the Part of the Contractor

The Case's Chronological Listing of Important Events														
EMP = Employer / ENG = Engineer / PM =Project Manager / CNT = Contractor														
CLAIM PHASE														
Event(s) Giving Rise to the Claim – Prior to the Issue of Formal Notice														
Entry	Increment/Clock	From / To	Description	Event	Governing contract conditions	Possible action by means of / through FIDIC			Possible action by means of / through the contract					
						Stipulated option	By whom	Nature / Type of action	Stipulated option	By whom	Nature / Type of action	Was any action taken? ( by means of the contract OR otherwise )		Remarks
												Yes	No	
1a	0/0 days	EMP / CNT	Employer did not pay Contractor (1 <sup>st</sup> delayed payment) within period stipulated in the Contract.	Milestone	Payment by the EMP	yes	CNT	► Send a Notice to the EMP in accordance with Sub- Clause 2.4 asking for reasonable evidence regarding financial arrangements. ► The EMP has 42 days to remedy the 1 <sup>st</sup> delayed payment. ► The CNT shall send a 21 days' notice of suspension to the EMP	No				X	The CNT could have sent a letter to the EMP informing him of the expiration of the payment period under the Payment Clause, the action described via FIDIC is not available to the CNT under the Case's conditions
1b	8/8 days	CNT / EMP	Phone conversation with EMP's CEO initiated by the CNT's CEO promised releasing a partial payment.	Phone conversation	Payment	No			No					
2	11/11 days	CNT / EMP	Contractor referred to a Tele-conversation with Employer and requested that a promised partial payment be honored by Employer.	Letter	Payment by the EMP	No			No				X	A phone call between the CNT and the EMP is not enough to be considered by the CNT as a evidence of the EMP intension to pay
3	4/15 days	EMP / CNT	Employer made a partial payment (SR1.0M), in respect of 1 <sup>st</sup> delayed payment.	Partial payment	Payment by the EMP	No			No				X	
4	2/17 days	EMP / CNT	Employer wrote Contractor concerning workforce strike on site, requiring assurances that salaries be paid to laborers as a condition for Employer to release any monies certified as due to Contractor.	Letter	Payment by the CNT	Yes	CNT	Send a letter to the EMP providing him with evidence that the strike is caused by him due to his delayed payment	Yes	CNT	Letter	Entry 5		The action taken by the CNT similar to the action that might be used via FIDIC99
5	2/19 days	CNT / EMP	Contractor clarified that payments to vendors and manpower suppliers would be affected due to Employer's delay in making payment.	Letter	Payment by the EMP	No			No				X	
	0/21 days	CNT / EMP	The Final day of the 21 days' notice of suspension	Milestone	Suspension Order (FIDIC99)	Yes	CNT	The CNT may suspended the work in accordance with the suspension order clause	No				X	This Action is not available by means of the Case's Contract
	0/28 days	CNT / EMP	The CNT did not receive the reasonable evidence regarding financial arrangements	Milestone	Employer's Financial Arrangements (FIDIC99)	Yes	CNT	► He shall send a 21 days' notice under Sub-Clause 16.1 Contractor's Entitlement to Suspend Work in accordance with sub-clause 2.4 ► he shall send a 42 days' notice regardin the maximum period the EMP may respond within	No				X	This Action is not available by means of the Case's Contract
6	11/30 days	CNT / EMP	Contractor was entitled to consider Employer to have become in default under the Contract (30 days of delay – 1st delayed payment).	Milestone, justifying notice in respect of contract termination	Default by EMP	No			yes	CNT	Send to the EMP first 14 days' notice of termination under the 1 <sup>st</sup> delayed payment		X	The CNT ignored his right by not taking any action

7	1/31 days	EMP / CNT	Employer did not pay Contractor (2nd consecutive delayed payment) within period stipulated in the Contract.	Milestone	Payment by the EMP	Yes	CNT	► Send a 42 days' notice to the EMP to remedy the 2nd delayed payment ► Send to the EMP a 21 days' notice of suspension	Yes	CNT	Send a letter to the EMP informing him that he didn't receives neither the First nor the second payment under the payment clause	X	The action described by FIDIC99 is not available by means of the Case's Contract
8	11/42 days	CNT / EMP	<ul style="list-style-type: none"> <li>Contractor informed Employer that such payment delays have had severe impact on progress and on payments to vendors, suppliers, and site staff.</li> <li>Contractor stated that payments should be received within 4 days; otherwise, Contractor would halt all site operations on.</li> <li>Contractor stated that all consequent liabilities shall be carried by Employer, and Contractor's right to compensation in respect of all incurred damages, resulting from payments delay, would not be waived.</li> </ul>	Letter (warning)		No			No			X	<ul style="list-style-type: none"> <li>The CNT does not have the right to suspend the work under the Case's Contract</li> <li>the CNT can't make the EMP responsible for all the liabilities unless the EMP is the one behind the suspension as described by the case's condition</li> </ul>
	0/42 days	CNT / EMP	The EMP did not remedy the 1st delayed payment within the 42 days	Letter	Termination by contractor (FIDIC99)	Yes	CNT	He shall send a 14 days' notice of termination to the EMP	No			X	This Action is not available by means of the Case's Contract
	0/44 days	CNT / EMP	End of the first 14 days notice of termination	Milestone	Termination/default of EMP	No			Yes	CNT	The CNT may terminate the contract within the following 14 days in accordance with the termination/default by EMP Clause	X	The CNT by not terminating the contract within the following 14 days is agreeing on taking the risk of continuing the Work even when no payment is delivered
9	2/44 days	EMP / CNT	Employer stated that payments were being processed, and the delay was tied to the assurances requested under Entry 4.	Letter		No			No			X	Clearly the EMP is prolonging the deliverance of payment by blaming the CNT on the labor strike
10	2/46 days	CNT / EMP	<ul style="list-style-type: none"> <li>Contractor reiterated that strike was an isolated instance, resulted from non-payment by Employer, and never encountered before.</li> <li>Contractor requested process of payments with 7 working days.</li> <li>Contractor was concerned about his company's image being tarnished in the market.</li> </ul>	Letter		No			No			X	The CNT does not have the right to determine within how many days the EMP should pay, he shall just reminds the EMP of the delayed payments
	0/49 days	CNT / EMP	After the elapsing of 21 days notice To suspend the work ( in accordance with the notice uncer the sub-clause 2.4)	Milestone	Contractor's Entitlement to Suspend Work(FIDIC99)	Yes	CNT	Suspend the Work or reduce rate of work under Sub-Clause 16.1	No			X	This Action is not available by means of the Case's Contract
11	4/50 days	EMP / CNT	Employer settled balance of 1st delayed payment	Payment		No			No			X	
	0/52 days	CNT / EMP	The Final day of the 21 days' notice of suspension	Milestone	Contractor's Entitlement to Suspend Work(FIDIC99)	Yes	CNT	The CNT may suspended the work in accordance with the suspension order clause	No			X	This Action is not available by means of the Case's Contract

12	10/60 days	CNT / EMP	<p>Contractor wrote Employer notifying him that:</p> <ul style="list-style-type: none"> <li>• He has not received any response or payments.</li> <li>• In view of the sought legal advice concerning the laws governing the contract, progress rate of all operational works on site will be slowed down, which could lead to ceasing all work until delayed payments are settled.</li> <li>• He is not exercising his right to terminate the Contract, in order to maintain a cordial relation with Employer.</li> <li>• Letters of Credit (LoC) for the supply of materials will be cancelled if payments are not made within 5 days.</li> <li>• LoCs and adjoining expenses related to their issuance shall be paid by Employer.</li> <li>• Future fluctuation in market prices shall be borne by Employer.</li> <li>• If payments are not made by the end of the current month, Contractor will terminate existing workforce contracts, and any arising consequential liability and time lost in the completion of the works shall be carried by Employer.</li> <li>• Employer shall be liable for any compensations or rights due to Contractor as established by law or by Contract.</li> </ul>	Letter, viewed by Contractor as final notice		No			No				X	<ul style="list-style-type: none"> <li>► The CNT should have referred each claim to its relative clause</li> <li>► The action taken by the CNT to suspend the work is similar to the FIDIC99 even if the contract conditions does not allow the CNT to do so</li> <li>► Claiming for extra cost regarding the increment in market price is very reasonable as the employer is the main reason behind the delays but sadly there is nothing similar mentioned in the case's conditions</li> </ul>
13	1/61 days	CNT / EMP	Contractor was entitled to consider Employer to have become in default under the Contract (30 days of delay for the 2nd payment – two consecutive delayed payments).	Milestone, justifying notice in respect of contract termination	Termination/ Default by EMP				Yes	CNT	Send to the EMP a 14 days' notice of termination under the 2'nd delayed payment		X	The CNT ignored his right by not taking any action
14	2/63 days	EMP / CNT	Employer did not pay Contractor (3rd consecutive delayed payment) within period stipulated in the Contract.	Milestone	Default by EMP	Yes	CNT	<ul style="list-style-type: none"> <li>► Send a 42 days' notice to the EMP to remedy the 3'rd delayed payment</li> <li>► Send to the EMP a 21 days' notice of suspension</li> </ul>	No				X	This Action is not available by means of the Case's Contract
	0/70 days	CNT / EMP	The EMP did not answer the CNT request under 2.4 within the 42 days period	Milestone	Employer's Financial Arrangements (FIDIC99)	Yes	CNT	The CNT may send a 14 days' notice of termination	No				X	This Action is not available by means of the Case's Contract
	0/73 days	CNT / EMP	The EMP did not remedy the 2'nd delayed payment within the 42 days	Milestone	Termination (FIDIC99)	Yes	CNT	The CNT may send a 14 days' notice of termination under the 2'nd delayed payment	No				X	This Action is not available by means of the Case's Contract
	0/75 days	CNT / EMP	14 days' notice of termination under the 2'nd delayed payment by EMP had elapsed	Milestone	Termination/ default of EMP	No			Yes	CNT	The CNT may terminate the contract within the following 14 days		X	The CNT ignored his right to by not taking any action
	0/84 days	CNT / EMP	the last day of the 14 days' notice of termination in relation with sub-clause 2.4, the last day regarding the notice of suspension order under the 3'rd delayed payment	Milestone	Termination (FIDIC99)	Yes	CNT	The CNT may terminate the contract, the CNT may also suspend the work	No				X	This Action is not available by means of the Case's Contract
	0/87 days	CNT / EMP	the last day of the 14 days' notice of termination in accordance with the 2'nd delayed payment	Milestone	Termination (FIDIC99)	Yes	CNT	The CNT may terminate the contract	No					
	0/89 days	CNT / EMP	The last day of the 14 days period where the CNT could have terminated the contract within in accordance with the 2'nd delayed payment	Milestone	Termination/ default of EMP	No			Yes	CNT	Terminate the contract under the 2'nd delayed payment		X	The CNT ignored his right by not taking any action at the last day of termination
15	30/93 days	CNT / EMP	Contractor was entitled to consider Employer to have become in default under the Contract (30 days of delay for the 3rd payment – three consecutive delayed payments).	Milestone, justifying notice in respect of contract termination	Termination/ Default by EMP	No			Yes	CNT	Send to the EMP first 14 days' notice of termination under the 3'rd delayed payment		X	The CNT ignored his right by not taking any action

16	0/93 days	EMP / CNT	Employer did not pay Contractor (fourth consecutive delayed payment) within period stipulated in the Contract.	Milestone	Payment by the EMP	Yes	CNT	► Send a 42 days' notice to the EMP to remedy the 4'th delayed payment ► Send to the EMP a 21 days' notice of suspension	Yes	CNT	Send a letter to the EMP informing him that he didn't receives neither the 2nd nor the 3rd payment under the payment clause	X	The action described by FIDIC99 is not available by means of the Case's Contract
	0/105 days	CNT / EMP	The EMP did not remedy the 3'rd delayed payment within the 42 days	Milestone	Termination/ Default by EMP (FIDIC99)	Yes	CNT	The CNT may send a 14 days' notice of termination under the 3'rd delayed payment	No			X	This Action is not available by means of the Case's Contract
17	13/106 days	EMP / CNT	Employer made a partial payment (SR1.5M), in respect of 3rd delayed payment.	Partial payment	Payment	No			No			X	
	0/107 days	CNT / EMP	14 days' first notice of termination under the 3'rd delayed payment by EMP had elapsed	Milestone	Termination/ default of EMP	No			Yes	CNT	The CNT may terminate the contract within the following 14 days	X	The CNT ignored his right by not taking any action
18	3/109 days	ENG / EMP	Engineer certified amount due to Contractor under 5th consecutive payment	Certificate		No			No			X	
19	5/114 days	CNT / EMP	Contractor informed Employer that: • Partial payment made in respect of amount due under 3rd delayed payment is far less from cumulative amount due under 2nd, 3rd, and 4th delayed payment and 5th payment. • Progress rate of all operational works on site will be slowed down, which could lead to ceasing all work until delayed payments are settled (reiteration). • Contractor's refers to partial suspension being the result of employer's failure to make overdue payments to contractor.	Letter	Payment	No			No			X	
	0/114 days	CNT / EMP	The Final day of the 21 days' notice of suspension in accordance with the 4th delayed payment	Milestone	Contractor's Entitlement to Suspend Work(FIDIC99)	Yes	CNT	The CNT may suspended the work in accordance with the suspension order clause	No			X	This Action is not available by means of the Case's Contract
	0/119 days	CNT / EMP	the last day of the 14 days' notice of termination in accordance with the 2'nd delayed payment	Milestone	Termination (FIDIC99)	Yes	CNT	The CNT may terminate the contract	No			X	This Action is not available by means of the Case's Contract
21	7/121 days	PM / CNT	Project Manager responded by making his own interpretation of: • What, in his opinion, constitutes failure of the Employer, stating that for Employer to fail, Employer shall have refused to make payments or rejected Contractor's payments.	Letter	Payment	No			No			X	
	0/121 days	CNT / EMP	The last day of the 14 days period where the CNT could have terminated the contract within in accordance with the 3'rd delayed payment	Milestone	Termination/ default of EMP	No			Yes	CNT	Terminate the contract in accordance with the 3'rd delayed payment	X	The CNT ignored his right by not taking any action
22	2/123 days	CNT / EMP	Contractor was entitled to consider Employer to have become in default under the Contract (30 days of delay for the 4th payment – three consecutive delayed payments).	Milestone, justifying notice in respect of contract termination	Termination/ default of EMP	Yes	CNT	► Send a 42 days' notice to the EMP to remedy the 4'th delayed payment ► Send to the EMP a 21 days' notice of suspension	Yes	CNT	Send to the EMP first 14 days' notice of termination under the 4'th delayed payment	X	This Action mentioned by FIDIC99 is not available by means of the Case's Contract
23	0/123 days	EMP / CNT	Employer did not pay Contractor (5th consecutive delayed payment) within period stipulated in the Contract.	Milestone	Payment	Yes	CNT	► The EMP has 42 days to remedy the 1'st delayed payment. ► The CNT shall send a 21 days' notice of suspension to the EMP	No			X	This Action mentioned by FIDIC99 is not available by means of the Case's Contract
24	12/135 days	EMP / CNT	Employer settled 4th delayed payment	Payment		No			No			X	

25	1/136 days	CNT / EMP	Contractor: • reiterated the reinstatement of his right to claim; • negated the opinion concerning Employer's failure to pay; • Expressed his surprise that response was issued by PM and not Employer and requested that such correspondence on the matter to be maintained between the parties to the Contract; and proposed the scheduling of a meeting with Employer.	Letter		No			No					X	
26	6/142 days	EMP / CNT	Employer, while expressing his reservations regarding Contractor's letter (of Entry 25), concurred to meet with Contractor within two weeks.	Letter		No			No					X	
	0/144 days	CNT / EMP	The Final day of the 21 days' notice of suspension	Milestone	Contractor's Entitlement to Suspend Work(FIDIC99)	Yes	CNT	The CNT may suspended the work in accordance with the suspension order clause	No					X	This Action is not available by means of the Case's Contract
27	3/153 days	CNT / EMP	Contractor was entitled to consider Employer to have become in default under the Contract (30 days of delay for the 5th payment – three consecutive delayed payments).	Milestone, justifying notice in respect of contract termination	Termination/default of EMP	No			Yes	CNT	Send to the EMP a 14 days' notice of termination under the 5'th delayed payment			X	The CNT ignored his right by not taking any action
28	4/157 days	EMP / CNT	Employer settled 2nd delayed payment and the balance of 3rd delayed payment	Payment		No			No					X	
29	8/165 days	EMP / CNT	According to Employer's own version of the minutes of the meeting: • Contractor assured Employer of Contractor's commitment to carry on with the works, • Employer assured Contractor of making good all delayed payments in 10 days, subject to renewal of Performance Bond as per Employer's notification to concerned Bank. • Contractor shall submit a draft completion schedule for discussion with Employer.	Meeting		No			No					X	
	0/165 days	CNT / EMP	The EMP did not remedy the 5'th delayed payment within the 42 days	Milestone	Termination/ Default by EMP (FIDIC99)	Yes	CNT	The CNT may send a 14 days' notice of termination under the 5th delayed payment	No					X	This Action is not available by means of the Case's Contract
	0/167 days	CNT / EMP	14 days' notice of termination under the 5th delayed payment by EMP had elapsed	Milestone	Termination/default of EMP	No			Yes	CNT	The CNT may terminate the contract within the following 14 days in accordance with the 5'th delayed payment			X	The CNT ignored his right by not taking any action
30	8/173 days	EMP / CNT	Employer settled 5th delayed payment.	Payment		No			No					X	
31	1/176 days	CNT / ENG	Contractor submitted new completion schedule.	Transmittal											
32	10/186 days	ENG / CNT	Engineer instructed Contractor to amend and resubmit the proposed completion schedule in accordance with Engineer/PM review comments.	Transmittal Review											
33	56/242	CNT / EMP	CNT took the stand that the time on the project have become at large.	Letter											

(16-02-2011)

13-04-2011

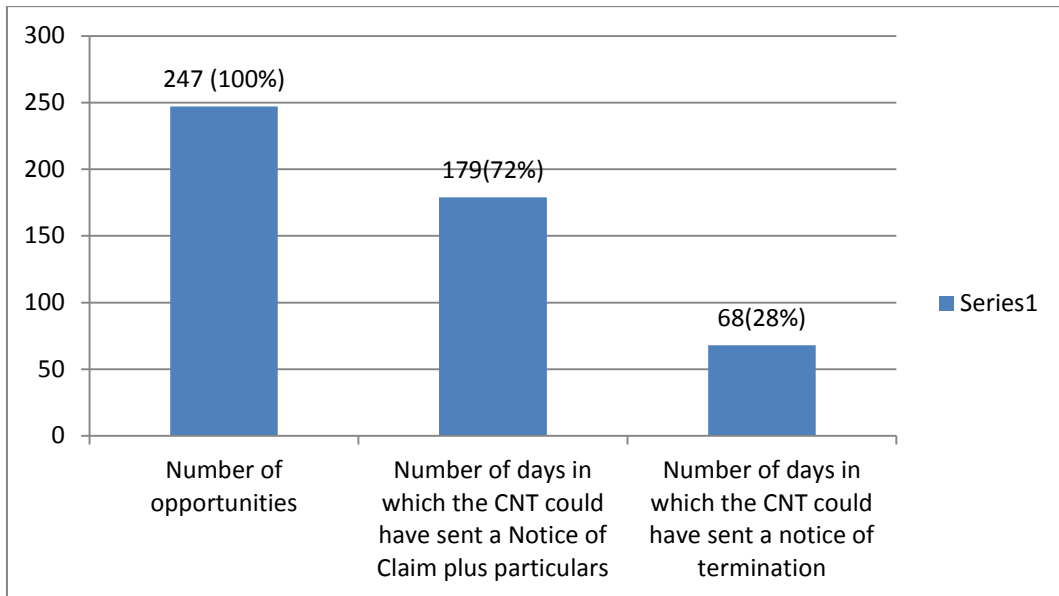




From the table shown above we can conclude that:

- The contractor resorted to the legal advice to understand how the non-payment under the contract conditions is construed by prevailing laws. Based on this advice he reduced rate of progress and threaten to cease the main continuing construction activity related to the concrete structure.
- The contractor explained that he did not exercised termination in order to maintain cordial relation.
- The contractor and the employer agreed on submitting a new schedule in accordance with their meeting.
- No adjustment for time of completion made by the employer prior to expiry of the set time of completion.
- The contractor proclaimed time to have become at large for two reasons:
  - Failure of mechanism pertaining time extension since the conditions pertaining the employers' payment default does not cause eligibility for request time extension.
  - Delayed payments by the employer were viewed by the contractor as act of prevention.
- Time extension was issued several weeks after the set time for completion with no specific reference to the contract's time extension clause.
- Yet, when the contractor asked for additional compensation in relation to the period extended by the employer, the engineer's reply focused on the contractor's un-fulfillment of notice and particulars requirement pertaining to the extension of time clause.

Moreover, from table 5.1 we can extract the information used in figure 5.7.



**Figure 5.7 Opportunities percentage**

From figure 5.7 we conclude that the contractor had 247 opportunities to act against the employer by using the contract. Among this percentage, 72% of it the contractor had the chance to send a notice of claim, and 28% of it the contractor had the chance to terminate the contract.

## 5.6. Measures/Tactics

From the table mentioned before, figure 5.7 was extracted and represents the actions' timeline between the contractor, employer and his in-house team. Each milestone represents an action made by the contractor which could be a phone call conversation, a letter, and even a notice as explained in the figure.

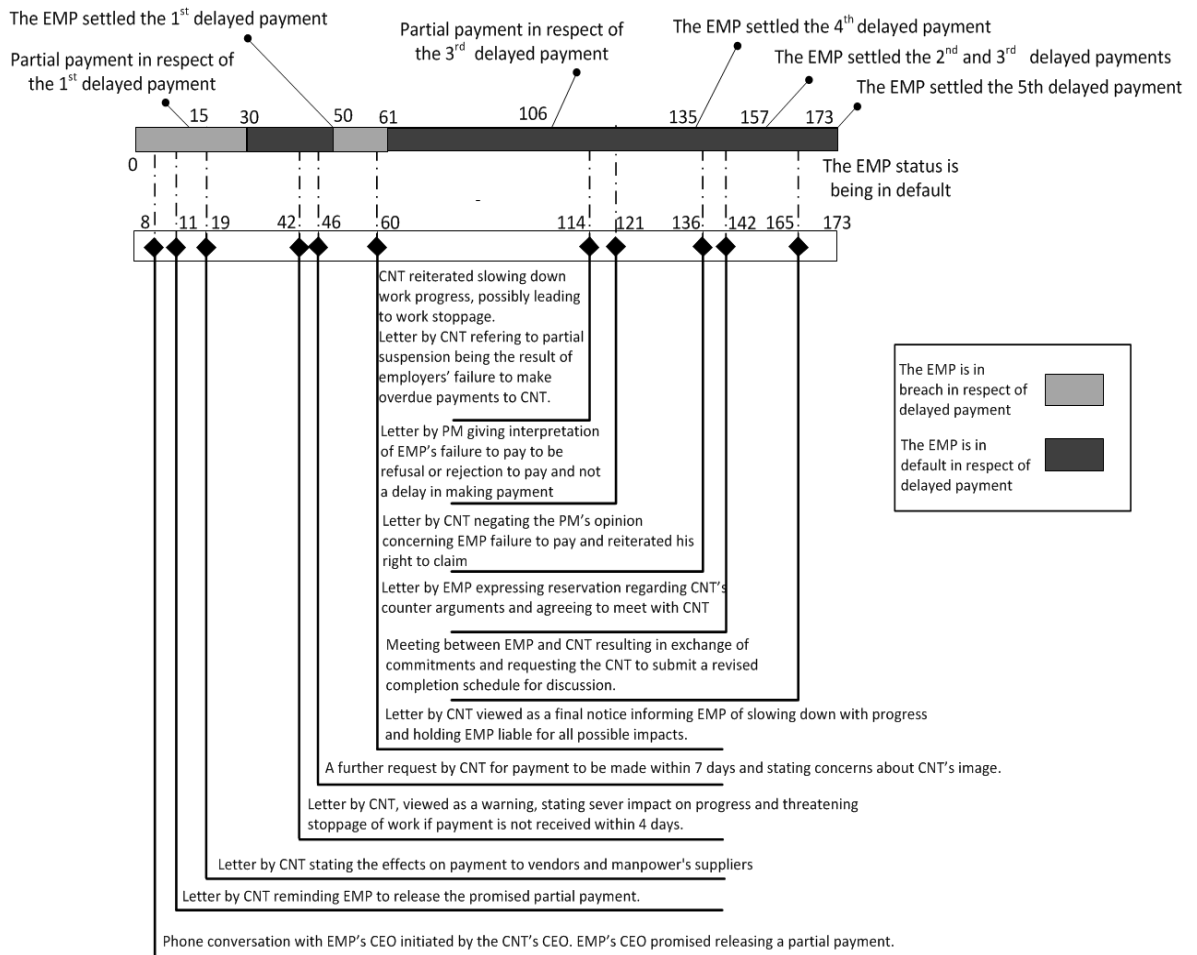


Figure 5.8 Employer's Actions Timeline

From the figure 5.8 we can conclude the following facts:

- It took the contractor 8 days to make a phone call to the employer regarding the 1<sup>st</sup> delayed payment.
- Another 3 days to send a letter to the employer in respect to the promised partial payment mentioned in the phone call.
- On 30<sup>th</sup> day, the contractor could have considered the employer in default in respect to the 1<sup>st</sup> delayed payment and send a 14 days' notice of termination. Nonetheless he chose to wait until day 42 to send a notice considered by the contractor as a warning in case payment was not established within 4 days.
- The contractor's action on day 42 could have been efficient if he had sent the notice on day 30 and could have terminated the contract on day 44, (30 + 14) the earliest day available, which is almost similar to the date set in the warning letter (42 + 4 = 46).
- In both actions made by the contractor, days 42 and 46, he did not support his action by the relative clause that he built his decision/entitlement upon.
- On 60<sup>th</sup> day, the contractor sent a letter, titled final notice regarding the delayed payment, threatening of suspending the work. This action is very similar to the action warranted via FIDIC99. As FIDIC states, the day of suspension could be after submitting a 21 days' notice of suspension while the letter was establish on day 60, which is far later than the one implied in a balanced contract. The contractor could have suspended the work since the first delayed payment occurred.

- The period between day 60 and 114, there were several payments due in addition to the failure of payments by the employer. The contractor, during this period, did not make any move against the employer.
- By using the available case's conditions, he could have terminated the contract under several delayed payments. On the other hand, a less aggressive action for keeping the cordial relationship with the employer, a notice of termination supported by the related clause could have been sent.
- It seems that the partial payments made by the employer were established to calm the contractor and to show him that the employer will pay him eventually.
- Another game made by the employer is settling the 4<sup>th</sup> delayed payment before the 2<sup>nd</sup> and the 3<sup>rd</sup>. In time, if the contractor was following the direct instructions mentioned in the contract, he could not have terminated the contract under the 4<sup>th</sup> delayed payment while under the 2<sup>nd</sup> and 3<sup>rd</sup> his right was questionable. The contract conditions does not state what will happen if the contractor delay his right of termination.
- Moreover, the partial payment made under the 4<sup>th</sup> delayed payment raises the question; why the employer made this partial payment is in respect to the 4<sup>th</sup> delayed payment and not under the 2<sup>nd</sup> or even the 3<sup>rd</sup> delayed payments?
- An extra information that needs to be highlighted is when the project manager answered the contractor regarding the statement of failure by employer to pay, by stating that a delayed payment is not considered as failure, while the contract's conditions clearly states that any delaying of payment after the 14 days period of payment will be considered as failure to pay.

- Furthermore, another question is raised against the behavior of the employer; why the employer settled the 4<sup>th</sup> delayed payment while he is still in default under the 2<sup>nd</sup> and 3<sup>rd</sup>?
- Another play made by the employer, when the contractor did reduce the rate of work without stating under which clause his action was made. The employer did not reject the action, did not object on its principle (as the contractor is not entitled of suspending the work as mentioned in the case's conditions), which means the employer knew what he was doing (delaying the payment).
- When the meeting was establish between the employer and the contractor, the request of a new schedule of completion means that an additional time will be granted to the contractor. While, when the employer gave the contractor additional time, he did not state under which clause it was granted and its way of measuring.
- Finally, another significant remark is that all the letters sent by the contractor do not mention what are the clauses in which he based his decision upon.

### **5.7. Conflicting stands of the parties leading to impasse**

From all what is mentioned before (the table 5.1, figure 5.8, and the additional description regarding the case) we can summarize the situation between the employer and the contractor via the figure 5.9.

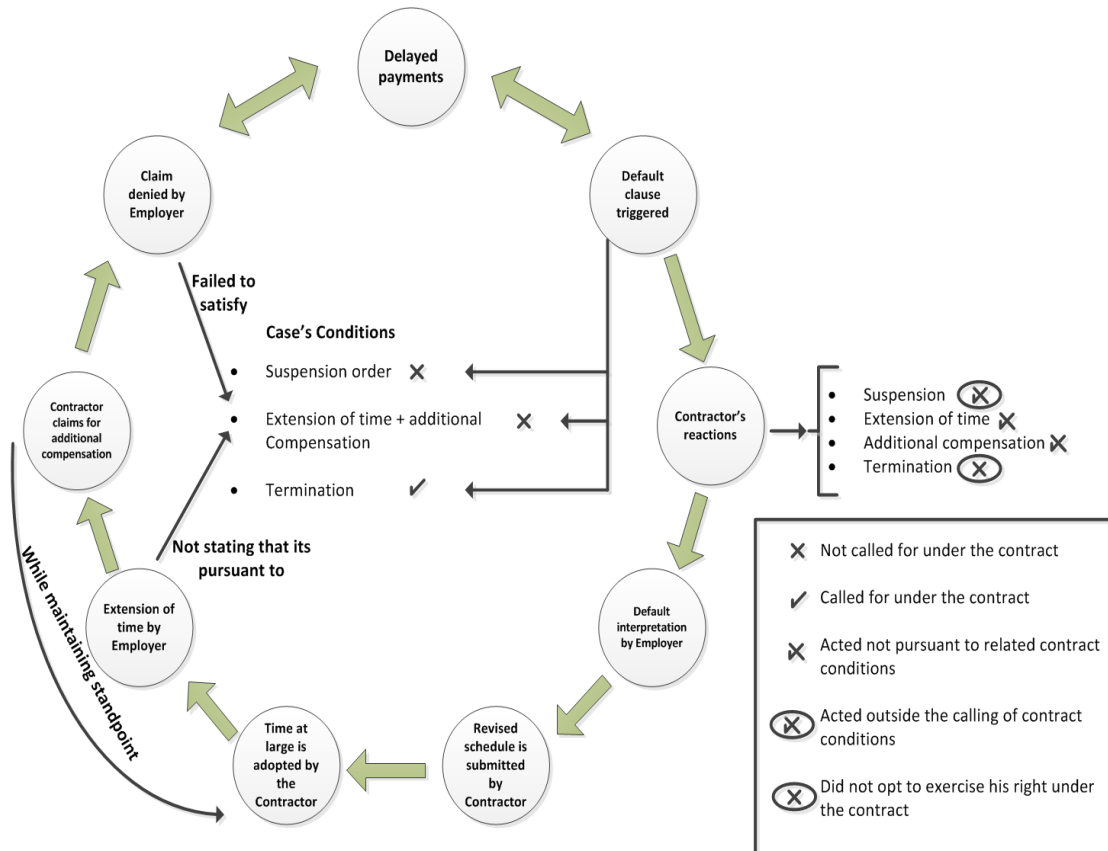


Figure 5.9 Conflicting stands of the parties leading to impasse

From figure 5.9 we can understand the following:

- The main problem faced by the contractor is the delayed payment.
- This problem trigger only one clause to be used by the contractor which is the termination under the default of the employer.
- The contractor’s reaction was not called under the contract (the contractor suspended most of the work, asked for extension of time, and additional compensation while he is not entitled to do so under the contract).
- The project manager claimed that to be able to consider the employer in default he should refuse to pay a payment not to delay a payment.



- The contractor submitted a new revised schedule for completion as it was agreed upon in the latest meeting held between the employer and the contractor.
- Due to the submittal of new schedule of completion, the contractor adopted time at large as the changes were major.
- Then the employer granted a 199 days extension of time without stating under what clause this extension of time was granted and the way it was estimated.
- That made the contractor claim for additional compensation regarding the extra time given by the employer while maintaining standpoint regarding the time at large.
- The employer rejected the contractor claim stating that he did not satisfy the notice's clause.

All what is mentioned before shows the vicious circle that was going between the employer and the contractor.

#### **5.8. The ideal series of actions that should have been adopted by the contractor.**

Figure 5.9 explains a scenario based on the case's conditions that could have helped the contractor and saved him from his immense loss.

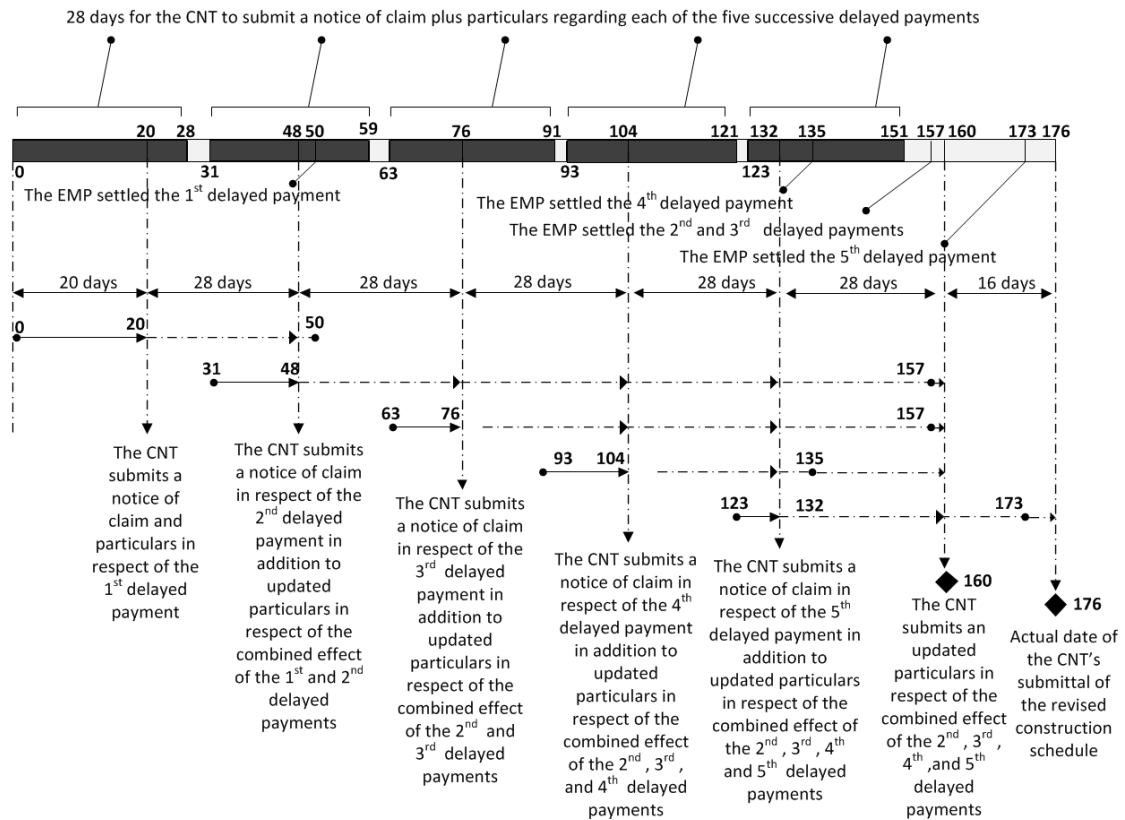


Figure 5.10 Comprehensive Claim Scenario

The scenario is:

- The contractor could have had submitted a notice of claim within 28 days of the occurrence of the event (EMP did not pay the 1<sup>st</sup> delayed payment). This notice deals only with the amount delayed as the claim's clause separates the request for additional money from the request related to extension of time. That's why the contractor should submit a second notice within 28 days stating his request of extension of time. Whenever it states that the contractor should do an update or a new notice, it means that both notice of claim and extension of time. Even though there was no relation between both clauses, the contractor should have used them either way.

- It considers that the contractor will submit to the employer a notice of claim in addition to fully detailed particulars in day 20.
- Moreover, the contractor could have suspended the work in day 22 after sending a notice of suspension in respect to the 1<sup>st</sup> delayed payment. This action is based on a balanced standard form of contract (FIDC99).
- In day 31, the employer failed to pay the 2<sup>nd</sup> payment. This gives the contractor the right to send a new notice in respect to the 2<sup>nd</sup> delayed payment and an update of particulars in respect to the 1<sup>st</sup> delayed payment. This notice and particulars should be submitted within 28 days from the previous notice to be considered as a continuous claim.
- Let's say the contractor acted in the last day (day 28) corresponding to day 48 in the calendar.
- The employer settled the first delayed payment in day 50 while he is still in breach of the second delayed payment. That gives the contractor the right to continue the suspension.
- On 63<sup>rd</sup> day, the employer did not pay the 3<sup>rd</sup> and the 2<sup>nd</sup> delayed payments. That requires the contractor to send a new notice of claim (for an extra cost and extension of time). This notice should also take place within 28 days after the previous notice to be considered as continuous claim.
- This process continues for all the five delayed payment. Even though the employer settled the 4<sup>th</sup> delayed payment, work on site won't go back to normal since the 2<sup>nd</sup> and 3<sup>rd</sup> payments are not settled yet.
- On day 157, the employer settles the fifth delayed payment which means no more delayed payment deserved to the contractor. Nonetheless, there effects are

still noticeable; this means the contractor should submit particulars on day 160 in respect to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> delayed payments (28 days in respect to the comprehensive claim).

- On day 176, the contractor did submit a new revised schedule in respect to the employer's request during the meeting held on the 165<sup>th</sup> day.

### **5.9. Conclusion**

Clearly the employer knows what he was doing during the construction of the project and that this act of changing details in the contract's clauses was intended to mislead the contractor.

When the contractor faces non-connected clauses, he should act in accordance with each clause separately. Moreover, he should make his actions as close as possible to standard forms of contract in relevance to time intervals.

The contractor shall make a move even when the contract's conditions limits his authority, especially when dealing with an adhesion contract, as the law will protect him by reinstating his rights.

The contractor should precisely deal with the submission of claims, extension of time, and suspension order notice could be the way in preserving his rights.

## CHAPTER VI

### SUMMARY AND CONCLUSION

#### 6.1. Summary

Not all owners adopt standard general conditions for drafting construction contracts, and even those who do they end up meddling with such conditions. Eventually, making them biased towards preserving the interest of the owners and giving them the upper hand in respect of the remedies made possibly available for dealing with contractual issues that are bound to surface during the fulfillment of the contract. Such practices by owners can have major implications on the options available to contractors when they are to react to matters and issues that are at the core of what has been prescribed in a biased or a vague manner under the contract conditions. The objectives of this research are to investigate those ways and means that can possibly help contractors react better in contracts that are biased and where the authority traditionally invested in the Engineer is made diffused by owners.

The methodology to be followed in this research is a case-based and involve:(1) reviewing the relevant literature, (2)describing the case study selected for the purpose of this research in which the contract was deemed biased and vague, (3) analyzing the case's contract conditions pertaining to the main issues encountered in contrast to the 1999 FIDIC clauses governing the same issues, (4) studying the full chronology of events noting the actions taken by the contractor, if any, versus the actions that would have been warranted under the FIDIC-based conditions, (5) making inferences as the tactics and measures that can be considered by contractors when faced with similar or related circumstances, and (6) offering conclusions and recommendations. The outcome

of this research will help shed light on the preparations and actions to be exercised by contractors when dealing with biased and vague contracts.

The findings are expected to be an eye-opener also to owners by way of showing that meddling with standard or reasonable contract conditions can have major detrimental implications on the performance of the construction contract, thereby forfeiting the purpose of such contracts.

## **6.2. Conclusion**

When the contractor agrees on entering an agreement governed through an adhesion contract, his behavior should be different. He should be more aggressive, punctual especially with the time bar related to each notice and request sent to the employer. He should also allocate more risk regarding such agreement.

Moreover, when he faces a situation where his actions are limited through the contract's conditions, he should make the adequate move related to the circumstances. The contractor should always remember that he could refer all matters to the law whom will support him especially when dealing with an adhesion contract.

## **6.3. Recommendation**

When the contractor faces similar problem, he should always acts in accordance with the contract conditions. Any action, letter, and notice issued by the contractor should be supported by the relevant contract clause. Moreover, if the contractor faces lack of relation between the contract clauses, he should act by norm, and parallel to a standard form of contract. Nevertheless, the contractor actions, even if they are

irrelevant to the case's conditions as a result of limiting the contractor authority, should be as close as possible to the FIDIC99 or any standard form of contract. Moreover, when the contractor faces an adhesion contract that took away some of the contractor's rights, he should act in a balanced way as the law will support his action. One of the major mistakes made by the employer is to delay a request or a notice. This type of letter should always be on time and within the set time bar. Even if the notice of claim do not allow the contractor to claim for an additional money or for an extension of time, the contractor should either way submit this notice, as the law looks differently to this type of contract and eventually will protect him.

#### **6.4. Further work**

There are more to be done in this domain, especially when dealing with an adhesion contract. One area that could be more investigated in is what are the main characteristic that all employer try's to meddle with in an adhesion contract. What is the employer's point of view regarding such agreement? Why an employer prefers to come up with a new contract instead of using a more mature contract like the FIDIC99 for example. If there is any similarity between the adhesion contracts, are they all the same or each employer prefers to meddle with the clauses in his own way. All of that are questions that need to be answered by more research and investigations work to resolve this growing problem.

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