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# Delay Events in Construction Delay Claims

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## Introduction<sup>1</sup>

In a construction contract, a contractor normally must complete the originally contracted scope of works (which for the purposes of this article is referred to as the “Base Works”), by a specified completion date or within a specified time.

Should a contractor fail to do so, it will typically be exposed to the risk of the employer levying damages. Generally, the level of damages is agreed in advance and is often described as delay liquidated damages. In the event that there is a delay to the completion of a project, a contractor can avoid or reduce its exposure to damages by submitting a claim demonstrating an entitlement to an extension of time (“EOT”). For such a claim to succeed, it must, in addition to satisfying various formalities,<sup>2</sup> demonstrate the causal effect of the delaying event on the specified completion date or specified period for completion (and if applicable, the financial loss incurred).

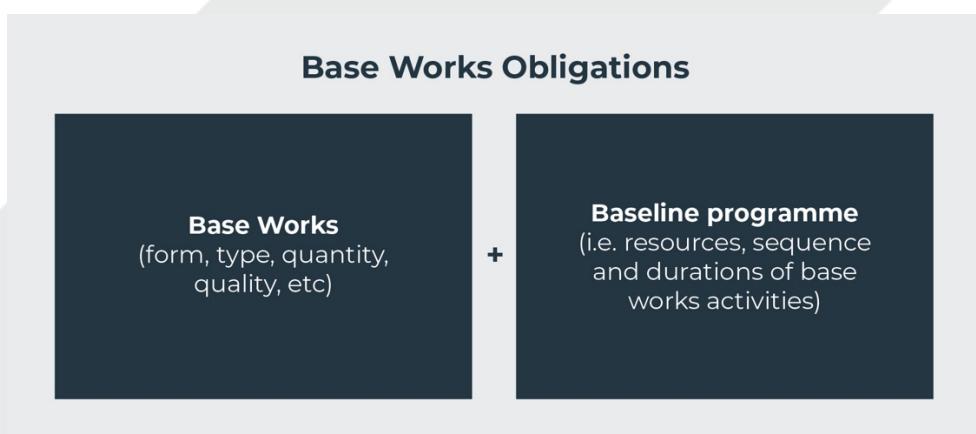
This article discusses what the authors consider to be the steps a contractor should take to understand a delay event and demonstrate entitlement to relief from liquidated damages. These steps are:

1. understand the Base Works obligation;
2. identify the delay event(s);
3. identify the party that bears the contractual risk for the delay event;
4. establish if the delay event is compensable;
5. establish the dates relevant to the delay event; and
6. establish the impact of the delay event.

## Step 1: Understand the Base Works Obligations

The figure below demonstrates that the Base Works obligations include two fundamental components, namely:

1. the Base Works; and
2. the baseline programme (i.e., the sequence and the time periods within which the Base Works are to be delivered).



*Figure 1: Base Works Obligations*

<sup>1</sup> This article makes reference to various court cases, however this article is not meant to provide a legal opinion. Furthermore, whilst this article is written in the context of a common law perspective, the authors believe that the principles discussed can be a useful guide to other jurisdictions. The FIDIC Red Book 2017 is referred to wherever a contractor's contractual rights and obligations are referred to in this article.

<sup>2</sup> For example, notice requirements.

## Base Works

The Base Works include two elements, namely:

1. the express requirements; and
2. the contingent works.

Typically, the express requirements are clearly identified in the contract documents through drawings, specifications and bills of quantities ("BOQ") etc. However, identifying the contingent works (i.e., those works which are necessary for the completion of the project but do not necessarily form part of the permanent works) often depends on the skill and expertise of the contractor.

The importance of understanding the contingent works was demonstrated in *Thorn v London Corp* (1876).<sup>3</sup> In this case, an employer engaged a contractor to construct a bridge. The employer provided plans and specifications for the caissons,<sup>4</sup> which, in the event, proved to be impracticable. The contract required the works to be carried out in accordance with the plans and specifications. In the event, the contractor was late completing the bridge and claimed prolongation costs associated with the critical delay based on an alleged breach of an implied warranty that the plans and specifications were practicable. The employer denied any such express or implied warranty.

In the first instance (upheld by the Exchequer Chamber), the court decided that the employer had not given any such warranty and confirmed that the contractor should have checked the practicability of the plans and specifications at the time of tender. Having failed to do so, any delay caused by defective information was the contractor's liability.

On appeal, the House of Lords<sup>5</sup> unanimously affirmed the Exchequer Chamber's decision. Lord Chelmsford stated:

*'...if the contractor ought, prudently and properly, to have full information of the nature of the work he is preparing to undertake, and the advice of a skilful person is necessary to enable him to understand the specification, is it any reason for not employing such a person that it would add to the expense of the contractor before making his tender? It is also said that it is the usage of contractors to rely on the specification, and not to go examine it particularly for themselves. If so, it is an usage of blind confidence of the most unreasonable description...'<sup>6</sup>*

Lord Hatherley stated:

*"There is nothing, I am sure, to induce your Lordships to lay down a new principle of law by which anybody entering into a contract is supposed to have an implied warranty from the person engaging him that the contract itself can be fully carried out without impediment, whether that impediment to be one he is himself able to foresee or not."<sup>7</sup>*

The *Thorn* case makes clear that it is the responsibility of the contractor to satisfy itself that the contract works, i.e., the express requirements and the contingent works, can be delivered within the time period mandated in the contract.

<sup>3</sup> *Thorn v The Mayor and Commonalty of London* [1875] Vol. XXXIII [London: Law Times Reports] at pp.308-314.

<sup>4</sup> Temporary works required to construct the bridge.

<sup>5</sup> *Thorn v The Mayor and Commonalty of London* [1876] Vol. XXXIV [London: Law Times Reports] at pp.545-550.

<sup>6</sup> Ibid. p.548.

<sup>7</sup> Ibid. p.550.

Following the identification of the Base Works, the next consideration is the baseline programme.

### **Baseline Programme**

It is trite that a construction project can be built in by many different ways.<sup>8</sup> Consequently, a contractor has the freedom to develop the logic and sequence of activities in its baseline programme as it deems appropriate, provided always that it satisfies all dates agreed in the contract (for example, interim milestones, sectional completion dates and/or a final/mechanical completion date).

Post contract, a contractor and employer/the engineer generally agree on a way of execution for the Base Works in the form of a baseline programme of works or an as-planned programme.<sup>9</sup> A properly prepared baseline programme will not only show the breakdown of the Base Works into various activities, but it will also show the planned sequence of how the Base Works will be carried out and the logical relationships between various activities for the entire project.

This baseline programme therefore demonstrates how a contractor intends to undertake the Base Works and should clearly show the expected input from the employer and/or the engineer necessary for the contractor to fulfil its obligations (examples might be site access, release of design information, inspection and approvals, etc.). Overall, the baseline programme must be reasonable i.e., “...realistic and capable of being achieved within the period for completion of the works”.<sup>10</sup>

A clear understanding of the Base Works obligations defines the context within which a delay event can be identified and investigated.

In the authors' experience, many contractors enter into complex projects without fully understanding the Base Works obligations or having made unreasonably optimistic assumptions (either related to price and/or schedule). Where this occurs, contractors often encounter serious performance and commercial problems and may be exposed to significant financial hardship.

### **Step 2: Identify the Delay Event(s)**

In order for a contractor to establish an entitlement to an EOT, it must demonstrate liability, cause and effect. To do so (note that liability is captured within step 3), the claimant will need to establish two causations:<sup>11</sup>

1. firstly, demonstrate an occurrence (cause) has affected the Base Works obligations (“First Causation”), i.e., a delay event has occurred; and
2. secondly, demonstrate the delay event has impacted the completion of the project, i.e., it caused critical delay (“Second Causation”) (effect).

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<sup>8</sup> “There is no one correct way to sequence any construction project. Different sequences may be equally possible, logical and reasonable. There are many ways to complete any project. Personal choices of various managers play an important role in sequencing. Differences between two schedules thus do not necessarily make one incorrect...” Michael T. Callahan, Daniel G. Quackenbush and James E. Roving, “Construction Project Scheduling” (USA: McGraw-Hill Series in Construction and Engineering and Project Management, 1992), p.55.

<sup>9</sup> For example, refer to Sub-Clause 8.3 of FIDIC Conditions of Contract for Construction, 2nd Edition 2017, p.46, which states “The Contractor shall submit an initial programme for the execution of the Works to the Engineer...the Engineer shall be deemed to have given a Notice of No-objection and the initial programme...shall be the Programme”.

<sup>10</sup> Stephen Furst QC and Sir Vivian Ramsey QC, Keating on Building Contracts, 11th Edition (London, Sweet & Maxwell, 2021), para 8-060.

<sup>11</sup> Keith Pickavance, “Extensions of Time – An Arbitrator’s perspective”, International Construction Law Review, 2003, p.367.

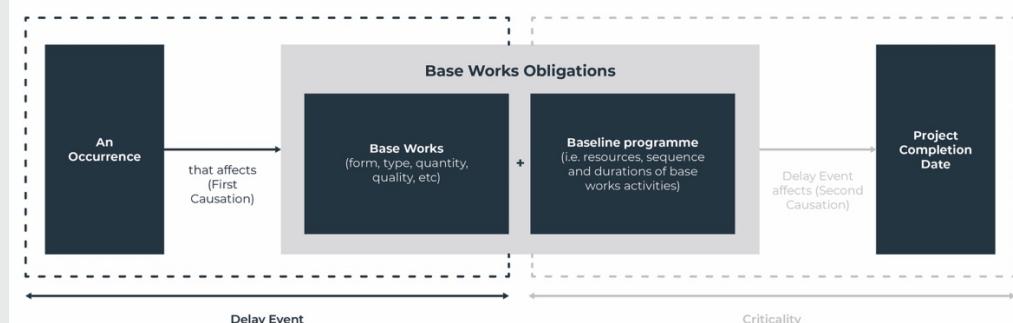


Figure 2: Two Causations. Delay Event and Criticality

## What is a Delay Event?

Generally, a contractor contracts to complete the Base Works within a prescribed period. Therefore, from a delay perspective and as shown in the figure above, a delay event is an occurrence that affects the Base Works obligations (i.e. Base Works and baseline programme). Put simply, a contractor must demonstrate that a delay event satisfies First Causation.

When identifying a potential delay event, it is important to identify the affected Base Works and how it has affected the progress of the Base Works as explained below.

## **Clear Identification of a Delay Event: Affected Base Works**

**Clear Identification of a Delay Event Affects Base Works**  
In a delay claim, the burden of proof falls on the party seeking an EOT to demonstrate that a delay event has affected the Base Works obligations. Therefore, any issue which has no effect on the Base Works obligations cannot properly be considered a delay event.

In *Saga Cruises*,<sup>12</sup> a vessel owner engaged a contractor to undertake certain repair and refurbishment works to one of its vessels. In the event, the contractor delivered the vessel on 16 March 2012 (rather than the agreed date of 2 March 2012) and the owner sued the contractor for delayed delivery of the vessel. In its defence, the contractor argued that the vessel delivery was not possible before 19 March 2012 because the owner was not ready with the lifeboats works, i.e., works that did not form part of the contractor's works. Judge Sara Cockerill QC held the contractor responsible for the delay and highlighted the connection between the event and the Base Work:

“[292] The Owner’s position is that... the work on the lifeboats is irrelevant to the completion of the Yard’s [contractor’s] Works. They say that the Yard did not have any substantive work to do on the lifeboats during this period. There was no reason for the Owner’s request for assistance in an essentially unrelated matter to delay contractual works or prevent delivery.”<sup>13</sup>

Therefore, a clear identification of the affected Base Works and its location in the project (such as relevant zones, levels and areas) is very important because it will define the related works affected by the delay event.

#### **Clear Identification of a Delay Event: Issues affecting Base Works**

**Clear Identification of a Delay Event: Issues affecting Base Works**  
Once the affected Base Works are identified, a claimant must identify the issues (the delay event) that affected the start, execution or completion of the Base Works.

<sup>12</sup> *Saga Cruises BDF Ltd v Fincantieri SpA* [2016] EWHC 1875 (Comm).

<sup>13</sup> Ibid. at paragraphs 292.

For example, if the installation of cable trays started/was completed later than planned, the claimant would need to identify what predecessor activities caused the delay, as shown in the figure below:

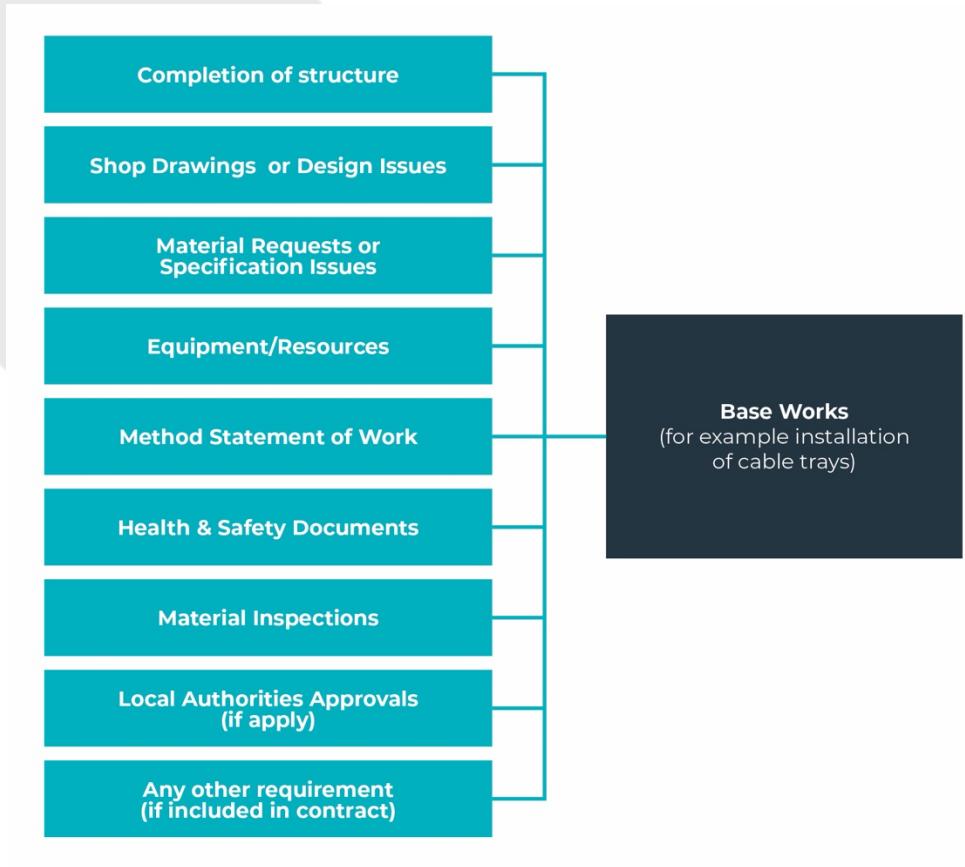


Figure 3: An Illustration of issues affecting the base works

Therefore, a claimant must clearly identify the issue(s) that has/have affected the Base Works. For instance in figure 3 above, if the approval of shop drawings is the identified issue (delay event), a claimant must address issues such as:

1. when the shop drawings were issued;
2. the completeness of the design;
3. the progress of the works;
4. the obligations in the contract regarding the time for review/approval;
5. the time actually taken to review the shop drawings;<sup>14</sup>
6. the nature of design comments, technical clarifications, design coordination requirements such as resolution of clashes, etc.

In summary, the impact arising from a delay event is established once the affected Base Works and delay event(s) affecting the Base Works is/are identified with clarity. This was confirmed in *Obrascon*,<sup>15</sup> where Mr. Justice Robert Akenhead indicated that if the delay event relied on is the ‘...unforeseeable physical conditions at site’ then a contractor should clearly identify what was unforeseeable – the type or quantities or location of the subsurface conditions.

Once a delay event is identified, a contractor should know how this affected specifics of the Base Works and at which location of the project.

<sup>14</sup> Generally, technical specifications relating to project management issues state the number of days allowed to the consulting engineer for the review of the contractor's request for information, shop drawings, material requests etc. If not stated expressly in contract documents, it can be inferred from approved baseline programme of works.

<sup>15</sup> *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC); [2014] B.L.R. 484 at para. 227.

After a delay event is identified, the next step is to determine which party carries the contractual risk for such event.

### **Step 3: Identify the Party that bears the Contractual Risk for the Delay Event**

The contract should define which events provide grounds for the relief sought and it is for the claimant to demonstrate that the delay event provides a cause of action i.e., contractual/legal grounds for the relief sought. Where a claimant is unable to demonstrate that a cause of action exists, any claim for additional time and/or cost relief will be without merit, irrespective of the impact of the event.

Issues may also occur in a design and build contract. For example, in *Obrascon*,<sup>16</sup> a design-build contractor (“OHL”) assumed, under FIDIC Yellow Book first Edition 1999, that maximum quantity of contaminated sub-surface soil would be 10,000m<sup>3</sup>, as shown in the Environment Statement included in the contract. In the event, the actual quantity was circa 15,000m<sup>3</sup>. Mr. Justice Akenhead did not accept the delay event (i.e., quantity of contaminated soil was an unforeseeable physical condition) as a qualifying delay event:

*"The real issue on analysis is whether OHL judged by the standards of an experienced contractor would or should have limited itself to some analysis based only on the site investigation report and the Environmental Statement. There is no evidence that OHL actually applied its mind pre-contract at all to what if any quantities of contaminated land might be encountered... I accept Mr. Hall's evidence that experienced contractors at tender stage would not limit themselves to a study of the ES, which is primarily directed towards planning matters, albeit that it provided useful technical information. What was needed and could have been expected from experienced contractors was some intelligent assessment and analysis of why there was contamination there... and therefore what the prospects of encountering more than had been unsurprisingly revealed by the pre-contract site investigation, even if it would be difficult to quantify."*<sup>17</sup>

The Court of Appeal agreed with the reasoning that ‘...an experienced contractor would not slavishly accept the figure of 10,000m<sup>3</sup> in the Environmental Statement. Instead it would make its own assessment of the information contained in the... Environmental Statement’.<sup>18</sup>

In summary, the terms of a contract, the facts surrounding the alleged delay event and interpretation of the contract clauses will provide the basis to determine if a delay event provides grounds for the relief sought.

If it is established that a delay event does provide grounds for EOT, then the next step is to establish whether or not the delay event also permits the contractor to recover associated costs.

### **Step 4: Establish if the Delay Event is Compensable**

If a delay event has prevented the contractor from achieving the dates specified in the contract, then it may submit a claim seeking relief from liquidated damages. Subject to other formalities,<sup>19</sup> a claimant may recover prolongation

<sup>16</sup> *Obrascon Huarte Lain SA v Her Majesty's Attorney General For Gibraltar* [2014] EWHC 1028 (TCC); [2014] B.L.R. 484.

<sup>17</sup> Ibid, at para 213.

<sup>18</sup> *Obrascon Huarte Lain SA v Her Majesty's Attorney General For Gibraltar* [2015] EWCA Civ 712; [2015] B.L.R. 521 at paragraphs 89 and 90.

<sup>19</sup> For example, concurrent delays. Concurrent delays were defined by Mr. John Marrin QC in the SCL paper entitled “Concurrent Delays”, 2003: “[T]he expression ‘concurrent delay’ is used to denote a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”. This definition was later approved by UK courts in *Adyad Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm); [2011] B.L.R. 384; 136 Con.L.R.190. In case of concurrent delay, where one of the events is compensable, a contractor would have incurred exactly the same prolongation costs had the compensable event not occurred. Therefore, a contractor may not be entitled to prolongation costs in case of concurrent delay even if the qualifying event is compensable.

costs if the delay event(s) relied on is/are compensable. Standard forms of construction contract generally include delay events and state if the delay event is compensable or not.

For example, FIDIC Red Book 2017 states, “*the Contractor shall be entitled... to EOT and/or payment of such Costs...*” if the Contractor suffers delay and/or incurs Cost as a result of (a) delayed issuance of drawing or instruction by the Engineer<sup>20</sup> or Unforeseeable Physical Conditions<sup>21</sup> or other events.<sup>22</sup> It means, these delay events provide entitlement to an EOT and/or additional costs. However, on the other hand, FIDIC Red Book 2017 does allow an EOT for all Exceptional Events<sup>23</sup> but does not allow Cost recovery for all Exceptional Events listed under Sub-Clause 18.1. In summary, terms of a contract normally express if a delay event is compensable or not.

Once a delay event has been determined to be a qualifying, compensable/non-compensable event then the next step is to establish the dates relevant to the event.

### **Step 5: Establish Relevant Dates of the Delay Event**

The start date of a delay event signifies that a cause of action may have arisen. The start date of a delay event triggers important contractual issues such as compliance with notification obligations.<sup>24</sup>

A delay event starts when an occurrence begins to affect the Base Work and ends when the occurrence ceases to affect the Base Work. There are circumstances where it is straight forward to identify a start and finish time/date of the event, for example rain stops concrete pouring at site, however, for other events, establishing the relevant dates can be less straightforward, for example, piling works are stopped at certain locations due to difficult subsurface conditions, but the remainder of the piling works continues.

Such issues are fact sensitive. The start and end date of a delay event defines the delay event duration. If an occurrence constantly affects the Base Work, the delay event duration will be continuous as is the case with the rain event. However, the delay event duration may not be continuous where an occurrence intermittently affects the Base Works as illustrated pile operation event in figure 5.

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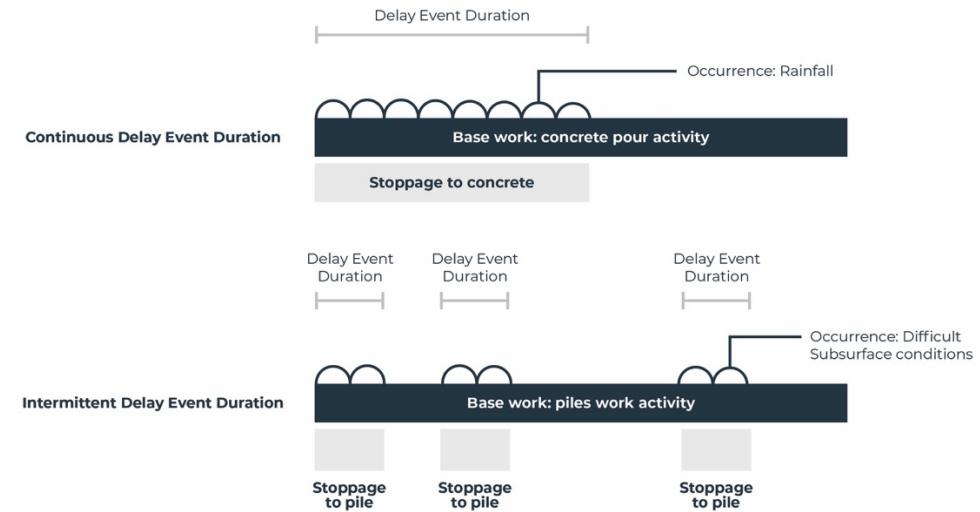
<sup>20</sup> Sub-Clause 1.9 [Delayed Drawings or Instructions] of FIDIC Conditions of Contract for Construction, 2nd Edition 2017, p.11.

<sup>21</sup> Sub-Clause 4.12 [Unforeseeable Physical Conditions] of FIDIC Conditions of Contract for Construction, 2nd Edition 2017, p.32.

<sup>22</sup> Events included in FIDIC Conditions of Contract for Construction, 2nd Edition 2017, such as: compliance with laws, Sub-Clause 1.13; lack of access to site, Sub-Clause 2.1; lack of cooperation, Sub-Clause 4.6; issues relating to setting out, Sub-Clause 4.7; non-suitability or non-availability of an access route, Sub-Clause 4.15; additional works relating to archaeological and geological findings, Sub-Clause 4.23; additional testing, Sub-Clause 7.4; remedial works, Sub-Clause 7.6; suspension of works by the Employer, Sub-Clause 8.10; taking over of works in part, Sub-Clause 10.2; interference with tests on completion, Sub-Clause 10.3 etc.

<sup>23</sup> Sub-Clause 18.1 of FIDIC Conditions of Contract for Construction, 2nd Edition 2017, p.90, defines “*Exceptional Event means an event or circumstance which: (i) is beyond a Party's control; (ii) the Party could not reasonably have provided against before entering into the Contract; (iii) having arisen, such Party could not reasonably have avoided or overcome; and (iv) is not substantially attributable to the other Party.*”

<sup>24</sup> Sub-Clause 20.2.1 [Notice of Claim] of FIDIC Conditions of Contract for Construction, 2nd Edition 2017, p.32, states “*The claiming Party shall give a Notice to the Engineer describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware of the event or circumstance...*”



*Figure 5: Continuous or intermittent duration of an event*

Simplistically, a delay event duration defines how long an occurrence has affected the execution of the Base Works. The effect on the Base Work could range from disruption (i.e., a reduction in productivity) to a complete stoppage in the execution of the Base Work.

#### **Step 6: Establish the Impact of the Delay Event**

It is critical to establish the actual impact a delay event has on the Base Work.

The impact of a delay event (i.e., the second causation as shown in figure 2 above) is determined by reference to the Base Works it affects, and whether those works are on the critical path. A delay event is critical if it affects the completion of the critical Base Works (i.e., impacts the critical path) – all Base Works cannot be critical at a given time. The moment at which the status of Base Work is changed from critical to non-critical, the status of the delay event is also changed from critical to non-critical, even if the delay event continued to affect the base work it was affecting before.

A claimant can determine if the Base Work is critical or not by reference to the critical path or its zero-float status or its existence on the longest path. The questions – which Base Works were critical at the time and for how long? – are often in dispute between the parties.

In short, it is the status of Base Work (i.e., critical or not) which will determine if the delay event is critical.

The actual impact of a delay event is often a matter of dispute, for example, in Vivergo,<sup>25</sup> a contractor claimed an extension of time of 11.1 days as a result of the employer's failure to provide adequate access lighting throughout the construction period. The contractor claimed that it suffered disruption as a result of inadequate access lighting. Mr. Justice Vivian Ramsey, highlighting the impact of the occurrence, stated:

*'...[the contractor] says that access lighting did not lead to any significant delay... On a project such as this the conversion of hours of disruption into an extension of time requires a degree of assessment. I accept that some 1800 hours were incurred because of the failure of access lighting and, doing the best I can, assess this as giving rise to an extension of time of 1 day...'<sup>26</sup>*

<sup>25</sup> Vivergo Fuels Limited v Redhall Engineering Solutions Limited [2013] EWHC 4030 (TCC).

<sup>26</sup> Ibid, at paragraphs 162 and 163.

In the above case, the occurrence (i.e. inadequate access lighting) was a qualifying delay event however, it was concluded that the delay event had little causative effect on the date for completion.

### **Conclusion**

Clear identification of delay events and Base Works affected by the events is vital. A delay event can be relied upon for time and/or compensation insofar as the delay event provides a cause of action. The terms of contract provide the basis to determine if an event provides grounds for the relief sought. It is fundamental to understand the relief that flows from a specific delay event in terms of recovery of additional time and/or financial compensation. This helps inform whether any associated claim would have merit or not per the contract provisions.

The duration of a delay event does not imply its criticality or relevance to project completion. Rather, it is the causative potency of an event in affecting the progress of critical base works that determines its criticality.