A closer look at ownership of float

STUART JORDAN* analyses the issue of float in a construction programme, with regards to which party – the contractor or the employer – owns it and whether it "translates" in the Gulf region.

WE looked last month at one of the enduring issues in construction (concurrent delay) and whether it "translates", that is, whether it would be treated under Middle Eastern legal principles in the same way as under common law principles.

We should take the opportunity to look in the same way at another of these long-standing questions: which party owns float in a construction programme (schedule)? And does the answer change if the governing law of the contract is a Middle Eastern jurisdiction, or the contract is being performed in the region? We shall also look at whether a common Middle East approach to contractual requirements on works progress (requiring the contractor to work to a specific programme) can have a bearing on the outcome.

As usual, let's first clarify our terms of reference: "float" is generally understood to be spare time in a construction programme, such that a delay to an activity will not delay completion of the works. The interesting point comes when we consider the relationship of the activity (or of the whole works) to the contractual completion date. We then have to consider the difference between a delay event that will cause delay to completion of the works by the contract completion date and one which will delay works completion but not beyond the contract date.

For the most authoritative definitions, we again turn to the Society of Construction Law Delay and Disruption Protocol (Protocol) which addresses this difference between "factual" and "contractual" float. It defines float as: "The time available for an activity in addition to its planned duration." The Protocol then defines total float as: "The amount of time that an activity may be delayed beyond its early start/early finish dates without delaying the contract completion date."

So, to the question: which party owns float? In practical terms, this means: if a contractor has built float into a programme such that the works are scheduled to be completed earlier than the contractual completion date, will any employer delays (including change orders) use up that float (making the contractor more exposed to failing to meet the contractual completion date) or will the float be preserved by an extension of time for those delays?

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Under common law principles, the answer lies, as always, in the terms of the contract. A typical statement of entitlement might be:

"The Contract Completion Date shall be extended by the period of time equal to the period by which any employer-risk delay events shall cause delay to completion of the works beyond the then-current Contract Completion Date".

Logically therefore, an employer-risk delay which just delays works completion beyond the planned completion date but does not delay beyond the contractual completion date (that is, it just uses up float) will not bring an extension of time.

Does this "translate" into local legal principles in the Gulf?

As with so many other features of construction contracts, there is little obvious accommodation of any potential difference, but we should be alive to that possibility. The most obvious place to look are the principles which support court intervention to bring about fairness in outcomes from operation of a contract, such as UAE Civil Code Articles 290 and 291 which we looked at last month. In broad terms, these articles both provide for a reduction or deletion of compensation where the party seeking compensation has contributed to the loss (290); and to make all parties who contributed to a wrongful act to be liable for it in proportion (291).

Additionally, Article 386 of the UAE Civil Code provides that a party will not be held liable to compensate for his non-performance [or delay of such performance] if performance was made impossible by an external event for which that party was not responsible.

Are these principles really applicable to using up float? If an employer has (unintentionally) used up float and later levies liquidated damages for contractor culpable delays, is the employer benefiting from his own wrongdoing? Should both parties' respective delays be aggregated to identify their respective contributions to the delay beyond the contract completion date? That is maybe stretching the legal principles too far, but a great deal depends on the facts of the case.

Finally, it is common in the Gulf region contracts to require that contractors, in addition to completing the works by the completion date, also work to a schedule. This means that any employer delay to any scheduled activity will prevent the contractor from meeting its contractual obligations – regardless of whether the delay will impact the contract completion date. Parties need to consider whether, in this case, the contractor owns, or should own, the float in that programme.

Whatever the chosen answer to this question, it can have substantial impact on final time (and cost) entitlements, so the contract should address it clearly. ■

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