



Legal implications of delays and time overruns in EPC contracts

Date: Sunday November 3, 2024

Due to the complex nature of Engineering, Procurement, and Construction (EPC) projects which involve:

- multiple stakeholders;
- intricate designs;
- procurement challenges; and
- strict construction timelines,

managing time effectively is critical. When delays occur in EPC projects, they can disrupt the project's critical path, leading to cost overruns, reputational damage and, importantly, legal consequences.

This article explores the legal implications of delays and time overruns in EPC contracts and offers insights into how these issues can be managed and mitigated.

Types of delays in EPC contracts

In EPC contracts, delays are broadly classified into three categories, each carrying distinct legal implications.

Excusable delays

These are delays that arise due to unforeseen circumstances beyond the contractor's control, such as natural disasters or force majeure events, strikes or political instability. In these cases, contractors may be entitled to extensions of time (EOT) without penalties.

Compensable delays

These occur when delays are caused by the client or principal in the project or factors attributable to them, such as late approvals, site access issues, or changes to the project scope. Contractors are typically entitled to both time extensions and compensation for additional costs incurred due to these delays.

Non-excusable delays

These are delays caused by the contractor's own fault or negligence. Such delays can lead to penalties, damages, or even termination of the contract. Contractors are not entitled to EOTs or compensation and may face legal liability for the principal's losses.

Understanding the type of delay is essential, as it determines the contractor's entitlement to time extensions, compensation, or liability for damages. Most EPC contracts include provisions to address these delays, but disputes often arise over their classification and the remedies available.

Liquidated damages for delays in EPC projects

A common contractual tool to mitigate the risks of delays in EPC projects is the "delay liquidated damages" clause. Delay liquidated damages refer to a pre-agreed sum that the contractor must pay for each day or week the project is delayed beyond the agreed completion date. These clauses are designed to compensate the principal for losses caused by the delay, such as lost revenue or additional project financing costs.

From a legal perspective, the enforceability of liquidated damages clauses depends on several factors, which include:

- whether the amount specified is a reasonable estimate of the loss that the principal is likely to suffer or whether a court may deem the amount to be punitive or excessive;
- whether the delay was directly caused by the contractor and not by external factors or the principal's own actions;
- whether the principal is required to mitigate their losses even when liquidated damages are enforceable.

Delay liquidated damages clauses provide a measure of certainty for both parties in the EPC contract by setting clear financial consequences for delays. However, their enforcement can lead to contentious disputes if the contractor believes the delay was excusable or partially caused by the principal.

Extensions of time (EOT) and delay claims

In many EPC contracts, provisions for EOTs are included to allow the contractor additional time to complete the project without incurring delay liquidated damages.

These provisions typically apply in cases of excusable or compensable delays. Contractors seeking EOT must follow strict procedures set out in the contract, including:

- notifying the principal within a specified period after the delay occurs;
- providing evidence that the delay was beyond their control and explaining how it affected the project's critical path; and
- substantiating the EOT claim with proper documentation, such as project schedules, daily logs, and records of communication.

Failure to comply with these requirements can result in the contractor's EOT claim being rejected, making them liable for liquidated damages or other penalties. From a legal standpoint, delay claims are often a source of conflict in EPC contracts.

Disagreements typically arise over:

- the validity of the delay;
- whether the contractor followed the necessary procedures; and
- whether the principal contributed to the delay.

To avoid such disputes, both parties should clearly define the circumstances under which EOT is granted and ensure that procedures for making delay claims are reasonable and well-documented.

Force majeure and unforeseen events

The doctrine of force majeure plays a vital role in EPC contracts when unforeseen events make project completion impossible or significantly delay progress.

Force majeure clauses typically excuse both parties from performing their non-financial obligations for the duration of the event.

Events often considered force majeure typically include:

- natural disasters (e.g., earthquakes, floods);
- war, terrorism, or political unrest;
- unanticipated government actions (e.g., sudden regulatory changes or expropriation); or
- pandemic or severe public health crises.

For a force majeure claim to be valid within an EPC contract, the event must typically meet the following legal criteria:

- The event must be beyond the reasonable control of either party;
- The event must have a direct impact on a party's ability to perform their (non-financial) obligations; and
- There must be no reasonable alternative means to mitigate the effects of the event.

Force majeure clauses can lead to time extensions but do not usually provide compensation for additional costs incurred unless explicitly stated in the construction contract. The legal challenge with force majeure often lies in proving that the event qualifies

under the contract's definition and that it genuinely prevented the performance of non-financial obligations.

Contractor liability and termination risks

Delays can also result in contractor liability and, in severe cases, lead to termination of the contract. In such severe scenarios, if the contractor is responsible for substantial non-excusable delays, the principal may elect to invoke termination clauses to exit the construction contract and seek damages.

Termination for delay can have serious legal and financial consequences for the contractor, including:

- forfeiture of performance bonds or guarantees;
- claims for damages by the principal for the additional costs of hiring replacement contractors or completing the project; or
- loss of retention money or final payments.

However, termination for delay is often a last resort and must follow the specific procedures outlined in the construction contract, including proper notice to the contractor and an opportunity for remediation.

From a legal perspective, wrongful termination due to delays can expose the principal to significant liabilities, including compensation for lost profits and reputational damage. Both parties must ensure that the contract's termination provisions are clear and adhered to strictly to avoid unnecessary litigation.

Dispute resolution mechanisms in EPC contracts

Delays in EPC projects frequently lead to disputes, especially when significant sums are at stake due to liquidated damages or compensation claims. To manage these disputes, most EPC contracts include provisions for dispute resolution mechanisms such as:

- **Negotiation and mediation:** Encouraging parties to resolve disputes amicably before resorting to formal legal action.
- **Arbitration:** Commonly used in international EPC projects, arbitration provides a binding resolution outside of the court system. It is often faster and more flexible than litigation.
- **Litigation:** In some cases, parties may need to resolve disputes in court, particularly where legal interpretations of contract clauses or regulatory issues are involved.

A well-drafted dispute resolution clause in an EPC contract can help avoid protracted legal battles and reduce the overall cost and time spent on resolving delay-related conflicts.

Get help from a lawyer with construction and EPC project experience

It is critical to involve legal counsel early in the [tender process](#) of your EPC or construction contract and throughout the project.

Wambeti Legal can assist you with key legal concerns around delays and time overruns by:

- assisting with contract drafting to clearly define delay-related terms;
- providing advice on the enforceability of delay liquidated damages clauses;
- assisting with the management of EOT claims and force majeure clauses;
- helping both contractors and clients to manage the risks associated with contract termination;
- providing guidance and assurance that the proper procedures for delay claims and dispute resolution mechanisms are followed during the course of the project to reduce legal risk.

Contacting Wambeti Legal

[0423 825 235](tel:0423825235)

hello@wambetilegal.com.au

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