

Delays Caused by Inclement Weather



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A contractor will only be entitled to an extension of time for events listed in the contract as excusable events i.e. those causes of delay for which the employer has assumed the risk and responsibility with regard to time. In Hong Kong, some standard forms of contract do not list inclement weather as an excusable event (see Figure 1) and, therefore, the contractor is not only responsible for the financial effects of inclement weather but also assumes the risk and responsibility of delay caused by inclement weather.

The standard forms which provide that extensions of time are to be granted for delays caused by inclement weather (e.g. the HKIA Form) are sometimes subsequently amended in special conditions of contract to provide otherwise.

Accordingly, contractors in Hong Kong may be required, by the terms of the contracts which they enter into, to make appropriate allowances in their programmes to account for the risks of inclement weather causing delays. This is not such a tall order as, by having regard to meteorological records, the time of year and the location of the site, a contractor should be able to reasonably estimate and allow additional time to reflect the risks of delays to activities which are sensitive to inclement weather.

Why should the contractor be held liable for the time effects of inclement weather? Well it is the contractor, who of the two parties, is probably in the best position to manage and/or price this particular risk. Therefore, for the original contract period, the Contractor can

identify weather sensitive work and traditional periods of inclement weather and make a reasonable allowance thereof.

Extended Periods

What happens if there is delay caused by inclement weather within an extended period after the original date for completion?

On the one hand, the contractor will not have made any allowance for such delays and, on the other hand, the contract administrator is superficially not empowered to grant extensions of time if inclement weather is not listed as an excusable event in the contract.

The answer is simple. Delays caused by inclement weather in an extended period should be considered as part of the effects of the primary delaying event (i.e an excusable event) for which extensions of time have been or should be granted.

If, for instance, a contractor received an extension of time of 20 working days (e.g. due

to an instruction to carry out 20 days of extra work), then the revised extended date for completion is fixed by counting the number of working days after the previous date for completion, i.e. without counting non-working days such as Sundays and labour holidays. If inclement weather caused further delay to the project in the extended period then further days should be counted to compensate for the time lost due to the inclement weather in the extended period.

Generally, the principle is that inclement weather in an extended period qualifies for further extensions of time if it was incurred due to the consequential or knock-on effects of an excusable event. Coupled with this is the fact that most standard forms of contract provide that the contract administrator’s assessment of an extension of time should be “fair and reasonable”. An extension of time, which failed to account for all of the effects caused by an excusable event, could not be said to be “fair and reasonable”.

Authority for the principle can be found in the Canadian case of Ellis Don v The Parking Authority of Toronto (1978) 28 BLR 98. The case concerned work planned to be carried out in the summer (pouring concrete) being delayed into winter due to the employer’s failure to obtain an excavation permit. This

Figure 1

	Excusable Event	Compensable Event
HKIA’s Standard Form of Building Contract	Yes (see Clause 23 (b))	No
Swire Properties Ltd’s Standard Form of Building Contract	No	No
Government’s GCC for Civil Engineering Works	Yes (see Clause 50(1)(b)(i), (ii) and (ia))	No
KCRC’s GCC for Civil Engineering & Building Works	No (see Clause 45.4(d))	No

delayed the commencement of the project. The extension of time claimed by the contractor was 17¹/₂ weeks which included 3 weeks consequential delay due to the concreting works being delayed into the winter. The court awarded the contractor the additional time for the consequential delay caused by winter working as well as financial damages to reimburse the extra cost incurred by the contractor due to concreting in the winter.

Change in Conditions During the Original Contract Period

The same principle of a summer job being delayed into a winter job may be used for extending the date for completion due to inclement weather delays before the original date for completion. This may apply where the primary cause of delay (which is an *excusable event*) results in the deferment of weather sensitive work that was to be carried out during a dry season, being carried out during a wet season. In such circumstances, the revised extended date for completion should be assessed to compensate for the effects of the inclement weather delays incurred because of the seasonal weather changes as the delays were consequential, or a knock-on effect, of the *excusable event* which was the primary cause of delay.

Additional Payment or Recompense

Generally, a delay caused by inclement weather is not a compensable event giving rise to additional payment or recompense. However, based upon the principles established above, the contractor may be entitled to recover the additional costs incurred due to delays caused by inclement weather, which costs were incurred due to the

knock-on effects of a primary excusable / compensable event.

Alternatively, if the contract does not provide for a consequential right to financial compensation, the contractor may have a claim for damages at common law. In the Ellis Don case, O'Leary J held (at page 121) that:

'... the parties should have contemplated that the [primary] delays would create a real danger or serious possibility of more work having to be done in winter, and the loss the [contractor] suffered both from the winter working and having to spend an extra 17¹/₂ weeks to complete the project.'

Culpable Delays

If there are contractor's culpable delays, in addition to delays caused by *excusable events* for which extensions of time are to be awarded, then such circumstances should be taken into account when assessing additional payment or recompense for an excusable and compensable event.

It is difficult to generalise, as each case should be taken on its own facts. Basically, there are two extremes:

- There is no entitlement to any additional payment or recompense as, absent the excusable and compensable event, the contractor would have been detained on the project for the same time or longer due to its own culpable delays.
- There is a minor adjustment to the amount of the additional payment or recompense due to the excusable and compensable event as the contractor's culpable delays were not critical and, without the excusable event, would not have caused, or would not have been allowed to cause, delay to completion.

Summary

A contractor who accepts the risk of weather conditions does so only for those conditions implied by the contract period. Delays caused by inclement weather within an extended period, or where a dry season job is delayed into a wet season job, are generally not risks which the contractor has agreed to undertake. They should be treated as part of the effects of a primary excusable / compensable event for which there are entitlements to extended time and/or compensation. All perhaps commonsense to some, but it is surprising how many contract administrators do not understand these concepts.

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