

WHAT IS CONSTRUCTIVE ABOUT ACCELERATION?

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WHAT IS CONSTRUCTIVE ABOUT ACCELERATION?

Constructive Acceleration is an established concept in the US. Whilst not an approach which is ordinarily pursued by EPC Contractors ('Contractor') within the Asian market it has recently been stated as the basis of entitlement for additional costs on some projects in Malaysia and Singapore. This paper discusses the concept of Constructive Acceleration and why it has no place in connection with those contracts in Malaysia and Singapore with which it has been raised.

'Whilst an established concept in the US, Constructive Acceleration provides no basis of entitlement in Asia'

Every contract sets out the obligations and responsibilities of the parties relative to performance, work execution and contractual relationship. In situations where the Employer

has an obligation under the contract which he, or his Contract Administrator ('CA'), fails to discharge appropriately¹, the Contractor may inherently be forced to take a *constructive* approach and continue to perform the terms of the contract; never mind that it is outside what was originally contracted for by the Contractor. The 'required performance' on the part of the Contractor is often referred to as a 'constructive change' by US EPC Contractors and others.

The most common example of constructive change, which is also potentially the most contentious, is Constructive Acceleration which occurs where the Employer or CA fails to grant an appropriate extension of time ('EOT') for excusable delay(s) forcing the Contractor to accelerate works to complete within the current time for completion. The Contractor would argue that he is forced to take acceleration measures to avoid the imposition of liquidated damages in the face of what potentially might have become an unachievable contract time for completion.

¹ Which have time implications on the progress of the Works.

Definition

'Constructive' refers to something that is inferred or implied.² In a construction project context, constructive acceleration is inferred from an *implied instruction* either from the Employer or his representative. Ostensibly, an implied instruction could also be construed in circumstances where the CA has failed to recognise entitlement to an EOT under the contract but still requires the Contractor to accelerate the works to overcome any potential delay and complete by the existing completion date³.

This is supported by the definition endorsed by the Society of Construction Law⁴ which states "Acceleration following failure by the Employer to recognise that the Contractor has encountered Employer Delay for which it is entitled to an EOT and which failure required the Contractor to accelerate its progress in order to complete the works by the prevailing contract completion date. This situation may be brought about by the Employer's denial of a valid request for an EOT or by the Employer's late granting of an EOT. ..."⁵

'For Constructive Acceleration to exist there needs to be an instruction, whether implied or otherwise, from the Employer or CA'

It follows that the key element within the definition of Constructive Acceleration is that there needs to be an instruction, whether implied or otherwise, forthcoming from the Employer or CA for the concept to apply.

Usually constructive acceleration is not as obvious as an explicit instruction from the Owner or CA. There are three situations in which constructive acceleration occurs:

- First, an Employer/CA claims the Contractor is behind schedule and issues a written or verbal direction to complete the work earlier than would be required if an appropriate EOT was issued.

² Definition of the term 'Constructive'-Merriam-Webster Dictionary: declared such by judicial construction or interpretation; Oxford Dictionaries: Law not obvious or stated explicitly; derived by inference.

³ Or deficient extended date for completion, as the case may be.

⁴ Delay and Disruption Protocol, October 2002, ISBN 0-9543831-1-7.

⁵ A similar definition is contained within Delay and Disruption in Construction Contracts, 4th edn., Keith Pickavance, at para 11-094 which draws upon the Office of the Chief of Engineers, Department of the Army, Modifications and Claim Guide, EP--415 1-2 (July 1987) at B-1.

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- Second, the Contractor is entitled to an EOT but the Employer/CA threatens the imposition of liquidated and ascertained damages ('LAD's') or termination because the Employer/CA claims that the Contractor is behind schedule.
- Third, a Contractor requests and is entitled to an EOT, yet the Employer/CA denies or fails to grant the extension in a timely manner.

It is important that the Contractor advises the Employer/CA that any efforts undertaken by the Contractor to accelerate performance are not voluntary, especially when there is the perception of acceleration, but an instruction has not been received. This notice will be of assistance in seeking compensation where the Contractor has not actually been expressly directed to accelerate.

Examples of Constructive Acceleration

The following examples of constructive acceleration are presented in illustration of the concept from US case law.

In *M.S.I. Corp.*⁶, the General Services Board of Contract Appeals ('BCA') held that the Contractor was entitled to adjustment of the price because the government directed it to accelerate the work. The opinion set out the five elements required for a constructive acceleration claim in the US. These are:

1. An excusable delay entitling the Contractor to an EOT;
2. A timely request for such an extension;
3. The Employer or CA's refusal of that request;
4. A demand for completion within the original performance period; and
5. The incurrence of extra costs after acceleration.

The CA did not grant the EOT until more than three years after substantial completion of the contract. During that period, however, the Contractor took different and inconsistent positions concerning the increased costs it said it was incurring. As a result, the BCA returned the claim to the CA to determine the value of damages arising.

⁶ GSBCA No. 2429, 68-2 BCA 7377 (1968).

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In *Eite, Inc. v. S.S. Mullen, Inc.*⁷, the Sub-Contractor contracted to quarry rock for the Contractor. The Contractor directed the Sub-Contractor to quarry in a location where the owner claimed suitable material was likely to be found. After three months without finding suitable material, the Sub-Contractor was directed to quarry in another area. Despite this, the Contractor insisted that the Sub-Contractor had to comply with the original progress schedule. The court found that accelerated effort was required because of the Contractor's initial failure to supply a suitable source of rock combined with the failure to grant the Sub-Contractor an EOT when it became necessary to find an alternative source.

In *Constructors-Pamco*⁸, the Corps of Engineers BCA found that the Contractor had been constructively accelerated, noting that the government had made it "abundantly clear" that work had to be completed without any EOT by:

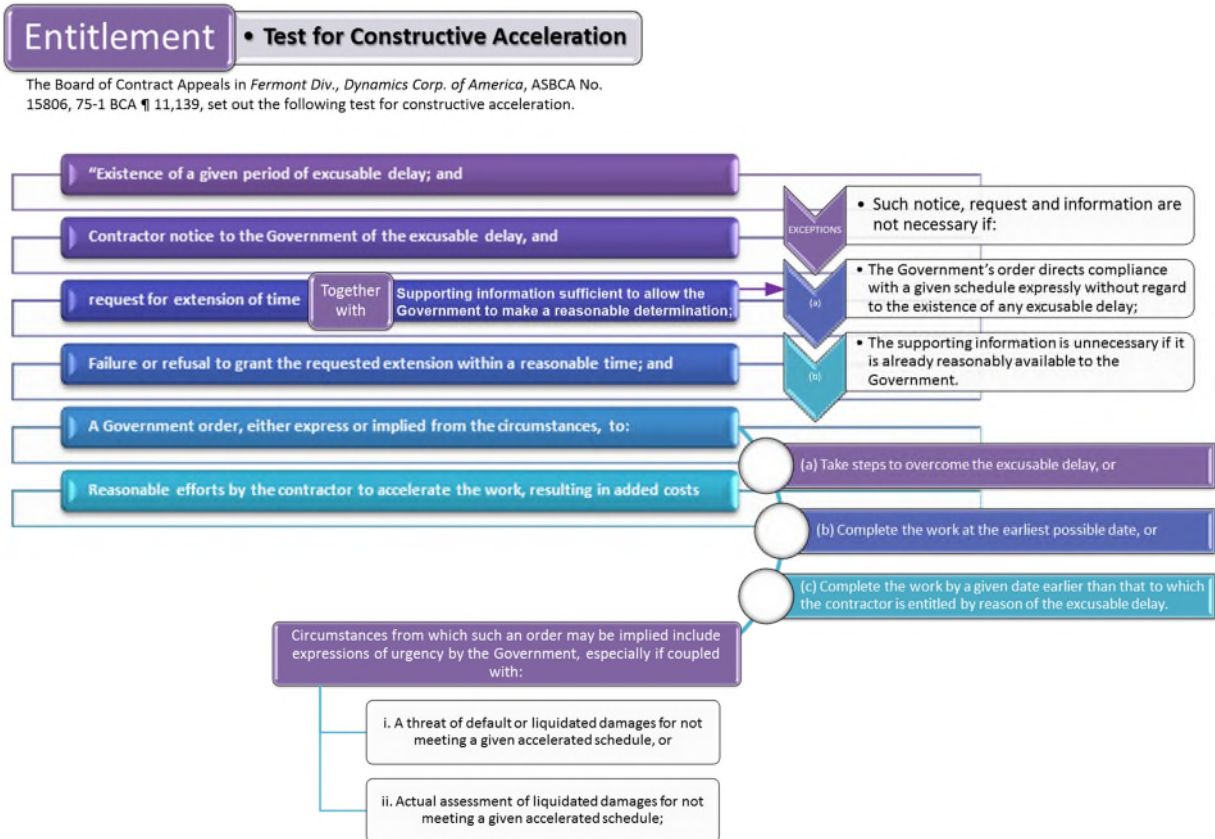
1. Using contract language that stated that the contract date would be strictly enforced;
2. Providing for the imposition of LAD's if the work was completed late;
3. Refusing to grant an EOT for a blizzard that was an obvious excusable delay;
4. Refusing to respond to the Contractor's request for instructions on how to proceed after the Contractor had complained about delays and extra costs; and
5. Making it consistently clear in daily communications to the Contractor's personnel that no EOT would be permitted.

For a Contractor to be successful in bringing a case for Constructive Acceleration before the BCA in the US he should be able to satisfy the following:

⁷ 469 F.2d 1127 (9th Cir. 1972).

⁸ ENGBCA No. 3468,76-2 BCA 11,950 (1976).

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Instructions and Acceleration

Under most standard forms of contract there is no express power that allows the CA to instruct the Contractor to accelerate the Works. Where such a provision does exist⁹, the Employer or CA's authority to issue an express instruction to accelerate the work normally arises only where the Contractor is himself responsible for the delay and he is required to 'expedite progress'. In such cases, the Contractor will be liable for any consequential costs.

But what happens where the Contractor is not culpable for delays, but at the same time entitlement to an EOT has not been recognised? How can it be possible to construe the lack of action on the part of the CA as an 'implied instruction' to accelerate? Can you infer an implied action from the CA's conduct where he does not recognise any entitlement to claim for delays in the first place?

⁹ Such as in FIDIC, PSSCOC, ICE derived forms of contract etc.

What is Constructive about Acceleration?

The authority of the CA stems from the provisions of the contract. Whilst most standard forms of contract give authority to the CA to instruct a change to the sequence or timing of the work under the variation provisions, this does not give the CA the power to instruct the Contractor to accelerate the work so as to complete earlier than the then date for completion¹⁰.

Inaction = Instruction!

How can it be possible to construe the lack of action on the part of the CA as an 'implied instruction' to accelerate?

These provisions relate to a change in the timing and/or sequence of the *execution* of the works, not the time for *completion of the works*.¹¹ The only valid approach would be for the contract to be amended to expressly allow the CA to instruct acceleration where there are Employer caused delays. Equally, the amendment should also stipulate how the CA is to address any resulting costs as a consequence of acceleration. At present, apart from variations, the CA's authority is similarly limited in assessing costs incurred outside the contract mechanism.

The Evolution of the Concept

The doctrine of Constructive Acceleration originated in the US in the 1960's and was devised to allow claims to be advanced under the contract as opposed to being presented as breach of contract.¹² At that time the US

'The doctrine of Constructive Acceleration in the US arose as a legal convenience'

BCA had no jurisdiction to deal with breaches of contract directly and therefore characterised certain actions of the Employer as a 'constructive request' to the Contractor to accelerate. As such, the doctrine of Constructive Acceleration arose as a legal convenience as opposed to a necessity; such claims could have been advanced on other basic principles of contract law or breach of contract.

¹⁰ See e.g. Sub-Clause 13.1(f) FIDIC 99 Red Book. The FIDIC Guide confirms that it was the intention of the draftsmen not to confer such ability (see p. 218).

¹¹ Max W. Abrahamson, *Engineering Law and the ICE Contract* 4th edn., 1979, Elsevier Applied Science Publishers, p. 176.

¹² See Barry Bramble and Michael Callahan, *Construction Delay Claims*, 2nd ed., at §6.8, for discussion of the legal doctrine and its background.

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Ian Duncan Wallace QC famously expressed the position thus: “In the United States, a highly ingenious type of contractor's claim, based on a “constructive acceleration order” theory, has been accepted in the Court of Claims for government contracts in the not uncommon situation where an A/E, in the bona fide belief that the contractor is not entitled to an extension of time and is in default, presses a contractor to complete by the original contract completion date, and it is subsequently held that the contractor had been entitled to an extension of time.¹³ This is, however, a development of what, in any event, is a largely jurisdictional and fictitious doctrine of “constructive change orders” (CCOs) developed by the Boards of Contract Appeals, and is not founded on any consensual or quasi-contractual basis which would be acceptable in English or Commonwealth Courts, it is submitted.”¹⁴

Reference is sometimes made to the doctrine of constructive acceleration being accepted outside the US¹⁵, e.g. in Canada¹⁶ citing, among others, *Morrison-Knudsen v British Columbia Hydro & Power Authority*.¹⁷ The Employer insisted that the Contractor achieve the contracted completion date notwithstanding the occurrence of delays for which the Contractor was not culpable; effectively instructing the Contractor to accelerate to recover delays for which he was entitled to an EOT. The British Columbia Court of Appeal found the Employer's conduct to be a fundamental breach of contract. The Contractor, the court determined, was entitled to damages on the basis that *“As to compensation for the vast enlargement of the contractor's burden by the accelerated programmes, we are driven to accept the argument...that the contract being undischarged, the contractor must seek his remedy under its terms”*.¹⁸

¹³ *Inforex v. U.S.* 216 Ct. C. (1978); *Norair Engineering Corp. v. U.S.* 666 F.(2d) 546 (1981).

¹⁴ Ian Duncan Wallace QC (editor), *Hudson's Building and Engineering Contracts*, 11th edn, p.909. A comment not repeated in the 12th edn, edited by a team of barristers from Atkin Chambers.

¹⁵ *The Basics of Constructive Acceleration*, James G. Zack Jr., *The Journal of AACE International*, January 2012. The Abstract states: This article examines constructive acceleration in various legal jurisdictions (both common law and civil law) around the world to determine whether a contractor is able to use this type of claim to recover damages. See also Keith Pickavance, *Delay And Disruption In Construction Contracts*, 4th edn., para 11-100, which references direct intervention by the Employer which, in that context, may give rise to a ‘collateral acceleration agreement’ with the Employer or, where not precluded by the terms of the contract, an instruction from the Employer to accelerate. Neither represents constructive acceleration in the sense described but present the potential for a claim coupled with estoppel.

¹⁶ *Supra* “There are, however, two benchmark Canadian cases that firmly established a mechanism by which a contractor in a constructive acceleration situation may be able to recover”.

¹⁷ *Morrison-Knudsen Co v British Columbia Hydro & Power Authority (No.2)* (1978) 85 D.L.R. (3d) 186 (B.C. Ct App.).

¹⁸ (1991) 7 Const. L.J. 227, p. 241.

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The court recognised that as the Contractor was asked to accelerate its programme, notwithstanding excusable delays and whilst all original terms of the contract still remain in force, it must accordingly be allowed to seek redress under those very same terms i.e. by seeking to recover damages as a result of Employer's breach of contract.

Whilst Constructive Acceleration has been presented as a basis of claim in both Singapore and Malaysia it is a doctrine that holds no direct reference in either country

The case also went on to discuss recovery of acceleration costs. Based on its determination of fundamental breach of contract, the court awarded the Contractor damages as prescribed under the contract. This would depend on the Contractor's ability to prove actual costs of additional resources engaged to recover delays. The case also discussed the entitlement to claim reasonable costs under the principle of 'Quantum Meruit'¹⁹ which potentially could be a basis to claim accelerative costs in certain circumstances.²⁰

The English case of *Motherwell Bridge v Micafile*²¹ is perhaps the closest reference to 'constructive acceleration' in the UK, albeit not expressed under that term. *Motherwell Bridge* had requested an EOT whilst at the same time stating that by working additional time at Micafile's expense that delay could be reduced.

It appears to have been an important consideration that Micafile complained that resources had not been increased whilst at the same time they did not award, or address the question of, an EOT. It is not clear from the Judgement what the legal basis of entitlement was and the decision can only be regarded as turning on its own facts without creating firm precedent.

The recovery of acceleration costs remains dependent on the Contractor proving that those costs were actually incurred as a direct result of the Employer's breach.

¹⁹ The principle is one based on reasonable restitution of costs incurred. In the case judgment, the Court of Appeal disregarded entitlement to quantum meruit on the basis that the Contractor elected to proceed with the contract and hence the breach was one under the contract; recovery will be limited to damages under contract.

²⁰ Where the Contractor elects to terminate the contract, he is entitled to claim under quantum meruit. Depending on the terms of the contract, reasonable costs may be recoverable based on unjust enrichment (Restitutionary Quantum Meruit)

²¹ *Motherwell Bridge Construction Limited v Micafile Vakuumtechnik* (22002) TCC 81 CONLR 44.

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The claim for acceleration costs is likely to be a claim for 'Quantum Meruit in Contract'²², the CA's actions not being regarded as a fundamental breach of contract. Claims for 'Restitutory Quantum Meruit', such as those rejected in the Morrison-Knudsen²³ appeal case above, assert a right to payment arising from circumstances of unjust enrichment by one party at the expense of another which may be appropriate if a fundamental breach had been found to have occurred, which of course it was not.

It is often argued that the Contractor should simply continue with the Works knowing that he is entitled 'Constructive Acceleration' was devised as a device to give jurisdiction to address breaches of contract to a body that lacked that jurisdiction; it would appear that there is no basis for the concept beyond that contrivance²⁴.

Whilst Constructive Acceleration has been presented as a basis of claim by some EPC Contractors executing contracts in both Singapore and Malaysia²⁵ it is a doctrine that holds no direct reference in either Singapore or Malaysia; it may be useful shorthand to describe a set of responses to a breach of contract but, even in that context, the term has the potential to create as many difficulties as it seeks to address given that, generally, the CA has no authority to deal with issues falling out with the terms of the contract, such as compensation for breach of contract.

The Dilemma for the Contractor Remains a Very Real One

Notwithstanding the ability to establish an Employer's breach of contract resulting in an entitlement to claim damages, the dilemma Contractors' face is whether to accelerate the works in the first place and leave the cost recovery process to follow.

Historically in Singapore and Malaysia, EOT's were very rarely granted during the currency of the Works creating a very real issue for regional Contractors; that position is often exacerbated

²² This was not argued under Morrison-Knudsen Co v British Columbia Hydro & Power Authority.

²³ Morrison-Knudsen Co v British Columbia Hydro & Power Authority (No.2) (1978) 85 D.L.R. (3d) 186 (B.C. Ct App.).

²⁴ Indeed, it appears that since 1978 and the passing of the Contract Disputes Act giving the US Agency Appeals Boards broader jurisdiction the legal doctrine was no longer required but the term itself has developed into an expression of a common claim.

²⁵ In both circumstances, support for the application of constructive acceleration as an entitlement, if not a legal doctrine, was stated as having been drawn, wrongly I believe, from: The Basics Of Constructive Acceleration, James G. Zack Jr., The Journal of AACE International, January 2012, Summary sections for Singapore and Malaysia, together with more general references asserting the Contractor's entitlement.

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by the culture of 'trading off' Contractors' claims against an assertion of entitlement to apply LAD's.

Where the CA wrongfully fails to award an EOT, either of appropriate duration or at all, the route under the contract usually prescribes a referral to a Dispute Adjudication Board (DAB), adjudication or arbitration as appropriate.

It is often argued that the Contractor should simply continue with the Works knowing that he is entitled to an EOT and that he will recover any prolongation costs and any LAD's wrongfully deducted when the matter is reviewed by the appropriate tribunal. Indeed, if the Contractor does increase resources, that is a matter of choice on the part of the Contractor unless at that stage he is confident of attributing the delays as a direct Employer breach.

Contractors will take no comfort in the knowledge that the situation remains uncertain as to whether or not to undertake accelerative measures are concerned. Large construction projects tend to be more complex and less linear situations which are then further compounded by immediate commercial considerations and the inherent uncertainty of outcome.

As a matter of commercial reality, the Contractor may consider that he has no option other than to accelerate and deal with the risk of recovering the cost associated with that increased effort later.

However, if he chooses that path, the Contractor has to underpin his entitlement based on proof of causation. Realistically, even if he can show that there is no culpable delay on his part, the Contractor still has to demonstrate that there is no prospect of an award of an EOT, ever, and that any liquidated damages payable would cripple his business.²⁶

Depending on which stage the project is at when accelerative works need to be undertaken, the Contractor may find it challenging to satisfy the causation requirements demonstrating that the need to accelerate is solely as a result of the Employers actions or inactions and associated refusals to address the issue of time.

²⁶ See *Perini Corporation v. Commonwealth of Australia* (1969) 12 BLR 82.

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Entitlement to an EOT is, generally, not something that now needs to be left to completion of the project to be determined given the availability of interim mechanisms such as DAB's, as existed in both of the particular contracts initiating this discussion, and increasingly statutory adjudication provisions²⁷ in a number of jurisdictions; in that context, reliance on an inferred or implied instruction to accelerate as a result of complained of delay or an asserted refusal of the CA to grant an appropriate EOT when a binding²⁸ third party decision is available to the Contractor that will address the issue at the heart of the matter must render the need for, and the concept of, constructive acceleration redundant.

The question then is what can a Contractor do when faced with a CA who refuses to recognise entitlement to an EOT and the contract carries substantial LAD's?

Contractor's Management of the Works when faced with Delays

If the Contractor is liable for the delay there is an inherent duty to mitigate those delays. Where the date for completion still remains that contracted for by the parties, the Contractor will need to consider engaging additional resources to expedite the works. In doing so the following will be relevant to the Contractor:



- Comply with any reasonable instructions issued by the CA to expedite progress of the Works.
 - Reserve your position, where CA's instructions are actually engineered to provide a benefit to the Employer over and above the contract requirements²⁹ as these are arguably variations under the contract.
- Assess the proposed acceleration costs against the financial exposure to LAD's (which are usually capped).
 - Assess the equilibrium point: the point at which it would make no commercial sense to incur additional acceleration costs.

²⁷ Albeit, in Singapore at least, the issue needs to be framed around adjudication of a payment claim dispute.

²⁸ Temporary or otherwise.

²⁹ Eg: To complete works before the contracted completion date or where specifications are changed for value engineering purposes.

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- Review the current state of the Contractor's cash flow and ability to procure additional labour, plant and bring forward material.
- Consider the Contractor's market reputation in the event of protracted delays.

Where the Contractor is firmly of the view that it has a basis for an EOT (excusable delays) the Contractor should consider taking the following steps:



- Immediately notify the CA of the delay event within the timeframe stipulated under the contract.
 - The Contractor should be aware that some notice requirements are a condition precedent.
- In providing any notice, the Contractor should provide sufficient contemporaneous information in support of its position.
 - The Contractor is encouraged to provide an estimate of the anticipated delay to completion and an estimate of the additional prolongation costs that may be incurred as a result of that excusable delay.
- Where an EOT is rejected, the Contractor should dispute the CA's determination of entitlement.
 - The Contractor should provide an acceleration work plan designed to achieve the Employer's preferred completion date.
 - This should be submitted together with the accompanying cost estimate for undertaking the works in the foreshortened period.

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- The acceleration plan and cost estimate will need to be directed to the Employer, bearing in mind that the CA is unlikely, under the terms of the contract, to have authority to instruct acceleration or agree payment for such acceleration.
- The intention is to provide the Employer with the opportunity to review the cost associated with potentially accelerating the work against the time and cost exposure of doing nothing. Parties may then be able to come to some mutual arrangement with respect to the time and cost implications associated with accelerating completion.
 - Where a mutual agreement to accelerate the Works is achieved, it is suggested that, it should be drafted as a supplementary agreement to ensure clarity where the contract does not provide an appropriate mechanism to effect such an agreement.
 - At the same time, the Contractor should reserve its position to refer entitlement to an EOT to the dispute resolution mechanism under the contract.
 - In doing so it is important that the Contractor has an eye on any condition precedents to referring the issue in order not to be 'timed out' of entitlement whilst 'talking about a solution'.
 - Until such time as an agreement is reached the Contractor may wish to submit a claim that time is at large.
- Whilst it would be prudent to have the acceleration agreement in place, the Contractor

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may decide to start the acceleration works on a goodwill basis, reserving its right to claim additional costs.

- Clearly this is a commercial judgement for the Contractor that carries a degree of risk if the 'agreement' does not materialise.
- The Contractor should immediately submit interim payment applications as and when acceleration costs are incurred.
- The Contractor may simultaneously want to consider applying for a variation order under the contract to support its cost claims for increased resources.
- If there is still no positive response from the Employer or his CA, it would not be in the Contractor's interest to continue with the acceleration works.
 - The Contractor will need to consider any repercussions of not undertaking acceleration measures against the prospect of LAD's. (Together with the other commercial considerations such as the state of the Contractor's cash flow, potential for repeat business with the Employer, Contractor's reputation as a time compliant contractor, etc.)
- At all times, the Contractor must keep detailed records of enhanced site activities in carrying out the acceleration measures to substantiate the additional costs incurred as a result. This should include:
 - Overtime Costs

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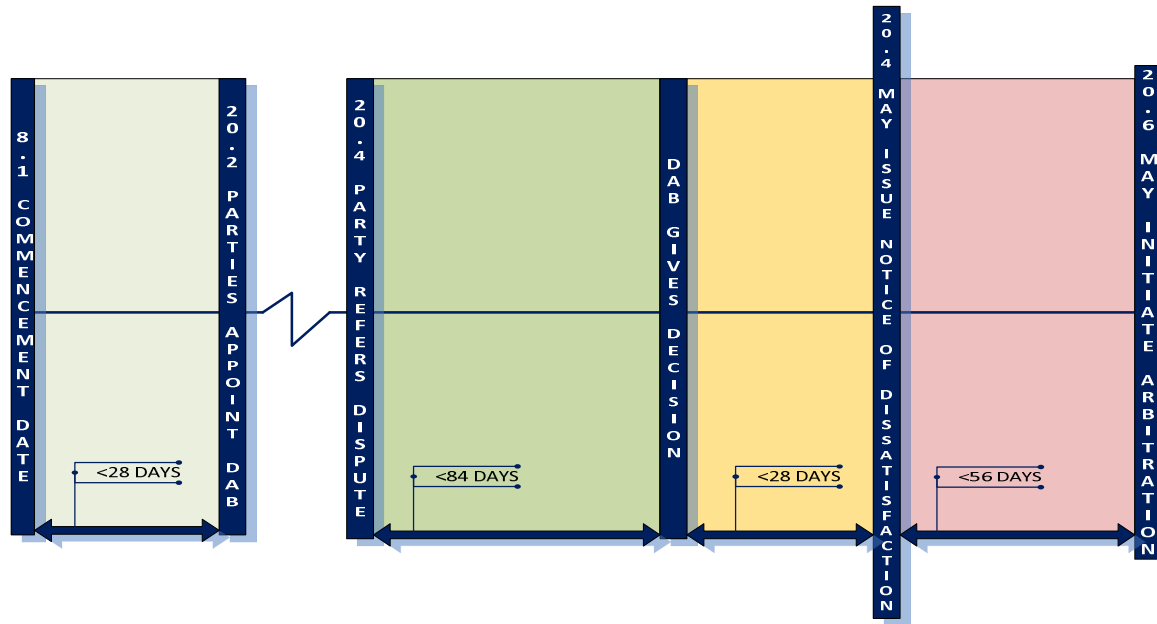
- Additional Labour Costs (additional squads or double shifting)
- Stacking of trades costs
- Disruption costs
- Additional equipment costs
- Additional supervision costs
- Increased material delivery costs
- Increased overhead costs, etc.
- All monthly progress reports should capture the detailed progress of work executed on site and the resources deployed to achieve that. That information should include any necessary changes to the sequence of work and the reasons for this.

The best method of resolving acceleration claims (where the delays are not Contractor related and the Employer/CA still insists on retaining the current contracted time for completion) would be for the parties to agree on the extent of additional works, the timeframe for execution and the ensuing costs and record that in an appropriate agreement. This is particularly important given that acceleration measures is work that falls out with the contracted for scope and for which the CA has no authority to value or certify compensation in respect of. However, that requires the parties to recognise the true underlying position, reach consensus on the actual cause and effect of the delay and the driving desire for acceleration.

The alternative, which is to progress the matter to the dispute resolution forum may, for some Contractors, be regarded as commercially disadvantageous given the timeframe associated with some of those provisions, e.g. those related to FIDIC contracts outlined below, and the potential ramifications of getting it wrong.

What is Constructive about Acceleration?

FIDIC³⁰ Red, Silver, Yellow³¹ Book Dispute Events, Clause 20 provides:



Whilst the Contractor's notice and the supporting claim content serves to capture the Contractor's contemporaneous position in forwarding a claim subsequently, it does not necessarily guarantee recovery of additional costs.³² Where it is subsequently determined by, e.g. the DAB, that the Contractor was not entitled to an EOT, the Contractor has effectively refused to carry out a valid instruction from the CA and that may entitle the Employer to terminate the contract³³.

Under FIDIC, the Employer has an express right to terminate³⁴ if the Contractor fails, "*without reasonable excuse*", to proceed with "*due expedition*", i.e. with a degree of speed to progress the Works towards completion by the Time for Completion as required by Sub-Clause 8.2. Whilst not determinative, the Employer may refer to the Contractor's Clause 8.3 programme and the progress reports³⁵ when considering whether the Contractor has failed to proceed with due expedition³⁶. Whether the cause of any delay to progress entitles the Contractor to an EOT will

³⁰ With reference to The Fédération Internationale des Ingénieurs-Conseils (FIDIC) published, in 1999, First Editions of the Conditions of Contract for Construction.

³¹ Replace reference to clause 8.1 noted with 'Party gives notice of the intention to refer a dispute to DAB'.

³² Both acceleration and prolongation costs, which are subject to proof of actual costs incurred due to Employer delays.

³³ Providing the appropriate mechanism is followed.

³⁴ FIDIC Red Book, Clause 15.2(c)(i), following the provision of 14 days' notice.

³⁵ A required submission under Clause 4.21, FIDIC Red Book.

³⁶ Which is a separate, albeit related, obligation to complete within the Time for Completion.

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be a relevant factor (even if the Contractor has effectively lost entitlement to an EOT by failing to give the required notice under Clause 20.1 in time)³⁷. The qualification "*without reasonable excuse*" provides the DAB and arbitral tribunal with discretion in determining whether the Employer's termination should be regarded as valid.

Inevitably, the management of delay to the Works and the decision to proceed with acceleration is a difficult one for the Contractor. It is not helped when faced by a lengthy contract process to address the underlying entitlement to an EOT, as outlined above³⁸; the need to comply with, often strict condition precedent, notice provisions; the likelihood of the CA delaying assessment and notification of the outcome of his EOT determination in the first place and thereby obscuring the underlying position between the parties; and eventually, to be faced with an outright rejection of the EOT claim. Coupled with the often protracted uncertainty as to whether an EOT will be awarded is the exposure to LAD's coupled with pressure for the Contractor to expedite progress and adhere to the existing completion date, all of which is financially daunting to the Contractor.

In the circumstances, one could argue that the doctrine of constructive acceleration would be a saving grace to Contractors where there is a legitimate claim for EOT. Although it may not address the practicalities of securing immediate cost recovery as and when the works are carried out, the threat of entitlement to 'Constructive Acceleration' costs as an alternative to having to demonstrate breach of contract and actual loss may be sufficient to put Employers and their CA's in check when demanding expedited progress of the Works where the Employer is the driving cause of those delays.

³⁷ FIDIC Red Book, Clause 20.1: 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.

³⁸ Some conditions of contract do not empower the CA to grant a prospective EOT, e.g. Singapore Institute of Architects Lump Sum Contract, Sixth Edition, clause 23(3), Time for Extension, SIA form: "After any delaying factor in respect of which an extension of time is permitted by the Contract has ceased to operate and it is possible to decide the length of the period of extension beyond the Contract Completion Date (or any previous extension thereof) in respect of such matter, the Architect shall determine such period of extension and shall at any time up to and including the issue of the Final Certificate notify the Contractor in writing of his decision and estimate of the same.", which essentially requires a "wait and see" approach.

What is Constructive about Acceleration?

Conclusion

Constructive acceleration is a doctrine that has not found prominence in Singapore or Malaysia. Whilst the type of issues hosted under that term will always require careful factual review, those circumstances are usually capable of being dealt with under the ordinary principles of law.³⁹ This discussion has also sought to set out a practical approach to managing what is a very difficult position for a Contractor faced with a refusal, or unreasonable delay, to having an appropriate EOT recognised whilst at the same time being pressurised to expedite progress to meet an existing completion date for fear of being penalised with LAD's.

Where a Contractor is faced with such a position, careful analysis is required to fully appreciate the underlying factual position and manage the accompanying contract, commercial and time related risks.

Employers and CA's alike need to assess the actual position on the project and very quickly come to a mutual understanding as to how to address the impact of delay events notified by the Contractor. Where EOT entitlement exists that should be recognised at the time it arises in compliance with the contract requirements.

If the Employer does require an earlier date for completion or preferred contracted date despite delays, then it would be prudent to enter into discussions with the Contractor to agree on an accelerated work plan. This will include a cost estimation to expedite the Works.

The actual costs of acceleration will depend on the measures implemented to achieve the same, whether that be re-sequencing, deploying additional resources or introducing multiple shift working etc. The interaction of these additional measures is likely to result in some element of disruption and loss of productivity. The loss of productivity,⁴⁰ costs of additional resources and potentially any premium cost of overtime will be the basis of the Contractor's claim for compensation for accelerative works.

Ultimately, any conciliatory approach will be influenced by the commercial incentives offered to the Contractor in order to achieve an early completion date.

³⁹ The cost recovered for breach of contract will be general damages or in some circumstances on a quantum meruit basis

⁴⁰ For both plant and labour

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Accredited Expert, Accredited Mediator, Accredited Expert Determiner

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Derek Nelson is employer and contractor trained as a Chartered Quantity Surveyor and a Chartered Engineering Surveyor. He is an Accredited and Certified Expert Witness, an Accredited Mediator and Accredited Expert Determiner. His experience covers over 35 years in the construction industry.

He has extensive experience of providing a variety of construction cost, commercial, contract and dispute related services; supporting clients in the international arena by providing strategic independent expert advice or acting as an Expert Witness in the event of litigation and arbitration or other formal dispute resolution process on their international projects.

With over 35 years as a quantity surveyor working on or providing advice in relation to international projects, Derek's expertise is in matters of quantity surveying practice, valuation, damages, contract administration, contract management, commercial management and cost management in connection with on- and off-shore construction and engineering projects. That contract and quantum capability is married to his planning and delay analysis experience.

Derek's academic and professional qualifications coupled with his extensive and detailed experience of the construction process has led him to be appointed as an Independent Expert Witness both in Europe and Asia and he is often called upon to undertake independent reviews of projects in the role of Project Neutral.

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E-mail us for a copy of our associated white paper on the Analysis and Valuation of Disruption at: DerekNelson@hka.com.

