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**CONSTRUCTION ACCELERATION—
A GLOBAL TOUR**

About the Speaker



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- **More than 40 years experience in construction management & dispute analysis & resolution**
- **Involved in more than 5,000 claims throughout U.S., Canada, Egypt, Chile, China, Guatemala, Germany, Kazakhstan, Netherlands, Peru, Saudi Arabia, Russian Federation, Trinidad & Tobago, & Venezuela**
- **Fellow of AACE International & Royal Institution of Chartered Surveyors**
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- **CCM, CFCC & PMP**

Introduction

- **Constructive acceleration is “judge made law”**
 - ✓ **Created by Boards of Contract Appeals in the 1960’s and 1970’s**
 - ✓ **Gave BCA’s jurisdiction over these situations**
 - ✓ **Alternative to breach of contract claim litigation in U.S. Court of Claims**
 - ✓ **Contract Disputes Act of 1978 formalized BCA jurisdiction over all claims arising on projects**
- **Constructive acceleration claims are common throughout U.S.**
- **Constructive acceleration claims are NOT common in other countries, however.**
 - ✓ **Leading English barrister termed Constructive Acceleration a “...fictitious doctrine...not founded on consensual or quasi-contractual basis.”**

Basics of Constructive Acceleration

- **Standard 6 part test to prove constructive acceleration**
 - 1. Contractor must encounter & prove excusable delay**
 - 2. Contractor must submit notice & request time extension**
 - 3. Time extension must be denied in whole or in part**
 - **Silence (after a “reasonable period of time”) deemed a denial**
 - 4. Owner must by coercion, direction or some other manner “...that can be reasonably construed as an order to complete work within the unextended time...”**
 - 5. Contractor must provide notice they construe action to be acceleration directive: owner must fail to act on this notice & stop acceleration**
 - 6. Contractor must actually accelerate work and document all actions and costs**

Is Constructive Acceleration Recognized Globally?

- Can a U.S. contractor working abroad expect owners, attorneys & courts to recognize concept?
 - ✓ English barrister on Saudi claim stated simply—
“English courts do not recognize this legal concept.”
- If there is no legal relief, contractor faced with Hobbesian choice
 - ✓ Refuse to accelerate, complete late, convince arbitrators they did not cause delay & owner has no right to LD’s
 - ✓ Or, accelerate work & pursue damages from owner under another legal theory
- Also, contractor may face twin economic losses—cost to accelerate & cost of LD’s

Is Constructive Acceleration Recognized Globally?

- The issue as to whether constructive acceleration is globally recognized explored...
- How can contractors faced with similar situations recover damages when constructive acceleration is not legally recognized in country where working?
- Performed Internet research for published articles
- Reviewed international law books
- Sent e-mail questionnaires to members of AACE CDR & P&S committees living abroad
 - ✓ Approximately 50 e-mails sent
 - ✓ 15 responses received
- A country by country review of findings may be found following...

Australia

- Australian law does not recognize the term, “constructive acceleration”
- But Courts do recognize the legal concept in *Perini Pacific’s* case
 - ✓ Contract administrator refused to award EOT’s
 - ✓ Court ruled owner had “implied duty” to ensure contract administrator was properly administering contract
 - ✓ Concluded owner did not live up to obligation
 - Therefore, owner’s “...breach of the implied terms...” gave rise to claim for damages
- Court also recognize “act of prevention”
 - ✓ When owner delays work, refuses EOT’s & forces acceleration
- CONCLUSION: May be able to recover under either legal theory

Brazil

- Brazil, a Civil Code nation, has no published court decisions
 - ✓ Does not recognize precedents; no “Doctrine of Stare Decisis”
- Brazilian claims consultant advised
 - ✓ Recovery of contractor damages a “gray zone”
 - ✓ Prepared constructive acceleration claims on two power plant projects
 - Recovered some damages via negotiation in one case
 - In another case, owner alleged Force Majeure event, but no damages were recovered at court
- CONCLUSION: Recovery highly unlikely

Canada

- Canadian courts do not recognize term
- However, contractors with proven facts “...which look remarkably like the shopping list of elements of constructive acceleration have tended to be successful with their claims.”
- Two recent cases have established protocol for contractors to recover constructive acceleration costs
 - ✓ Morrison-Knudsen Co., Inc. v. B.C. Hydro & Power Authority
 - ✓ W.A. Stevenson Construction (Western) Ltd. v. Metro Canada
- CONCLUSION: Even though “constructive acceleration” is not a recognized term in Canada, if one may prove the six criteria aforementioned, one may allege breach & recover acceleration costs

People's Republic of China

- Neither Contract Law of PRC nor Construction Contract of Construction Works recognize constructive acceleration
- Chinese law distinguishes between
 - ✓ “Acceleration” – increase resources to complete on time
 - ✓ “Mitigation” – reallocate resources to minimize cost & delay
 - ✓ “Expediting: -- make up lost time due to contractor delay
- Article 284, Contract Law of PRC – If owner delays work, owner shall offset or reduce contractor losses
- CONCLUSION: If one may show that owner is delaying work, refuses to grant EOT & demands on time completion (get demand in writing), recovery may be sought as “instructed acceleration”

Columbia

- Private e-mail from U.S. Claim Consultant now living in Columbia
- Columbia is a Civil Code nation
- Claim Consultant advised–
 - ✓ “...there is a substantial parallel between the U.S. & Columbia, similar steps...on all pieces of handling claims...”
- **CONCLUSION**: Legal system may provide for damage recovery in constructive acceleration situations provided that contractor complies with all 6 steps & documents compliance

Arabic Republic of Egypt

- Egypt is a Civil Code nation with no case law precedent
- Construction contracts governed by *Egyptian Civil Law*
- Constructive acceleration is not recognized in law
- Law does not recognize excusable delay & may not enforce notice provisions under Statute of Limitations
- Law does recognize breach of contract theory
- “Alternative Recovery Theory” under *Civil Code* recognizes that “...*the contract is the law...*” and looks to the terms of a contract
- CONCLUSION: If faced with constructive acceleration, contractor may be able to recover under Breach of Contract if all six conditions are met

France

- France is a Civil Code nation with no case law
- French *Civil Code* gives judges “great discretion” in reducing or increasing contractual damages
- Courts often reduce delay penalties when there are delays, in whole or in part, caused by others
- Law only allows for acceleration if owner offers bonuses or incentive
- Law does not recognize concept of constructive acceleration
- CONCLUSION: Contractor better off not to accelerate work. Courts commonly reduce late completion damages & owner can direct acceleration only if incentives are offered.

Germany

- Most contracts in Germany executed under *Terms for the Execution of Construction Works (VOB/B)*
 - ✓ Pre-formulated set of T&C's for construction set forth in Federal statute
- No recognition of constructive acceleration
- Fortunately, Clause 6 of *VOB/B* deals with “hindrances & delays”
 - ✓ If owner hinders/delays contractor, contractor must give notice & owner obligated to extend contract deadline
 - ✓ Contractor may seek “reasonable damage compensation” under *VOB/B § 642 of German Civil Code*
- CONCLUSION: Contractor facing constructive acceleration may be able to recover due to “Acts of Hindrance” & Breach of Contract for failure to issue EOT's in a timely manner

Hong Kong

- Courts do not recognize constructive acceleration theory
- Courts do subscribe to “mitigation of damages”
 - ✓ Contractor may “...recover...the additional costs of implementing delay mitigation measures (additional costs to normal working excluding prolongation) even where there is no employer’s instructions to implement such measures...”
- Courts do recognize contractors’ ability to recover acceleration damages resulting from owner delay where owner refuses to issue EOT’s
- CONCLUSION: Contractor may be able to recover damages under theory of Mitigation of Damages & Breach of Contract for not issuing EOT’s when warranted.

India

- **India Law: mixture of Common & Hindu Law**
 - ✓ **Contractor entitled to acceleration costs when & if...**
 - **Schedule delayed due to Force Majeure or owner delay**
 - **Owner requires on time completion**
 - **No national law deals with acceleration costs but courts may award it**
 - ✓ **Indian courts recognize “time at large” concept if--**
 - **1) A project is delayed & owner refuses to grant EOT; 2) there is no longer any date from which to measure LD’s; THEN owner loses right to impose LD’s & contractor obligated only to deliver project in “reasonable time”**
- **CONCLUSION: Recovery under delay mitigation, time at large & breach of contract theories possible even without the recognition of constructive acceleration**

Republic of Indonesia

- Indonesian PM advised
 - ✓ Contractors entitled to recover damages due to acceleration resulting from owner caused delay or Force Majeure events
 - ✓ *Keppres No. 80 (Republic of Indonesia Laws)* aligned Indonesian procurement law with that of other nations
 - ✓ Contractor must obtain written documentation of owner demand to accelerate work
- **CONCLUSION**: If contractor can prove excusable delay, owner refusal to grant EOT & owner demand to recover lost time, contractor may recover acceleration damages

Ireland

- Projects in Ireland performed under
 - ✓ Royal Institute of Architects Ireland (RIAI) documents
 - ✓ Conditions of Contract for Building, Government Departments & Local Authorities (GDLA) documents
 - ✓ Institution of Engineers of Ireland (IEI) documents
- Clauses 2 & 29 (b) of RIAI & GDLA & Clause 44 or IEI provide for recovery of damages
 - ✓ No provision for payment of acceleration costs
 - ✓ Must be “...some element of undue coercion...” compelling contractor to accelerate
- CONCLUSION: If the following can be proven: 1) delay, 2) owner refusal to grant EOT, 3) coercion to complete, & 4) actual damages, then one should be able to recover under RIAI, GDLA & IEI

Malaysia

- Malaysian projects performed under
 - ✓ Malaysian Institute of Architects (PAM) documents
 - ✓ Joint Contract Tribunal (JCT) documents
 - ✓ Institution of Civil Engineers (ICE) documents
- All recognize concepts of acts of prevention, hindrance & time at large
 - ✓ If able to show that contract administrator unreasonably withheld EOT this is breach of contract by employer
 - ✓ But, this matter will most likely be handled in court or in arbitration, not on project
- CONCLUSION: Constructive acceleration is not recognized in Malaysia, but Acts of Hindrance or Prevention, Time at Large & Breach of Contract are. Recovery sought, probably, via arbitration or through litigation

Oman

- Oman a Civil Code nation
 - ✓ Private projects under *Egyptian Civil Code*
 - ✓ Public contracts typically under International Federation of Consulting Engineers (FIDIC) documents
- CFIDIC based on U.K. ICE documents in where constructive acceleration is not recognized
 - ✓ If owner does not grant EOT, contractor is not compelled to accelerate
 - ✓ If owner issues acceleration directive in writing, damages recoverable under Clause 8
- CONCLUSION: Can recover under FIDIC if owner demands acceleration in writing. May recover under *Egyptian Civil Code* if able to prove owner caused delay & refused to issue EOT, causing Breach of Contract

Singapore

- Projects in Singapore frequently performed under
 - ✓ Joint Contract Tribunal (JCT) documents
 - ✓ Institution of Civil Engineers (ICE) documents
 - ✓ Singapore Public Sector Standard Conditions of Contract (PSSCOC) documents
- None of the above recognize constructive acceleration
- Courts in Singapore recognize Acts of Prevention or Hindrance, Time at Large & Breach of Contract
- CONCLUSION: If able to prove entitlement & owner refusal to issue EOT plus costs resulting from acceleration efforts, may be able to recover damages

South Africa

- South African law & courts do not recognize constructive acceleration
 - ✓ Do not acknowledge “deemed instruction to accelerate”
- However, under FIDIC, NEC, JBCC & SAICE documents
 - ✓ Engineer owes “duty of care” in administering contract
 - ✓ Engineer “obliged” to carry out function
 - ✓ Engineer required to review EOT requests & advise employer within reasonable period of time
- CONCLUSION: If able to prove Engineer failed to administer EOT provisions correctly causing contractor to accelerate, Breach of Contract arises. But, one must obtain owner’s demand to recover time in writing as no “deemed instruction” to accelerate recognized

Sri Lanka

- Sri Lanka law is a combination of Roman & Dutch laws
- Currently no known law on constructive acceleration
 - ✓ One recent case under ICC arbitration in Sri Lanka under Sri Lankan law
 - Contractor spent extra money to bring in new equipment
 - Because principal agent failed to award EOT
 - Panel awarded U.S. \$56 million in damages
- CONCLUSION: Recovery of constructive acceleration damages is possible, but not much is known about proof required to prevail

Trinidad & Tobago

- Trinidadian cost engineer & two lawyers not familiar with term & knew of no law, & no court cases dealing with constructive acceleration
- CONCLUSION: As law of Trinidad & Tobago is based on English law, contractors may be able to recover under Acts of Hindrance or Prevention, Time at Large & Breach of Contract

United Arab Emirate

- Doctrine of constructive acceleration not recognized in UAE
- But, under Article 246, UAE *Federal Law No. 5 of 1985 (the UAE's Civil Code)*
 - ✓ Contracts must be performed “in good faith”
 - ✓ Applies to contractor & party who has power to award EOT's
 - ✓ Under FIDIC Red Book, Engineer must act “impartially” when determining EOT's
 - ✓ If duties are not performed fairly and in violation of Article 246, Civil Code, one may be able to recover damages
- CONCLUSION: Contractor may be able to recover under *Civil Code* if notice is given, EOT's were filed for as required, & if one may show that Engineer failed to act impartially

United Kingdom

- “English courts have been a little slow at recognizing...where a claim for constructive acceleration would be relevant...”
 - ✓ English barrister—“Constructive acceleration is a fictitious doctrine...& would not be acceptable in English courts.”
- Owners & engineers required to administer contracts in accordance with T’s & C’s
- English Courts recognize Acts of Hindrance or Prevention, Time at Large & Breach of Contract
- Under new *Housing Grants, Construction & Regeneration Act*, contractors faced with constructive acceleration may refer issue to adjudication & seek damages in this manner

United Kingdom, cont...

- A recent court case (*Motherwell Bridge Construction, Ltd. V. Micafil Vacuumtechnik*) comes close to recognizing constructive acceleration
 - ✓ Court concluded "...claimant was entitled to the cost of the measures taken to achieve completion earlier than contractually necessary..."
- **CONCLUSION:** If an Act of Hindrance or of Prevention arises, & owner refuses to issue EOT, & contractor is coerced to make up for lost time, then contractor may be able to recover damages under Breach of Contract

Conclusion

- Countries other than U.S. do not recognize constructive acceleration
- But, contractors may recover some or all of their damages under different legal theories such as...
 - ✓ Breach of Contract / Implied Terms
 - ✓ Acts of Prevention / Hindrance
 - ✓ The Contract is the Law
 - ✓ Mitigation of Delay & Damages
 - ✓ Time at Large

Conclusion

- **Common themes supporting these alternative legal theories seem to be—**
 - 1. Fixed period requirement**
 - ✓ **Contract must have Time of the Essence clause & Time of Completion requirement**
 - ✓ **If time not important, then contractor simply has to deliver project within “reasonable time”**

Conclusion

2. Contract provides for EOT's

- ✓ Contract must provide owner the legal ability to issue EOT's
- ✓ If no EOT clause, owner cannot be in breach for failing to issue EOT

Conclusion

3. **Contractor must meet six steps checklist for constructive acceleration**
- ✓ Excusable delay
 - ✓ Notice & contractually required EOT request submitted
 - ✓ Owner issued no time extension or less than should have been allowed (& silence may be deemed denial)
 - ✓ Owner threatened/coerced contractor into accelerating work
 - ✓ Notice of acceleration provided to owner in writing
 - ✓ Contractor actually accelerated & can document actions & costs

Conclusion

4. But, arbitration or litigation may still be required
- ✓ Unlike in U.S., this type of claim probably cannot be negotiated to settlement on project side
 - ✓ Most countries deal with claim as Breach of Contract (as did the U.S. prior to the Contract Disputes Act of 1978)
 - ✓ In most countries, contractor may need to arbitrate or litigate to recover damages

Questions?

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