



CONSTRUCTIVE ACCELERATION – What Is It & How Can These Damages Be Recovered Around The Globe?

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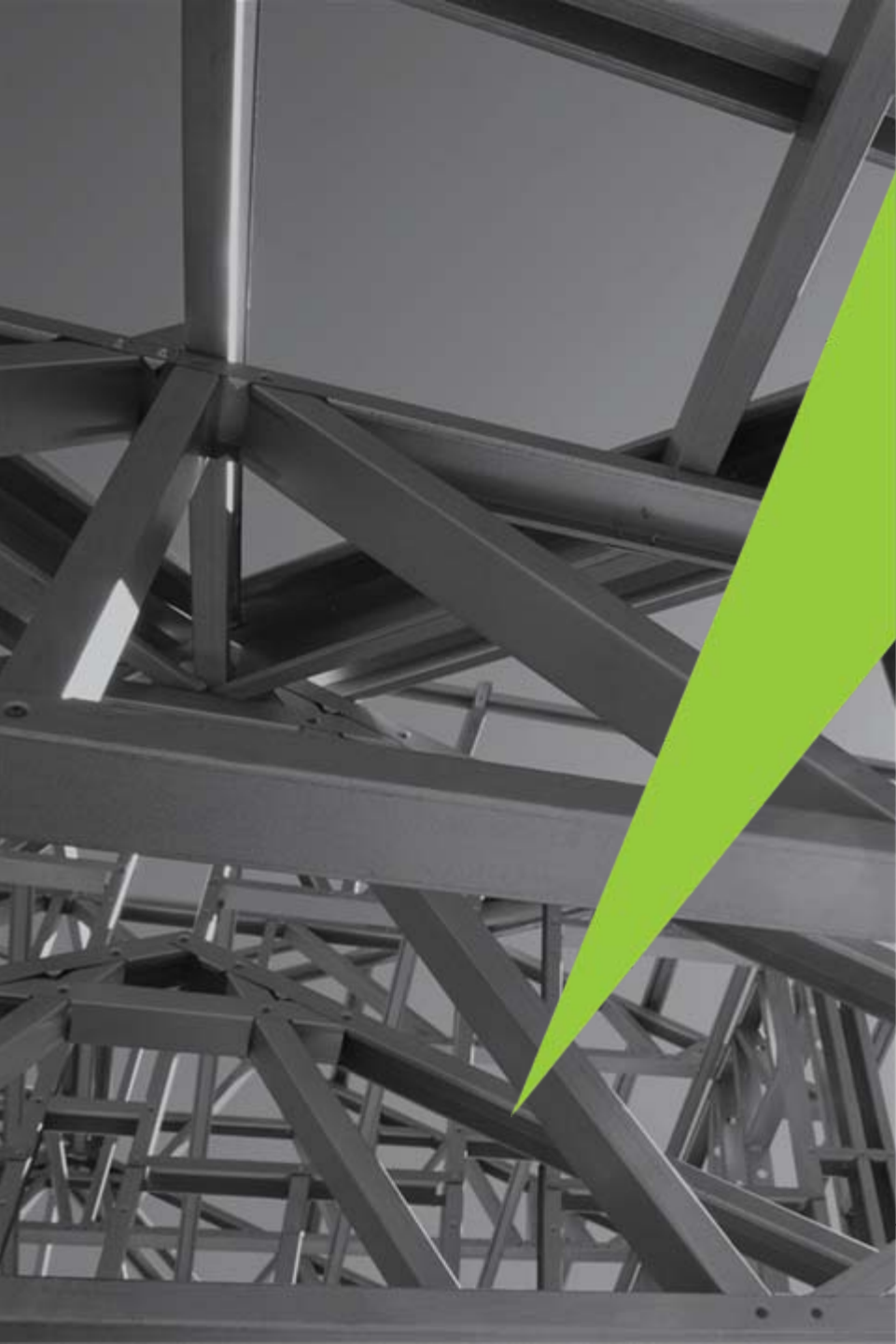


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INTRODUCTION

What is Acceleration?



- **Acceleration = deliberate speeding up project completion to**
 - **Complete work prior to contract completion date**
 - **Complete work earlier than planned**

Why Accelerate?



- **Directed by owner**
 - **Under Changes clause to complete work early**
 - **Direct contractor to recover late completion**
- **May be brought about by contractor**
 - **To recover late completion**
 - ❖ To avoid LDs
 - **To complete work earlier than required**
 - ❖ For own business reasons
 - ❖ To collect early completion bonus

What is Constructive Acceleration?



➤ Constructive =

- “That which is established by the mind of the law in its act of *construing* facts, conduct, and/or circumstances”

➤ Constructive Acceleration =

- Act or lack of action on part of owner which causes contractor to complete work earlier than required or should have been required under contract

➤ Accidental, unintended acceleration

Examples of Constructive Acceleration



➤ Owner refusal

- To agree to time extensions when change orders issued
- To respond to extension of time requests until end of project
- To issue time extensions when contractor encounters differing site conditions
- To adjust time of completion when contractor encounters concurrent delay



CONSTRUCTIVE ACCELERATION IN THE U.S.

How Did Constructive Acceleration Claim Develop?



- **Constructive acceleration “judge made law”**
 - **Created by Boards of Contract Appeals in 1960’s & 1970’s**
 - **Board recognized that when owners refuse to grant time extensions in timely manner & contractor faced with large LDs**
 - **Contractors must protect themselves**
- **Contractors have to “speed up” work to avoid LDs**

How Did Constructive Acceleration Claim Develop?



- Contractor costs expended to protect themselves because owner failed to comply with terms of contract should be recoverable
- When owners wait until end of job & then issue time extension, too late, damage already done

How Did Constructive Acceleration Claim Develop?



➤ Therefore, Boards

- **Adopted constructive change concept to situation**
- **Gave Boards jurisdiction over these situations**
- **Seen as alternative to breach of contract claim litigation in U.S. Court of Claims**
- **Contract Disputes Act of 1978 formalized Boards' jurisdiction over all claims arising on project**

What are the Elements of Constructive Acceleration?



- **Boards & Courts established standard 7 part test necessary to prove constructive acceleration**
- **Each part of test must be documented by contractor to successfully recover damages arising from acceleration effort**

What are the Elements of Constructive Acceleration?



- Contractor must encounter & prove excusable delay
- Not matter whether delay excusable or compensable
 - Must impact project's critical path
 - Must entitle contractor to time extension under terms of contract
- If cannot prove delay & excusability, not entitled to time extension
 - Constructive acceleration not justified

What are the Elements of Constructive Acceleration?



- Contractor must submit notice of delay
- Contractor must request time extension
- Both in full accord with terms & conditions of contract
- If contractor not comply with terms & conditions of contract, owner not required to issue time extension
 - Constructive acceleration not justified

What are the Elements of Constructive Acceleration?



- Time extension request must be denied by owner in whole or in part
- “Silence” on part of owner, after some reasonable period of time, deemed a denial of the time extension request
 - Reasonable period of time?
 - No formal rule but experience shows, larger the LDs the shorter “reasonable period of time”

What are the Elements of Constructive Acceleration?



- Owner must by coercion, direction or some other manner “...that can be reasonably construed as an order to complete work within the unextended time...” direct contractor to complete work “on time”
 - “For constructive acceleration to exist there needs to be an instruction, whether implied or otherwise, from the Employer”
- “Threats” count
 - Assess LDs or Terminate for Default

What are the Elements of Constructive Acceleration?



- Contractor must provide written notice they construe action to be an acceleration directive
 - “We’ve submitted 3 EOT requests over past 2 months. You have not responded to any. At this morning’s meeting your PM said you would assess LDs starting on July 1st. We take this statement to be a directive to accelerate ...”
- Notice owner’s “...last clear chance to stop claim”
 - Failure to send written notice a “deal killer”

What are the Elements of Constructive Acceleration?



- **Owner must fail to act on notice**
 - **Deny actions are acceleration directive but not advise contractor not to accelerate**
 - **Continue to deny or ignore time extension requests**
 - **Directing contractor to provide “recovery schedule”**

What are the Elements of Constructive Acceleration?



- Contractor must actually accelerate work
- Must document all actions & all costs incurred
- Contractor should treat acceleration effort as T&M change order
 - Track all costs on day to day basis with appropriate supporting documentation

What are the Cost Elements of Constructive Acceleration?

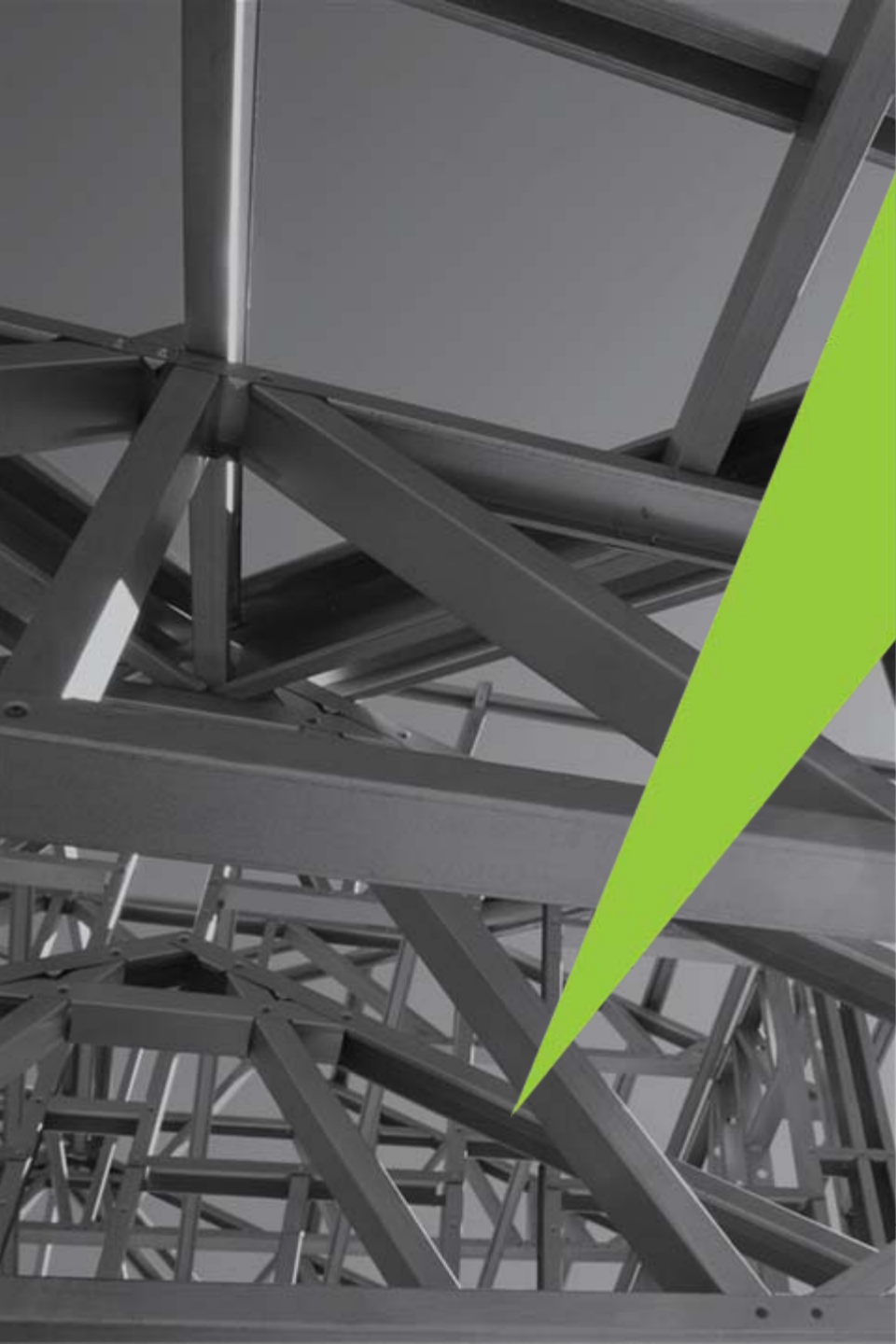


- All added costs incurred solely as result of acceleration
- Examples
 - Overtime costs beyond planned overtime
 - Additional labor costs
 - Additional supervision costs
 - Additional equipment costs
 - Expediting costs to meet acceleration efforts
 - Subcontractor acceleration costs

What Must a Contractor Prove to Recover Such Costs?



- Prove excusable delay & amount of delay
- Prove owner denied EOT requests & directed acceleration
- Prove notice of constructive acceleration
- Prove all costs arose solely as result of accelerated efforts
 - No duplicative costs
 - Overheads adjusted due to overtime hours
 - Etc.



CONSTRUCTIVE ACCELERATION INTERNATIONALLY

Constructive Acceleration Recognized Globally?



- Can U.S. contractors working abroad expect owners, attorneys & courts to recognize concept?
 - English barrister on Saudi claim stated simply –
“English courts do not recognize this legal concept”
- Claim not common in other countries
 - Leading English barrister termed constructive acceleration a “... fictitious doctrine ... not founded on consensual or quasi-contractual basis...”

Constructive Acceleration Recognized Globally?



- If **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
- Contractor **may** face twin economic losses – cost to accelerate & cost of LD's!

Is Constructive Acceleration Recognized Globally?



- **Decided to explore issue**
- **How can contractors faced with similar situations recover damages when constructive acceleration not legally recognized in country where working?**
- **Performed internet research for published articles**
- **Reviewed international law books**

Is Constructive Acceleration Recognized Globally?



- **Sent e-mail questionnaires to members of AACE CDR & P&S Committees living abroad**
 - **Sent approximately 50 e-mails**
 - **Received about 15 responses**
- **Following is country by country review of findings**

Australia



- Australian law **not** recognize **term**
- But Courts **do** recognize legal concept in **Perini Pacific case**
 - Contract administrator **refused** to award EOT's
 - Contractor accelerated & sought damages at end of project
 - Court ruled owner had "**implied duty**" to ensure contract administrator was properly administering contract

Australia



- Concluded owner **not** live up to obligation
 - Therefore, owner's "... **breach of the implied terms ...**" gave rise to claim for damages
- Courts also recognize "**acts of prevention**"
 - When owner delays work, refuses to issue EOTs & forces acceleration
- **Conclusion**: May be able to recover under either legal theory

Brazil



- Brazil a Civil Law nation, **no** published court decisions
 - **Not** recognize precedents, **no** “**Doctrine of Stare Decisis**”
- Brazilian claims consultant advised
 - Recovery of contractor damages a “**gray zone**”

Brazil



- Prepared constructive acceleration claims on two power plant projects
 - Recovered some damages via negotiation in one case
 - Other case, owner alleged Force Majeure event, case went to court, but **no** damages recovered
- **Conclusion**: Little likelihood of recovery

Canada



- Canadian courts **not** recognize **term**
- But, 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 mechanism for contractors to recover constructive acceleration costs

Canada



- *Morrison-Knudsen Co. Inc. v. B.C. Hydro & Power Authority*
 - *W.A. Stevenson Construction (Western) Ltd. v. Metro Canada*
- **Conclusion**: Even though **not** recognize term if can prove six criteria, can 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

People's Republic of China



- **Article 284, Contract Law of PRC** – If owner delays work, owner shall offset or reduce contractor losses
- **Conclusion**: If can show owner delay, refusal to grant EOT & demand for on time completion (**get demand in writing**) can seek recovery as “**instructed acceleration**”

Colombia



- **Private e-mail response from U.S. claim consultant now living in Colombia**
- **Colombia a Civil Law nation**
- **Claim consultant advised**
 - **“ ... there is a substantial parallel between U.S. & Colombia, similar steps ... on all pieces of handling claims...”**

Colombia



- **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 a Civil Code nation, **no** case law precedents
- Construction contracts governed by *Egyptian Civil Law*
- Constructive acceleration **not** recognized in law
- Law **not** recognize excusable delay & may **not** enforce notice provisions under *Statute of Limitations*

Arabic Republic of Egypt



- Law **does** recognize breach of contract theory
- **Conclusion**: Faced with constructive acceleration contractor **may** be able to recover under Breach of Contract if meet all six conditions –
- **Alternative Recovery Theory**: Under *Civil Code* is “...the contract is the law...”, so look to terms of contract

France



- France a Civil Law nation, **no** case law
- French *Civil Code* gives judges “**great discretion**” in **reducing** or **increasing** contractual damages
- Courts often reduce delay penalties when delay, in whole or in part, caused by others
- Law only allows for acceleration **if** owner offers bonus or incentive

France



- Law **not** recognize concept of constructive acceleration
- **Conclusion**: Contractor may be better off **not** to accelerate work. Courts commonly reduce late completion damages & owner can direct acceleration **only if** offer incentives.

Germany



- Most contracts in Germany executed under *Terms for the Execution of Construction Works (VOB/B)*
 - Pre-formulated set of terms & conditions for construction contracts set forth in Federal statute
- No recognition of constructive acceleration
- But, **Clause 6** of *VOB/B* deals with “hindrances & delay”

Germany



- 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 &/or Breach of Contract** for failure to issue EOT’s in timely manner

Hong Kong



- Courts **not** recognize constructive acceleration theory
- Courts **do** subscribe to “**mitigation of damages**”
 - Contractors may “... recover ... the additional costs of implementing delay mitigation measures (additional costs to normal working excluding prolongation) even where there is no employer’s instruction to implement such measures...”

Hong Kong



- Courts **do** recognize contractors ability to recover acceleration damages resulting from owner delay where owner refuses to issue EOTs
- **Conclusion**: **May** be able to recover damages under theory of **Mitigation of Damages & Breach of Contract** for **not** issuing EOTs when warranted

India



- Indian law mixture of Common & Hindu Law
- Indian project management consultant related following
 - 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

India



- Indian courts recognize “**time at large**” concept
 - Project delayed; owner refuses to grant EOT; no longer any date from which to measure LDs; owner loses right to impose LDs; & contractor obligated only to deliver project in “**reasonable time**”
- **Conclusion**: While constructive acceleration **not** recognized, can recover under **Delay Mitigation, Time at Large & Breach of Contract theories**

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

Republic of Indonesia



- **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 generally 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**

Ireland



- **Clauses 2 & 29(b) of RIAI & GDLA & Clause 44 of 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 can prove delay, owner refusal to grant EOT, coercion to complete on time & actual damages, should be able to recover under RIAI, GDLA & IEI

Malaysia



- **Malaysian projects generally 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****

Malaysia



- If can show contract administrator **unreasonably** withheld EOT this is breach of contract by employer
- **But**, likely to be handled in court or arbitration, **not** on project
- **Conclusion**: **Not** recognize constructive acceleration theory but acknowledge **Act of Hindrance or Prevention, Time at Large & Breach of Contract**. **Probably** have to recover in arbitration or litigation

Oman



- **Oman a Civil Code nation**
 - **Private projects under *Egyptian Civil Code***
 - **Public contracts typically under International *Federation of Consulting Engineers (FIDIC)* documents**
- **FIDIC based on U.K. ICE documents so not recognize constructive acceleration**
 - **If owner not issue EOT, contractor not compelled to accelerate**

Oman



- 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 can 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 recognize constructive acceleration**

Singapore



- Courts in Singapore recognize **Acts of Prevention or Hindrance, Time at Large & Breach of Contract**
- **Conclusion**: If can 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 **not** recognize constructive acceleration
 - Do **not** acknowledge “**deemed instruction to accelerate**”
- But under FIDIC, NEC, JBCC & SAICE documents
 - Engineer owes “**duty of care**” in administering contract
 - Engineer “**obligated**” to carry out function

South Africa



- Engineer required to review EOT requests & advise employer within reasonable period of time
- Conclusion: If can prove Engineer failed to administer EOT provisions correctly causing contractor to accelerate, breach of contract arises. But, must obtain owner's demand to recover time in writing as no "deemed instruction" to accelerate recognized

Sri Lanka



- Sri Lankan law combination of Roman & Dutch law
- **No** known law on constructive acceleration
 - One recent case under ICC arbitration in Sri Lanka under Sri Lankan law
 - ❖ Contractor spent extra money bring in new equipment
 - ❖ Due to **failure** of principal agent to award EOT
 - ❖ Panel awarded U.S. \$56 million in damages

Sri Lanka



- **Conclusion**: Recovery of constructive acceleration damages **possible** but **not** much known about proof required to prevail

Trinidad and 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 based on English law contractors **may** be able to recover under **Acts of Hindrance or Prevention, Time at Large & Breach of Contract**

United Arab Emirates



- Doctrine of constructive acceleration **not** recognized in UAE
- But, under **Article 246, UAE Federal Law No. 5 of 1985 (UAE Civil Code)**
 - Contracts must be performed “**in good faith**”
 - Applies to contractor & party who has power to award EOTs
 - Under **FIDIC Red Book** Engineer must act “**impartially**” when determining EOT’s

United Arab Emirates



- If not perform duty fairly, violate **Article 246, Civil Code** & may be subject to damages
- **Conclusion**: Contractor may be able to recover under **Civil Code** if give notice, file for EOTs as required & can show 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”**
- **But, owners & engineers required to administer contracts in accordance with terms & conditions**

United Kingdom



- 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

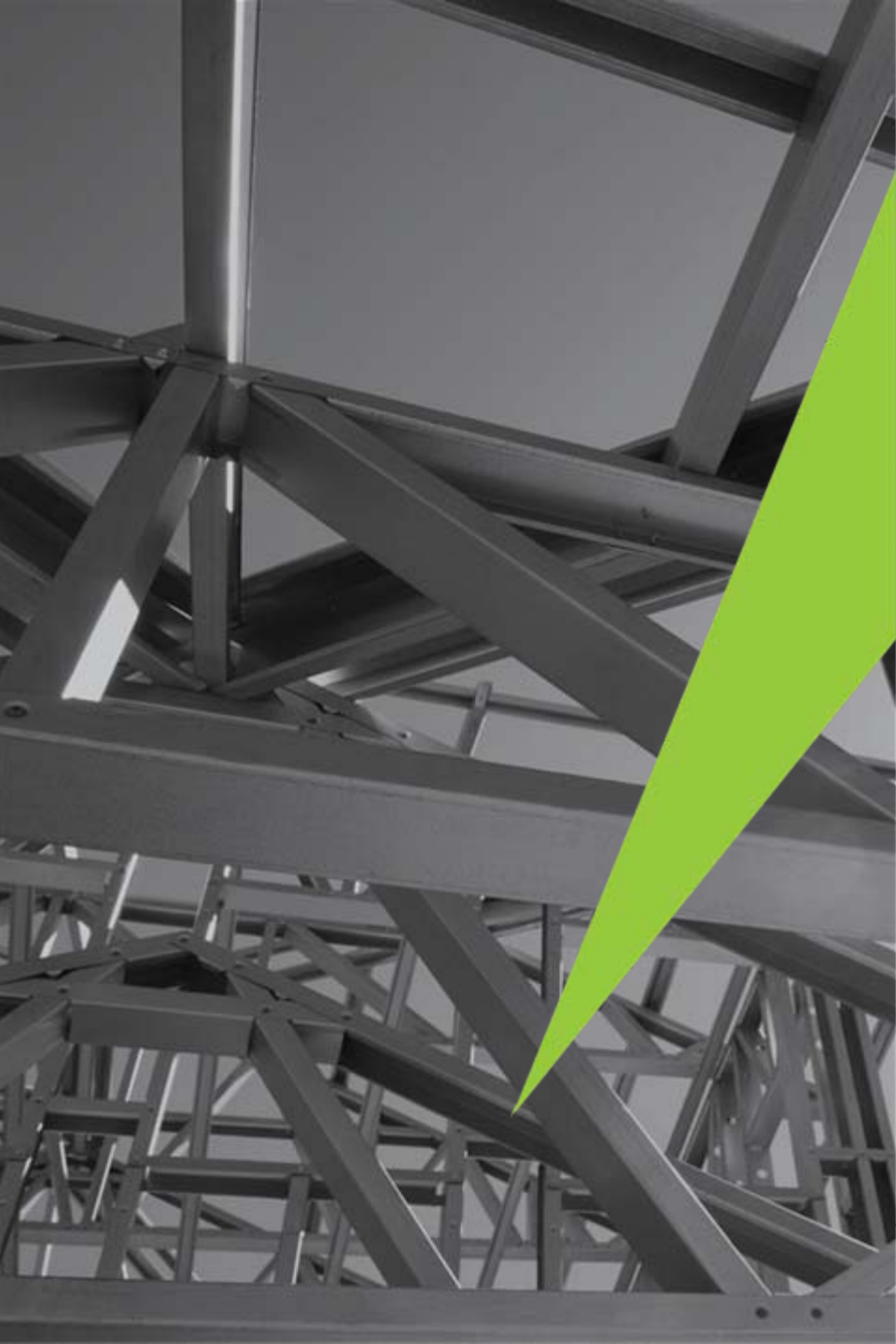


- Recent court case (*Motherwell Bridge Construction, Ltd. v. Micafil Vacuumtechnik*) comes close to recognizing constructive acceleration
 - Court concluded “... claimant was entitled to the cost of the measures taken to achieve completion earlier than contractually necessary...”

United Kingdom



- **Conclusion**: If **Act of Hindrance** or **Prevention** arises, owner refuses to issue EOT, contractor coerced to make up lost time, then contractor **may** be able to recover damages under **Breach of Contract**



CONCLUSION

Conclusion



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

Conclusion



Common themes supporting 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 step 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)

Conclusion



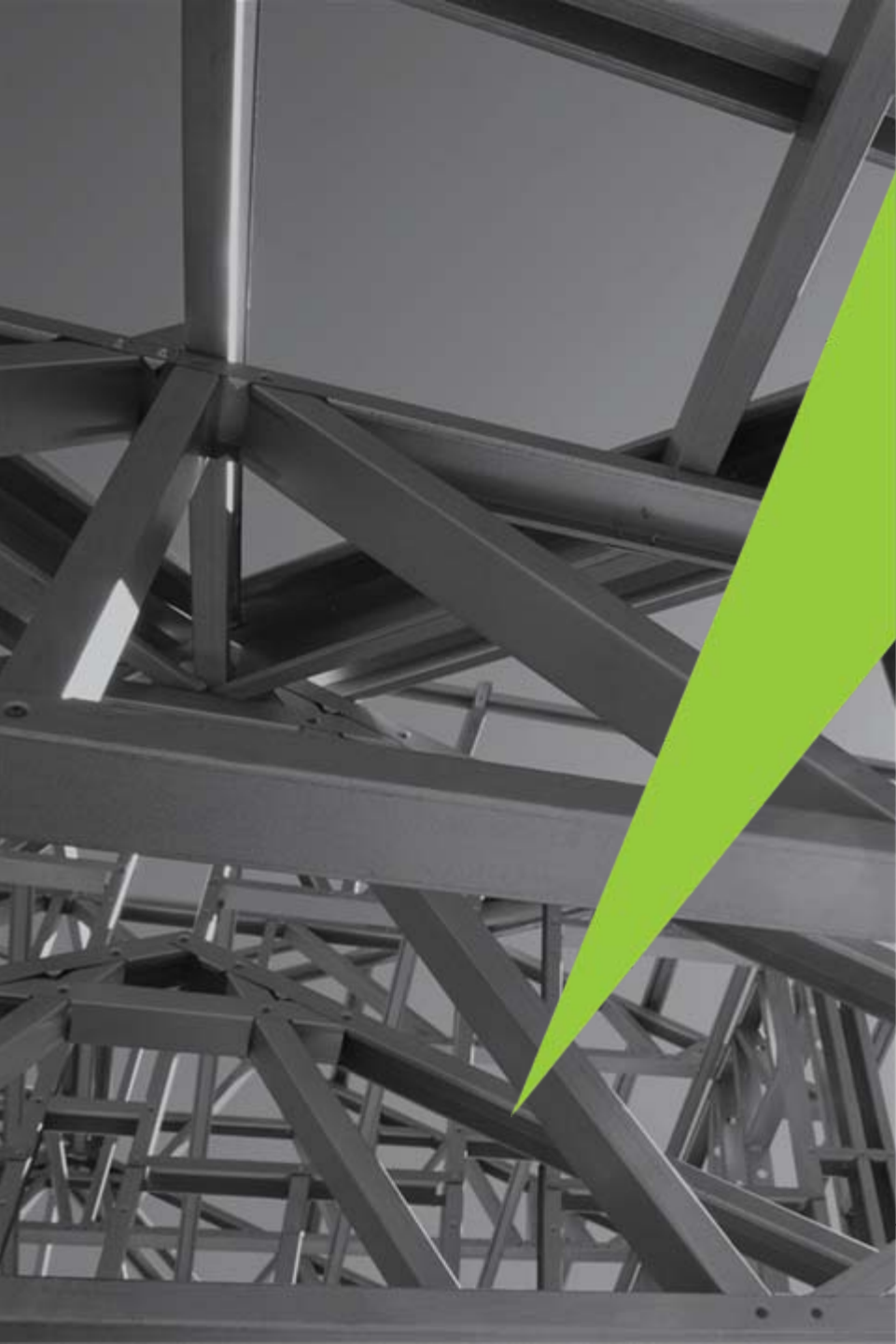
- Owner threatened / coerced contractor into accelerating work
- Notice of acceleration provided to owner **in writing**
- Contractor actually accelerated & can document actions & costs

Conclusion



4. But, arbitration or litigation may be required

- Unlike in U.S., this type of claim probably cannot be negotiated to settlement on project site
- Most countries deal with claim as a **Breach of Contract** (as did the U.S. prior to Contract Disputes Act of 1978)
- In most countries, may need to arbitrate or litigate to recover damages



QUESTIONS?

Questions?



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