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

- Directed by owner
  - Under Changes clause to complete work early
  - Direct contractor to recover late completion
- May by 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
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
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
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 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
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*
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
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
• 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
“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
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

- 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”
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
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
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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