



## **CONSTRUCTIVE ACCELERATION – A GLOBAL TOUR<sup>1</sup>**

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**ABSTRACT** – Constructive acceleration is a well recognized claim in the United States. The Federal Government’s Boards of Contract Appeals long ago created this claim and established the basic rules of entitlement concerning this type of claim. Thus, U.S. based contractors know what must be documented in order to recover in such situations. But when U.S. contractors are working outside the U.S. and are faced with this sort of situation, can they recover in arbitration or litigation in other jurisdictions? This paper 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.

**Key Words:** Constructive acceleration, legal entitlement, recovery of acceleration damages

### **Introduction**

The constructive acceleration claim is a creation of the Federal Boards of Contract Appeals (“the Boards”). Prior to 1978 the Boards were only empowered to hear claims “arising under a contract”. A claim not arising under a contract was typically classified as breach of contract, something the Boards could not hear. As a result all such claims had to be taken to the U.S. Court of Claims. The constructive acceleration claim “...was devised prior to 1978 in order to give jurisdiction to the federal agency appeals board as a claim on the contract and not for its breach.”<sup>3</sup> One English barrister, Professor Ian Duncan Wallace, has termed constructive acceleration as a “...fictitious doctrine ... not founded on consensual or quasi-contractual

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<sup>3</sup> Bramble, Barry B. and Michael T. Callahan, Construction Delay Claims, 2<sup>nd</sup> Edition, §6.8, pp. 178 – 182, Wiley Law Publications, New York, 1992.



basis.”<sup>4</sup> Regardless of this opinion, the doctrine of constructive acceleration is a well recognized legal theory in United States.

### The Basics of Construction Acceleration

The earliest cases issued by the Boards in the 1960’s established a standard six point test to determine whether constructive acceleration occurred on a contract.<sup>5</sup> Various authors have summarized these requirements as follows.

1. The contractor must have encountered excusable delay or delay for which a time extension is warranted under the terms of the contract (whether the delay is compensable is irrelevant);
2. The contractor must timely submit notice in accordance with the provisions of the contract and follow up with a proper request for time extension;
3. The time extension must be denied, in whole or in part, or otherwise postponed (i.e., not responded to at all, which after some reasonable period of time is deemed a denial);
4. The owner or their representative must act by coercion, direction, or in some other manner that can reasonably be construed as an order to complete the work within the unextended time;
5. The contractor must provide notice that they construe this action to be a directive to accelerate; and,
6. The contractor must actually accelerate the work, incur and document their added costs.<sup>6</sup>

It is noted that some authors condense these point to five, four or even three. Notwithstanding whether they are compressed or not, this standard set of rules meets the basic construction claims equation – entitlement, causation and damages. (For a more thorough discussion of the doctrine of constructive acceleration see *Constructive Acceleration: Waking the Sleeping Giant* by Thomas F. Peters;<sup>7</sup> *Reconciling Concurrency in Schedule Delay and Constructive Acceleration*

<sup>4</sup> Hudson’s *Building and Engineering Contracts*, 11<sup>th</sup> Edition, § 7-050, Sweet & Maxwell, London, England, 1995.

<sup>5</sup> See, for example, *Lewis Constr. Co.*, ASBCA 5509, 60-2 BCA ¶ 2732; *Mechanical Utils., Inc.*, ASBCA 7345, 1962 BCA ¶ 13,260; and *Electronic & Missile Facilities, Inc.*, ASBCA 9031, 1964 BCA ¶ 4338.

<sup>6</sup> See Cibinic, John, Ralph C. Nash and James F. Nagle, *Administration of Government Contracts*, 4<sup>th</sup> Edition, pp. 445 – 458, George Washington University, Washington, D.C., 2006; see also, Wickwire, John M., Thomas J. Driscoll, Stephen B. Hurlbut and Mark J. Groff, *Construction Scheduling: Preparation, Liability and Claims*, 3<sup>rd</sup> Edition, § 7.10(B), pp. 268 – 271, Wolters Kluwer Law & Business, New York, 2010.

<sup>7</sup> *AACE International Transactions*, 2004.



by W. Stephen Dale and Robert M. D’Onofrio;<sup>8</sup> and *A Government Windfall: ASBCA’s Attack on Concurrent Delays as a Basis for Constructive Acceleration* by W. Stephen Dale and Kathryn T. Muldoon.<sup>9</sup>)

Subsequent to 1978, with the passage of the Contract Disputes Act of 1978<sup>10</sup> the Boards were given broader jurisdiction over claims arising under government contracts, including breach of contract claims. Nevertheless, the legal doctrine of constructive acceleration remains firmly established and has developed into a well known and relatively common claim on construction projects.

### **Is Constructive Acceleration Recognized by Courts Outside the United States?**

The issue for this paper is to respond to the above question. If a contractor is working outside of the United States and encounters the situation set forth above, do they have the legal right to file a constructive acceleration claim? The issue arose some time back when the author was working with English barristers on a claim in the Mideast. When the author asked if the contractor had filed a notice of constructive acceleration, the barrister client advised that “English law does not recognize that legal concept.”

It occurred to the author that owners who refuse to issue time extensions when they are due force contractors into a Hobbesian choice. Either the contractor refuses to accelerate and waits until the end of the project to gamble that they can convince an arbitration panel or court that they did not cause the delay and the owner has no right to impose liquidated damages or the contractor opts to accelerate the work to complete on time and pursues damages from the owner for the cost of the acceleration. However, should the contractor accelerate and then learn they are working in a jurisdiction that does not recognize the concept of constructive acceleration, they may face twin economic losses – the cost expended on their acceleration efforts plus the late completion damages imposed under the contract!

Let’s now look at various countries around the globe to determine whether the legal concept of “constructive acceleration” is recognized and, if it is not, is there another legal mechanism a contractor can use to recover such costs in situations such as this?

<sup>8</sup> Public Contract Law Journal, Vol. 39, No.2, Winter 2010.

<sup>9</sup> Procurement Law, Summer, 2009.

<sup>10</sup> 41 U.S.C. §§ 601-613 (1988).



➤ **Australia**

Even though Australia is one of the Commonwealth countries, its courts differ from English courts. While Australian law does not recognize the term “constructive acceleration” there is a leading court case, commonly cited, where an Australian court awarded acceleration damages to a contractor despite the fact that the owner never ordered acceleration of the work.

“In the Australian case of *Perini Pacific v Commonwealth of Australia* (1969) Mr. Justice Macfarlane in the Commercial Court of New South Wales indicated clearly that this type of claim could only be on the basis of some proven breach of contract by the owner – coupled, of course, with proof of damages in the form of completion to time by expenditure greater than would otherwise have been incurred. In that case, the breach consisted of a refusal or failure by the certified to give any consideration at all to the contractor’s applications.”<sup>11</sup>

In this case, the contract administrator repeatedly refused to award extensions of time (“EOT”) and the contractor accelerated to complete the project on time in order to avoid being assessed liquidated damages. Under the terms of the contract the owner had an implied duty to ensure that the contract administrator was properly administering the EOT provisions of the contract. The court found that the owner did not live up to this obligation and the “...proven breach of the implied terms...” gave rise to a claim for damages. The court awarded the cost of acceleration to the contractor.<sup>12</sup>

As a result of this ruling “...where the contractor feels obliged to accelerate because claimed EOT’s have been rejected or are not being approved in a timely way and the contractor feels it is faced with the need to accelerate to avoid incurring penalties ... the failure to grant EOT’s in a timely manner can be interpreted as an instruction to accelerate.”<sup>13</sup>

In other cases, Australian courts have looked to the English law rule concerning “acts of prevention”. Should the owner act in some manner as to delay the project and then refuse to

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<sup>11</sup> Lyle, Bryce, *What Is Constructive Acceleration?*, MasterBuilders KwaZulu-Natal, August, 2009

<sup>12</sup> Rawling, Brian E., Delay Mitigation, Brian E. Rawling & Associates, Ltd, Winter, 2005/6.

<sup>13</sup> Weaver, Patrick, Delay, Disruption and Acceleration Costs, Mosaic Project Services Pty Ltd, South Melbourne, Victoria, 2005.



grant an appropriate time extension and coerce the contractor into acceleration, Australian courts are likely to award the resulting damages to the contractor.<sup>14</sup>

*Conclusion:* Even though Australian courts have not adopted the term “constructive acceleration” if a contractor can prove that the delay to the project was not caused by the contractor; that they submitted timely time extension requests; that the contract administrator failed to grant the appropriate time extension; that the owner knew the contract administrator was not administering the contract correctly; then the contractor can successfully argue the owner breached their implied duties and owes the resulting damages. In the alternative, the contractor may be able to pursue the claim under the “act of prevention” theory common in English law. In either event, the contractor will still be held to the standard of proving their damages.

#### ➤ **Brazil**

Brazil is a civil law country and decisions of courts are not published nor do they have any precedential value. However, the author contacted a Brazilian scheduling expert and claims consultant to learn whether the concept of constructive acceleration is recognized in Brazil. It was reported that “In Brazil, recovery of costs by contractors has always been a gray zone. I ... have prepared claims for ‘constructive acceleration’ in two power plant projects. In one we managed to get some of the money back but in the other one the [owner] alleged [a] force majeure and the case went to court with no recovery of the losses.”<sup>15</sup>

*Conclusion:* Brazilian law does not recognize the concept of constructive acceleration. There appears to be little likelihood of recovery of such costs legally.

#### ➤ **Canada**

Canadian Courts have not expressly recognized the term “constructive acceleration” as U.S. Courts have. One Canadian attorney commented on this in the following manner.

“Consideration of “*constructive acceleration*” expressly by Canadian courts is rare ... In reviewing Canadian cases on acceleration, those contractors which have proven facts which look remarkably like the shopping list of elements of

<sup>14</sup> Cremean, Damien J., B.A. Shnookal and Michael H. Whitten, Brookings on Building Contracts, 4<sup>th</sup> Edition, Section 6.8, LexisNexis Butterworths, Australia, 2004.

<sup>15</sup> Private e-mail communication from Aldo Dorea Mattos, Aldo Mattos Consulting, April 20, 2010.



*constructive acceleration* ... have tended to be successful with their claims. On the other hand, if one reviews the claims which have been denied, one can easily pick out which of the elements is missing. This despite the fact that one will be hard pressed to find Canadian cases which have expressly adopted the term “*constructive acceleration*” or have adopted the five listed criteria.”<sup>16</sup>

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. In *Morrison-Knudsen Co. Inc. v. British Columbia Hydro and Power Authority*<sup>17</sup> the court found that the owner was in fundamental breach of contract respecting payments for acceleration. Both the trial court and the appellate court found that (1) the owner refused to grant time extensions for both owner caused delays as well as other delays beyond the contractor’s control; and (2) the owner demanded on time completion of the work. As a result, the court determined that “...the appellant’s (the owner) conduct respecting payment for acceleration constituted fundamental breach (of contract).”

Likewise, in *W.A. Stevenson Construction (Western) Limited v. Metro Canada Limited*<sup>18</sup> the court found that the owner refused to grant any times extensions when requested by the contractor, both for owner caused and excusable delay. The court also determined that the owner issued demands that the contractor accelerate the work, reminded the contractor that time was of the essence of the contract and that the costs of acceleration would be at the contractor’s sole expense. The court concluded that

“In a deliberate, anticipatory breach of contract by means of a policy decision, the owner decided that the time for completion would not be extended, no matter what the cause.”

**Conclusion:** Despite the fact that Canadian courts have not adopted the term “constructive acceleration” if a contractor can prove the situation met all of the six criteria set forth above, then they can claim breach of contract in order to perfect the claim and recover their acceleration costs.

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<sup>16</sup> Grenier, Glenn, *The Traps and Pitfalls of Construction Delay Claims in Ontario*, Lang Michener LLP, Toronto, Ontario, 2005.

<sup>17</sup> (1978), D.L.R. (3d) 186 (B.C.C.A.)

<sup>18</sup> (1987), 27 C.L.R. 113 (B.C.S.C.)



➤ **China**

The People's Republic of China does not recognize the concept of constructive acceleration in their *Contract Law of The People's Republic of China*.<sup>19</sup> Nor is constructive acceleration included in the Chinese *Construction Contract of Construction Works (GF-1999-0201)*.<sup>20</sup> Chinese construction law and contracts distinguish between “Acceleration”, “Mitigation” and “Expediting”. Acceleration is an increase in resources and intensity of work with the aim of bringing the job in on time. Mitigation means reallocating existing resources in order to minimize cost and delay resulting from changed conditions. Expediting is due to contractor caused delay, and results in the contractor taking measures to meet the completion date at their own expense.<sup>21</sup>

However, Article 284 of the *Contract Law of The People's Republic of China* mandates the following –

“Where due to the fault of the employer, the project is stopped or postponed in the course of the construction, the employer shall adopt measures to offset or reduce the losses and compensate the contractor for the losses and actual expenses recurred thereof due to stopping and idling of the labor force, changes in the transportation, removal of the machinery and equipment, overstocking of materials and building components.”

The author of the private paper referred to above suggested that in situations where owner caused delay has occurred; the contractor has requested appropriate time extensions; and the owner has refused to grant extensions of time and demands on time completion; the contractor needs to obtain the owner's demand for on time completion in writing. If all of this is done, then the contractor may be in a position to file suit for damages arguing “directed or instructed acceleration” based on the employer's breach of contract. It was also suggested that Chinese culture and business practice may assist in resolving such claims as there is little tendency to pursuing disputes in litigation.

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<sup>19</sup> Adopted and promulgated by the Second Session of the Ninth National People's Congress on March 15, 1999.

<sup>20</sup> Issued by the Ministry of Construction of the People's Republic of China and the Bureau of Industrial and Commercial Administration of the People's Republic of China on December 24, 1999.

<sup>21</sup> Zhang, JianHua, Construction Acceleration in China, an unpublished paper prepared in response to the author's inquiry concerning constructive acceleration in China, April 25, 2010. See also: Richter, Irvin E., International Construction Claims: Avoiding & Resolving Disputes, pp.73 – 77, McGraw Hill Publications, New York, 1983.



*Conclusion:* Chinese law does not recognize constructive acceleration but does require an owner to appropriately adjust the time of completion and pay for delay damages for owner caused delays. However, should the owner refuse to issue appropriate time extensions and demand on time completion, the contractor should insist that the on time completion instruction be put in writing. Once this is received the contractor is in a position to seek recovery of acceleration costs arguing that the owner breached the contract (which incorporates Chinese construction law by reference) and instructed acceleration.

➤ **Colombia**

A private e-mail response to the author’s inquiry concerning constructive acceleration in Colombia elicited the following response.

“...there is a substantial parallel between U.S. and Colombia, similar steps, somewhat different mix of characters and a different emphasis on all the pieces of handling claims.”<sup>22</sup>

*Conclusion:* Despite the fact that Colombia is a civil law nation it appears from the above that their legal system may provide for recovery of acceleration costs in a constructive acceleration situation; provided that, the contractor complies with the six steps justifying constructive acceleration and can document each point.

➤ **Egypt**

The Arabic Republic of Egypt is a civil law nation and as such, has no case law. Construction projects, generally, are governed by Egyptian Civil Code.<sup>23</sup> In response to the author’s inquiry concerning the recognition of constructive acceleration under Egyptian law, one claims consultant working in Egypt responded with the following.

“From my 13 years of experience in working in Egypt so far, I can generally tell you that ‘constructive acceleration’ is not recognized here. ... there is also no recognition of delay analysis techniques either, so the principle of an ‘excusable

<sup>22</sup> E-mail response from John Smith, a recognized U.S. construction claims consultant and testifying expert, currently retired and living in Bogota, Colombia, May 3, 2010.

<sup>23</sup> Articles 646 to 667.





delay’ (point 1 in the U.S. conditions for contractor’s recovery...) does not exist.”<sup>24</sup>

The author has worked in Egypt on three different projects – two in Alexandria and one in Cairo – and based on this experience concurs that Egyptian Civil Code offers relief to the contractor only for owner caused delay.

There is another problem concerning the concept of constructive acceleration under Egyptian Civil Code. Many attorneys argue that the Statute of Limitations<sup>25</sup> renders notice provisions in Egyptian contracts unenforceable by law. As such, many courts and arbitration panels ignore the notice provisions – thus eliminating part of the second point as well as the fifth point of the six point test for constructive acceleration. This argument is counterbalanced by other Egyptian attorneys who argue that it is a well established Civil Code principle that “the contract is the law of the parties”.

Conclusion: Egyptian law does not recognize constructive acceleration. Nor does it recognize the concept of excusable delay and notice provisions may or may not be enforced. A contractor facing a constructive acceleration situation probably cannot recover acceleration costs incurred to recover lost time due to excusable delay situations; but may be able to recover such costs incurred in recovering lost time due to owner caused delay under a breach of contract theory. If, however, the contractor can negotiate all six conditions related to constructive acceleration into the contract the Civil Code concept that “the contract is the law” is likely to prevail.

### ➤ **France**

France too is a civil code country so no case law, as we know it in the United States, exists. French Civil Code gives judges great discretion to reduce or increase contractually agreed penalties and liquidated damages. There are a number of “...cases where French courts have reduced the delay penalties to be paid by a contractor because the delay was in total or in part attributable to the behavior of others, such as either the main contractor or the owner.”<sup>26</sup> Based on a reading of French law set forth in this article, the only way to accelerate the work of the

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<sup>24</sup> E-mail response from Waleed El Nemr, April 20, 2010 and presentation slides by Dr. Sheif El Haggan, FIDIC Middle East Contract Users Conference, Abu Dhabi, 25 – 25 February 2010.

<sup>25</sup> Article 388, Egyptian Civil Code.

<sup>26</sup> Colaiuta, Virginie A., How French Courts’ Discretionary Power to Reduce Delay Penalties and Liquidated Damages May Affect Acceleration of Works in Construction Projects, IBA Conference, Session on Time and Acceleration Issues Affecting International Construction Contracts, Madrid, 2009.



project is to offer an incentive or bonus for such acceleration. Accordingly, French law does not recognize the concept of constructive acceleration.

*Conclusion:* A contractor working on a project governed by French law who encounters delay and an owner, who refuses all requests for time extension, is better off to not accelerate the work to attempt to recover the lost time. French courts have the power and the predilection to reduce liquidated damages or penalties when actual damages are lower and acceleration can only be ordered by adding bonuses to the cost of the contract.

➤ **Germany**

Most contracts in Germany are executed under the *Allgemeinen Vertragsbedingungen für die Ausführung von Bauleistungen* (VOB/B) the German contract Terms for the Execution of Construction works. The VOB/B is a preformulated set of terms and conditions designed for the addition and partial modification of German law as it applies to construction contracts.<sup>27</sup> There is no recognition of the concept of constructive acceleration in the VOB/B. Section 6 of the VOB/B deals with the issue of “hindrances and delay”. Should the owner hinder or delay the contractor’s performance, the contractor is obligated to give notice to the owner and the owner is obligated extend the deadline for completion the work. The contractor is also entitled to seek recovery of “reasonable damage compensation” under Clause 6 of the VOB/B as well as § 642 of the German Civil Code. Should the owner refuse to issue time extensions and demand on time completion the contractor may be able to recover their acceleration costs.

*Conclusion:* A contractor facing a constructive acceleration situation may be able to recover acceleration costs arguing “acts of hindrance” and breach of contract for failure to issue time extensions in a timely manner.

➤ **Hong Kong**

Hong Kong courts, like many other Commonwealth courts, do not recognize the concept of constructive acceleration. “Claims on this basis [constructive acceleration] are common in the United States, but in Hong Kong ... there is no such doctrine.”<sup>28</sup> However, they do subscribe to

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<sup>27</sup> Osing, Dr. Stefan, Time and Acceleration Issues Affecting International Construction Contracts: The German Approach, paper presented the IBA Annual Conference, Madrid, 2009.

<sup>28</sup> Molloy, John B., *Constructive Acceleration – A Valid Claim?*, Hong Kong Institute of Surveyors, Feature Article, July, 2002.



the legal theory of mitigation of damages, a concept that is based upon UK law. As one author pointed out "...contractors have for many years looked to recover from employers the additional costs of implementing delay mitigation measures (additional costs to normal working excluding prolongation) even where there was no employer's instruction to implement such measures."<sup>29</sup> Additionally, Hong Kong courts recognize the contractor's ability to recover acceleration costs incurred as a result of owner caused delay where the owner refuses to grant time extensions. Like other courts, Hong Kong courts acknowledge this as a breach of contract. They do, however, uphold notice provisions and require that the contractor document the delay mitigation measures and costs accurately.

Conclusion: Despite the lack of acceptance of the theory of constructive acceleration, contractors caught in such a situation in Hong Kong may still be able to recover damages using the mitigation of delay or breach of contract theories.

➤ **India**

In response to the author's inquiry concerning the recognition of constructive acceleration in Indian courts, the following was provided

"Contractor is entitled to acceleration with costs when/if: ... Schedule is delayed due to force majeure and client requires original end date to be met ... Client is direct cause of delay to schedule, but still requires original date to be met... There is no general (national) law ... which specifically prescribes when a contractor can, or cannot claim acceleration costs."<sup>30</sup>

Additionally, Indian courts recognize the "time at large" concept wherein if there is an act of hindrance by the owner or their agents, or force majeure events, then a time extension is owed to the contractor. Should the owner refuse to grant such a time extension then it can be said that time is at large and as there is no longer a date from which liquidated damages can be calculated, the owner loses their right to impose liquidated damages.<sup>31</sup> If the owner demands on time completion the contractor may be able to recover on the basis of breach of contract.

<sup>29</sup> Rawling, Brian E., Delay Mitigation, Brian E. Rawling & Associates Limited, Hong Kong, Winter, 2005/6.

<sup>30</sup> E-mail response from Madhu Ponnappan Pillai, ACEI Regional Director and project management consultant in India, April 22, 2010.

<sup>31</sup> *Westwood v Secretary of State for India* (1863) 1 New Rep 262, citing *Holme v Guppy* (1838) 3 M&W 387. See also: *Roberts v Bury Commissioners* (1870) LR 5 CP 310.



*Conclusion:* As much of Indian law is drawn from English common law it appears that Indian courts do not recognize the doctrine of constructive delay but are amenable to legal arguments centered on delay mitigation, time at large and/or breach of contractual obligations.

➤ **Indonesia**

In another e-mail response to the author's inquiry, Mr. Asrizal Sabri, an Indonesian project manager, responded with the information that Indonesian laws recognize the right of contractors to recover damages resulting from acceleration due to owner caused delay or force majeure events.<sup>32</sup> Reference was made to Keppres No. 80 (Republic of Indonesia Laws) in support of this statement.<sup>33</sup> Keppres No. 80 was the Indonesian government's attempt to align their procurement process with those of other nations and, as such, the government imported legal and contractual concepts from many other countries. The e-mail response also pointed out that for a contractor to recover such costs they will need to obtain written documentation that the owner has demanded acceleration.

*Conclusion:* Although it is not clear which legal theory contractors may rely upon to recover constructive acceleration costs what appears to be clear is that if the contractor can prove excusable delay, the owner's refusal to grant time extensions, and the owner's demand that the contractor take action to recover the lost time, then the contractor may have a legal right to recover damages.

➤ **Ireland**

Many projects in Ireland are contracted for under RIAI<sup>34</sup>, GDLA 82<sup>35</sup>, or IEI<sup>36</sup> form of contract. None of these contracts expressly recognize the concept of constructive acceleration. However, all of them provide for recovery of "loss and expense or damages" as well as time extensions.

"Some causes of delay may also entitle the contractor to claim loss and expense or damages, under RIAI/GDLA clauses 2 and/or 29(b) [as well as under IEI clause

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<sup>32</sup> E-mail response from Asrizal Sabri, Indonesian project manager April 20, 2010.

<sup>33</sup> Presidential Decree Number 80 of 2003.

<sup>34</sup> Royal Institute of the Architects of Ireland.

<sup>35</sup> Agreement and Conditions of Contract for Building Work for use by Government Departments and Local Authorities, March 1982.

<sup>36</sup> Institution of Engineers of Ireland, Conditions of Contract for use in Connection with Works of Civil Engineering Construction (3<sup>rd</sup> Edition 1980, revised and reprinted October 1990).



44] ... However ... there is no provision in those clauses for the payment of pure acceleration costs. ... A mere voluntary decision by the contractor to accelerate is not enough to found a claim for constructive acceleration. There must be some element of *undue coercion by the employer*, which compels the contractor to accelerate.”<sup>37</sup>

*Conclusion:* It is not clear if Irish courts will adopt the concept of constructive acceleration. But, if a contractor can prove delay entitlement; the owner’s refusal to allow an extension of time; coercion by the owner forcing the contractor to accelerate work; and actual damages, then costs may be recoverable under the “loss and expense or damages” clauses of RIAI, GDLA 82 or IEI contract. Additionally, since Irish courts are heavily influenced by English courts, the legal concepts of breach of contract, delay mitigation and/or time at large may also assist in recovery of damages.

➤ **Malaysia**

Many projects in are constructed using the PAM<sup>38</sup>, the JCT<sup>39</sup>, or the ICE<sup>40</sup> for of contract. As such, Malaysian contracts recognize the legal concepts of act of prevention or act of hindrance and time at large. The Malaysian Federal Court in *Sim Chio Huat v Wong Ted Fui*<sup>41</sup> dealt with a case where the contract had a liquidated damages provision but did not have a time extension clause. The court ruled that the owner’s delay in providing the site and the issuance of extra work orders operated to set time at large and render inoperative the liquidated damages clause.

Mr. Dennis Oon Soon Lee, a Malaysian construction manager, has analyzed the issue of constructive acceleration under Malaysian law and concluded that this concept is not recognized. However, he also determined the following.

“...where it can be shown that the contract administrator has unreasonably or unnecessarily delayed the grant [of] extensions of time, there is little difficulty in

<sup>37</sup> Lyden, John M.E., Acceleration Claims on Construction Projects in Ireland, paper given to a meeting of the Society of Construction Law and the Society of Chartered Surveyors, Cork, Ireland, 14 March 2005.

<sup>38</sup> The Malaysian Institute of Architects Form, 2<sup>nd</sup> Edition, 1998, modeled after the JCT form of contract but not updated as frequently.

<sup>39</sup> The Joint Contract Tribunal Standard Forms of Contract, 2<sup>nd</sup> Edition, 1998.

<sup>40</sup> The Institution of Civil Engineers Contracts, 7<sup>th</sup> Edition, 1999.

<sup>41</sup> [1983] 1 MLJ 151.



establishing that this is a breach of contract by the employer. In cases which deal with the failure to grant an extension of time and the effect that this has on the liquidated damages provisions, it appears to be accepted that the said failure by the contract administrator is a breach of contract by the employer. That a distinction needs to be made between an express refusal or continued failure to deal promptly with an extension of time application on the part of the contract administrator, and an honestly held view or assessment that no extension of time is due. The issue however is when can the contract administrator be considered to have unreasonably or unnecessarily delayed the grant of an extension of time.”<sup>42</sup>

However, as noted by Mr. Oon Chee Kheng in a thorough article on time extensions and liquidated damages under Malaysian law,

“It remains to be said that even if ‘loss and expense’ or ‘costs’ of constructive acceleration is claimable, this is strictly beyond the jurisdiction of the Engineer/Architect/S.O. and the same can only be pursued in arbitration or litigation. ‘Loss and expense’ and ‘costs’ are both contractual financial compensation mechanisms and the Engineer/Architect/S.O. can only certify these arising from constructive acceleration if there are contractual provisions to that effect.”<sup>43</sup>

*Conclusion:* Malaysian courts do not recognize the constructive acceleration legal theory. They do, however, acknowledge the legal concepts of acts of prevention/hindrance, time at large and breach of contract. Thus, if a contractor can prove entitlement to a time extension and refusal of the owner to issue the time extensions warranted by the contract, plus the damages incurred by the contractor’s acceleration efforts, then the contractor may be able to recover such damages but will have to do so in arbitration or litigation.

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<sup>42</sup> Oon Soon Lee, Dennis, Extension of Time and Acceleration Claims, thesis submitted in fulfillment of the requirements for the award of the degree of Master of Science in Construction Contract Management, Faculty of Build Environment, Universiti Teknologi Malaysia, March, 2006.

<sup>43</sup> Kheng, Oon Chee, Extension of Time and Liquidated Damages in Construction Contracts, paper presented at a seminar on Construction Contracts and Arbitration, sponsored by The Institution of Engineers, Malaysia (Perak Branch), Ipoh, Malaysia, 18 October 2003.



➤ **Oman**

Oman's legal system is based on civil code principles and, in particular, Egyptian Civil Code. Privately financed contracts in Oman are generally governed by Egyptian Civil Code. However, Oman adopted a form of contract general conditions based on the International Federation of Consulting Engineers ("FIDIC") documents. Public works project in Oman are subject to this latter set of conditions.<sup>44</sup>

Constructive acceleration is not a recognized concept under the FIDIC documents as the FIDIC document were adapted from the Institute of Civil Engineers ("ICE") documents. As the ICE documents were developed by an English professional society it is not unexpected to find that they do not recognize this concept. However, when working under a FIDIC contract, should the owner refuse to issue appropriate time extensions the contractor is not compelled to accelerate their work unless for ordered in writing by the owner. (If such an order is issued, this becomes a directed acceleration under Clause 8 of the FIDIC documents.)

“Under English law one of the primary areas of concern with respect to these provisions would be the potential applicability of the doctrine of ‘acts of prevention’. Under this doctrine if there is no provision for an extension of time or none is granted when it should have been and if an employer ‘prevents’ through his own actions the contractor from completing within the specified time for completion, time becomes ‘at large’ and the contractor is given a reasonable time in which to complete *Peak v. McKinney* (1969) 1 BLR 111 (CA). Liquidated damages fall away.”<sup>45</sup>

In a situation where a contractor is working on a privately financed contract subject to Egyptian Civil Code and faces constructive acceleration situation, acceleration costs may be recoverable in accordance with the earlier discussion of Egyptian law above.

**Conclusion:** Oman law does not recognize the concept of constructive acceleration as such. As many contracts in Oman are executed under FIDIC contracts a contractor in this situation is not

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<sup>44</sup> Unpublished paper prepared by legal counsel at Trowers & Hamlyns, Muscat, Oman, dated 21 October 2008 and presentation slides by Dr. Sheif El Haggan, FIDIC Middle East Contract Users Conference, Abu Dhabi, 25 – 25 February 2010.

<sup>45</sup> Knutson, Robert, An English Lawyer's View of the New FIDIC Rainbow – Where is the Pot of Gold?, privately produced paper, London, June, 2003.



compelled to accelerate if they are delayed by act of the owner. The contractor can assert the argument that the delay was an “act of prevention” and time is now at large (i.e., there no longer exists either a completion date or liquidated damages) and the contractor is free to finish the work within a reasonable period of time. Should the contractor be working on a privately funded contract, subject to the provisions of Egyptian Civil Code then a contractor facing a constructive acceleration situation probably cannot recover acceleration costs incurred to recover lost time due to excusable delay situations; but may be able to recover such costs incurred in recovering lost time due to owner caused delay under a breach of contract theory.

➤ **Singapore**

Projects in Singapore are frequently constructed under the JCT, ICE, or the PSSCOC<sup>46</sup> form of contract. None of these contract forms recognize or acknowledge the concept of constructive acceleration.<sup>47</sup> Like Malaysian courts (discussed above) courts in Singapore recognize the concepts of act of prevention or act of hindrance, time at large and breach of contract.<sup>48</sup>

*Conclusion:* The courts of Singapore do not recognize the constructive acceleration legal theory. They do, however, acknowledge the legal concepts of acts of prevention/hindrance, time at large and breach of contract. Thus, if a contractor can prove entitlement to a time extension and refusal of the owner to issue the time extensions warranted by the contract, plus damages incurred by the contractor’s acceleration efforts, then the contractor may be able to recover such damages.

➤ **South Africa**

South African law and courts do not recognize the doctrine of constructive acceleration.

“The argument adopted by many contractors in South Africa namely that a rejection to an EOT request which the contractor believes is correct amounts to an instruction to accelerate and finish on time is simply incorrect. ... The refusal to grant an EOT can’t amount to a ‘deemed’ instruction to accelerate. A claim for

<sup>46</sup> The Singapore Public Sector Standard Conditions of Contract, 3<sup>rd</sup> Edition, 2005.

<sup>47</sup> Stephenson, Andrew and Ian Bailey, Concurrency Causation Commonsense and Compensation, IBA Conference, International Construction Projects Committee, Madrid, 2009.

<sup>48</sup> Oon Soon Lee, Dennis, *supra*.





constructive acceleration under English law must be based on ordinary principles for breach of contract and damages.”<sup>49</sup>

However, it has been pointed out that under FIDIC, NEC<sup>50</sup>, JBCC<sup>51</sup>, and the SAICE<sup>52</sup>

“The engineer owes a duty of care towards the contractor in administering the contract to determine such [time] extension and is obliged, not entitled, to carry out this function. It is the engineer and not the employer who must determine and grant the extension. ... The engineer is obliged to reach a decision and convey this decision to the contractor within a reasonable period of time after the extra or additional work or other special circumstances have arisen.”<sup>53</sup>

*Conclusion:* Based in this principle, the failure of the engineer to properly administer the time extension provisions of the contract is likely a breach of contract. Should the owner then demand on time completion thus causing the contractor to accelerate their work, damages will arise which should be recoverable as they flow from the breach of contract. It would appear, however, that the contractor must obtain the owner’s demand for on time completion in writing as South African courts apparently do not accept a “deemed” instruction to accelerate.

### ➤ Sri Lanka

Not much is known concerning constructive acceleration in Sri Lanka. However, the following was reported.

“Sri Lankan Precedent

Of particular interest is the report of a hallmark case in Sri Lanka involving the construction of irrigation canals. In that case the contractor was forced to spend a large sum on duplicating his temporary equipment due to the failure of the

<sup>49</sup> Maritz, M.J. and Andries P. Shutte, A Practical Approach to Calculate Acceleration Costs on Construction Projects in South Africa, 5<sup>th</sup> Post Graduate Conference on Construction Industry Development, Department of Quantity Surveying and Construction Management, University of the Free State, Bloemfontein, South Africa, 16 – 18 March 2008.

<sup>50</sup> The New Engineering Contract, Institution of Civil Engineers, November, 1995.

<sup>51</sup> The Joint Building Contracts Committee, September, 2007.

<sup>52</sup> The South African Institution of Civil Engineers, 5<sup>th</sup> Edition, 1982.

<sup>53</sup> Loots, P.C., Engineering and Construction Law, Juta & Co. Ltd., Cape Town, South Africa, 1985.



principal agent to award an extension of time timeously. The ICC Arbitration awarded the contractor some US \$56 million being approximately 95% of its proven costs of constructive acceleration. What makes this case of particular interest is that the law of the contract was Sri Lankan law and Sri Lanka is one of the few countries outside South Africa having a Roman-Dutch legal foundation.”<sup>54</sup>

***Conclusion:*** Recovery of constructive acceleration damages is potentially possible in Sri Lanka but based upon the above information, the circumstances under which such damages may be recovered are not known. Should a contractor begin to become involved in such a situation, contact with competent legal counsel is required – sooner rather than later.

➤ **Trinidad and Tobago**

In response to the author’s inquiry concerning recognition of the doctrine of constructive acceleration in Trinidad and Tobago, Mr. Stanley West, Past President of AACE International’s Caribbean Section responded – “Two of the senior lawyers who deal with contracts ... are not familiar with the term and as such have no knowledge of any court case or other claims dealing with ‘constructive acceleration’.”<sup>55</sup>

***Conclusion:*** Since the laws of Trinidad and Tobago are based in English law, it is presumed that even though Trinidadian courts do not recognize constructive acceleration as a legal doctrine, they would most likely subscribe to the concepts of act of hindrance or act of prevention, time and large and breach of contract.

➤ **United Arab Emirates (“UAE”)**

In a short but very informative article, Mr. Chris Larkin, an English Chartered Engineer, with a law degree and arbitration qualifications, advised that the doctrine of constructive acceleration is not recognized in the UAE.<sup>56</sup> However, Mr. Larking notes that Article 246 of the UAE Federal Law No. 5 of 1985 (the Civil Code) “...contracts must be performed in a manner consistent with the requirements of good faith...” Mr. Larkin opined that this applies both to the parties to the

<sup>54</sup> Binnington, Chris, *Sri Lankan Precedent*, The Civil Engineering Contractor, January, 2006.

<sup>55</sup> E-mail from Stanley West, Past President, AACEI International Caribbean Section, dated April 29, 2010.

<sup>56</sup> *Constructive Acceleration Demands Clear Intentions*, Construction Management Guide (<http://cmguide.org/archives>), September 18, 2008.



contract but also to the person who has the power to award extensions of time and certify payment application. He noted, for example, that under the FIDIC Redbook, 4<sup>th</sup> Edition, the “...the engineer has a duty to determine the extension of time that the contractor is ‘fairly’ entitled to. In exercising this duty, the engineer must act impartially within the terms of the contract...” Mr. Larking suggested that if the engineer did not perform their duty fairly then they could be found in violation of Article 246. He goes on to suggest that “...if there was an act of bad faith that resulted in the contractor incurring additional costs, then the defaulting party or parties responsible could be liable to pay compensation.” He noted also that Article 282 of the Civil Code states that

“Any harm done to another shall render the perpetrator, even if he is a minor, liable to make good the harm.”

***Conclusion:*** Notwithstanding the fact that UAE law does not recognize the doctrine of constructive acceleration, it is possible for a contractor to recover damages under the UAE Civil Code if the contractor follows the requirements of the contract concerning notice and time extension requests and can prove that the engineer failed in his duty to act impartially.

➤ **United Kingdom (“UK”)**

In a classic bit of understatement, Mr. R.D. Pickles wrote

“The English courts have been a little slow at recognizing a situation where a claim for constructive acceleration would be relevant.”<sup>57</sup>

In fact, Professor Ian Duncan Wallace, editor of Hudson’s Building and Engineering Contracts, has gone on record by declaring the doctrine of constructive acceleration a “fictitious doctrine ... not founded on consensual or quasi-contractual basis... and would not be acceptable in English Courts and Commonwealth Courts.”<sup>58</sup> Numerous other schedule and schedule delay texts out of the UK agree with the statement that the doctrine of constructive acceleration is not yet recognized in UK courts.<sup>59</sup>

<sup>57</sup> Pickles, R.D., *What Is Constructive Acceleration?*, Master Builders KwaZulu-Natal News, August, 2009.

<sup>58</sup> Hudson’s Building and Engineering Contracts, 11<sup>th</sup> Edition, § 7-050, Sweet & Maxwell, London, England, 1995.

<sup>59</sup> See, for example, Keane, P.J. and A.F. Caletka, Delay Analysis in Construction Contracts, Wiley-Blackwell, London, 2008; and Lowsley, Stephen and Christopher Linnett, About Time – Delay Analysis in Construction, RICS Business Services Limited, London, 2006



What is acknowledged, however, is the owner and engineer's duty to administer the contract in accordance with the terms of the contract. Thus, if some action of the owner or the engineer constitutes an act of hindrance or an act of prevention; the owner or engineer refuses to grant an appropriate time extension; the contractor is pressured or coerced to make up the lost time; the contractor accelerates and incurs actual costs; then under the legal concepts of prevention, time at large and breach of contract, the contractor may be able to recover their acceleration costs. However, as one author pointed out,

“Under the Housing Grants, Construction and Regeneration Act,<sup>60</sup> the contractor now has the option to address this uncertainty at an early stage by referring his claim for an extension of time to an adjudicator during the course of the contract, rather than to the court or an arbitrator after completion. This is probably the right way to go, given the problems with acceleration...”<sup>61</sup>

Thus, contractors faced with a constructive acceleration situation can seek adjudication, which typically takes a very short period of time, whenever the owner or engineer denies a time extension and attempts to make the contractor recover the lost time.

It is also noted that one English court case within the last few years came very close to acknowledging constructive acceleration. In *Motherwell Bridge Construction Ltd v Micafil Vacuumtechnik*<sup>62</sup> the court ruled that “...the claimant was entitled to the costs of the measures taken to achieve completion earlier than contractually necessary.”<sup>63</sup>

**Conclusion:** Even though English courts do not currently recognize the concept of constructive acceleration, they appear to be moving in this direction. If a contractor finds themselves in a constructive acceleration situation, and the contract is under the jurisdiction of the Housing

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<sup>60</sup> Referring to Section 108, *Right to Refer Disputes to Adjudication*, of the Housing Grants, Construction and Regeneration Act of 1996, Part II. This Act has more recently been amended by the Local Democracy, Economic Development and Construction Act of 2009 which requires that a contract specifically “...include provision in writing...” to this effect.

<sup>61</sup> Winter, Jeremy and Jacqueline Mimms, Acceleration Claims, Baker & McKenzie, March 2002. See also, Gibson, Roger, Construction Delays, Extensions of Time and Prolongation Claims, Chapter 20, Routledge Taylor & Francis Group, London, 2008.

<sup>62</sup> (2002) 81 Con LR 44; TCC, 31 January 2002.

<sup>63</sup> Ndekugri, Issaka, A Legal Analysis of Some Schedule-Related Disputes in Construction Contracts, The Construction and Building Research Conference of the Royal Institution of Chartered Surveyors, Georgia Tech, Atlanta, September, 2007.



Grants, Construction and Regeneration Act, the first step should be to refer the dispute to adjudication to seek a decision by a neutral decision maker. In the absence of this, contractors seeking recovery of constructive acceleration costs will need to document acts of prevention or hindrance, coercion to obtain completion earlier than should be allowed, and breach of contract. If the contractor in such a situation can prove these points, then they should be able to recover their acceleration costs.

## Conclusion

In all countries outside the United States included in this survey, the concept of constructive acceleration is not recognized, at least under this name. But in most of the countries listed above, contractors who have been constructively accelerated due to the refusal of the owner to grant time extensions when warranted followed by coercion to force on time completion, contractors may recover some or all of the damages incurred using a number of other legal theories. The common theme supporting these alternative legal theories seems to be the following.

- **Fixed Period Requirement** – The contract must have a Time of the Essence Clause and a Time of Completion requirement accompanied by some sort of late completion damages clause. After all, if time is not important to the project owner, then the contractor is simply held to a standard of completing the work within a “reasonable time”.
- **Contract Provides for Extensions of Time** – The contract must have language which allows the owner to extend time under certain circumstances. That is, the owner must have the legal ability under the contract to grant time extension. If there is no clause providing for time extensions then the owner cannot be said to have breached their obligation by not granting such extensions.
- **Meet the Six Step Checklist for Constructive Acceleration** – Contractors seeking recovery of acceleration costs resulting from an owner’s refusal to grant a time extension probably have to demonstrate the following to the trier of fact.
  - ✓ Excusable delay was encountered
  - ✓ Notice was provided to the owner and appropriate time extension requests were submitted
  - ✓ The owner issued no time extension or less time than should have been allowed
  - ✓ The owner threatened or coerced the contractor into accelerating their work in order to recover some or all of the lost time
  - ✓ The contractor provided notice to the owner that they considered the owner’s actions to be a directive to accelerate



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- ✓ Finally, the contractor did actually accelerate and can document their actions and the resulting damage.
  
  - **Arbitration or Litigation is Required** – It appears from the results of this survey that, unlike the United States, this is not a claim that can be negotiated to settlement on the job site. Rather, as most countries deal with this sort of claim in the context of breach of contract (as did the United States prior to the Contract Disputes Act of 1978) then the claim in most countries will most likely have to go to arbitration or litigation.