CONSTRUCTION CLAIMS AND DEFENCE

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PROTECTING YOUR INTERESTS AGAINST THE RISING TIDE OF DISPUTES AND CLAIMS

The construction sector in the UK is awash with a rising tide of disputes and legal claims. Michael Gallucci, Managing Director of construction consultancy MPG, outlines the issues, and explains how contractors and engineers can protect themselves against claims and counter claims both in the UK and in the Gulf.

The National Construction Contracts and Law Survey, currently being undertaken by RIBA's NBS service, has yet to report, but anyone who follows the property sector news will know that the number of disputes in the sector is as high as ever.

The rising tide of disputes and legal claims in construction has been an ongoing trend. When the results of the last NBS survey were revealed two years ago, nine out of ten respondents said the number of disputes had either gone up or stayed the same. It was the same story in the previous poll of 2012.

You might expect that disputes are more likely to arise when times are tough. Indeed, in recession, many people assumed they were an unpleasant but understandable reaction to lack of work and low-value contracts, the only way to turn a profit in those mean times.

But in 2015, UK construction was booming again after the 2008 crash, and yet the number of disputes continued unabated. Almost half of those who responded to the last survey had to deal with at least one dispute in the previous 12 months – with most disputes occurring between clients and main contractors (according to 76% of respondents) or between a main contractor and subcontractor (29%).

As NBS put it, "the adversarial legal process is an inherent issue in the construction industry".

Of course, many disputes remain unresolved without ever coming to court. It is likely the disputes that we do see are just the tip of the iceberg with huge numbers of claims never made. An obvious manifestation of this is non-payment. The recently published Modernise or Die review of the construction industry highlighted non-payment, including abuse of retentions, as a major issue for the industry. Meanwhile, the Federation of Master Builders reported nearly a quarter of construction SMEs have had to wait more than four months for payment from clients or large contractors.

The news is not all gloomy. A healthy reaction to the litigious world of UK construction reported by NBS is that organisations are increasingly using contracts that are better suited to higher value, collaborative projects. Figures suggest an increase in the use of NEC and FIDIC contracts with use of JCT contracts declining.

Having said that, these are complex instruments made even more complex in the way they can be interpreted and implemented by different jurisdictions and in different contract agreements. The comprehensive update to the FIDIC Yellow Book this month (November 2017) greatly extends its coverage and makes it even more important that contractors and engineers have comprehensive and well-managed programmes in place.

For those who may one day pursue a claim or defend themselves, here is my overview of construction claims and defence.

> “The adversarial legal process is an inherent issue in the construction industry.”

BRINGING A GLOBAL CLAIM

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If your organisation has suffered a loss because of something your client has done or failed to do, but the circumstances aren't crystal clear, it may still be possible to bring what is called a global claim.

There are two things to consider, the factual component - did the damage result from the breach or other entitling event? – and the legal condition – is the law prepared to attribute the damage to the breach/event, creating a nexus (the "causal link") with the factual connection?

According to one definition, "a global claim is one that provides an inadequate explanation of the causal nexus between the breaches of contract or relevant events/matters relied upon and the alleged loss and damage or delay that relief is claimed for."

Here's an example. Let's say a contractor notifies the Engineer running a construction project of several delay events specifying the cumulative delay effect and the total amount of loss incurred. Delay events could be late provision of design drawings, denial of access to parts of the site and interference by other contractors engaged by the Employer. But there is a problem. The contractor is unable to identify a causal link between the delay and the loss incurred, and the Employer asserts that the Contractor has insufficient labour.

> “The Contractor must prove its claim as a matter of fact and on the balance of probabilities”

A key judgment throws some light on this. In a case like our example, the Contractor must prove its claim as a matter of fact and on the balance of probabilities. The inability to disentangle causes is not fatal to the claimant. Neither is the struggle to apportion loss between different causes, some recoverable and others not. In other words, contractors are open to prove the occurrence of an event causing delay, leading to loss and expense, with whatever evidence will satisfy the tribunal and relevant standard of proof.

Bringing a global claim may raise evidential difficulties. The Contractor will need to show that the loss would not have been incurred in any event, the tender was sufficiently well priced and no other matters are likely to have caused the loss.

In a perfect world, the classic route of duty, breach, causation and loss will apply to the facts of your claim, and you will have given notice to the client or project manager on time. Unfortunately, construction projects often take place in a real world that is not perfect. Numerous interlinking events may cause various losses, and it is impossible to untangle them.

That is where global claims may help, but their existence should not be treated as a panacea for poor record-keeping or failure to notify claims on time, both of which will help to avoid disputes and allow for more straightforward claims.

FIDIC

Clauses in the FIDIC Red and Yellow Book act as claim gateways. There are 18 clauses setting out circumstances under which it is possible to bring claims, ranging from errors in Employer's documents to late access to site. You will find a complete listing of the clauses at the end of this section. However, note that these are all in a standard, non-amended FIDIC contract. In regional contracts, many of these are edited out.

Key elements to remember are to give notice within 28 days followed by a detailed submission within a further 14 days. Any delay must be on the critical path and fall within clauses 8.4 'a' to 'e' of the FIDIC book.

Once the Contractor submits, the engineer running the project either approves or disapproves with comments. The contractor can then consider next steps. It is worth noting that FIDIC introduces the concept of "fairness" in claims.

Clauses in FIDIC books under which claims may be brought

- **Clause 1.5** errors / ambiguities in documents
- **Clause 1.9** errors in Employer's Requirements
- **Clause 2.1** late access to Site
- **Clause 3.3** instructions of the Engineer
- **Clause 4.6** co-operation with Others
- **Clause 4.7** errors in Employer's reference materials for setting out
- **Clause 4.12** ground conditions
- **Clause 4.24** fossils, antiquities
- **Clause 7.4** Testing
- **Clause 8.9** suspension for Employer's convenience
- **Clause 10.2** partial Taking Over
- **Clause 10.3** interference with Tests on Completion
- **Clause 12.2** delays to Tests on Completion
- **Clause 12.4** delayed access following failed Test
- **Clause 13.7** change in Laws
- **Clause 16.1** suspension for non-payment
- **Clause 17.4** claims from employer's risk items
- **Clause 19.4** Force Majeure

> "Key elements to remember are to give notice within 28 days."

CONCURRENT DELAY PRINCIPLES

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There are three approaches to this problem

1 Dominant Cause,
2 Apportionment
3 Malmaison

Usually, a "critical" project delay is attributed to a single cause. In other words, if it wasn't for that one cause, the delay would not have happened. But what if there is more than one cause?

A concurrent delay is a period of project overrun with two or more causes that are approximately equally responsible. It is the delay that is concurrent, not necessarily the causes. This creates a problem with the "but for" test. In cases of true concurrency, he delay would have occurred even if one or other event had not happened.

Dominant Cause

Keating on Building Contracts defines dominant cause like this: "If there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point of order in time, but is to be decided by applying common sense standards". But there are problems with dominant cause. What if there are two concurrent causes of delay of equal potency? Why should parties be taken to have agreed to apply this principle?

> “The delay should be apportioned as between the Relevant Events and the contractor’s risk events.”

Apportionment

On apportionment, one ruling held that where there are concurrent causes of delay, none of which can be described as dominant, the delay should be apportioned as between the Relevant Events and the contractor’s risk events.

There are difficulties with this in England. There is too much emphasis on the words “fair and reasonable” for English law. Apportionment in common law claims for damages is not generally available anyway, and there is no English judicial support. But in the Gulf the situation is different. Here Scots Law applies. This is, in part, a civil law system, and most Civil Law systems are content to apwportion. There is a duty on the Engineer running the project to be fair set out in Clause 3.5 of FIDIC.

Malmaison

The Malmaison approach was described in this ruling from a 1999 judgement (Malmaison was the name of the hotel involved in the case with a construction company):

> **“...it is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event) and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour.”**

My observations are that Malmaison is about time but not money, and it potentially favours the Contractor. It is a generally accepted test in “true concurrency” situations, but only “true concurrency” scenarios, and those are very rare What about overlapping but not fully concurrent events, which are far more commonplace?

> “Malmaison is about time but not money.”

IMPLIED TERMS REGARDING PREVENTION

What are implied terms? The phrase is a misnomer in a Civil Law context. Implied terms, to a common law lawyer, include terms implied by statute, custom or for reasons of business efficacy.

The distinction may be a subtle one, but rather than implying terms, we should look to the relevant laws to see what additional terms are applicable, rather than implying a term into a contract. The test of these is: are they necessary obligations such as to co-operate or not to prevent performance? These are not implied terms but additional obligations under the contract. In the Gulf, they are required by the performance of contract as a matter of the law, by which I mean the Civil Code, the "Mother of all Laws". These additional obligations apply to the manner of performance of the contract, and stem from a pre-Civil Law, Arab concept transliterated as mustalzimāt. This can be seen in both the Qatar and UAE Civil Codes.

In practice, this means you have an obligation to act in good faith and to perform the obligations in the contract in accordance with "law, custom and equity appurtenant to the obligation in question". So, these are positive obligations on how the contract should be performed, rather than merely implied terms. They also expressly apply in statute

In English law, the prevention principle is a long tradition as set out in this judgement from 1838: "There are clear authorities that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default."

In a civil law context, analysis may be different, but it should result in a similar outcome. It is not an implied obligation to complete within a reasonable time, nor a concept of time at large – these are entirely alien to a civil law tribunal or analysis. Instead, in the Gulf, we look at the mustalzimāt – the indispensable requirements, in accordance with which the building contract must be performed. It is mustalzimāt that drives the concepts of good faith, as well as "custom and equity appurtenant to the nature of the obligation".

So, an act of prevention by an employer – if not properly compensated by the Engineer – becomes a breach of the Employer's obligations under the Qatar and UAE Civil Codes. Article 256 Qatar Civil Code states that if the debtor does not perform the obligation specifically, or is delayed in its performance, he is obliged to compensate the damage caused to the creditor; unless it is proved that the non-performance or the delay was for an extraneous cause for which the debtor is not responsible. Article 386 UAE Civil Code, meanwhile, states that if it is impossible for an obligor to give specific performance of an obligation, he shall be ordered to pay compensation for non-performance of his obligation, unless it is proved that the impossibility of performance arose out of an external cause in which (the obligor) played no part. The same applies if the obligor defaults in the performance of his obligation.

Qatar's Civil Code helpfully goes one step further in making clear the obligations connected with the prevention principle: Where performance of the work requires a specific action within a specific time period by the employer but he fails to act within such time period, the contractor may demand the employer to act within such reasonable time as determined by the contractor. It adds that if that period expires without the employer's action, the contractor may demand termination of the contract without prejudice to his right to indemnity, if applicable. This (Article 692) is a mandatory provision of Qatar Civil Code but there is no equivalent in the UAE.

> "Rather than implying terms, we should look to the relevant laws to see what additional terms are applicable, rather than implying a term into a contract."

WHEN AND HOW TO CLAIM UNDER THE CONTRACT AND WHEN TO CLAIM FOR BREACH OVERVIEW

There are a variety of considerations when making a claim under a FIDIC Contract.

Extension of time

Claims under FIDIC Contract for an extension of time on a contract are covered by Cllause 8.4 and include variations (unless already agreed via Clause 13.3), exceptionally adverse climactic conditions, shortages in personnel/goods caused by "epidemic or governmental actions" and acts of prevention caused by the Employer or those for whom the Employer is responsible as well as a catch-all that covers other clauses. Condition precedents to claiming extension of time include making the issuing of proper notices a pre-condition of entitlement, establishing that the project "is or will be delayed", and the delay must be on the critical path.

Engineer's determination

FIDIC states: "… the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances."

The Engineer is required to give notice of determination (with supporting details) to both Parties. The Engineer's determination could lead to crystallisation of a dispute.

Notification of claim

The Contractor must give notice to the Engineer of time or money claims, as soon as practicable and not later than 28 days after the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance. Time is of the essence. When submitting a claim, the Contractor should include reference to all clauses which may be relevant. Examples include Clause 1.9 - delayed drawings or instructions, Clause 4.12 - unforeseeable physical conditions, Clause 4.24 – fossils, Clause 16.1 - Contractor's entitlement to suspend work and Clause 19.4 - consequences of force majeure. Some claims situations are covered by more than one clause and Contractor's entitlements may vary depending upon which clauses are used as the justification for the claim.

"Be aware of the contract mechanisms and key clauses in FIDIC."

Particulars of claim

Under Clause 20.1, the Contractor has to give notice within 28 days and to submit a fully particularised claim after 42 days. The Engineer is to respond within 42 days of receipt of claim (or such other period as may be agreed with the Contractor). If the event giving rise to claim has a continuing effect, the Contractor has to submit further interim updated claims at monthly intervals and a final claim is to be submitted, unless agreed otherwise, within 28 days of the end of the claim event.

Employer's claims

Under Clause 2.5, if the Employer considers himself to be entitled to any payment under any clause of the contract then the Employer or the Engineer shall give notice and details to the Contractor. Procedures are much less onerous than those for Contractor's claims. After the Employer has provided notice, the Engineer makes determination under clause 3.5. Clauses requiring notice under clause 2.5 include Clause 7.5 rejection, Clause 7.6 remedial work, Clause 8.6 rate of progress, Clause 8.7 delay damages, Clause 9.4 tests on completion, Clause 11.3 extension of defects notification period and Clause 15.4 payment after termination.

Delay damages

If the Contractor fails to complete the Works by the Time for Completion, the Contractor is liable to pay the Employer LADs. The default position is that the agreed rate of LADs shall be payable daily and shall not exceed an agreed "maximum amount of delay damages" (typically between 5-10% of Contract Sum). Delay damages are the sole remedy for delay other than in the event of termination under clause 15.2 (Termination by Employer)

Dispute resolution

Here's an example of how a dispute crystallizes. The Contractor has submitted a claim under clause 20.1 for extension of time and additional payment for variation. The Engineer has made determination under clause 3.5 and awarded adjustment to the contract sum and extension of time for completion, but the Contractor disagrees with the Engineer's assessment. FIDIC provides for a Dispute Adjudication Board (DAB). However, DAB and amicable settlement provisions are frequently omitted from Gulf contracts. Alternative escalation provisions include a senior representatives' meeting (CEO level) or expert determination. In Clause 20.6, FIDIC prescribes for Arbitration under ICC Rules. If a government entity is involved, there may be additional hurdles to overcome before Arbitration can commence. For example, in Qatar law, the permission of the Minister of Finance is required before a public body can agree to arbitrate. In the UAE, ICC Rules are unlikely to be applied in arbitrating against government or quasi-government bodies. For example, RTA has its own rules. In Dubai, if your claim is against the government then you are likely to have to refer it first to the Dubai Legal Affairs Department for resolution before you can commence arbitration.

To summarise, be aware of the contract mechanisms and key clauses in FIDIC. Check if your FIDIC contract has been altered Contractors should be aware of time limits to serve notices on time while Engineers should note their responsibility to respond on time. Check the appendices to see if a particular format for notice required.

If in doubt, get professional advice.

CONSIDERATIONS IN EXTENSION OF TIME ASSESSMENTS – CRITICAL PATH AND CAUSE AND EFFECT

The first principle in an Extension of Time assessment is that delay does not automatically lead to an extension of time. Beyond that, concurrent contractor-caused delay does not negate the contractor's entitlement to an extension of time.

On most projects, the project 'owns' the float, which must be consumed before the completion date can be affected by any delays. Delayed activities may not be on the critical path. A delay analysis should be performed early in the claim process to establish the effect. To establish entitlement to an extension of time it is necessary to link cause with effect, i.e. that an Employer-caused delay actually affected the completion date

For a claim to succeed it is essential to link the cause with the effect. To establish and demonstrate cause and effect of a delay, it is necessary to carry out a delay analysis. There are two ways to assess delay and disruption claims.

Impacted as-planned

If the delay does not extend the time of completion, then the analysis demonstrates that an extension of time is not warranted. If the delay extends the time of completion, then the analysis demonstrates that an extension of time is warranted. If the Contractor completes earlier than the impacted programme, this demonstrates mitigation. If the Contractor completes later than the impacted programme, this demonstrates contractor-caused delays. An Impacted as-planned assessment is simple to carry out but is theoretical. It depends in the feasibility of the as-planned programme and does not establish concurrency.

Time impact analysis

This is the recommended and accepted practice for delay analysis. It depends on updated (as-built) programmes being produced on a regular basis. Delays should be analysed promptly and consecutively. The programme should be brought fully up to date to the point immediately before the delay event. The delay should be inserted into the updated programme. The difference between the completion date predicted on the update and the completion date predicted on the impacted update will demonstrate the extension of time due to the delay event

AN EXAMPLE OF A NOTICE OF DELAY

Re: Notice of Delay for xxxxxx - BLOCK A

Please find detailed below our Notice of Delay: xxxxx order is based construction programme ref: xxxxx, dated 1st August 2012, which was issued via email dated xxxxxx.

xxxxx were required to start on Block A on 8th July 2013 and complete commissioning on 6th December 2013 with the total duration of 109 working days, in accordance with programme xxxxxx – Block A.

xxxxxx are in delay through no fault of their own in Block A and as prescribed in the Contract we hereby notify you that you are preventing us the opportunity to proceed with the work in a regular and diligent manner.

[Photo illustrating the status of the works]

Unit A1: xxxx failed to coordinate contractors on site resulting in partitions being incomplete thus preventing xxxx from completing scheduled 1st & 2nd fix mechanical installations.

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CLAIMS FOR ADDITIONAL PAYMENT FOR PROLONGATION

What additional payments can contractors claim for? FIDIC allows a Contractor to claim additional payment in certain circumstances 'if the Contractor … incurs cost'. The law allows for the Contractor to be placed in a position that he would have been had the Employer not breached the Contract.

If the Contractor is obliged to maintain his site resources and contribute to head office overheads for an additional period for which an extension of time should be awarded, he is entitled to the reimbursement of his cost for doing so. These are known as prolongation costs. In basic terms, this means that the Contractor will be entitled to the reimbursement of his costs for providing site and head office overheads as well as costs, which must be actual costs incurred and not a theoretical estimate made from the preliminaries section of the bills of quantities.

Typical site overheads are site management and administration staff, non-productive labour, non-time-related plant, transport of labour and staff, site vehicles, site establishment, guarantees and bonds and project specific insurances. Meanwhile, head office overheads, as their name implies, cover running of the head office. These are often evaluated by way of prescribed formulas which allocate the audited head office overheads proportionally to the value of the project against company turnover during the period of delay.

Acceleration claims come in where the Employer has instructed the Contractor to accelerate work to mitigate the effects of Employer delays. The Contractor may claim for costs for working longer hours or extra days, cost for mobilising and remobilising additional resources, decreased efficiency through employing additional resources and additional site overheads in utilising additional resources. It is preferable to agree the acceleration costs before accelerating.

When an Employer either recognises the effects of delays on the construction programme and requires the contractor to accelerate the remaining work, or intentionally shortens the contract duration without the occurrence of any delays, the acceleration is said to have been “express” or “directed”.

DISRUPTION AND ACCELERATION COSTS CLAIMS

Disruption claims may be used where the Employer has disrupted the work, causing loss of efficiency. They are notoriously difficult to prove and to calculate. The effects of disruption should only be evaluated against actual productivity achieved, rather than estimated or theoretical productivity.

> “It is preferable to agree the acceleration costs before accelerating.”

Directed acceleration is seldom disputed. Because it is generally recognised that a contractor is entitled to its full contract term to complete, costs of acceleration carried out pursuant to a direction of the developer which shortens the available term are usually negotiated and agreed before the acceleration begins.

Constructive acceleration, which is the most commonly disputed form, is said to occur when the contractor claims an extension of time for a valid reason, but the Employer denies that request and affirmatively requires completion within the existing contract term, and it is later determined and agreed that the contractor was entitled to the extension.

Generally, it is recommended that contractors be careful to ensure that all contractual elements are present before accelerating and, to that end, that they take legal advice. A contractor who is simply being ordered or harassed to accelerate should should try to make direct contact with the Employer and negotiate a special agreement, or at least notify directly that he is implementing the Employer's wishes on the basis that he will be paid extra for going beyond his contract, although that may not in itself guarantee that the contractor will be held to be entitled to extra payments for accelerating.

"It is recommended that contractors be careful to ensure that all contractual elements are present before accelerating and, to that end, that they take legal advice."

ABOUT MPG

Formed in 1996, MPG specialises in all aspects of financial, commercial and contractual services in the construction and property sector, particularly in the area of mechanical and electrical services. The company is capable of managing the financial, commercial, contractual and engineering aspects of projects, from inception to completion and beyond.

With headquarters in London, MPG has an international staff base, providing an around-the-clock service in the UK, Europe and the Gulf Region.

ABOUT THE AUTHOR

Michael Gallucci is the Founder and Managing Director of MPG, providing quality surveying, project management, expert witness and dispute resolution services. With more than 25 years' experience in the construction industry, Michael is an expert in mediation, arbitration and dispute resolution. He is an accomplished and experienced MEP Quantity Surveyor, Project Manager and Quantum Expert Witness.

Michael is a member of the Society of Construction Law, the Chartered Institute of Arbitrators and the Royal Institution of Chartered Surveyors, and is an RICS Accredited Mediator.

Having graduated with a MSc in Construction Law and Arbitration, Michael has completed an I-GDL at the University of Law.

He enjoys travel, which is fortunate as the MPG network of offices grows across Europe and the Middle East. Michael spends his time away from work competing in triathlons, playing golf, watching West Ham and looking after his twins, although not necessarily in that order.

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