

**APPROACH OF INTERNATIONAL LAW
TO COMPUTATION OF DAMAGES
INCLUDING GLOBAL CLAIMS**

1. Introduction

This is in continuation to a small treatise titled 'DELAY DAMAGE DISPUTE' the enclosure, with the planner, 2012-2013-2014. The write up mentioned types of claims with exclusive treatment on delay damage claim. It was then indicated that certain documentary evidence could be necessary. It was with reference to **AIR 2006 SCW 3276 "Mc Dermott International Inc. v. Burn Standard Co. Ltd."** that hint was given to work out Time Impact Analysis (TIA). Even at this stage, it would be appropriate to recall approach of international law of computation of damages including discussion on Global Claims Approach.

2. Approach

It is essential that we must recognise type of damage component required to be included in computation of various claims, which essentially include the four types:

- a. Scope of work Claims (Change Orders)
- b. Delay Damage Claims (Time Overrun)
- c. Acceleration Claims (ordered by Employer)
- d. Change in Site Conditions (Differing Site Condition)

It is important that Contractor appreciates the different types of cost to include in a claim. Once the types are indentified, it facilitates Contractor to keep appropriate record. With the ability to identify this element with respect to specific claim, the Claimant can include in the claim justification, the computation, graphs, charts etc.

From the point of view of Owner, the ability to identify these components can help him to prepare defence by rejecting inclusion of redundant cost component, if any.

3. Cost Components

Through, industry survey* conducted by questionnaire and information collected, is tabulated for the above four types of claims. Following are the type of cost component, required to be **Generally Included (GI), Not Included (NI) and Sometime Included (SI)**

Type of cost claim	Type of claim				
	Scope of work claim	Delay Damag e Claim	Acceler at-ion Claim	Chang es in site Condi ti on Claim	
1. Additional Labour (Hours)	SI	GI	GI	SI	
2. Increased Labour Wages	SI	GI	GI	SI	
3. Increased Material Cost	GI	NI	SI	SI	
4. Additional Sub-Contractor Work	GI	GI	NI	SI	
5. Equipment Rental	GI	SI	GI	GI	
6. Job Overhead Cost (Variable)	GI	SI	SI	GI	
7. Job Overhead Cost (Fixed)	NI	GI	NI	SI	
8. Company Overhead Cost (Variable)	SI	SI	SI	SI	
9. Company Overhead Cost (Fixed)	SI	GI	NI	SI	
10. Interest	SI	GI	SI	SI	
11. Profit	GI	SI	SI	GI	

* Extract from ME thesis (1993) of Prof. Dr. Vandana Bhatt

In addition to above four claims, a fifth and an important claim is presented as Lost Productivity Claim (LPC).

4. Methods

There are some popular methods to compute these claims

1. Cost Method on Job Basis

This is computed by increase in actual cost with estimated cost as basis.

2. Cost Method on Item Basis

This is computed by increase in cost with reference to estimated cost for specific item.

3. Measurement Approach with Time factor

This is method includes comparison of productivity for a specific item before delay and after delay.

4. Measurement Approach with Scientific Models

Labour time cards on daily basis will show labour spent on various work item. This will help one to compute scientifically the productivity loss.

5. Expert Witness Approach

In case of this approach, one can add a third parties opinion and credibility to actual claim.

The Productivity can also be ascertained with reference to Method-Time-Measurement (MTM) system. which is the method of determination of time and cost. We do not have in India, productivity model for various jobs in terms of labour as we have for machineries and equipments and therefore, it will be fair to include a percentage loss with reference to original provision.

As far as TIA is concerned, the planner of 2012-2013-2014 listed number of different CPMs whose superimposition can be done through a computer programme to work out Net Attributable Delay. It is in this context that the Mc Dermott judgement (2006) cannot be operated using any of the formulas approved without computing net delay which is result of computer exercise.

5 TIA Approach

TIA is concerned with modelling of effect of single change or delay events, it requires CPM schedule that is capable to show difference between impacted delay and original time. The difference for project completion between non impact schedule and that of the schedule with the impact amounts to net impact delay in time.

In context of computation for the claims, we need to have for Expert's input CPMs, change notices, minutes of meetings, job correspondence, progress reports, equipment log books, progress photographs in addition to computer output for Time Impact.

6 Global Claims

Global Claim is so named because of a global or composite sum is demanded as damage arising out two or more separate claims stating that it would be impracticable to provide separate sums for each of the cause and effect. Global Claim is a claim which is worked out by subtracting the tender cost of work from the final cost. Claimant has the responsibility to lead evidence to prove essential elements of global claims such as breach of contract, causation, the loss suffered and proves the same through events and breaches of the total sum of loss. The Claimant asserts that the events caused the losses.

Global Claim is permissible where it is not easy to disentangle one claim from the other, for being arising out the same cause.

The Global Claim is defined as one in which the contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between the loss incurred and individual Employer Risk Events. It is further defined as ***“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.”*** Global claim is also called “rolled up” or “total cost claim”.

The short cut and simple approach which is becoming fast trend is the Global Claim approach. For this, the Claimant owns the burden to prove that the breach of contract has actually occurred and the dependent is legally answerable, resulting in the losses suffered. As per HUDSON *“Global Claims may be defined as those where a global or composite sum, however computed, is put forward as the measure of damages or of contractual*

compensation where there are two or more separate matters of claim or claimant, and where it is said to be impractical or impossible to provide breakdown or sub-division of sum claimed between those matters”

7 Basic Principle of Global Claim

The basic principles to consider global losses are:

1. A breach of contract as occurred due to default of defendant who is legally responsible
2. The breach has resulted in loss
3. Loss has been suffered which cannot be precisely computed on item basis.

In short, the main principles of Global Claims are breach of contract, the breach causing the loss and the Claimant having burden to prove the loss.

Global Claims are useful where loss is attributed to number of events with more specific link to each part of claim and specifically cannot be identified as the cause and effects situation. Global Claims are not simple for parties and tribunal to handle. A global claim is often made in situation resulting from combination of events. All the events that contribute to causing global loss must be liability of other party. In fact the method of handling the global claim and its pleading is in contradiction to fundamental principles of pleading. It is privilege of opposite party to know full particulars so that it cannot be handicapped from raising proper defense. Such technique is often called “**forest technique**” Here the pleading does not inform the other party of exact nature of claim made against them. A global claim in essence merely states the list of delay and disruptive events for which the Defendant is identified to be responsible. The nexus between events and period caused is missing in the pleadings.

8 Types of Global Claims

1. Loss and expenses
2. Delay and Disruption

These claims arise upon allegation of numerous variations events which impede, interrupt and interfere in the progress. It is interesting to note that since 2004 when global claims were pleaded (*Laing Management (Scotland) Ltd vs John Doyle Construction Limited*) before Extra Division of inner house court of session, it was recalled **“the logic of a global claim demands that all the events which contribute to the causing of the loss be events of which the party against whose claim is made is responsible”** (2004 BLR 295). It is also mentioned that **“there is no doubt advancing a global claim for loss and expense remains risky exercise”** International Construction Law Review (ICLR) 2003 Pg. 543.

In appreciating global claims, attention need be paid to “contribution claims” where extension of time was certified by Architect. The Employer, having settled the claim, made demand against Architect for negligent certification, identifying the lapse on part of Architect as “contribution claim” ICLR 2003 Pg 542. Sometime, internationally “pass-through” claims may be recognised. It is defined as **“A claim by a party who has suffered damages against responsible party with whom he has no contract and which is presented through an intervening party, who has a contractual relationship with both”** ICLR 2003 Pg 377.

9 Proof for Global Claims

To succeed in Global Claims as per *Laing Management (Scotland) Ltd vs John Doyle Construction Limited*, Claimant must prove three issues.

1. Event for which the dependent is responsible
2. Loss and expenses
3. Causal link between the event and the loss

There are objections to the approach **“Total claims, Composite claims or Rolled up claims”** and particularly to the Global Claim Approach. As mentioned in *John Doyle*, the Defendant and Court should not have to do Claimant’s job. Global Claims do not explain causes of additional cost for which Employer is not responsible viz. low tender price, low productivity

than average or material shortage. These are unfair claims to the Defendant. In event of Global Claims, all requirements for a valid claim need be complied. The claim must be factually true. The Claimant must give proof that he would not have incurred the loss in any event and while compiling the claim all matters for which the Employer is not responsible need be eliminated. Wherever, it is possible to demonstrate the causal link, the same should be clearly avoided to be linked with global claims.

10 Disruption

In appreciating value of global claim, we must not ignore the clear concept of “Disruption”. It is defined as **“Disturbance, hindrance or interruption of a Contractor’s normal work progress, resulting in lower efficiency or lower productivity than would otherwise be achieved. Disruption does not necessarily result in a Delay to Progress or a Delay to Completion.”** (*The Society of Construction Law Delay and Disruption Protocol Society of Construction Law, October 2002*).

In defence of Global Claims, one may state that the totality of breaches cannot establish individual claims and hence generalised claims should not be entertained. The contractor is then said to have failed to prove entire claim. Another defence is that the Contractor failed to prove that but for the Employer incurred any loss.

Payment of Interest

In case of interest, to be paid as opportunity loss, it is interesting to quote 2004 BLR 275 *Earl Terrace Properties Ltd vs Charter Construction PLC* **“...no damages are recoverable if no loss of any kind can be established. If it can be established that a party lost the opportunity to make commercial use of the money in question but cannot precisely quantify that loss, it is in principle acceptable for a Claimant to quantify that loss by reference to reasonable return that it could have earned by placing the money on deposit and then collecting reasonable commercial rate of interest over the relevant period of delay.”**

Considering the orthodox approach of Indian Courts and Tribunal, it is not advisable to attempt Global Claims approach in Construction. It has been noticed that in absence of discipline for accurate processing and presentation, Global Claims are being canvassed. While computation is difficult being without basis and linked to impact of events, the conservative approach requires each claim to be made “pure and being firm” on its own footing provable through the provable recognised technique through TIA through computer processing. The standard of technolegal consultancy has come up with appropriate answers to the need of proving and pricing.

11 Caution

While the Global Claim approach could be in order, under certain circumstances, the same is not a professional presentation and therefore, certain care need be taken in calculating construction damages. A construction claim must answer Entitlement and Computation. Without establishing both these aspects clearly, the chances of success is getting the claims fairly adjudicated are not right. Poor or inadequate analysis of valid construction claims, make the case weaker. When a claim is required to be defended, the same equation of Entitlement and Computation requires accurate approach. The main reason for thorough analysis is need to succeed in totality. To lose partly on entitlement and succeed in computation or vice-versa is like winning a battle and losing the war.

To begin with, quick calculation need be done to determine claim and approximate damage. While defending a claim, it is required to focus attention on quality of supporting records. The golden rule for success for defense of a claim is to have detailed cost accounting data. In process of reviewing the cost overrun, there may be no job delays, if we appreciate effect of time necessary for change orders.

Sometimes damages are considered under the two heads viz. General or Direct and Consequential damages which are not caused by the claim event but that may be the reason for event. Following are the two methods.

1. Actual Cost Method: Where one compares the actual cost incurred vs one ought to have incurred.
2. Total Cost Method: It is based on recognising total cost incurred against the bid amount, on assumption that the Contractor has taken all the care to mitigate losses. This method is defended on the basis that the quote is not accurate, errors and deviation from the work planned, poor management of contract.

In establishing the causal connection, one must study concurrent delay arising out of delay to obtain construction material at site in timely manner, failure to employ appropriate equipment and machinery, failure to furnish shop drawings for approval in timely manner and poor management.

In a 2009, US District case of New Jersey (AMEC Civil LLC vs DMJM Haris Inc) rejected cumulative impact theory of causation saying ***“the plaintiff seeking recovery for delay damages must demonstrate which of their specific damage proven to reasonable delay of engineering certainty are casually related to defendants alleged negligence”***.

In view of above discussion, there are number of judgements from various jurisdiction emphasizing the necessity for appropriate critical path analysis for delay claims (***Winter vs. United States -23 Cl.Ct. 241 (1991)***)

Contractor may incur extra cost sometime because of action of Owner of their consultant and vendors, and errors of contractor at the bid stage such as

1. Misreading difficulties in performance by labour input and equipment hours
2. Miscalculating time required to perform
3. Making unjustified assumptions