

“DELAY DAMAGE DISPUTE”

RISKY & DISPUTE PRONE INDUSTRY

Construction Industry is one of the largest activities in civilized world. It is highly volatile and risky, and offers low return at high capital investment and some risk.

It is the industry, which is very sensitive and dispute prone. The disputes are almost inevitable byproduct of this development process and clear with its conflicting interest, tracked in a highly competitive world of construction. There are number of factors controlled by the players, who are not directly the part of the construction process and, therefore, it is need to handle and manage the construction disputes and claims either from the side of the Owner, Contractors, Architects, Designers, Engineers or often the third parties. It is easier to say that the best way is to anticipate and avoid. This is easily said than that. While process calls for best co-operative instances, it is paradox why it generates bitter conflicts. No amount of hard work or check on credentials on parties can guarantee zero dispute situation. As the core of the process is sensitive soft monitoring consideration is required.

The process is usually handled through well written documents, defining the rights, responsibilities, risks and even provisions for resolutions. Such contracts are hardly negotiated and drafted. They are boiler-plate contracts, pre-drafted by the Employer/Owner and the Contractors virtually sign it without demur. These are the contracts of adhesion.

The principle ingredients of such contracts are Time for Completion and Extension of Time, Liquidated Damages, Change Orders, Variations, Terminations, Payment, Change of Conditions, Dispute Resolution Mechanism and Protection through Insurance. With most ideal conditions and excellently balanced draft of a contract, there are inescapable reasons why the disputes are virtually inevitable. In this context, various claims have to be managed :-

TYPES OF CLAIMS

1. Delay damages
2. Disruption claims,
3. Acceleration claims
4. Differing site condition claims

5. Change in scope claims
6. Termination contract claims
7. Delayed payment claims
8. Technique of computations and methods of resolutions are other integral parts of whole study and their management. However, only one type of claims is covered through this information bulletin, which is an extract updated for interpretation of relevant law in respect of delay damages.

DELAY DAMAGE CLAIMS

In Construction-Contracts, parties agree and bind themselves to complete a job within certain time. Delay is the time during which part of the Contract has not been performed due to unanticipated causes. These claims are also called Extension of Time claims.

Disputes originate majority from :

1. **Defects** - In Document of Contract and/or Design
2. **Deficiencies of Contractor** - A choice for lowest bidding could be beginning of a never ending Dispute.
3. **Deficit of Budget** - Project Planned on Deficit Budget yes could be completed within this Cost-under estimation.
4. **Differing Site-conditions** - This was not contemplated or envisaged or anticipated.
5. **Demand from Owners/Engineers** - Execute the work beyond the scope of work
6. **Damn it attitude** - Involving people, the professional, the prejudices the preconceived notions.

TYPES OF DELAYS

There are three broad categories of delays.

- a. Excusable and Non-excusable Delays.
 - b. Concurrent Delays
 - c. Critical and non –Critical Delays.
- a) **Excusable and Non-excusable Delays**

It is the Contract document, which says or in expressed or in implied terms : who is responsible for which event or activity, who holds the key and who has the control. Site-possession, Access, Drawings, Promised materials, Payments etc. are Owner's controlled activities. Timely execution and Good workmanship etc. are Contractors promises. In addition to these roles shared by Owner and Contractor is reason to be examined "**who could have**

foreseen a problematic situation - and did he attempt to avert or correct it?" Thus, we see four parameters for inspection of Delay being an Excusable or Non-excusable.

Delay that could be avoided by one-party makes it Non-excusable delay, giving right to the other party to be compensated and if the delay duration sheds off the label of "**Reasonable Delay**" even total breach of Contract results.

b) Some Non-excusable Delays

By Contractor

1. Lack of competence and skill for the job.
2. Inadequate deployment of Labour-force
3. Insufficient financial resources
4. Failure to mobilise proper equipment
5. Bad workmanship-removal & replacement delays

By Owner

1. Non-handing over of Site and/or Access
2. Non-supply of facilities promised in Contract
3. Non-supply of promised Materials
4. Improper or Inadequate Drawings
5. Failure to make Timely-payments

Non-excusable delays on part of the Contractor can give rise to claims by Owners or right to terminate or other specified remedies, and the same on part of the Owners may give Contractors a good case to demand, Delay-damages or even to rescind contract to the total risk and consequences of the Owner.

Excusable delays give, contractor right to extension of Time watering down liability under liquidated Damages Clause.

Excusable Delays have two important aspects viz. Compensable Delays and Non-compensable delays. All changes to scope of Work-additions/ alterations are compensable. "Suspension of Work" clause also is a mechanism to compensate Non-compensable delays in contract, viewed carefully in proper perspective.

c) Concurrent Delays

More often, we have a situation where Owner and Contractor contributes Independent delays, during the same period. In such a case neither party could recover

damages exclusively attributable to the other.

However Owner caused compensable delay invites a serious legal problem arising out of what is known as "**Rule against Apportionment**". Owner loses enforceability of Liquidated Damage clause unless a re-statement thereof is concurred by contractor. In case of concurrent delays, blame has to be apportioned between parties. Contractor alleging Delay, by Owner obstructing his performance should give proof of actual performance-capabilities demonstrated at other time when no obstruction existed. Imaginary efficiency could be an unjust approach against Owner's delay. •

d) Critical and Non-critical Delays

These delays in other words are Impact Delays or Non-impact Delays All delays-even of good duration may not make impact on schedule of completion. These are consumptions of '**Floats**' on C.P.M. Scheduling. There could be small delays on critical path, which could have telling effects on completion Schedule.

ONUS ON PARTIES

Having examined different types of delays, parties must know their cards.

For Contractor: He must demonstrate-

1. That Owner failed to discharge his contractual obligations.
2. That delays were critical in Impact on overall Completion.
3. That delays are not watered down by concurrency of his delay.
4. That delays caused by him are excusable and compensable.
5. That his delays suffer from no ingredient of negligence or are such as could have been foreseen or contemplated by contract.

For Owner: He must demonstrate.

1. That he did not fail to discharge his contractual obligations.
2. That his concurrent delays did not trigger any impact as completion schedule.

TIME IS AN ESSENCE

It is not clearly understood why the drafter of Construction Contract have fallen in love with this difficult phrase. As we hardly convince the Court about our intention to achieve such completion as we have already provided safety valves in terms

of extension of time and also have struck the bargain to damages in terms of pre-determined amount that can Liquidated Damages. We have introduced the concept of virtual completion, when we start making use of facilities created for our planning and we have also the Defect Liability clause without any distinction on latent liability and the period, for which the Contractor need to be held responsible.

There are two principle causes of delay (1) Change order/variation and (2) Differing site condition claim. Each of these heads need a complete detailed treatment and the same is not the contents of this information. The claim arising from consequence of delays are :-

For Owner

1. Delay in use of project
2. Locked up Capital
3. Escalation in subsequent investment.

For Contractor

1. Delay in getting Profit
2. Idling of Resources-Manpower, Tools, Plants and Machineries
3. Acceleration Losses
4. Productivity Loss due to uncontracted work-period.

While most of the above effects are so obvious that they do not need any amplification, two of the effects which are so prominent need special reference. They are –

1. Acceleration Losses
2. Productivity Losses due to uncontracted work-Period.

None of these effects also will be dealt with as each one forms a huge subject matter including the technique of computation for losses and methods for resolutions.

DOCUMENTS AID

So much as we may hate to delay execution of a project, more often we can't escape it. We want to submit Delay-claims. Following documents would provide a good insight, apart from thorough study of Contract documents.

1. Schedules - Bar-chart, C.P.M. etc... with all revisions
2. Change Notices - Extras, Additions, Omissions
3. Minutes of Meetings
4. Job Correspondence

5. Progress Reports
6. Log-books of equipments

COMPUTATION OF DELAY CLAIMS

The burden of proof lies with the Contractor, who seeks compensation and the general rule is that he cannot be compensated for the event within his control. This is **“mitigation of losses”**. The most important issue before the Court/Arbitral Tribunal is the computation of the period, for which such delay claims need be compensated. The events causing delays are special and complicated, and, therefore, it is a net effect of breach caused by other parties with direct relationship to the losses suffered have to be established before any amount of compensation is to be decided and there are various methods for working out this sensitive element for the **“Net Delay Effect” (N.D.E.)**. The Indian Law provides clear provision as to what should be the approach to compute the delay.

Section 73 of Indian Contract Act, 1872 allows as substitutional relief is the compensation only and cannot levy any penal amount. Losses, for which the compensation is demanded, must arise as a natural consequence of such a breach or which the parties knew when they entered into the contract. This clearly means that there should be damages, any prudent person to imagine that in usual course or expressly provided event of breach, for which compensation is required to be paid. The Employer may provide for Liquidated Damages to be covered by provision of Section 74 and where the contract gets aborted due to voidable element and rightfully rescinded, parties must make restoration of whatever gain made out of such contract in due course, when it was being performed before rescission. (Section 75)

Paras 109, 110 and 111 of AIR 2006 SCW 3276 "McDermott International Inc. and Burn Standard Co. Ltd." deals with method for computation for damages and in para 116 of the judgment is very clear statement of law **“Sections 55 and 73 of the Indian Contract Act do not lay out the mode and the manner as to how and in what manner the computation of damages of compensation has to be made”**. This statement is likely to be misused, particularly as the significance of the element “period of delay compensable is not clearly dealt with”. There is nothing wrong about this formula except that this period of delay has to be a result of a thorough search of scientific and mathematical model of Time Impact Analysis (TIA). As this element is not discussed nor the difference between Hudson and Emden on one side and Eichleay on the other for different usage. Way back in the paper in 1989, we

have attempted to canvass Eichleay formula but clearly stating that it only covered the main office overheads and that is the correct approach. Formulas are as below :-

A) Hudson's formula :

$$\text{"Contract head office overhead \& Profit percentage"} \times \frac{\text{contract sum}}{\text{contract period}} \times \text{period of delay"}$$

B) Emden's formula :

$$\frac{\text{Head office overhead \& profit}}{100} \times \frac{\text{Contract sum}}{\text{Contract period}} \times \text{period of delay"}$$

C) Eichleay's formula :

Step (1)

$$\frac{\text{Contract billings}}{\text{Total billing for contract period}} \times \frac{\text{Total overhead for contract period}}{\text{period}} = \frac{\text{Overhead allocable to the contract}}{\text{period}}$$

Step (2)

$$\frac{\text{Allocable overhead}}{\text{Total days of contract}} = \text{Deil overhead rate}$$

Step (3)

$$\text{Daily contract overhead rate} \times \text{Number of days of delay} = \text{Amount of unabsorbed overhead"}$$

It is encouraging to see that Indian Courts will not hesitate to accept the computation of delays based on this formulas. However, it is required to be warned to the computers that the period for compensable delay has to be arrived at through Time Impact Analysis (TIA).

In it's simplest form, the technique to demonstrate the impact of causes of claim upon the project schedule for overall completion and cost have to be appreciated. This requires schedule evaluation. The analysis should begin with assessment of -

- 1) As-Planned Schedule
- 2) Developing As-Built Schedule
- 3) Superimposition of above
- 4) Global Impact Approach
- 5) Net Impact Approach

- 6) Adjusted As-Planned CPM Approach
- 7) Adjusted As-Built CPM Approach
- 8) Collapsed As-Built Schedule Approach
- 9) Impacted Updated CPM Approach
- 10) Modification Impact Analysis Approach
- 11) Time Impact Analysis Approach

The result may be –

- 1) A delay for the day increased to the project
- 2) Useful consumption available float
- 3) Concurrent delay should be segregated
- 4) Creation of float for other activities

It is a study of all these from every event that is to have caused impediment, need to be recorded and analysed. It is only then that worst possible time impact summary at various stages is to be worked out. It is the list of all these that may need to be compensated only for specific erosion of resources at the relevant point of time. Any gross computation of delay inserted in either Hudson's formula and Emden's formula still not offered the acceptable result.

Finally, what is most important is the result and detailed record keeping of events and expenses through the performance period and time to time of computation to be finally tuned in an overall effect. It is possible to develop the management to keep the reliable and sound record of events at site. The salient features of other types of claims shall be discussed in subsequent issues.

*** EXTRACT FROM PAPER AT INTERNATIONAL SEMINAR ON ARBITRATION HELD ON 5TH AND 6TH NOVEMBER, 1989 WITH RELEVANT UPDATES FOR LAW**

Disclaimer :

The basis and reasoning of delay damages is based on experience, acquaintance of Construction Law and not to be understood as accurate expression of Law

- Kirty Dave