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To claim or not to claim, that is the question



- Giovanni Rigoni -
Claims Manager & Head of Contracts
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Like doubtful Hamlets, contractors are often faced with the following recurring dilemma: when an excusable event occurs on site, whether to either serve notice of claim to the engineer, or to try to reach an agreement with him/her on a possible solution without starting an argument that could most likely lead to a dispute and an endless litigation?

In my working experience as a contractor's representative and as a consultant in the construction field/industry spanning over 35 years, I often had the opportunity to observe two different and separate schools of thought within the contractor's organisations that may be summarized as follows: on one hand the production and productivity side and old school, which handled the execution of the works and which considered the contractual rules almost a sort of hindrance to its goal to ensure optimum results in terms of volume of executed earthworks, square meters of

executed superstructures, etc., within the time for completion, while on the other, the contract management novel approach which did take any opportunity to raise contractual awareness regarding matters for which the contractor did not bear responsibilities and for which it would have been entitled to claim for time and money thereof.

Frequently these different and separated schools of thought were in a type of hidden conflict between themselves, thus often causing further problems, loss and possible damage to the entire project and not only to the contractor itself. As it is widely and well known, any conflict involves losses to both parties, whether winner or loser. For this reason, it would be of paramount importance to resolve conflict in the shortest time possible, hence avoiding increasing loss and damage as time passes by and matters escalate to legal ramifications.

Whilst working as a contractor's representative, I observed both contractor's behaviours, like pertinaciously chasing production at all costs by trying avoiding conflict with the Engineer and, conversely, almost desperately searching for any opportunity to claim in order to fill the gap created by a very keen tendering approach, irrespective of the consequences to the on-site operations and the works actually executed. In all honesty, I often found myself behaving in the same way.





When I was a young site manager on important projects due to be completed within a certain time, I was mostly devoted to achieve maximum production, yet by ignoring that each of my actions on site had contractual implications, and by considering the warnings from my contract managers as pure theory based on empty words and creation of useless paperwork, the called 'site records', which could have diverted my site personnel from their main scope, i.e. **to produce as much as possible** at all times.

Later in my career, while acting as a contract manager and while devoting my time to the study and interpretation of contract clauses and the content of the contract documents, whichever type they were, I was tempted to claim by taking advantage of any opportunity the contract as a whole would give me, and mostly because I considered back then most of the engineer's actions wrong most of the time, because in my mind - on most projects - I considered the Engineer inadequately experienced and as having the pre-conceived attitude to act against the contractor, and that for these reasons he did not deserve the respect of the position, while I was essentially wholly focused on my main goal **to claim**.

With the passing of time and gaining of experience, I have changed my understanding of the contractual rules and my attitude toward contract management and the Engineer. Through this article I will share some of my seasoned beliefs, hoping that what I have achieved, mostly as consequence of my mistakes and at times one-sided ill-thought positions, will be useful to those reading it.

Common sense suggests that when two parties agree to a contract they should comply with the terms and obligations that they have negotiated and agreed upon for their collaboration. However, when the scope of the contract becomes complex and the provisions therein, which were intended to regulate the parties' actions, become too onerous as a consequence, the relations between the parties become difficult. In these circumstances, it is almost impossible to have a contract, which

provides for all the aspects of the agreed collaboration without contradictions, ambiguities, oversights and inaccuracies.

My reasoning applies more so to public works tenders and contracts thereof, where the possibilities of negotiating the terms and obligations imposed within these mostly considered as adherence contracts, are indeed almost non-existent.

Contractors should understand that the tender process is a free interaction between those soliciting the tender, namely the client or the contracting authority, and those who decide to submit their tender, namely the contractors. The submission of a tender is a free decision taken by the contractor and it should be fully aware of what it is tendering for and that is therefore understood that minimal negotiation would be allowed and undertaken before the conclusion of the contract.

As tenders in the construction industry often concern complex projects, the parties should accept the fact that their concluded contracts after award, may be imperfect, thus comprising grey areas where more than one interpretation of the contract's provisions, terms and obligations therein may apply. The parties should be prepared and open to discussions about a better course of actions to be undertaken for the benefit of the project, as opposed to spending time and money accusing each other of all types of non-compliance and defaults, with the result of losing focus and sight of the main

scope of their contract agreements, while instead they should execute and complete the subject matter of their contracts and projects, in the most favourable and timely manner for the benefit and in favour of common will of the parties enshrined within the contract.

Notwithstanding a widespread perception to the contrary between those within the construction industry, the word 'claim' and the verb 'to claim' do not imply any kind of negative or insidious meaning or behaviour, which sadly employers, engineers and even contractors sometime fail to understand.

A claim is an assertion of a party, supported by evidence, stating that, in its opinion, something did not work as it was provided for or it has been done in a different way in respect of how it was foreseen, thus causing consequences and entitling the claimant to relief as detailed and substantiated by a claim.

According to the wording of most forms of contract, to claim is a right that any party to a contract should have. Such right may be asserted, in case any kind of event occurs, which is not anticipated and provided for by the contract, and therefore requires corrective action to allow the claiming party to correctly proceed with the execution of its contractual obligations, expeditiously and without further delays and to avoid the responding party incurring more grave consequences caused by the event, whether the corrective action is not timely applied or not applied at all.





In principle, serving a notice of claim should be intended as an exercise of one party common sense and due process while respecting the contract, and I personally consider it unwise to understand/believe that a notice of claim should be intended as an act of hostility against the other party; serving notices of claim is the action of raising a hand because something has happened, or does not work properly or as it was intended to work.

I may certainly assert that during my professional experience, the events, and relevant notices I had the opportunity to analyse, which subsequently led to a submission of a claim, were in large part genuine technical events that objectively prevented the contract and project from being properly carried out. In most of these cases the negative reaction of the party who received the notice of claim has been the reason that turned a technical problem into a dispute and later in litigation, in some cases even bitter litigations, while instead - in most of the cases - the issue could have been easily solved, without exorbitant costs, just by the correct application of the rules of the contract and a genuine approach to collaboration.

Quite often, the missed opportunity to take the corrective action in a timely manner depends on the fact that those who receive the claim, and would have the duty to decide about the possible solutions, focused only on a thorough criticism of the wording of the complaint itself, in certain cases reacting as if they were offended by the other parties action, rather than to undertake an objective analysis of the subject matter of the complaint or claim in order to understand the reasons for its submission. It is depressing at times to read some engineers' answers to notices of claims, whereby they "reject" the notice before the ensuing claim is even submitted, without any kind of analysis on the merit and in blatant breach of contract obligations and indeed of natural justice. But this is another aspect that I could consider as the subject matter of a future article.

As a matter of fact, almost all forms of contract that I had the opportunity to study

and apply, contain mainly all the possible formalities that should be complied with for a claim to be submitted in a timely manner. These formalities have been refined and developed over the years in order "to reduce disputes and indeed litigation" as stated by the so called experts, who on a voluntary basis accept to write forms of contract, setting tighter times for notification, providing for an ever-increasing number of documents to be prepared in support of the notification itself, rather than detailing the rules for the analysis of the subject matters of complaints/claims and the definition of their possible solutions, thus limiting the possibility of further manipulation of the dispute resolution clauses. But this is also another aspect that may deserve further consideration as part of a future article.

Coming back to our Hamlet-like contractor, what may we suggest to solve this terrible dilemma, which unfortunately is very real even nowadays?

As mentioned above, the right to claim is a right under most bilateral contracts, but I would not hesitate to state that to claim is the duty of a party that has the obligation to report any event, hindrance and inconsistencies it would face while performing its duties under the contract, and any problems that could create loss and damage to the other party, if these were not timely notified and eventually solved.

To avoid notifying claims when an excusable event occurs is like hiding the newly formed dust with the broom under the carpet. The dust will reappear as soon as the cleaning is done with greater care and someone lifts the hem of the carpet.

Parties to a contract should always consider that any delayed notification of an event of risk, involving a consequent submission of a claim, may have two equally serious consequences: i) the probable increase in the loss or damage for the party receiving the notice due to





the delay in promptly defining and instructing the actions to remedy the risk on one hand, or/and ii) the loss of the right to the acknowledgment of the loss or damage due to the rules of limitation, both under the contract and at law, for the party submitting the claim.

The contractor should therefore never doubt or hesitate about the decision whether to serve notice of claim or wait. **When the circumstances arise, it should always submit such a notice within the time provided for by the contract.** The contractor should always consider that it needs to ensure that its rights are not later denied/lost by the ever-tighter conditions stipulated by contracts nowadays and/or by intervened limitation at law.

In such circumstances, the Contractor's attention must always be directed to the manner of submitting its reasons for the notice, both regarding the wording used and the submission time of a claim. The Contractor should avoid wasting time and resources in discussing the opportunity to submit notices of claim. If in its opinion the reasons for submission are contractually valid, there is no doubt that any hesitation in taking the action may result in a

disastrous loss of rights that may not be claimed later on.

It is evident that the substance, as well as the form of any claims, must be treated in a careful way, taking care of both the quality of the argumentation and the language used. Evidence needs to be carefully collected and submitted to whoever oversees the review and the decision concerning the resolution of the claimed issue. However, no doubts should arise regarding the opportunity to submit notices and ensuing claims.

In conclusion, I have no doubt in asserting that when an event affecting the proper performance of any contractual obligation and the works occurs, the contractor should always submit a notice of claim timely and in accordance with the contract, which should be followed by detailed interim claims later, and completed by the proper, complete and final submission of the claim once the effect of the event giving rise to the claim will have ended and the relevant implications would be thoroughly known. The discussions on the reasons about the opportunity when to notify and then claim should only be confined to the appropriate timing of these

submissions always. It goes without saying, with attentive care for the statute of limitation, and not only to the substance; a claim is a right that needs to be pursued with the respect of the contract and presented to the other party accordingly, for it to be acknowledged as rightful under the contract and at law and to avoid painful and expensive loss of rights.

Managers and representatives responsible for decisions concerning the opportunity when to submit notices of claim, should concentrate on the required timing for submission, leaving the onus to better argue and prove the contractor's rights and entitlements thereof, based on adequate methodologies, to the specialists and experts in the field. The contractor's strategic issue must always focus on time of submission of notices and in that regard, it is always advisable to consult with reputable specialists and experts in this field who can provide contractors with suitable support and advice. The selection of suitable claims specialists and experts is crucial for the positive resolution of claims through the required determination procedures under the contract.





Loss of efficiency claims



- Violeta Dinu -
Technical Director & Manager of QS and
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Definitions

The disturbance of the contractor's planned construction activities and progress with resulting loss of productivity, causing additional cost/expenditure for labour and equipment, but rarely materials, has been the industry wide accepted plain description of the phenomenon called disruption. This is a head of claim occurring and made when there has been delay to completion or disturbance of the contractor's physical and financial progress, even though the ultimate delay to completion would be minimal or non-critical. Disruption may consist of the sort of delay events, which would be typically ignored by project managers in the initial stages of the works, and even later, because ostensibly they would appear as causing no tangible delay effect on the completion date if non-critical trade[s] or element[s] was/were delayed, albeit later there would have been recorded financial losses, due to the engagement of resources on non-critical paths of the works, for longer periods than necessary/planned. Indeed, to maintain the schedule, non-critical work may often be delayed, truncated, carried out in other more difficult ways and generally subjected to uneconomic effects.

Disruption is not delay

As with the word "delay", "disruption" is a comparative term that has no intrinsic meaning except by reference to a standard of

performance against which it can be measured. In construction and engineering contracts, disruption is the difference between an intention and reality as pertaining to productivity, where the reality is a derogation from the intent. Disruption is not delay, although disruption may cause delay, and it may be caused by delay, delay is not a precondition of disruption, and, indeed disruption may occur when the progress of the works is not only delayed but when it is in fact accelerated, whereby acceleration may indeed mean disruption.

Disruption to construction work may lead to late completion of the work, but not necessarily so. It is possible for work to be disrupted and for the project works still to finish by the contract completion date. In this situation, the contractor will not have a claim for an EOT, but it may have a claim for the cost of the reduced efficiency of its workforce and equipment.

Disruption claims, comparatively with other types of claims, are harder to detect, prove and measure for many reasons. First of all, they are usually not promptly detected by the contractor until much later, and for those responsible for substantiating claims to recover the financial ill-effects, it is a comparative process which relies and makes reference to some pre-defined cost/value reports and adequate contemporary records.

Acceleration claims, on the contrary, may be easier to measure, if they are managed properly, because they are usually instructed



in advance, hence adequate forewarning implies proper cost record keeping and the acceleration ascertainment becomes a function of analysing those records.

Methods of Evaluation

Numerous methods exist to calculate loss of labour and equipment productivity, and although no method is generally accepted, some are preferred over others. There are two groups of methods used to measure disruption, the first involves **measurement of productivity** and the second is based on **examination of actual costs**.

Group 1 of methods for disruption calculations:

1. Measured Mile;
2. Industry Standards;
3. Comparison with similar projects;
4. Productivity analysis.

Group 2 of methods for disruption calculations:

5. Total Cost Method;
6. Modified Total Cost Calculations.

The methods for measuring disruption are often particular to each individual project, and it is not as easy as choosing the ideal method from a predetermined list in most cases. This means that, for example in a project where the work varies, plus the change in the circumstances in which the execution took place, there may be no alternative but to examine and compare actual against planned costs. There is a fair amount of academic literature from the USA and the UK which addresses the evaluation of disruption costs, however, much of the commentaries I refer to herein after focus on the disruptive effect of Change Orders (i.e. client/owner/employer-ordered variations to the works). These represent limited circumstances and unfortunately the availability of methods for disruption calculation is down to the least accepted method, the total cost approach, which is a last resort method.



The Total Cost Approach

This section will take on the challenge of examining the least widely accepted method to calculate decreased labour and equipment productivity. Under the total labour method, decreased labour productivity is calculated by subtracting the estimated cost of performing the work from the actual cost of performance. The pre-requisites or the assumptions of the method's adoption are as follows:

1. The cumulative effect of the changes in the scope of work cannot be disentangled to show causation, liability and recoverability in slices;
2. The original bid for the work was reasonably established;
3. The contractor's actual costs were reasonable;
4. The contractor was not responsible for the additional expenses/costs.

Each of the four elements above must be present before a total cost calculation is justified. Recently, the total cost method appeared to be gaining acceptance by courts and boards, especially at the state level and by arbitrators and juries. Where there is a multiplicity of causes, such as a high number of Change Orders and varied work recorded, the contractor or claimant will often resort to the rolled-up methodology in efforts to measure loss arising from disruption, and such claims are likely to suffer from criticism as to said method and the assumptions underlying such an approach.

The greater number of changes to the initial scope of work, the more there are likely to be unmeasured and unquantifiable effects in all areas of project costs, including supervision, and on other operations where specific disruption caused by identifiable employer-responsible events has not been observed by those at site level, and which will not feature as discrete heads of claim. In the circumstances, arguments based on a cumulative disruption are attractive to a claimant.

Most relevantly, record keeping challenges ensuing from the great number of disruption causes, make the situation even harder in quantifying losses, because it becomes much harder to maintain comprehensive accurate

records. None of the various alternative methods to evaluate disruption, identified by academic studies in the industry, offer complete answers to the problems raised hereinabove.

Sources: article "Evaluating Disruption Costs on Major Construction Projects", by Christopher Ennis, SCL, July 2011, & "Delay and Disruption in Construction Contracts" by Keith Pickavance, 2005

Case law: *BELL BCI COMPANY vs THE UNITED STATES (April 2008)* – An award for cumulative impact or labour inefficiency claim

On this \$63.6 million project, the \$21.4 million in change orders increased the Contract price by 34 percent. Changes of this magnitude are unusual for building construction projects. The approximately 700 variations affected every floor of the project. To determine the cumulative effect of the changes, the disruption analyst compared actual hours incurred on the project against the originally planned hours, to calculate unearned hours attributable to the changes. It was found that 25% of Bell's total hours expended on the project were attributable to labour productivity loss caused by the changes. The Court accepted that Bell's original estimate for the project was reasonable, as Bell was not the lowest bidder for the project.

The award for BELL's claim for damages from delay and cumulative impact on the project is sometimes called a "delay and disruption" claim, wherein a distinction in the law is made between (1) a "delay" claim, and (2) a "disruption" or "cumulative impact" claim. The Court described the difference as follows: *"Although the two claim types often arise together in the same project, a "delay" claim captures the time and the cost of not being able to work, while a "disruption" claim captures the cost of working less efficiently than planned"*.

A disruption claim compensates for losses and/or damages when the work is deemed more difficult and/or expensive than anticipated. The contractor must prove for either claim the elements of liability, causation and resultant injury. When the contractor is asserting a delay claim, the contractor has the

burden of showing the extent of the delay, that the delay was caused proximately by the employer's action, and that the delay caused loss and/or damage to the contractor.



Another important statement in this court trial was: *"While the law requires reasonable certainty to support a damages award, damages do not need to be proven with mathematical exactness. Rather it is sufficient if a claimant furnishes the court with a reasonable basis for computation, even though the result is only approximate."*

The constant tendency of the courts is to find a suitable manner in which losses and/or damages can be awarded where and if a wrong has been done. Difficulty of ascertainment is not to be confused with the right of recovery. Nor does it exonerates the defendant of his misconduct, which has made the inquiry into the question of harm necessary, rendering that inquiry even more difficult to determine. The defendant who has wrongfully breached a contract should not be permitted to gain an unfair advantage from his own wrong by insisting on proof, which due to its breach is unobtainable or very difficult to prove.

Multiple change orders on a construction project can potentially be accommodated if the employer acknowledges that additional time and money will be required, and if the parties carefully plan the sequencing of the changed work. However, if the owner /employer, as here, denies the additional time or money to perform changed work, but nevertheless continues with the flow of issuing change orders to the contractor, a chaotic project will inevitably be the result.

The factual evidence presented in this trial was supportive of the disruption analyst's conclusions that 25 percent of Bell's labour hours were attributable to employer's changes. The court found the analyst's estimate to be reasonable when considering the number of changes, the amount of replacement of previously completed work, and the overall deteriorated project environment. The court awarded Bell's cumulative impact claim for the amount of \$2,058,456.



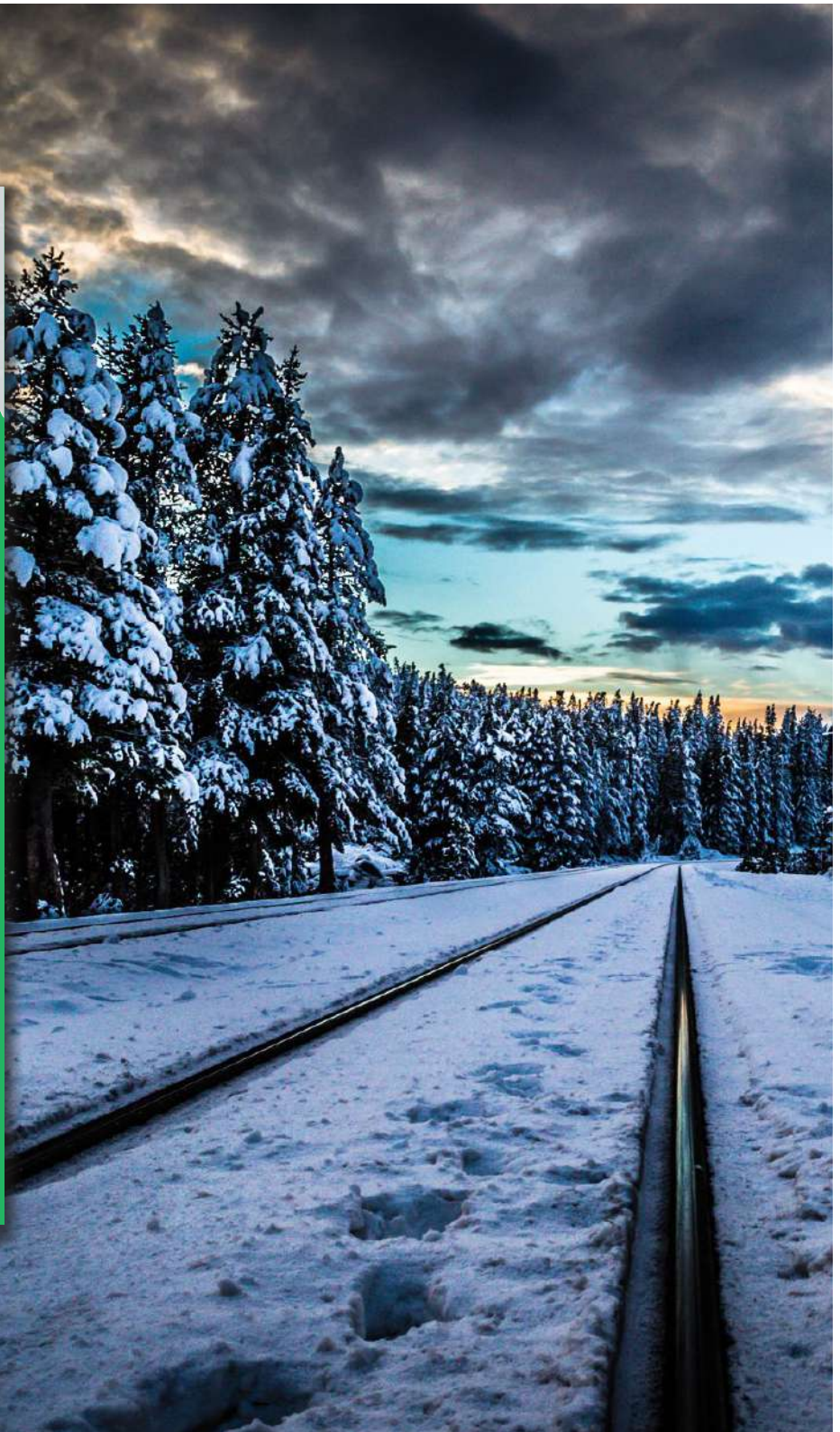
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Warm wishes for a happy holiday season and our sincere thanks for your loyalty and business throughout the year!

Happy Holidays from all of us!



We hereby kindly inform you that Techno Engineering & Associates will be closed during the winter holidays, between December 22nd 2017 - January 8th 2018.