

The Anatomy of a Delay Claim

There are three fundamental elements of a construction contract: price, scope, and time. Contractors and owners rely on the terms of the contract to inform them of the work that is required to be performed; the price for that work; and the time frame during which the work, or other various aspects of it, are to be completed. As a result, a change to either price, scope, or time may have a significant impact on the parties' performance under the contract.

Although construction contracts will vary, each contract will explicitly state or else imply that the work will be performed over a certain period of time. Delays may frustrate plans, resulting in inconvenience and loss to the innocent party, and potentially compromising the quality of the end product. While delays occur frequently on large construction projects, not all delays to a project schedule will necessarily give rise to a claim.

Establishing a Claim

In order to establish a claim for damages flowing from a construction delay, there are a number of considerations that must be taken into account before proceeding with a claim.

Classification

The first step is to determine whether a delay will be considered critical. A critical delay is one that will affect the project completion date or another important deadline or milestone in the lifespan of the construction project. A non-critical delay is one that will affect the completion of a specific activity, but not the completion date or an important deadline or milestone of the project. A party bringing a delay claim must be able to establish that the delay affected the critical path of the overall project. To make a determination as to whether a delay is critical or non-critical, consideration will be given to two factors:

- I. **Float:** non-critical activities have float, which is the amount of time an activity can be completed late without affecting the critical path of the project. If an activity is determined to have float, it may be extended or postponed without constituting a delay. This will often be contained in time extension clauses, which specify that a contractor will not be entitled to a contract extension for delays to a non-critical work activity until the delay has consumed all available float associated with the activity.
- II. **Acceleration:** acceleration occurs when a contractor mobilizes resources or incurs expenses beyond the original contractual expectation in order to meet the project the schedule. Generally, acceleration occurs as a result of delays and may result in overtime, decreased productivity, issues with scheduling, and a corresponding increase in costs.

Once a determination has been made as to whether a delay is critical or not, it will be necessary to establish whether a delay is excusable or not. An excusable delay is one in which the contract allows for an extension of time, compensation, or both. An example is where a delay falls under a force majeure clause because the delay is deemed to be out of the defaulting party's control. If there is an entitlement to compensation as well as an extension in the contract time, the delay is a compensable excusable delay. However, if the claimant is only entitled to an extension of the contract time, the delay is classified as a non-compensable excusable delay. A non-excusable delay is one in which the party is entitled to neither an extension in the contract time nor any monetary compensation. A non-excusable delay tends to be a

delay where the cause is within the control of or could have been foreseen by the contractor.

Elements

To recover damages, the party advancing the delay claim (the "Plaintiff") must establish that the responsible party (the "Defendant") breached the contract by causing a delay in the completion of the project, and that a loss was suffered as a result of the delay. The Plaintiff will bear the onus of proving facts which support its case on a balance of probabilities. So the first step is to consider whether there is a viable delay claim. This determination requires a review of the contract terms to ascertain whether the delay in question is compensable or claimable, as well as a consideration of whether the delay in question is on the critical path.

Preparing a Delay Claim

Notice Requirements

The construction contract governs the parties' rights against one another for delays in performance. It is essential that the notice requirements in a construction contract be strictly adhered to in order to be able to recover damages related to the delay. For this reason, parties must determine what notice is required under the contract and when that notice must be delivered. Most construction contracts will require that a specific form of timely notice be given to the defaulting party in order to preserve the innocent party's right to claim compensation for the delay. While standard form construction contracts have timelines that specifically address the issue of delay, a contract may have supplementary terms attached to it which deviate from the notice provisions found in the standard form contract. Parties should therefore carefully review and familiarize themselves with the notice provisions contained in their contract.

Additionally, strict compliance with the notice provisions set out in the construction contract has been held to be a condition precedent to invoking a force majeure clause defence, as discussed below.

Documentation and Information Gathering

Supporting documents are vital to proving that there was a critical delay by establishing that the elements outlined above have been met. Proper documentation will assist

the Plaintiff in proving the facts which support its case on a balance of probabilities and the Defendant in its opposition of a delay claim.

Documents that may assist either the contractor or owner in preparing for the possibility of a delay claim can include, but are not limited to, documents such as purchase orders, invoices, receipts and other accounting documents; original and revised schedules; signed contracts with third parties such as subcontractors and suppliers; the tender package; minutes of meetings; records of payments and holdbacks; any relevant photos or video footage of the construction site; and field diaries.

Experts

The analysis of whether a delay is on the critical path or whether there are overlapping delays is complex. Scheduling experts can be retained to provide their expertise in this assessment. Such experts can also be retained during the project when there is an early indication of a possible delay, as they can assist the parties to revise schedules and find areas to accelerate, in order to minimize the actual delay.

Damages

Once the Plaintiff has established that there has been a breach of duty or contract, that it suffered a loss, and that the loss is a result of the breach of contract or negligence, the Plaintiff is entitled to recover damages for all reasonably foreseeable losses caused by the Defendant. The purpose of awarding damages is to put the innocent party, as far as possible to do so using money, into the same position as if the innocent party's rights had not been violated.

For delays determined to be caused by an owner, a contractor may be entitled to damages related to lost profits, loss of use, insurance costs, project management and supervisory expenses, and loss of use. For delays determined to be caused by a contractor, an owner may be entitled to damages related to additional construction costs, including increased costs of consulting professionals, loss of profits, diminution of value of the project, and liability insurance.

Defences

A Defendant may contest a claim for damages on four available grounds:

- the Defendant's actions did not cause the Plaintiff

to suffer a loss;

- the Plaintiff's damages were not reasonably foreseeable;
- the Plaintiff exaggerated the amount of its loss; and
- the Plaintiff has failed to mitigate its loss by failing to take all reasonable steps to reduce its losses.

There are a number of clauses in construction contracts that may be of some assistance to establishing a defence, including force majeure and disclaimer clauses:

"Force Majeure" Clauses

As mentioned above, a delay may fall under a force majeure clause. Frustration of a contract occurs when its performance becomes impossible due to a supervening event caused by neither party, and not within their contemplation. In order to rely on a force majeure clause as a defence, a Defendant must show that the circumstance which occurred could not have been foreseen and could not have been prevented. The result is that the contract comes to an end.

Disclaimer Clauses

A construction contract may contain a disclaimer clause attempting to exclude or limit a party's liability if certain events occur. It is important to note that exclusion clauses and disclaimers will be strictly construed by the courts against the party for whose benefit it was inserted.

Conclusion

During the lifecycle of a construction project, delays may be frequent and recurring. While not all delays are created equal, many delays will not only increase the time required to perform the work under the contract, but are also likely to result in increased costs. It is therefore important for all parties involved to consider adopting at the outset of the project a risk management framework that sets out practical steps to help identify and manage potential delay risks.

The construction contract will play a critical role in determining the validity of a claim and is therefore a vital tool for managing the risk of a delay. As mentioned above,

there are a number of contractual provisions that may be of some assistance to establishing a defence. Likewise, delay risks may be allocated and controlled for by including contractual provisions that speak to acceleration, termination, notice, formal change order requests, and the apportionment of liability.

Outside of the contract, parties should take practical measures to safeguard against liability. Proper record-keeping will be essential to protecting a party in the case where a delay turns into a claim. For this reason, every change order or complaint with respect to project performance should be recorded and tracked. Similarly, if a delay does occur, it is important to document the specifics of the delay as thoroughly and unambiguously as possible.

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Eugenia joined Civic Legal LLP as an Articled Student after completing her Juris Doctor from the Peter A. Allard School of Law at the University of British Columbia. During law school, Eugenia served as the Clinic Coordinator of the Artists' Legal Outreach Clinic, and worked with the Law for Non-Profits Project, where she provided legal services to local charities and non-profit organizations. She was also extensively involved with the UBC Law Review, serving on the Board of Directors as the Patrons and Special Projects Manager.

Prior to enrolling in law school, Eugenia completed a Bachelor of Political Science degree at the University of Calgary.

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