

Delay Claims Management in Construction

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Abstract

Changes to the base contract occur almost in every construction project. These changes can result from the owner's adding additional scope of work, differing site conditions, errors or omissions in the Contract Documents, delays by the owner, unpredicted conditions, constructive change and/or acceleration. Construction projects frequently suffer from delays and are usually completed within a period longer than what is agreed upon by the contracting parties. Substantial financial claims can arise from those circumstances; and consequently clients and contractors often argue about the causes of and liability for the delay circumstances. Delay claims management in construction is a predominant key to the success of any project in today's litigation world. Methods of delay analysis have been developed over the last two decades to assist in the investigation about project delays and in the assessment of causation and allocation of such liability. This article examines some of the methods applied in this respect, and assesses their evidential reliabilities in delay analysis. Traditional methods of dispute resolution regarding construction are nowadays enormous and costly. In this article, Alternative Dispute Resolution (ADR) techniques are introduced as an alternative method to facilitate dispute resolution process.

Delay Analysis Approaches

One of the most prevalent ways of assessing and handling claims is to analyze time delays suffered in the project. There are several methods through which this task can be performed. This article describes the four methods applied in managing delay claims. They effectively summarize the main approaches which have been offered so far in connection with analyzing the impact of claims on the Schedule together with the advantages and disadvantages of each approach.

A) PLANNED VS AS-BUILT METHOD:

This approach is probably the oldest and most straightforward one. It compares activities from Contractor's planned Baseline Schedule with the actual Completion Dates of the delayed activities on the "As-Built" Schedule. The activity or activities need to be clearly falling on the Baseline Critical Path.

Advantages:

- It is simple to use and understand.
- Mathematical computation only.

Disadvantages:

- It assumes that the baseline schedule logic remains hold.
- It cannot deal with the issue of concurrent or parallel delays.
- It makes no allowances for mitigation measures.
- It does not consider the dynamic nature of the critical path that changes from time to time either by delayed activities and/or consumption of the float by other activities in other paths.
- Since the Contractor is liable for other delay events caused by him, this approach is not recommended in arbitration and/or litigation.

B) IMPACTED AS-PLANNED METHOD:

In this approach delayed event(s) by the client are incorporated in the planned Baseline Schedule and then the re-run is done to determine the resultant impact of the delayed event(s) to particular Milestones and overall project. In this method, the contractor inserts the owner caused delays only.

Advantage:

- Relatively simple to implement.

Disadvantages:

- Highly subjective and theoretical, particularly if the result of this method projected particular date(s) much later than the actual completion date(s).
- The contractor caused delays are not considered.
- It assumes the contractor always follows Schedule logic.
- It does not consider the dynamic nature of the Critical Path that changes from time to time either by delayed activities and/or consumption of float by other activities in other paths.
- The preferential (soft) logics may exaggerate delays.
- It assumes that the owner is responsible for all delays in the project.

Due to what is mentioned above, this approach is not recommended in arbitration and/or litigation.

C) COLLAPSED AS-BUILT (KNOWN AS “BUT FOR” METHOD):

The beginning point of this approach is to develop “As-Built” schedule that reflects the actual dates and actual sequence of schedule activities. In this method, the owner caused delay event(s) shall be removed from the As-Built schedule to show what the completion date for particular milestones and/or overall project completion would have been if the owner delay events had not occurred i.e. recalculate the schedule to determine new completion date in the absence of owner caused delays.

Advantages:

- As it is based upon the As-Built Schedule, the certainty is enhanced that the outcome coincides with the actual situation on site.
- It is easy to understand.
- It is a technique that’s well accepted and recognized in arbitration and/or litigation.

Disadvantages:

- It assumes that the existence of As-Built Critical Path which can be perceived by the scheduler, in other words, methodology and application of technique is open to criticism between owner and Contractor.
- Since the process involves the re-construction of the As-Built logic, the recreation of the Critical Path following the removal of the delay events may not be the same as the Critical Path that actually existed at the time of the delayed event/s.

D) WINDOWS/SLIDE METHOD:

Windows analysis (also known as contemporaneous method) is based on the analysis of the effect of delayed events on the entire length of the project by looking at the events which have impact within the Schedule at the reporting time period when the events occurred.

Advantages:

- This method considers the dynamic natures of the critical path.
- It is a technique well accepted and recognized in arbitration and/or litigation.

Disadvantages:

- It is time consuming to develop.

Categories of Delays:

- Float consumption
- Inexcusable delay
- Excusable delay
- Compensable delay
- Concurrent delay
- Pacing delay

Generally, there are four causes of delays in projects, 1) Owner including agents e.g. project management firm, designers etc-. 2) Contractor including subcontractors, suppliers, vendors etc 3) Neither, e.g. Force Majeure, regulations etc. 4) Both of them i.e. concurrent delays.

Accordingly, delays can be classified as follows:

Excusable compensable delays (E/C):

These are delays caused solely by the owner’s actions or inactions. These delays are not caused by the contractor and over which contractor has no control e.g. variations, work suspension, delays in approvals, differing site conditionsetc. This type of delays typically results in time extension, increased overhead expenses and perhaps profit and bonds charges.

Excusable non-compensable delays (E/N):

These are delays over which neither the owner nor the contractor has control e.g. strikes, riots, exceptional adverse weather and Force Majeure. This type of delays typically results in time extension but no increase to overhead expenses.

Non-excusable delays (N/N):

These delays are caused by the sole actions or inactions of the contractor (also known as culpable delays) e.g. project mismanagement, insufficient workers and plants, delays in engineering/shop drawings production, failure to provide submittals in a timely manneretc. This type of delays typically does not result in time extension, nor increase in overhead expenses. The contractor shall be liable for the damages resulting from late completion as stipulated under the contract, or he shall pay for the acceleration damages to make up the lost time. Two or three of the stated delay categories may occur concurrently; the typical result is to defer based on the type of delays, e.g. excusable compensable delays (E/C) occur concurrently with non-excusable delays (N/N), the outcome will be typically time extension i.e. reduction in late completion damages but no cost is associated with the delays.

Dispute Resolution:

Contract traditionally includes dispute clauses. These clauses detail to a greater or lesser degree, the process by which all contract disputes will be prosecuted. In general, there are four basic methods of resolving disputes in projects:

Negotiation: Face-to-face negotiation between project teams in both organizations of the owner and the contractor. The concept is to discuss the disputed issues and to mutually reach an acceptable business solution to the problem.

Mediation: Mediation is a form of a structured negotiation between the parties utilizing the services of an outside neutral facilitator. The role of the mediator is generally to help bring the parties closer together in terms of persuasion until agreement on the reached solution. This process is largely controlled by both parties.

Arbitration: Arbitration is a more formal and legal process in which both parties no longer control either the process nor the outcome. In this process, the dispute is heard by an outside organization typically operating under a national or international set of rules. In most arbitration proceedings, the arbitrator's rule is enforceable at law in a court of a competent jurisdiction and may be appealed only for very limited causes.

Litigation: This is a formal lawsuit in court pursuant to the terms of contract and under the rules of the jurisdiction where the lawsuit is filed. Lawsuits are time consuming, lengthy and very expensive.

Alternative Dispute Resolution Techniques (ADR):

As construction budgets and schedules for completion continue to tighten, current construction projects are increasingly fraught with tremendous risk. Claims and disputes over even the smallest issues can quickly escalate, with crippling consequences to the parties involved therein. The traditional methods of dispute resolution regarding construction are nowadays enormous and costly. Relationships between parties that were strained before litigation are often irrevocably broken during lengthy and acrimonious court battles.

Due to the cost and risk associated with litigation, construction professionals began searching for new ways to resolve disputes at earlier stages, with lower cost. Resolving construction disputes is easier when resolution occurs quickly at lowest possible levels of management and with less confrontation. It is always perfect to reach completion of all issues related to claims and disputes by the end of works execution. It is more interesting for all project stakeholders to find a close out report about the project showing that all variations, claims and disputes, arising during the course of execution have been finalized and agreed upon, and the related registers are also mentioned therein.

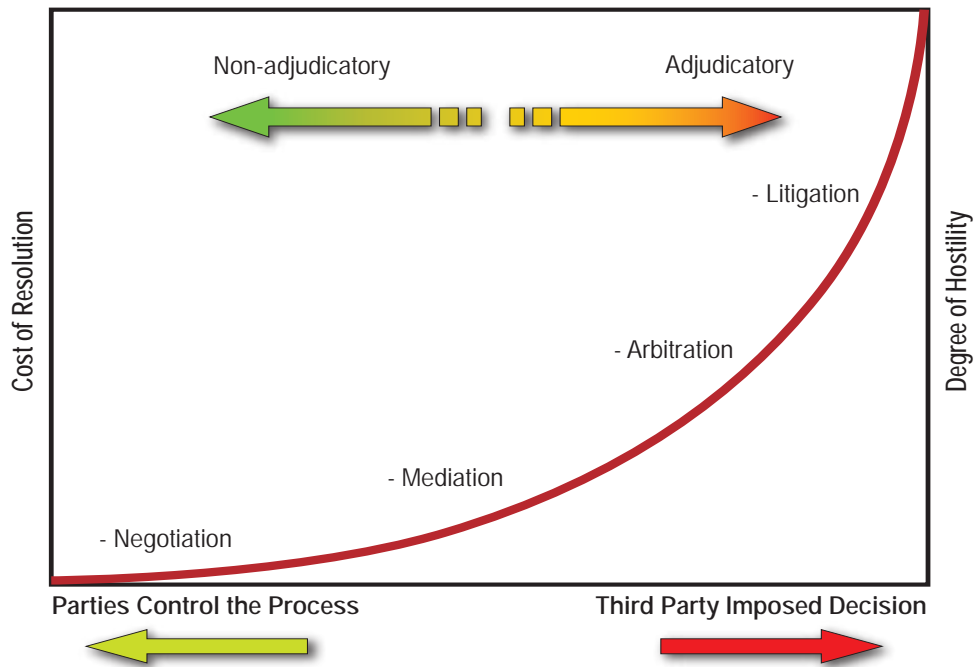


Fig 1: Cost of Resolution and Degree of Hostility

Alternative Dispute Resolution (ADR) techniques have been highly successful over the recent years as an alternative method to facilitate dispute resolution process. ADR techniques usually involve selection of a third party, often contract/claim experts. Techniques of ADR include non-adjudicatory procedure, quasi-adjudicatory procedure and adjudicatory procedure, and ranging from mediation, mini-trial up to project arbitration panel. Detailing these techniques is beyond the scope of this article. Figure (1) shows the cost of dispute resolution along with degree of hostility. Implementation of ADR technique helps ensure that the disputes are resolved quickly with less hostility and at the lowest possible cost.

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