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Countdown to RIDW2024: Acceleration of Construction Projects

Franco Mastrandrea (HKA) · Sunday, February 25th, 2024

Acceleration is increasingly on the agenda for construction projects. Its use for decades in the United States in the form of constructive acceleration appears to continue unabated, and there is some evidence that the concept may be sought to be applied more broadly in other jurisdictions, including in the international marketplace through alternative dispute resolution mechanisms such as mediation, expert determination, adjudication, and arbitration.

Acceleration can be achieved in a variety of ways: by changing the design or specification of permanent and/or temporary works, altering methods of working, re-sequencing work, introducing additional (or more expensive) resources whether material plant or labour, working overtime, extending working hours, introducing shift working, among others.

Although acceleration has traditionally been discussed in the context of project, or critical path, delays, that seems too narrow a focus. The underlying justification for acceleration claims can, it is suggested, be put more broadly: the contractor's wish through acceleration to contain its costs or losses, or increase its profit. Thus, a contractor hindered by defaults of the employer leading to non-critical delays would typically be entitled, for breach of contract or according to the contract's loss/expense provisions, to localised time-sensitive and/or disruption costs. The contractor sees advantage instead in taking exceptional measures in seeking to reduce those costs, incurs and claims additional expenditure in pursuing that acceleration, and proves that expenditure (which can in all cases of acceleration be a challenging task, being an exercise in incremental costing). If that is right, acceleration is not confined to seeking to reduce the duration of critical path activities.

Acceleration directed at some failure on the part of the employer is to be distinguished from acceleration motivated by some other consideration. A contractor making poor progress (for whatever reason) will often find itself under significant pressure from an employer to improve upon that progress. The additional cost of accelerative measures taken in response to legitimate demands by an employer for the contractor to pick up the pace of works will typically be unrecoverable.

By contrast, additional costs incurred by a contractor instructed or directed to accelerate where the contractor is not itself falling behind will typically be recoverable.

Constructive acceleration, widely recognised in the United States, is intended to denote "deemed" as opposed to "instructed" acceleration. Notwithstanding some recent suggestions otherwise in

response to unfolding case law,[1)] it has not found fertile ground in other common law jurisdictions[2)]where, beyond instructed acceleration, compensation is typically limited to accelerative measures taken by way of a justifiable response, such as mitigation, to a breach of contract. The challenge then becomes one of identifying the triggering breach. This is typically a failure on the part of the employer or its agents properly to discharge its contractual obligations (*e.g.*, to grant possession of the site, to provide timely design information, by the contract administrator to carry out the employer's functions, or illegitimate collusion with the employer such as by failing to award extensions of time properly due).

How these seemingly continued differences between jurisdictions will be viewed in the international arbitration landscape be awaited with interest by the various disciplines involved in those disputes. In particular whether, as in common with other areas over the recent past, there is an impetus for these approaches to converge is something which is yet to be seen.

We look forward to attending the SCCA24 Conference!

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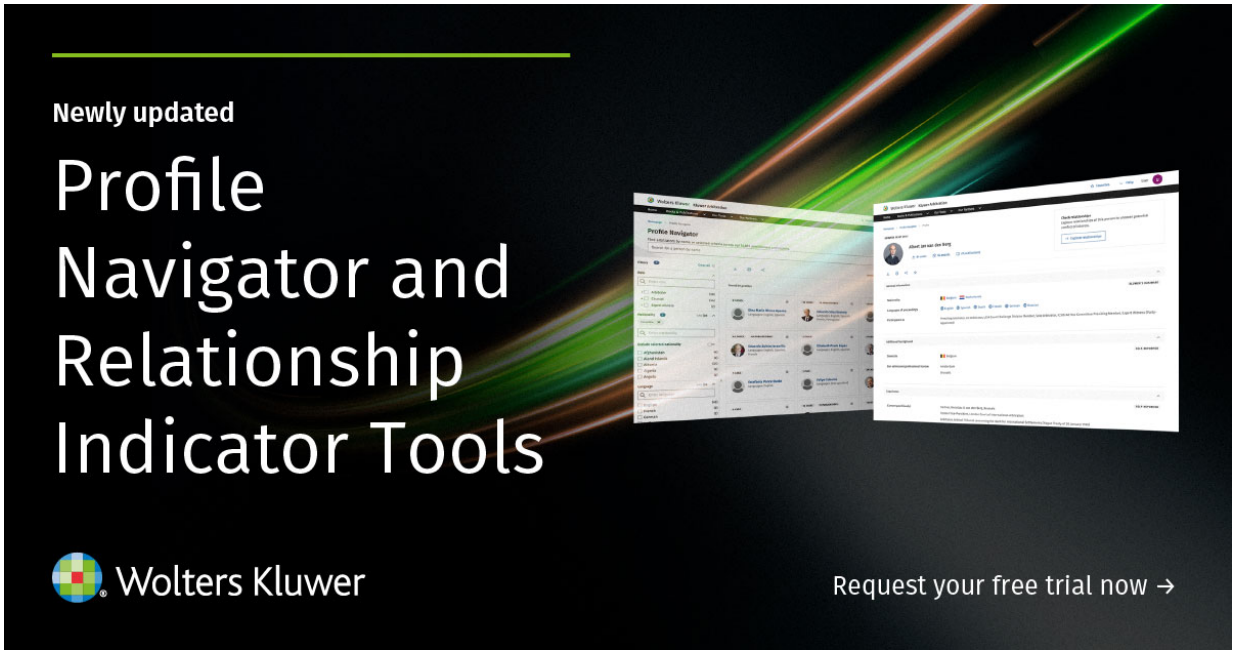

References

?1 A recent example popularly used for illustration is V601 v. Probuild [2021] VSC 849.

?2 There appear to be few examples of the concept being pursued in civil law jurisdictions: for an exception, see the ‘accélération par induction’ in Dawcolectric inc. c. Hydro-Québec, 2014 QCCA 948.

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