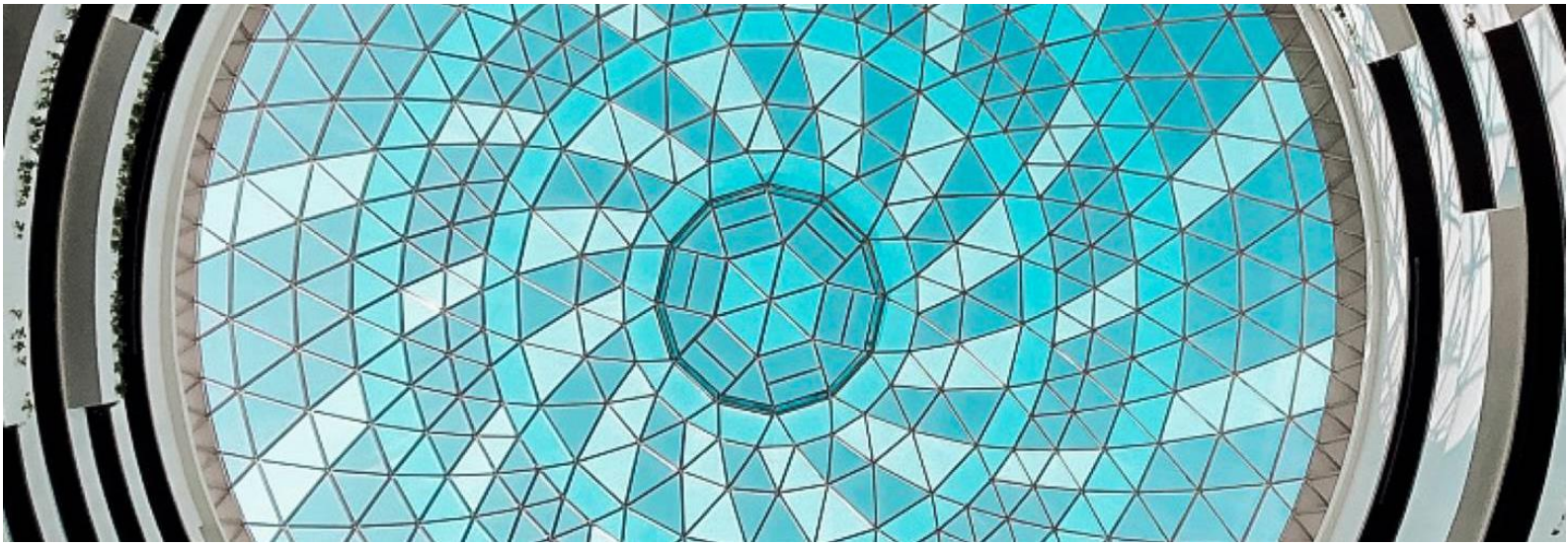

Acceleration of construction projects[1]

Acceleration is increasingly on the agenda for construction projects. Its use for decades in the U.S 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.

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, etc.

The SCL 'Delay and Disruption Protocol', Second Edition, 2017, defines acceleration by reference exclusively to contractor-driven strategies.

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 which lead to non-critical delays would typically be entitled, as a remedy for breach of contract, or according to the contract's loss/expense provisions, to localised time-sensitive and/or disruption costs.[2] The contractor sees advantage in those circumstances in taking exceptional accelerative measures as a potential means of reducing overall costs it 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.

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[1] For a more comprehensive review of this topic see Mastrandrea, F, "The Appraisal of Contractors' Acceleration Claims", [2024] ICLR 27.
[2] For a more comprehensive review of this topic see Mastrandrea, F, "Localised Delays: The Poor Relation in Construction Claims Appraisals?", [2023] ICLR 112.

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.

It seems unlikely that, in the absence of an express provision to that effect, an obligation on the part of the contractor to accelerate arises simply by reason of the application of common-sense principles, as presumably the contractor will ordinarily be entitled to say that if it is late in completion the employer will have its remedy in delay damages.

Constructive acceleration, widely recognised in the U.S., is intended to denote deemed, as opposed to instructed, acceleration. Notwithstanding some recent suggestions otherwise in response to unfolding case law,[3] it has not found fertile ground in other common law jurisdictions[4] 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).

As with other claims a contractor's claim for acceleration may be barred because of its failure to submit its claim in accordance with the express contractual requirements, many of which may be exacting, although exceptions, such as waiver and the employer's own knowledge, may apply in particular jurisdictions.

A disincentive to acceleration may in future be the increasing availability - by way of developing standard forms of contract and/or statutory reforms – of adjudication or other expedited forms of dispute resolution to decide delay claims speedily.

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[3] A recent example popularly used for illustration is V601 v. Probuild [2021] VSC 849.
[4] 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.