FORGE
PROJECT FORENSICS

# Time Entitlement Recovery Strategies

## Introduction

As a natural feature of its intended purpose, even the most compelling, well-structured and contractually compliant claims for entitlement to delay and disruption will express conflicting positions that have no doubt been the subject of much debate, which is to say that there may be weaknesses in your claim, or even opportunities beyond its current assertions. Though the hard work and toil involved with assembling the claim may be over (for now), its success will now be largely dependent on more human and strategic matters, and these need to be afforded as much attention as the claim itself.

But before examining potential claim resolution strategies, it may be appropriate to consider the evolvement of construction related dispute resolution, and perhaps to review a few 'alternative' approaches to reaching agreement.

Ever since man (or woman) started to build things there existed a need for dispute resolution, in one form or another. In fact, laws relating to construction has its roots back way before biblical times (which by the way also refers to the consequences of tardy project controls in construction projects[1]) from the evolvement of meditation between heaven and earth for divine guidance in ancient Egypt[2] to a more recognised 'legis actio'[3] system of Roman litigation that was functioning from as early as 450 BC. Jump forward to the modern era and a range of formalised dispute resolution options are available, from 'quick and dirty' adjudications (or that's the theory anyhow), to longer and more expensive proceedings such as arbitration and litigation. There are project / contract specific procedures too, such as dispute resolution boards or referral of matters to joint independent expert opinion. All however tend to be expensive, whilst diverting the attention of key project team members away from immediate challenges and management of future risks, to retrospective matters involving the detailed recollection of complex events.

[1] At Luke 14:28-30 "For which of you, desiring to build a tower, does not first sit down and count the cost, whether he has enough to complete it? Otherwise, when he has laid a foundation and is not able to finish, all who see it will begin to mock him, saying, "This man began to build and not able to finish"

[2] Refer for example to King Menes (c.2925 BC) and also 'The Code of Hammurabi' who was the sixth king of Babylon and ruled from 1792 BC to 1750 BC. This contained 282 laws inscribed on twelve stone tablets which were placed in public view. Several of the laws related to construction, for example #229 that stated "If a builder builds a house for someone, and does not construct it properly, and the house which he built falls in and kills its owner, then that builder shall be put to death."

3 A two-stage procedure that took place before a magistrate and judge.

## Really Alternative Approaches to Dispute Resolution

The pain and toil of needing to refer matters to formalised proceedings does however have one or two notable attempts to circumvent the associated time, energy and costs. Take for example the case of Herwald vs. Kelleher. Here Herb Keller, co-founder of Air Southwest airlines and Kurt Herwald of Stevens Aviation decided to resolve a dispute over the use of an advertising slogan[4] by challenging each other to an arm-wrestling match. This, they agreed, would avoid having to spend thousands of dollars on consultants, lawyers and legal fees, as well as preventing the courts having to decide on the matter. The resultant "Malice in Dallas" was held on 20 March 1992. Herwald won but agreed that both companies would be able to use the slogan as a show of good sportsmanship. Both companies agreed that in any event the associated publicity had assisted with their bottom line.

A further example of deciding matters in an altogether more amicable, though somewhat alternative manner, involved the playground game of rock, paper and scissors, which as it turns out, is not so much a game of chance, but a game involving strategy, gender bias and poker like 'tells'! This all started in 2005 when Mr Takashi Hashiyama, president of the electronics firm Maspro Denkoh in Japan, was compelled to sell the corporate collection of French impressionist paintings in order that his business could survive. The famous auctioneer's Christie's and Sotherby's were invited to make presentations, with both being equally as compelling as each other. So Mr Hashiyama proposed a game of rock, paper, scissors. As events unfolded it seems that the Sotherby's representative didn't give his approach to this much more thought than turning up on the day and leaving everything else to chance. On the other hand, the Christie's representative turned to experts in this field, his 11 year-old twin daughters. He was reliably informed that scissors is the least popular choice, and men favour rock. Both are reasons to choose paper in a one-shot match. It also appears that you should announce to your opponent what you're going to throw and then to do it, as most players figure that you won't go through with it. In the end it seems that additional research and strategy prevailed, with Christie's being awarded the contract, auctioning the paintings for $17.8 million, and earning the auction house a $1.9 million commission.

## Developing a Strategy

On the assumption that the aforementioned examples may not sit well with your general corporate governance and commercial resolution policies, it is clear that the best way to avoid formalised dispute proceedings is to negotiate a settlement in the first place, and that the odds of successfully concluding matters positively are significantly improved with a well thought out claim resolution strategy. This often starts with the question "when should we submit our claim?"

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[4] Southwest introduced a new slogan "Just Plane Smart" which they used for about 15 months until they got a call from Stevens Aviation who stated that had been using the slogan "Plane Smart" prior to Southwest.

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There appears to be a general reluctance to table a claim in the early stages of a project, especially when relationships are positive and the forecast time and cost targets remain on track. It is also not unusual in the latter stages of a project for the prospect of future work to be dangled in carrot like fashion in front of contractors. This however needs to be balanced with two competing dynamics; business survival, and an ability to influence the outcome of the subject of the claim. The prospect of future work is of course positive, but until a contract is awarded and signed it is pure fallacy to run any business on the strengths of such promises. The adage “turnover is vanity, margin is sanity and cash is king” comes to mind – it’s not a decision about whether or not the recipient is in a position to award future works, but a simple matter of business survival (jam today). With respect to influence the outcome of a claim, it is surely disingenuous to submit a claim at a later point in time when little or nothing can be done to influence the outcome of the associated change, save for fighting over the cost of it. If dealt with contemporaneously this would at least present an opportunity to stop the change entirely (on account of its forecast impact on time, cost, safety, etc…) or at least to influence the associated impact mitigation strategies. Add to this the obligations under a typical contract to provide notification of events that are considered to constitute the basis of a claim, in addition to the presentation of a claim itself within defined periods of time, and it becomes not only the sensible thing to do, but also an approach that removes an opportunity for the recipient to send a very simply reply “your claim is time-barred”.

Attention should next be turned to an assessment of your position. This should include a position of the matters relied upon under the terms of the contract (with respect to contractual compliance, records and your most pessimistic assessment of entitlement), as well as a review of the project environment, which should include the relative position and strengths of each organisation. The latter is somewhat subjective and also too easy to be superficial, though if you dig a bit deeper it’s not difficult to imagine the effect of delay (for example) on key financial targets, on cash-flow, on the pressures that each respective Board is placing on their management teams, and on a need to administer matters as efficiently as possible. This also raises the issue of timing and of the identification of key stakeholders and their ability to agree change. What is the recipient worried about and what would make it easier for them to sign off the claim?

With the best will in the world and with all the best intentions, claims often get stuck somewhere between poor administration, blatant maladministration, and a simple belief by the recipient that your claim is badly presented or simply wrong. There are essentially two ways to move the recipient’s position, being either to convince them to move towards your position from their current standpoint, or to light a sufficiently strong fire to makes matters uncomfortable and to compel them to move from their standpoint. It must however be remembered that claim negotiations are people things, and that nobody wants to be made to look a fool. Positive, clear and assertive behaviours will facilitate acceptance of the claim whilst also keeping in mind that the recipient’s opinions should be respected. An effort to understand interests instead of focusing on positions will go a long way to finding common ground that can be built on.

Claims tend to become personalised with some connection between the parties on an emotional level. Given then that the recipient will typically need to promote your claim to higher levels in their business it is important that the claim narrative is impersonal in order to facilitate clear and aligned views of your

assertions. Read your claim from the recipient's perspective and remove any personal challenges if at all possible.

So, with all the aforementioned attributes in mind you need a plan of attack. This should include surrounding the issues at hand with the right behaviours, performance, information and direction. It's far easier for the recipient to digest and sponsor your claim if there's a positive conclusion, for example, imagine a claim recipient being able to say the following to their Board - "the contractor asserts its entitlement to 100 days extension of time, which is fully supported in their claim, both with regard to compliance with the contract and the actual impact on the critical path. They have since increased resources and re-scheduled the remaining scope of work in order to mitigate the impact of further delays, whilst I have been personally included in several workshops to assess and challenge the project schedule".

Remember too that Information is king and you should therefore seek to uncover and understand the factors and matters that you don't already know (as opposed to those that you're pretty sure you do). People like to talk, especially about negative aspects of performance, from which you can often find out more about the recipients emotional engagement with the matters in hand and their positions and attitude to settling (on what basis), as well as the areas that they feel to be weakest.

Ultimately you will want to conclude a deal, and this also requires a great deal of thought and preparation. Can an agreement be developed on a share of profits or the completion of future performance? Can additional or amended performance milestones be established that show commitment to the schedule, whilst recognising better than expected performance? The latter is a lot easier for the recipient to sell to its stakeholders. Ultimately, formal dispute proceedings are available as a backstop, but are an expensive, time-consuming and a draining option to pursue.

## Summary

Whether considering a really alternative form of dispute resolution, or seeking to conclude matters more informally following submission of a claim, the resolution of matters to each party's mutual and relative satisfaction is as much dependant on personal engagement and a clear strategy as it is to just how competently the claim has been put together. A claim dropped on the recipient desk without forewarning and without prior sponsorship is likely to receive an equally cold response. On the other hand, recognition of the recipient's constraints and their need to positively articulate your claim to their stakeholders will ensure that the presentation of your claim connects with a common understanding of events.