

# How to Prepare for a Successful Claim

## Background

According to a recent Arcadis report<sup>1</sup> the global average value of disputes in 2018 was USD 33 million, with a global average length of time to resolve disputes given as 17 months. The UK equivalent values are reported to be USD 17.9 million and 12.8 months. Quite simply, recovery of time and money in dispute proceedings consumes cash, ties-up resources and diverts business attention that should otherwise be directed on positive ventures. It is therefore essential that stakeholder expectations are managed and that claims are as compelling and robust as is possible, the success of which is directly proportionate to the preparation and groundwork that has been afforded to the claim resolution strategy and the forensic assembly of compelling evidence.

What then are the considerations and attributes that should be considered when thinking about the submission (or defence) of a claim for lost time and/or costs that are believed, in principle, to be recoverable on account of being the responsibility of other parties and based on matters that are understood to be outside of the assumed risk tolerances specified under the contract?

It is important to initially construct an overview and timeline of the circumstances relating to the asserted loss, together with an appraisal of the interrelationships between key events. This should not include the apportionment of responsibility, and indeed it is advised that any finger-pointing is put to one side at this stage. This will typically reveal several attributes:

- The sequence of events as it relates to the loss
- The records and data available to quantify for the loss
- The causal effect of matters as they relate to one another and the assessment of probable root-causes
- The contextual circumstances pertaining to the loss e.g. was there collaborative decision making or a need to make isolated high-risk decisions – were additional (non-contractual) burdens imposed – what would have been the consequences of not making a decision at that time – did the recipient's project management practices influence the loss?

Having compiled a rich picture of the circumstances related to the losses being recovered, it should be quite transparent where the root causes and responsibility lies for the loss, in whole or part, together with an appraisal of the challenges that

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<sup>1</sup> Global Construction Disputes Report, Laying the Foundation for Success, Arcadis, 2019

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will be involved in preparing an irrefutable claim. This will also inform the claim strategy. Clear, compelling and directly aligned contemporary evidence will point towards a claim that can be asserted vigorously, whereas impressionistic and unsupported assertions will need an all-together different approach.

Ultimately, the objective of this stage of entitlement recovery is to clarify the size, scope, challenges and risks involved in the claim, or to put it another way, the problem to be solved. Together with an appraisal of the specific contractual terms under which entitlement to time and/or costs may be pursued, and an honest view of compliance with any specific conditions precedent, the effort afforded to this stage of the process will greatly assist in managing internal expectations and in defining the effort and costs that should be attributed to pursuing contractual entitlement. This is also a phase of dispute resolution that can be conducted using internal resources as it should not need any 'specialist' expertise.

As a final consideration, and as a general guiding principle throughout the development and submission of a claim, it is important to review each aspect of the assertions made in a claim with respect to "what would be the position and opinion of the recipient". This could be tested by asking internal resources to scrutinise assumptions made and to deliberately find evidence of arguments that would undermine those assumptions and opinions. Not only is it better to be aware of the weakness of a claim, but the adage "forewarned is forearmed" is a powerful ally.

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