

CONSTRUCTION CONTRACT & MANAGEMENT ISSUES



In this combined first and second quarter issue for 2011, BK Burns & Ong Sdn Bhd, a subsidiary of **BK Asia Pacific**, a regional group providing project, commercial and contractual management services joins with **Entrusty Group**, a multi-disciplinary group, collectively named as **BK Entrusty**, presents a **new series of contract and management articles** in construction related areas of project, commercial, contracts, risks, quality and value, on “*What are Expedition, Mitigation and Acceleration ?*”

INTRODUCTION

In practice, the decision of whether to Expedite, Mitigate or Accelerate a project in delay often comes at a difficult juncture of that project. The decision is often clouded with varying circumstances enfolding the project, usually with time and cost implications. The financial effect of such decision particularly in a heavily geared large construction project affects the business efficacy and relations, as well as posts major risks to the project and the contracting parties. The decision not to do anything, will most certainly lead to the “*waiver*” of the entitlement to damages as in Mitigation, be it drastic or subtle, effective or not, is required not only at common law, but sometimes expressed as “*a pre-condition*” in conditions of contract.

The terms Expedition, Mitigation and Acceleration, have been difficult to define, until recently. The difficulty arises due to the perceived subtle difference between these terms, not to mention, the subset which each of these terms may exist within one another. The difficulty is elaborated by Wallace (1995) who thought Expedition is a subset of mitigation due to expedition often exists in the common contract with “*due diligence*”. The conundrum does not stop there. The complication is extended as different countries perceiving each term differently. In some Arabic nations, these terms were not known, understood and accepted until recently. The differences further increased as each term has its own variance. For example, in Acceleration, the term can be sub-divided into Constructive Acceleration, Directive Acceleration and Voluntary Acceleration. Even more puzzling, not all of these variances are taken too well. Wallace (1995), has termed constructive acceleration as a “*...fictitious doctrine ... not founded on consensual or quasi-contractual basis.*”

In this article, BK Entrusty aims to provide readers with a better appreciation and understanding of the terms, Expedition, Mitigation and Acceleration, including the differences between them and their implications. It is hope that this will provide the necessary clarification to

the construction industry in Malaysia, tainted with usage of terms with much confusion, particularly when the construction contract concern, do not provide any definition to these terms or using one or all of them, without much appreciation and understanding or concern and regards to the implications that each term have, contractually and/or legally.

The following are the sub-headings to the contents of this article;

- Introduction
- What are Expedition, Mitigation and Acceleration?
- Comparison of Expedition, Mitigation and Acceleration
- Contractual provisions on Expedition, Mitigation and Acceleration
- Doctrine of Constructive Acceleration in various countries
- Relevant Case Law
- Conclusion
- References/Bibliography

WHAT ARE EXPEDITION, MITIGATION AND ACCELERATION

EXPEDITION

In understanding the meaning of Expedition or Expediting, it is best to refer to Wallace (1995):

*“.., often with express “time of the essence” reference still to be found in some old-fashioned contracts at the present day, with liquidated damages provided as the remedy for breach of the particular obligation. As a matter of analysis, it could well be argued that **an implied term for due diligence and expedition** (which if so subsume the remedies available for failure to achieve a promised or reasonable completion date) is in reality and as a matter of business efficacy, and indeed as a matter of law, the primary basis of the contractor’s implied obligations as to time in all construction settings.”*

Further, from the same quotes:

*“If the contract date for completion has passed, an implied obligation to complete within a reasonable time will be substituted. In addition, an obligation to carry out the work **with reasonable diligence and due expedition**, throughout the period of construction, will also need to be implied, consistent with the contract period (if any).”*

“Expedition” or Expediting” or “To Expedite” is usually due to a delay caused by the Contractor, which necessitates measures to be taken to overcome the delay, at its own expense. Contractor should expedite its Works, so as to be able to complete within the completion time or extended time of the project. Failure to complete within

the completion or extended period, will inevitably lead to liquidated ascertained damages (“LADs”) being imposed and/or may lead to eventually termination of the contract. If the Contractor is instructed/directed by the Superintending Officer (“SO”) or Employer’s Representative (“ER”) to “expedite” its Works, which is in culpable delay, this does not constitute acceleration of the Works.

MITIGATION

The Oxford Dictionary of Law defines Mitigation as “*the reduction in the loss or injury resulting from a tort or breach of contract and the injured party is under a duty to take all reasonable steps to mitigate his loss when claiming damages*”. This dictionary also states “*Mitigation*” (also known as the doctrine of “*avoidable consequences*”) holds that “*...an injured party cannot ignore an opportunity act as to reduce the continuing increase in damages from that injury, and recover the same from defendant*”. In construction terms, mitigation of delay simply means doing things differently or rescheduling the Works, reallocating resources, with little or no cost implication to the Contractor, thereby minimizing the delay due to the changed conditions.

A contractor is usually contractually obliged to mitigate any delays so as to ensure that the Works can be completed as soon as possible and accordingly. Mitigation is also



recognized in common law. The contractor who fails or refused to mitigate delays may risk jeopardizing any extension of time due.

ACCELERATION

Acceleration can be defined as “*..the act of completing a project earlier than required under the contract*” (RICS, 2007). In most construction contracts, the provision for acceleration is simply a mechanism for an earlier completion, usually involving additional costs.

Often the Contractor is requested to provide an acceleration quotation for the additional costs to do so. However, the Employer or its authorized representative cannot force the Contractor to accelerate, if it is not practical nor possible to do so.

Acceleration can be divided by three categories, namely:

- (i) Directive Acceleration – Employer or his authorized representative instruct the Contractor to complete the work earlier than the completion date stipulated in the contract, usually with additional cost compensation.
- (ii) Constructive Acceleration – The Contractor have to accelerate the work in order to avoid liquidated damages due to refusal of the Employer or his authorized representative to grant extension of time or instruct to accelerate, usually with the ulterior motive to deny the Contractor of its rightful entitlement of extension of time and additional costs.
- (iii) Voluntary Acceleration – Contractor at his own liberty accelerate the work without any instruction from the Employer or his authorized representative nor any pressure from surrounding circumstance, usually incurring additional costs, at its own expense.

In most cases, the contracting parties have no dispute on Directive Acceleration arrangement. However most disputes come from Constructive Acceleration due to lack or no instruction by the Employer or his authorized representative to accelerate the work, and the timing to undertake the acceleration work by the Contractor. The Society of Construction Law's Delay and Disruption

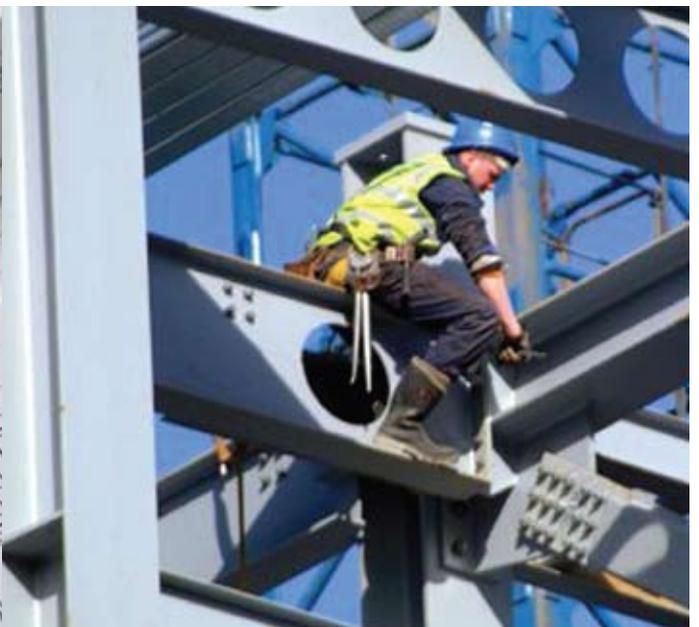
Protocol defines constructive acceleration as “*Acceleration following failure by the Employer to recognize that the Contractor has encountered Employer Delay for which it is entitled to an EOT and which failure required the Contractor to accelerate its progress in order to complete the works by the prevailing contract completion date. This situation may be brought about by the Employer's denial of a valid request for an EOT or by the Employer's late granting of an EOT*”.

In determining whether a Constructive Acceleration had occurred on the project, the use of a six points test (Zack, 2011), is recommended;

1. Excusable delay was encountered;
2. Notice and extension of time application was submitted;
3. No or less time extension was granted;
4. Contractor was threatened or coerced into accelerating to recover the time not extended;
5. Contractor notify such action is tantamount to an instruction to accelerate;
6. Contractor accelerated and substantiated with documentation.

Typically, the additional costs involved in acceleration include work activities re-sequencing, increasing resources, overtime working, shortening deliveries. etc.

Unlike in USA, where acceleration is recognized, elsewhere, including in Malaysia, constructive acceleration is not really recognized. Consequently, a claim for constructive acceleration is likely to be resolved in arbitration/litigation, by depending on the legal concepts of acts of prevention/hindrance, time at large and breach of contract are trite law, in its substitution, when so required.



The following is a tabulated comparison of Expedition, Mitigation and Acceleration, for ease of understanding and reference.

COMPARISON OF EXPEDITION, MITIGATION AND ACCELERATION

EXPEDITION/EXPEDITING	MITIGATION/MITIGATING	ACCELERATION/ ACCELERATING (DIRECTIVE)
Falls within Contractor's obligations in the contract.	Falls within Contractor's obligations in the contract.	Requires Employer's or ER's Instruction.
To meet the Contract Completion Date or extended date.	To minimize the effect of delay.	To complete earlier than stipulated in the contract.
Contractor bears the expediting costs.	Contractor bears the mitigating costs (minimum or insignificant).	Contractor to be reimbursed acceleration costs by the Employer.
Any costs.	Reasonable, usually minimum or insignificant costs.	Usually incur significant additional costs.
Refusal may amount or lead to breach of contract.	Pre-condition to entitlement of extension of time.	Contractor may ignore/reject the request for acceleration in the absence of acceleration provision in the contract.

In the case of Mitigation, the reasonableness of the said imposed responsibility lies with the extent or the scale of the mitigating measure/s taken. Should the acceleration process only involved resequencing or the like, the Mitigation usually does not involve any significant additional costs, and where it does, only a minimum costs may be incurred, therefore can be afforded/absorbed by the Contractor. Where the scale of the Mitigation includes increase in manpower, incentivisation, etc, in complying with the Mitigation, then under such circumstances and requirements, it cannot be within the meaning and necessity for Mitigation.

CONTRACTUAL PROVISIONS ON EXPEDITION, MITIGATION AND ACCELERATION

EXPEDITION

In Malaysian Standard Forms of Building or Construction Contract, the general forms expressly state that the Contractor must carry out the work with diligence, which necessitate expediting its works, whenever it is necessary. Below are a few typical clauses in the Standard Forms of Building or Construction Contract:

The CIDB Clause 25 - Expediting Progress of Works, provides

25.1 Notification to Expedite

- 25.1(a) *If for any reason which does not entitle the Contractor to an extension of time, the rate of progress of the Works or any section of the Works is at any time, in the opinion of the Superintending Officer, too slow to achieve completion by the Time for Completion of the Works or any section of the Works, the Superintending Officer shall instruct the Contractor accordingly.*
- 25.1(b) *The Contractor shall upon the receipt of such instruction take such steps as are necessary to expedite progress and to complete the Works or any section of the Works in accordance with the said instruction. Such steps shall include, if required by the Superintending Officer, the preparation of a revised or modified Works programme for acceptance pursuant to Clause 5.*
- 25.1(c) *Unless the Superintending Officer shall issue an instruction for Variation in accordance with Clause 28, the Contractor shall not be entitled to any additional payment whatsoever for taking the steps referred to in sub-clause 25.1(b).*

25.2 Work to Expedite Progress

If as a result of any instruction given by the Superintending Officer under Clause 25.1, the Contractor considers that it is necessary to do any work at night or on Public Holidays, he shall seek the consent of the Superintending Officer in accordance with the provisions of Clause 13.1."

Further, CIDB Clause 7.1(a):

*"The Contractor shall, with due care and **diligence**, design (to the extent required by the Contract), execute and complete the Works and remedy Defects to the satisfaction of the Superintending Officer in accordance with the provisions of the Contract."*

PWD Form 203 (2007) Clause 10.1:

"The Contractor shall –

*(d) perform the Works and discharge its obligations as contained in this Contract by exercising professional judgment and practice, requisite skill, care and **diligence**. In performing the Works, the Contractor shall provide well-outlined procedures in the form agreed by the Government for reporting and co-ordination purposes;"*

time is of the essence. The understanding of Expedition or Expediting in addition to being synonymous to "due diligence", often leans toward being the subset of Mitigation for which Wallace (1995) quotes:

*"In addition to express provisions for completion by a stated date, virtually all construction contracts, for very good practical reasons, also contains provisions requiring due diligence or expedition by the contractor at all times prior to completion. Thus, the English standard forms provide that the contractor "shall ... regularly and diligently proceed with the [works]" and "shall proceed with the [works] with due expedition and without delay", but in fact, even in the absence of such provisions, it is submitted that there must be an implied term that the contractor **will proceed with reasonable diligence**, although no doubt, **in cases where a completion date is stipulated in the contract, the degree of the required progress will be measured against the prospects of completion by that date**. The reason for this latter implied term, it is submitted, is that otherwise, an owner will be forced to stand by helpless until perhaps, distant completion date, notwithstanding a rate of progress clearly inadequate to achieve the promised date and certain to cause irremedial future loss to the owner."*

MITIGATION

The Malaysian Standard Forms of Building or Construction Contract provide for clauses which require Contractor to use his best endeavor to prevent or reduce delay in the progress of its works. In PAM 2006, the need for Contractor to mitigate the delay, is described, as follow:

"The Contractor shall constantly use his best endeavour to prevent or

reduce delay in the progress of the Works, and to do all that may reasonably required to the satisfaction of the Architect to prevent and reduce delay or further delay in the completion of the Works beyond the Completion Date."

In PAM 2006, the terms diligence and expedition is mentioned under Clause 11.2 which provided, "No Variation ordered by the Architect or subsequently sanctioned by him shall vitiate the Contract. Pending the valuation of the Variations, the Contractor shall carry out with due diligence and expedition all Variations so instructed."

Although the term Expedition/Expediting is not expressly written in most of the Malaysian Forms of Contract, except for CIDB Form, however Expedition in traditional contract seems to be the implied equivalent to "due diligence", where

Other relevant mitigation clauses in respect of the various forms of contract in use in Malaysia, are:

- PAM 1998 – Sub-clause 23.4 on Extension of Time;
- JKR 203A(2007) – Sub-clause 43.1 on Delay and Extension of Time ;
- IEM – Clause 43 on Extension of Time ;
- CIDB – Sub-clause 24.1 – Delay and Extension of Time.



Under the aforesaid provisions, the Contractor is not expressly required to incur additional expenditures, other than implied minor costs, for any re-sequencing activities, changing priorities, amend logic links and/or redeployment of resources, if necessary.

ACCELERATION

In the Malaysian Standard Forms of Building or Construction Contract, there is no expressed Acceleration provision provided. However, there are number of projects where the contracting parties agree to introduce an acceleration clause in their contract. A sample of such Acceleration provision, is as follow:

“Where the Employer’s Representative considers that the Contractor by adopting measures (referred to in this Clause XX.X as Acceleration Measures) would be able to Complete the Works earlier than the expiry of the Date for Completion or would be able to extinguish or significantly reduce any extension of time to which he would be otherwise be entitled pursuant to Clause XX (Extension of Time), the Employer’s Representative may be in writing request the Contractor to provide estimates of:

- (i) *the price of adopting Acceleration Measures; and*
- (ii) *any saving in time which could be made by adoption of the Acceleration Measures,*

and details of any other terms and conditions sought by the Contractor in consideration of agreeing to adopt Acceleration Measures (which estimates, details, terms and conditions are jointly referred to in this Clause as the Acceleration Proposals). The Contractor shall use his best endeavours to prepare Acceleration Proposals which would enable the Works to be accelerated in the most economical manner practice.”

In the absence of an Acceleration provision, Employer may still request (but cannot instruct, contractually) the Contractor to accelerate the work and negotiate the terms and rate of the acceleration work. In such cases, the Contractor has the right to refuse to do the acceleration work if the Employer do not agree with or accept the terms and rate of the Acceleration proposal.

DOCTRINE OF CONSTRUCTIVE ACCELERATION IN VARIOUS COUNTRIES

Constructive acceleration doctrine is a well-recognized legal theory in Unites States. The United States Federal Government’s Board of Contract Appeal has established the basic rules of entitlement concerning such claim and these rules have been summarized by Zack (2011) under the Acceleration section above.

However in United Kingdom, the courts do not recognized the concept of constructive acceleration, except being close in acknowledging this concept via the case of Motherwell Bridge Construction Ltd v Micafil Vacuumtechnik (2002). Consequently, in the event of a constructive acceleration situation, it is common in the UK to refer the dispute to the adjudication to seek an adjudicator decision where the contracts are under the jurisdiction of the Housing Grants, Construction and Regeneration Act, UK. Otherwise, the Contractor will need to plead acts of prevention or hindrance, coercion to obtain earlier completion and breach of contract in order to recover any acceleration costs.

In Australia, the courts have not adopted the term “constructive acceleration”. A Contractor would need to prove that the Employer has breached their contractual obligation in granting extension of time and administrating the contract correctly, as well as owing the resulting damages in order to be successful in its “constructive acceleration” claim. Alternatively, the Contractor may rely on act of prevention or hindrance when pursuing their claim.

In Hong Kong, Malaysia and Singapore courts, like many other Commonwealth courts, the concept of constructive acceleration is not really recognized. A Contractor in Hong Kong may still be able to recover damages by using mitigation of delay or breach of contract as the legal basis. In the case of Malaysia and Singapore, both countries acknowledged the legal concepts of acts of prevention/hindrance, time at large and breach of contract. A Contractor may be able to recover damages, most likely through arbitration or litigation, provided the Contractor is able to prove entitlement to time extension or refusal of the Employer to grant additional time allowed under the contract and additional costs or damages incurred by the Contractor’s acceleration efforts.

RELEVANT CASE LAW

The following are legal cases on the matters relating to Expedition, Mitigation and Acceleration;

MOTHERWELL BRIDGE CONSTRUCTION LTD V. MICAFIL VACUUMTECHNIK (2002) 81 CON LR 44

Micafil had ordered numerous variations but declined to award extension of time under the applicable provisions because it was vitally important to achieve completion by the original completion date. Motherwell had after receiving progressive complaints from Micafil, decided to accelerate the works by (working overtime and providing additional resources). Motherwell claimed the additional costs in complying with Micafil’s instruction to finish the project on time.



It was held that (Rawling, 2005/6):-

- (i) There had been excusable delays;
- (ii) Micafil had refused to grant extensions of time to which Motherwell would have been entitled under its sub-contract;
- (iii) Motherwell had accelerated to complete by the required date and had proved that, but for the delay mitigation measures, the works would have been completed on a later date than they were actually completed;
- (iv) Motherwell had written and told Micafil of the actual and projected costs of implementing delay mitigation measures, either prior to, or at the time of implementing the necessary measures; and
- (v) Motherwell was entitled to reimbursement of its additional costs incurred in mitigating the delays notified to Micafil.

The above case concluded that if a party is wrongfully refused an extension and accelerates to avoid liquidated damages, it may be entitled to recover acceleration costs, even without the agreement of the Employer. This case recognizes constructive acceleration as a ground for construction claim.

[MATANG INTEGRATED SDN BHD V USAHASAMA SPNB-LTAT SDN BHD \[2010\] 1 LNS 809](#)

The plaintiff was a rescue contractor engaged by the defendant to rescue and revive an uncompleted housing project comprising of several high rise blocks of housing accommodation for an army camp. Dispute arose when the defendant though admitting that it had requested the plaintiff to accelerate the works nevertheless maintained that it had not agreed to the additional cost quoted. The judge said that the defendant should have made a clear response in not agreeing to the revised quotation. By not having doing so, the defendant was estopped from saying that *“while we have no objection to your accelerated completion*

as requested by us, we nevertheless do not agree on your revised quotation”.

[JOO LEONG TIMBER MERCHANT V DR JASWANT SINGH A/L JAGAT SINGH \[2003\] 5 MLJ 116](#)

The damages were assessed on the basis that an innocent party had a duty to mitigate his damages. The judge explained the principle of mitigation, which was *“Damages are assessed on the basis that an aggrieved party has a duty to mitigate his damages. A claim for damages is subject to a duty to mitigate the loss and the right is qualified by a duty to mitigate. A victim of a breach of contract cannot cut short his duty to mitigate his loss by mere commencement of an action for damages. It is well settled that innocent party can recover no greater damages for breach of contract than the loss he would have sustained had he acted reasonably to avoid or reduce loss.”*

[MALAYSIA RUBBER DEVELOPMENT CORPORATION BERHAD V GLOVE SEAL SDN BHD \[1994\] 4 CLJ](#)

The plaintiff entered an agreement with second defendant on agreeing to supply two million pieces of rubber glove per month to the first defendant from November 1988 until 1989. Due to failing in issuing an irrevocable letter of credit in favour of plaintiff, the first defendant committed breach of contract. The plaintiff sued for the damages for inter alia loss of profits and marketing costs.

In the matter of mitigation of damages, the Judge said: *“it is a settled principle that the plaintiff is under a duty to take reasonable steps to mitigate the loss consequent to the defendant’s wrong and he will not get damages in respect of any part of the loss which is due to his neglect to take such steps. In the sale of goods, the principle of mitigation is a foundation of the normal rule for the measure of damages which requires the innocent party to act immediately upon the breach. Even in the absence of an available market, the innocent party must act reasonably to mitigate his loss.”*

[CONCLUSION](#)

The task of segregating expedition, mitigation and acceleration has not been easy, but not impossible. What appears relatively clear is that both acceleration and expedition could be subsets to Mitigation, but not vice versa. Practically, the lack of clear express contractual provisions pertaining to Expedition, Mitigation and Acceleration add to the challenge in categorizing the methods for speeding up the works of a particular project. Adding to the ambiguity is the often lack of clear instruction from the Employer or its authorized representative to overcome the delay to the completion of the works.

BK Asia Pacific

BK Asia Pacific is a group of companies incorporated in the Asia Pacific Region providing a comprehensive network of project management, commercial and contract management services to the international construction industry, with offices in Cambodia, China (Hong Kong, Shanghai), Malaysia, Philippines, Singapore, Thailand, Vietnam, United Kingdom and United Arab Emirates. For further details, visit www.bkasiapacific.com.

ENTRUSTY

Entrusty Group is a multidisciplinary group of companies which comprises Entrusty Consultancy Sdn Bhd (formerly known as J.D. Kingsfield (M) Sdn Bhd), BK Burns & Ong Sdn Bhd (a member of BK Asia Pacific Ltd, Hong Kong), Pro-Value Management Sdn Bhd (in association with Applied Facilitation & Training, Australia), International Master Trainers Sdn Bhd (in association with Master Trainer of New York), Agensi Pekerjaan Proforce Sdn Bhd, Alpha-Omega Matrix and Entrusty International Pte Ltd. The Group provides comprehensive consultancy, advisory and management services in project, commercial, contracts, construction, facilities, risks, quality and value management, cost management, executive search / personnel recruitment and corporate training / seminars / workshops to various industries particularly in construction, petrochemical, manufacturing and IT, both locally and internationally. For further details, visit www.entrusty.com.

BK Entrusty provides 30 minutes of free consultancy (with prior appointment) to MBAM members in the areas of project, commercial, contracts, risks, quality and value management. For enquiries, please contact HT Ong at BK Entrusty, 22-1 & 2 Jalan 2/109E, Desa Business Park, Taman Desa, 58100 Kuala Lumpur, Malaysia. Tel: 6(03)-7982 2123 Fax: 6(03)-7982 3122 Email: htong@entrusty.com.my or htong@bkasiapacific.com

PUBLIC SEMINARS

1. Claims Preparation and Management
2. Certifications and Payments
3. Time and Monetary Claims
4. Common Contractual Issues/Problems in Malaysia
5. Pertinent Contractual Provisions in Construction Contracts
6. Recent Construction Contract case law in Malaysia

PUBLIC / IN-HOUSE TRAINING PROGRAMMES

1. Effective Project or Contract Administration / Management.
2. One Day or Two Days Intensive Seminar (with workshop) on Practical Construction Claims in Malaysia.
3. 10 Half Day or 5 Full Day Modules on Practical Construction Contract Administration / Management.
4. One Day or Two Days Intensive Training (with workshop) on Value Engineering / Management.
5. International/Accredited Value Management Programmes.
6. ISO 9001:2008 Training.
7. One Day Seminar on "Doing The Right Things Right".
8. Motivation, Train-The-Trainer and NLP programmes.

