

Not All Construction Damage Recoveries Are Created Equal

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A. Introduction – Objective

- Compare how typical construction claims on the same project will vary based on the venue of the project
 - State and Local
 - Federal
 - International

B. Hypothetical Project – Waste Water Treatment Plant



B. Hypothetical Project – Waste Water Treatment Plant



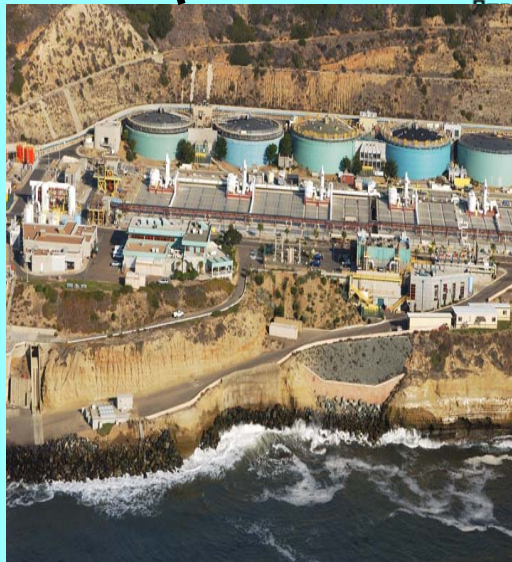
B. Hypothetical Project – Waste Water Treatment Plant



C. The Three Different Venues

1. California
2. A “typical” Federal Project
3. International (ICC, LCIA, ICDR of “Ad Hoc.”)

C. The Three Different Venues



D. Project Has Encountered Difficulties

1. Design changes have increased the scope of work
2. Contractor has had difficulty with a subcontractor that it had to terminate for default
3. Contractor has a labor overrun
4. Project completion is delayed due to owner and contractor causes
5. Owner claims liquidated damages

E. Forums

- State and Local Projects: Courts vs. Arbitration
- Federal Projects: United States Court of Federal Claims v. applicable Board of Contract Appeals
- International Projects: Typically, Arbitration (UNCITRAL vs. Institutional, Adjudication first if England is the forum?)

F. Delay Claims

1. Contractor Extended Site Overhead

a. State

- Requires some form of schedule analysis
- Accounting for overhead costs
- Exacting proof of loss, or more likely than not?
- Concurrent delay

F. Delay Claims

1. Contractor Extended Site Overhead

b. Federal

- DCAA or OIG Audit generally required
- If over \$100k, must be certified under Contract Disputes Act and subject to False Claims Act
- Must be approved at a settlement level
- Must exhaust administrative remedies prior to appeal
 - CO Final Decision or Deemed Denial
 - Full schedule and cost analysis

F. Delay Claims

1. Contractor Extended Site Overhead

c. International Arbitration Under Common Law (E.g., US, UK, CAD or AUS Law.)

- Proof can be more exacting, especially if forum is UK, but with no depositions, documents are the key, making document production huge
- Universal norms of evidence will apply
- Still need experts, but tribunal may appoint its own expert, particularly for schedule analysis
- Dealing with concurrent delay a must
- Arbitrators engaged and able to understand the evidence?

F. Delay Claims

1. Contractor Extended Site Overhead

d. International Arbitration under Civil Law

- Much less reliance (if at all) on oral testimony, either through witness statements or through oral testimony
- Arbitrators will take larger role in how the case is presented
- Document discovery may be very limited
- If contract is governed by Civil Law, best to have a very detailed arbitration clause

F. Delay Claims

2. Home Office Overhead – *Eichleay*

a. Federal

- Federal law is clear
- *Eichleay Corporation*, ASBCA No. 5183, 60-2 BCA ¶2688 (1960), *aff'd on recon.*, 61-1 BCA ¶2894
- Recent Case law restricting use of *Eichleay*

b. State

- Not much different – Maryland, Virginia, Ohio, Texas, others follow *Eichleay*

c. International

- Subject to actual proof
- No *Eichleay*

F. Delay Claims

3. Liquidated Damages

a. State and Federal

- Now in virtually all contracts
- Unenforceable if considered a penalty
- Only assessable on inexcusable, contractor-caused delay
 - Will “no harm no foul” apply?

b. International

- Almost always in International contracts
- If UK law, “no harm no foul” will not apply
- UNIDROIT principles may provide refuge if LDs are unreasonably high, if not in the UK

G. Extra Work

1. Unpaid Change Orders

a. State

- Need to conform to contract requirements
- Juries not as likely to fault contractor for insignificant deviations
- Some states (e.g., Texas) will award attorney fees on a breach of contract basis

b. Federal

- Need to conform to the FARs to get these paid

G. Extra Work

1. Unpaid Change Orders

c. International

- Arbitrator more likely to hold you to the terms of the contract and notice provisions, especially if expressed as a condition precedent
- Be aware of the contract clause requiring written notice to proceed with extra work; Implied or oral notice won't fly
- Proof of actual additional cost is key; Keeping the project cost report current is essential

H. Labor Inefficiency

a. State

- Put up an expert and go for it

b. Federal

- Federal law recognizes cumulative impact claim but need more analytical approach like measured mile, Army Corp study or other accepted method
 - *Bell/BCI Co. v. U.S.*, 570 F.3d 1337 (Fed.Cir 2009) – *Release/Waiver & Cumulative Impact*
- Total cost frowned upon, but still possible if preconditions are met

H. Labor Inefficiency

c. International

- Productivity claims are recognized, but poorly understood
- Proof is the challenge, making contemporaneous record keeping the key
 - Measured Mile is the best, if not only, approach that will succeed; Comparing efficiency to the isometric may be required
 - MCAA Factors, USACE, CII Studies alone likely will not fly, but may be useful as a cross reference
 - “Sanity checking” results against cost report a must
- Total cost approach nearly impossible

I. Consequential damages

a. State

- Are limitations in standard contracts enforceable
- Are consequential damages defined in the contract

b. Federal

- No consequential damages
- Argue over what constitutes consequential damages

c. International

- Comparable to State law

J. Claims Against Design Professionals

a. State

- Viable Claim, but be aware of tort reform that requires a certified act of negligence
- Must Prove Standard of Care
- Contractor claims may be barred by Economic Loss Rule

b. Federal

- Government does not want to go after the designer

c. International

- Much like State Courts

K. Attorneys Fees, Cost and Interest

a. State

- Fees only recoverable pursuant to a Contract clause
- Interest – Liquidated Sums

b. Federal

- Fees recoverable in limited circumstances

c. International

- Typically recoverable
- Who is the “Prevailing Party”
- In the UK, stringent fee shifting clauses may not be enforceable.

Questions?

