

be quickly dismissed as the main source of claim disputes.

The techniques of modern project management were also examined to determine if the number of litigious situations resulting from construction projects will increase or decrease.

Finally, the Report concluded that claims are here to stay and neither can they be prevented nor should they be prevented in all cases because the cost/benefit analysis may not justify the expenditures.

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CHAPTER 1

THE CONSTRUCTION INDUSTRY

INTRODUCTION

Construction is Canada's largest industry by a large margin. The construction program even in this well-below-capacity year of 1977 is estimated to have a value of some \$34 billion. Within this program the individual projects have increased in both size and complexity. It is perhaps only natural that this king-sized program should have matching king-sized problems.

This is an immense program, involving an average field force far larger than the combined populations of all of the municipalities in the National Capital Region. Admittedly, not all of the program is carried out under contract but the vast majority of it is. Even in the cases where there is no Prime Contractor, the work is often carried out under direct contracts with Specialty Contractors.

The Government of Canada, for example, is the nation's largest single buyer of construction services. The volume of disputes and disputed claims decreased relatively when the standard Federal forms of construction contract were introduced in 1966. These documents were far more equitable than those which previously governed Federal projects and gave Contractors the right to compensation under a number of circumstances. What had previously involved lengthy claim procedures and ex-gratia settlements approved by the Cabinet were

henceforth largely dealt with in routine administrative fashion, often at the regional level etc.

1.1 THE NATURE OF THE CONSTRUCTION INDUSTRY

The construction industry is a highly individualistic and diversified one; there exists about 80,000 contracting firms varying from single artisan to giants. Among these firms are the following:

- Prime (General) contractors
- Speciality (Sub) contractors
- Manufacturers and suppliers
- Manufacturing contractors
- Owner-builders.

1.1.1 Size of the Industry.

Estimated volume for 1976 was between 25 to 30 billion dollars and estimated volume for 1977 was 34,349,325 billion dollars, 40% of which was by all levels of government. These figures represent approximately 20% of Canada's G.N.P.

According to Statistics Canada, the overall working force for 1977 was 10,000,616 persons, of which 752,000 were employed in the construction industry and 600,000 in the construction manufacturing industry. The combined force of the construction industry represents 13% of the total working force in Canada.

1.1.2 Broad Sectors

According to Statistics Canada, the following is the 1977 construction volume in billion of dollars:

Residential	\$ 11,863,210	34.54%
Commercial	3,256,954	9.5%
Industrial	1,501,439	4.37%
Institutional	1,564,712	4.55%
Road Building and Heavy Construction	2,736,390	8%
Other Buildings	1,287,379	3.75%
Pipeline and Petroleum Construction	2,943,275	8.57%
Transmission Lines	128,216	0.37%
Sewer and Water Systems	1,508,610	4.4%
Other Construction: Tunnels and Subways	2,217,226	6.45%
Marine Construction	222,283	0.65%
Railway, Telephone and Telegram	1,268,735	3.7%
Electric Power and Hydro Power	3,860,896	11.24%
Total Volume of Construction for the Year 1977 in <u>Billion</u> of Dollars.	<u>\$ 34,349,325</u>	<u>100.00%</u>

1.1.3 Overlap of Activities

There is no clear demarkation between sectors of the industry.

Many firms operate in more than one area, e.g. General and Sub-Contractors work on commercial, industrial and institutional as well

as residential projects. Sub-contractors in all sectors of the industry perform between 30 - 40 trades from demolition to painting.

1.1.4 Role of Government in the Industry

- | | |
|-----------------------------------|---|
| Federal | (a) Fiscal and Monetary policies. |
| Federal, Provincial,
Municipal | (b) Direct purchasers of construction
and tax. |
| | (c) Quebec Government and the industry. |
| Municipal | (d) Building permits, zoning, codes, etc. |
| Federal and Provincial | (e) Labour legislation. |

1.1.5 Work Force

The major work force consists of:

- (a) organized and non-unionized segments of the industry;
- (b) traditional guild systems and unions that are paralleling specialty contractors;
- (c) trade jurisdiction and hiring halls.

1.2 MAJOR PROBLEMS

- a- Cyclical nature.
- b- Education.
- c- Construction process.

1.2.1 Cyclical Nature

Problems of a cyclical nature are due to seasonal work and fluctuations in demand.

1. Seasonal Work

Weather conditions restrict the type of work that can easily be done and necessitate extra costs due to more complicated techniques made necessary because of adverse conditions such as below freezing temperatures.

2. Fluctuations in Demand

Factors to be taken into consideration affecting construction demand include taxation, control of money supply, cost of money (interest costs) and currency fluctuations due to world markets. The various levels of governments also play a major role through their long and short term projects creating jobs in periods when the private sector's construction investment is slow.

1.2.2 Education

Problems in the educational sector would include:

- (a) Lack of adequate qualified apprenticeship programs for the construction trades which are partially due to the short duration (approximately two years in Canada) as compared to European programs where it would be a five year program.
- (b) Re-training of tradesmen to keep pace with technological developments.
- (c) Training and educating supervisory personnel with respect to theoretical construction concepts.

- (d) Lack of basic implementation of safety procedures through negligence on the part of the employee, the supervisory personnel, and government agencies involved.

1.2.3 Construction Process

There is a difference between the manufacturing and construction processes.

In manufacturing there exists a controlled environment with a stable work force and permanent equipment where raw material is brought in and finished product is distributed out.

The construction process is open to elements until certain stages of construction have been reached. Man, materials, components and machinery come to the project site. On completion, the equipment and the work force move from the site while the finished product stays.

The construction process starts with design [E2]. However, design professions require knowledge not only of behaviour of materials but an appreciation of how and by whom they are to be installed. Accuracies and tolerances achievable in a manufacturing plant cannot be achieved on the site. The practicality of the design is important, e.g., concrete elements with so much reinforcing steel that there is no room for concrete and much less room for a vibrator; or, concrete structures designed to limit or minimize quantities so that the slightest inaccuracy results in weakening the structure.

1.2.4 Productivity

The main elements that affect productivity (meaning the number of productive hours in a man's daily work load) are detailed here together with the evaluation of why they are important and what normal steps might be taken to affect them positively for higher productive results [3]. These major factors fall into two main categories that can be summarized as follows:

1. Technically-oriented factors.
2. People-oriented factors.

Technically-Oriented Factors

- a- Changes can be classified into two categories: changes that result from inadequate design and changes that result from the owner changing his mind on exactly what he requires from the finished product or not making up his mind exactly what it is he wishes to prior to tendering.
- b- Inadequate standards due to the inability of management in the construction industry to arrive at workable standards against which performance could be accurately measured has produced a good deal of the "eye-ball" and "seat-of-the pants" decision-making in the past.
- c- Insufficient instructions due to inaccuracy of the informations received about labours' productivity. Poor engineering makes it difficult for the trade foreman to organize

his crews properly.

- d- Design complexity and over-demanding requirements on the part of the design group both have significant impact on productivity.
- e- Climatic conditions affect the productivity of construction workers. The loss in productivity that can be expected is related to the specific skill being performed and the interaction of temperature, humidity and wind.

People-Oriented Factors

- a- Motivation, which relates to structures and mechanisms within which, and through which, people in jobs normally operate, the people related problems refer to the conditions which create either positive or negative attitudes in these people toward their work.
- b- Although scheduled overtime is a strong motivation to attract workers to a large project, studies indicate substantial productivity losses occur during all overtime work.

- c- Delays in the project schedule sooner or later will result in increased pressure from the owner and accordingly from top management within the company to speed up the work and bring the project back on schedule by overmaning it.
- d- STOP & GO, i.e., remobilization costs, a long delay in the construction schedule has a built-in loss factor to the contractor because of his fixed costs on the job site such as supervision and construction equipment. Should the delay be the result of strikes, another important long neglected cost factor enters the picture, remobilization costs.
- e- Mistakes, i.e., shortage of skilled labour; this major item contributes to low productivity and can have a drastic effect on profits. Mistakes can be personal or company mistakes.

The major causes of mistakes which occur on most projects are:

1. Inadequate information.
2. Poor or inadequate design, architectural or engineering.

3. Complex design.
4. Poor estimating.
5. Excessive changes.
6. Labour turnover.
7. Extensive overtime.

1.2.5 Effect on Costs

No single magic instant solution to problems exists. What is required is co-ordinated, unified reassessment by industry, organized labour and government. Given a more stable rate of growth, stability of work force and predictability of material prices, the competitive nature of the industry will result in optimum cost to the buyer of construction. Owners are well advised to take into consideration the contractor's knowledge of all the above factors when selecting the contractor member of his design-build team.

1.3 THE PAST VS. THE PRESENT CAUSES OF CONSTRUCTION DISPUTES

Construction contract disputes and the preparation of formal claims are such widespread facts of life as aspects of the completion of a construction project, that their description or definition may well seem to be unnecessary. It may, however, be useful to place them in a broader perspective in order to appreciate why they have become a much bigger and more pressing factor than was the case in the living

memory of those involved in the construction process as Contractors, Construction Managers, Designers or Owners [1].

If one considers the number of contracts, sub-contracts, sub-sub-contracts and supply contracts entered into on the average sizeable building project and then the number of construction projects that are under way across the country, the scope for contract disputes and claims is obviously limitless. This is particularly so when one considers the human element: contracts are written, entered into and performed by people, none of whom are completely infallible.

Add to this the relatively informal nature of business procedures in the construction industry, the strong pressures to meet or beat time schedules, the general prevalence of the lowest-bidder principle, the lack of a complete or "perfect" set of contract documents, the difficult and/or hazardous nature of many construction sites and the fact that many factors directly affecting construction operations are outside of the construction industry's control. The opportunities for misunderstanding, errors and omissions as well as changed conditions are legion. And, as in any case where the numbers involved are so large, there is a small percentage of the Owners and members of the construction industry who deliberately act contrary to the spirit and letter of the contract for the express purpose of saving or making money at the expense of the unwary.

1.3.1 The Growing Problem of Construction Disputes

Perhaps the cause for wonder really is not so much the growing prevalence of disputes and claims, but rather that there are not far

more.

Why was this field relatively inactive in the past and what has led to the substantial increase in the number of claims for recompense that is very much an integral part of the current construction scene? Descriptions of "the good old days" are probably exaggerated but among the reasons why claims were relatively infrequent in the past are the following:

- Projects were often more simple to specify and execute.
- The parties to a contract were often all well-known to each other.
- Contractors operated on larger margins and could absorb additional costs more easily.
- There also might be an undertaking from the Designer or Owner that the contractor could make up an extra cost item on the next contract.
- Contracts and sub-contracts were often entered into orally and marked by a handshake.
- Political contracts with more or less an open purse.
- In the case of written contracts, the provisions were customarily so slanted in the owner's favour that the contractor wouldn't stand a chance in pursuing a claim in the courts anyway.

Such factors have certainly not entirely disappeared from the scene. Also, contractors are by nature optimists and temperamentally more interested in getting new contracts than in haggling over work

that has already been done. More and more, however, changing conditions in the construction business have been such that this luxury can no longer be entertained. These changing conditions include:

- A greatly increased competition for the available work and much lower margins.
- This in turn has meant a general reduction in continuing relationships between owners, designers, contractors and sub-contractors with respect to repeat business.
- The general application of public tender calls and public tender openings on publicly-financed construction work.
- An increase in the complexity of construction projects and a decrease in the time frames allowed for the design and construction periods.
- An increased mortality rate among firms in the construction industry; the pursuance of a claim is often essential for business survival.
- Some improvement in contractors' records.
- The gradual introduction of more equitable provisions in contracts granting contractors more rights for compensation in the event of changed conditions.

This trend towards more contract disputes and claims has been exacerbated in recent times by current economic conditions. Owners are often pressed for cash and seldom budget for additional capital costs based on claims. Accordingly, they (or their agents) may well be less disposed to approve quite proper extras than would be the case under

more buoyant business conditions. Owners are also showing a greater tendency to lay claims themselves. This is not only the case with regard to provisions in contracts entered into with contractors, but also with regard to the provisions of their Agreements with their architects or consulting engineers. The prevalence of professional liability insurance policies nowadays makes such action against designers much more financially attractive than used to be the case.

Members of the construction industry, faced with fewer projects to figure, have not only a greater incentive to claim for compensable extra costs incurred on current contracts, but also have the staff who are free to work on the submissions. It also could be that the widespread unprofitability in the industry has prompted an increase in the number of specious claims being submitted as a last resort to recoup losses on contracts that are losing money.

So much for generalities and the background leading up to the present situation. Now for some specifics.

1.3.2 Disputes Vs. Claims

Sometimes disputes and claims have something of a "What comes first, the chicken or the egg?" nature. Well, in some cases the dispute comes first. For example, the contractor disagrees with the designer/owner that work that he is directed to perform is covered by the provisions of the contract documents. This dispute over interpretation may lead to a formal claim and, if unresolved by negotiation, may in turn lead to adjudication by arbitration or litigation.

In other cases, the contract may provide for the adjustment in

the contract amount because of changed conditions. A claim is accordingly submitted but a dispute may result because of disagreement over the calculation of costs contained in the claim.

Whereas disputes and claims are frequently inter-related, this is not always the case. Virtually any provision in a contract document may be the subject of a dispute. A construction claim, however, is a written statement asking for additional payment and/or time for work and/or damages that will be incurred or have been incurred as a result of some variation in the requirements as provided in the contract documents.

1.3/3 Most Common Bases for Claims

Contract provisions vary widely depending upon such factors as the nature and location of the work and which party had the document drawn up. Among the most common bases for claims related to the performance of the contractor (or sub-contractor) are the following:

- Actual sub-surface or sub-aqueous conditions differ from those described in the tendering documents.
- Some extra or changes in the scope of the work is required of the contractor.
- The quantities of work as indicated in the tendering documents are subject to an appreciable over-run or under-run.
- The owner orders the work to be performed at an accelerated rate and completed before the due date.
- The owner causes delays through failure to perform some

specific obligation such as the supply of unimpeded access to the site, owner-supplied materials, drawings, permits, services, etc.

1.3.4 Summary


In summary, claims are properly related to changed conditions: changes in the contract, changes in the site, changes in the work and changes in the time schedule.

Often the dollar value of such claims is substantial. Another very tangible cost factor is related to the time, effort and outlays incurred by all parties concerned in resolving construction contract disputes and claims. Key personnel are usually involved in representing the owner, his agents, the contractor and possibly sub-contractors. These parties may in turn engage professional counsel and consultants. There may well be interest charges.

The longer a construction dispute drags on, the more it will ultimately cost and the less the claim will eventually be worth. Apart from the odd windfall, claims do not generate or increase profits, rather they seek to receive justified compensation and to mitigate losses caused by the actions or non-actions of others.

Ideally then, it is desirable to prevent disputes from arising. This applies to the owner, who may well find his capital budget unexpectedly and adversely affected and, as mentioned, will incur additional administrative expenses. It most certainly applies to the architect or consulting engineer, particularly if he does not receive additional fees for his staff's time in reviewing claims, etc. And it

applies to the contractor and to any of his sub-contractors and suppliers who are affected. If the claim is initiated by a trade contractor under the terms of the sub-contract, it is still possible that the owner's agents and perhaps the owner himself will be involved [1].



CHAPTER 2

MEASURES AND PRECAUTIONS FOR THE PREVENTION OF CLAIM DISPUTES

INTRODUCTION

Recently, the Construction Industry Research and Information Association in England published the findings of a rather exhaustive study of this issue, recommending that a new Method-Related Bill (59) should replace the Bill of Quantities and Prices heretofore used with the Standard ICE Conditions of Contract, the British equivalent to the standard Canadian Construction Association Unit Price Contract Form.

Can claims be prevented? Yes - claims may be prevented, but only under ideal conditions and, frequently, only for a price exceeding the value of the probable claim which is being prevented. Claims may be defined as: A demand by the contractor for additional compensation and by the owner for damages or losses incurred.

From the viewpoint of the contractor, the history of claims before the Canadian courts is a melancholy one. While it is true that many claims are settled, to the reasonable satisfaction of the contractor, by negotiation or arbitration, it is also true that what is likely to happen to a claim before the courts will influence the course of negotiations and the amount of any settlement [5].

Claims are generally accepted today in the construction industry as a very undesirable but almost inevitable step in completing a construction project. Nevertheless, because of their frequency, and at

times, their gravity, much has been said and written about methods of avoiding them [4].

Frequently, buyers of construction services and occasionally, members of the industry, regard claims as a disreputable method, almost a form of blackmail, contractors use to compensate for their own inefficiency. One may sympathize with the reaction of owners, because the additional compensation they are asked, or perhaps forced to pay may well be the difference between a viable enterprise and one which should not have been started. Claims are seldom, if ever, budgeted for and their magnitude has often caused severe embarrassment to owners and/or their consultants.

In fact, the prevention of claims by closer adherence to the original budget and schedule is one of the apparent selling points of the project and/or construction management systems.

2.1 STRATEGY

What are the measures and precautions for claim disputes prevention? It is very important to define what claim disputes are, because of the difficulty in differentiating between a request for a change order under the appropriate term of contract and the claim dispute itself. Therefore, it is safe to say that a good definition can be termed as follows: "ONCE A REQUEST FOR A CHANGE ORDER IS TURNED DOWN, THEN IT BECOMES A CLAIM DISPUTE".

However, there is very little difference between a claim dispute and a change order's request in reality. The make-up of it, the

entitlement for it, the method of quantifying it, are one and the same thing. Hence, the suggested strategy for claim dispute prevention becomes an important phenomenon. The strategy steps are as follows.

2.1.1 Understanding the Essential Elements of a Contract

A contract may be defined as a private arrangement entered into voluntarily by at least two people for the purpose of creating legal obligations between them which are capable of being enforced by a court of law [7]. The essence of any contract is agreement. In deciding whether there has been an agreement and what its terms are, the court looks for an offer to do or forbear from doing something by one party and an acceptance of that offer by the other party, turning the offer into a promise. The resulting agreement is, however, only enforceable as a contract if the promises it comprises are supported by consideration or are contained in a deed. The law further requires that the parties have the capacity to make a contract and that certain formalities be complied with [6].

Thus, there are four basic elements necessary for the formation and enforcement of a contract:

1. An intention to enter into a legal relationship, or an animus contrahendi.
2. An agreement, or consensus ad idem, constituted by an offer made by one party and accepted by the other.
3. The capacity of the parties to contract.

4. The compliance with certain formalities required by law as to consideration, contracts under seal and the necessity for writing.

2.1.2 Understanding the Privity of Contract and the Type of Contracts

Generally speaking, a building contract involves only two parties: the person who wants the building or work to be done, who is called the "owner", and the person who is to carry out the work, who is called the "contractor". It is necessary to distinguish between parties to a contract and sub-contractors, since the latter are not parties to the original contract. There is no "privity of contract" between the owner and sub-contractor.

The word "privity" involves the idea of being privy to a contract, i.e. being a party to, or participant in a contractual arrangement. The common law draws a distinction between (1) those who are involved in a contract, as being signatories (if the contract is in writing with or without a seal) or, if it is oral, as being among those assenting to the contractual undertakings, and (2) those who claim rights under a contract, or upon whom it is sought to impose liabilities under a contract, when they were not involved in the original making of the contract and were not expressly engaged to or in it by their participation. An agreement between A and B involves only A and B as parties; there is privity of contract between them. A contract between A and B which requires that A do something for C or that C do something for A creates no privity of contract between A and C or B and C. The contract may mention C and may purport to confer a

benefit upon C or impose an obligation upon C, but it cannot result in C's being a party to the contract in the ordinary, usual sense. Thus, [8] where a sub-contractor enters into a contract with the prime contractor to carry out certain work on the owner's land, the sub-contractor cannot look to the owner for payment for any work done, even though it is for the owner's benefit. This is so even where the whole of the work is let under a sub-contract; the prime contractor remains contractually bound to the owner [9] and there is no contractual relationship between the owner and the sub-contractor [6].

As between the prime contractor and a sub-contractor, the prime contractor stands in the same position as an owner under an ordinary contract and the sub-contractor stands in the position of the contractor. Since there is no privity between the sub-contractor and the owner, it is no defence to a claim by the sub-contractor that the sub-contract was prohibited by the terms of the prime contract [10].

It is quite common for a sub-contract to incorporate by reference so much of the prime contract as is applicable to the particular work in question. This does not have the effect of creating any contractual relationship between the sub-contractor and the owner but it does make the terms and conditions of the prime contract, to the extent that they are so incorporated, a part of the sub-contract in the same way as if they had been separately written out as part of the sub-contract [11].

Since the position of the sub-contractor is wholly dependent on the terms of the sub-contract, if the prime contractor's contract is

terminated or forfeited, the sub-contractor's contract will usually automatically become impossible of further performance and will terminate, unless the owner or a new prime contractor chooses to enter into a fresh contract with the sub-contractor [12]. The owner is under no obligation to allow the sub-contractor to complete. Nor does the appointment of a new prime contractor by the owner create any privity of contract between the sub-contractor and the new prime contractor [13]. In the absence of such a new contract, the sub-contractor's rights are confined to suing the prime contractor for what is in effect a breach of the sub-contract, and he has no contractual rights against the owner even if the owner's termination of the prime contract was wrongful and without justification. He may, in certain circumstances however, have a right in tort against the owner for wrongfully inducing a breach of contract [14].

If the work of a sub-contractor does not comply with the specifications or requirements of the prime contract, the owner's complaint is against the prime contractor, not against the sub-contractor.

The owner has no right to direct a sub-contractor what to do or how to do it, unless in the sub-contract the sub-contractor agrees to follow the directions of the owner or his engineer [15]. Similarly, the sub-contractor has no right to claim payment or compensation from the owner [16] and, except to the extent that The Mechanics Lien Act [17] contains provisions for the protection of the rights of sub-contractors, his rights are confined to making a claim against the prime contractor. Even if the prime contract contains a provision

Understanding the Types of Contracts [34]

	FIXED-PRICE GREATEST RISK ON CONTRACTOR				COST-REIMBURSEMENT GREATEST RISK ON GOVERNMENT	
	FIRM FIXED-PRICE	FIXED-PRICE WITH ESCALATION	FIXED-PRICE INCENTIVE	FIXED-PRICE WITH REDETERMINATION	COST AND COST-SHARING	COST-PLUS-INCENTIVE-FEE
APPLICABILITY	Fair and reasonable price can be established at inception e. g. - Reasonably definite design or performance specifications - Realistic estimates - Adequate competition - Valid cost accounting data that provide reasonable price comparisons Level of effort research contract	Market or labor conditions unstable over extended production period	Where cost uncertainties exist and there is the possibility of cost reduction and/or performance improvements by giving contractor (1) a degree of cost responsibility and (2) a positive profit incentive Firm Target Type: firm target and final profit adjustment formula can be negotiated initially Successive Target Type: Initial target can be negotiated, but firm final targets cannot; sufficient information will be available early enough in performance to set final goals	Stated Time or Times: quantity production-- realistic price can be negotiated initially but not for later period(s) of performance Retroactive After Completion: realistic fixed-price cannot be negotiated initially; amount so small or time so short any other contract type impracticable	Uncertainties in Performance Cost: R&D with nonprofit organizations or educational institutions; facilities contracts Cost-Sharing: development or research projects jointly sponsored by Government and contractor where contractor anticipates commercial benefit in lieu of fee under the contract	Development and test incentive formula can provide positive incentive effective management. Where feasible, use performance incentives together with cost and schedule incentives
ESSENTIAL ELEMENTS	Initial fixed-price places 100% responsibility and risk on contractor	ASPR Clause Established Price: ASPR 7-106 Labor/Material: ASPR 7-107 Ceiling on upward adjustment; downward adjustment appropriate where elements escalated may fall below base levels provided in contract	Firm Target: target cost; target profit; price ceiling; and profit adjustment formula Successive Targets: Initial target cost and target profit; price ceiling; firm target profit formula; and production point for application to get either a firm target and final profit formula, or a fixed-price contract	Stated Time or Times: fixed-price initially; prospective redetermination, upward or downward; a specific time or times for redetermination; price ceiling if appropriate Retroactive After Completion: ceiling price; agreement to negotiate price after performance	Cost: Government pays ASPR XV costs; no fee Cost-Sharing: Government pays agreed predetermined portion of ASPR XV costs; no fee	Target cost; target fee; minimum and maximum fee; fee adjustment formula (formula applied at end of performance)
LIMITATIONS	Government and contractor must agree on fixed-price at inception If FFP level of effort, agreement must be reached on identification of effort and number of man-hours.	Contingencies are industry-wide and beyond contractor control; contingencies must be specifically defined in the contract	Adequate Contractor Accounting System Required Must determine (1) that this is least costly contract type and (2) that any other contract type is impractical. Used for development and production procurements	Stated Time or Times: firm fixed-price not possible; length of pricing period 12 months or more; reasonable assurance of prompt redetermination Retroactive After Completion: research and development of \$100,000 or less only; fair and reasonable billing price	Cost-Sharing: must present evidence that there is high probability that contractor will receive substantial present or future commercial benefits	Adequate Contractor Fee Limitations Production & Services R&D Formula should provide incentive effectiveness over variation in costs throughout the full range of reasonable foreseeable variation from target cost
APPROVALS	None	None	Contracting Officer	Stated Time or Times: none Retroactive After Completion: from a level above Head of Procuring Activity	Cost-Sharing: Head of Procuring Activity	Determination and Findings
MISC.	Advertised or Negotiated Procurements Preferred over all types Minimum administration	Reduces fixed-price risk for contractor	Negotiated Procurements Only May also use performance or delivery incentives, where feasible	Administration required by contractor and Government	Negotiated Procurements Only Government auditing and	

TYPES OF CONTRACTS APPLICABLE IN USA.

Printed from the Procurement Association, Inc.
Project Managers' Hand Book.

COST-REIMBURSEMENT GREATEST RISK ON GOVERNMENT				OTHER CONTRACTUAL DEVICES SPECIAL USES		
COST-PLUS- INCENTIVE-FEE	COST-PLUS- AWARD FEE	COST-PLUS- FIXED-FEE		TIME AND MATERIALS (LABOR-HOUR)	LETTER CONTRACT	INDEFINITE DELIVERY
Uncertainties in Performance	Impossible to Estimate Costs Firmly			Not possible initially to estimate extent or duration of work (L-H used where materials not involved; e.g., engineering or design services; repair, maintenance, or overhaul)	National defense requires immediate binding agreement so work can begin but time does not permit negotiation of a definitive contract	Exact time of delivery unknown
Development and test when incentive formula can provide positive incentive for effective management. Where feasible, use performance incentives together with cost and schedule incentives	(i) Level of effort for performance of services where mission feasibility is established, but measurement of performance must be by subjective evaluation; (ii) work which would have been placed under another type of contract if performance objectives could be expressed in advance by definite milestones or targets susceptible of measuring actual performance.	Term Form: research, preliminary exploration, or study when level of effort is initially unknown (or development and test when a CIPF is impractical) Completion Form: research or other development effort when the task or job can be clearly defined, a definite goal or target expressed, and a specific end product required				Definite Quantity: quantity known; delivery period can be specified; supplies available or have a short lead time Requirements: precise needs of designated activities during a definite period not known initially
Target cost; target fee; minimum and maximum fee; fee adjustment formula (formula applied at end of performance)	Negotiated estimate of cost; a base fee; maximum fee; the criteria against which performance is evaluated; resulting in an award fee.	Negotiated estimate of costs; fee fixed initially except for changes in the work or services required		Direct labor hours specified at fixed hourly rates; direct materials at "cost" ("cost" as defined by ASPR and Departmental instructions). Ceiling price shall be established	Maximum Government liability; type of definitive contract; as many definitive contract provisions as possible, other provisions required by ASPR Section VII, part 8	Indefinite Quantity: impossible to know precise quantities needed by designated activities during a definite period and Government cannot commit itself beyond a minimum
Adequate Contractor Accounting System Required						
Fee Limitations	(Same fee limitations as CPFF and CIPF)	Fee Limitations		Determination that no other type of contract is suitable	No other contract type suitable; definitive contract prior to (i) 180 days; or (ii) 40 percent of production or performance; maximum liability no more than 50 percent total estimated cost of procurement	Definite Quantity: provision for delivery to designated points or upon order Requirements: estimated total quantity; maximum and minimum total quantity where feasible, maximum and minimum order where appropriate Indefinite Quantity: stated maximum and minimum total quantity; maximum and minimum order where applicable
Production & Services R&D	Final fee determination by Government not subject to disputes clause. CPAF is not for procurements of a major system categorized as either engineering development or operational system development which have undergone contract definition.	10% estimated cost 15% estimated cost Not for development of major weapons once exploration indicates engineering development is feasible				
Formula should provide incentive effectiveness over variation in costs throughout the full range of reasonable foreseeable variation from target cost						
Determination and Findings by Contracting Officer (except for cost-sharing)	(Same as CPFF and CIPF)			Contracting Officer	At level higher than Contracting Officer as stated in Departmental instructions	None
Negotiated Procurements Only. "Costs" defined in ASPR XV. Government auditing and administrative surveillance				Negotiated Procurements Only		
	Can use combination of CPAF/IP or CIPF/AF as appropriate to reflect degree of subjectivity and objectivity of performance measurement method.	Least contractor responsibility for costs; least preferred contract type		Constant Government surveillance necessary	Greatly restricted use	Advertised or Negotiated Procurements Delivery on orders or "calls" under the contract. Obligation of funds on orders and, where applicable, on stated minimum total quantity or definite quantity

under which the prime contractor undertakes to pay the accounts of his sub-contractors, such a provision cannot be enforced directly by a sub-contractor against the owner. Similarly, if the prime contract contains a clause permitting the owner to pay sub-contractors out of moneys due to the contractor, the owner may, if he so wishes, exercise his right as against the prime contractor, but he cannot be compelled to do so by an unpaid sub-contractor.

2.1.3 Understanding the General Rules of Contract Interpretation

Questions of interpretation arise only when there is some doubt as to the meaning of the words or expressions used by the parties in their agreement, or where there is some conflict between the various parts of an agreement. The same rules of interpretation which apply to contracts generally, apply also to building contracts, although there are some words and phrases which are peculiar to building contracts and which have been judicially interpreted [6]. See Appendix I.

Basically, the function of the court interpreting a contract is to determine the intention of the parties if expressed in their agreement. It is not the actual intention of the parties, but the intention of the parties as they have expressed it, that is the guiding consideration. If the parties have expressed their intention in clear terms, there is no need to resort to rules of interpretation and in fact, it is not permissible to do so [18]. A written contract must be construed as a whole [19], and as a general rule, by looking at nothing

other than the document itself. If the written agreement itself is clear and unambiguous, it is not permissible to ask what the parties in fact intended by the words that they used, nor may the surrounding circumstances or the pre-contract negotiations be taken into consideration [20]. There are, however, certain circumstances where such extrinsic evidence may be considered.

*Extrinsic Evidence

Evidence of surrounding circumstances is admissible to explain the meaning of words which are ambiguous [21] or to identify persons [22] or things not clearly defined in the document [23]. The facts which existed at the time when the agreement was entered into and the conduct of the parties may sometimes be helpful in resolving such an ambiguity or clearing up such questions of identification. Such evidence, however, must not contradict or vary the written agreement, and may only be used to clarify any ambiguities or uncertainties [24]. If the words in the agreement in themselves are clear and unambiguous, no such evidence is admissible at all. Nor can extrinsic evidence be admitted to fill a blank which the parties have left in the agreement [25]. This sometimes happens where printed forms are used. Where a printed form is partly filled out in writing, written words generally take precedence over the printed words [26].

Where a written agreement contains technical terms or foreign words, the meaning of these can be proved by extrinsic evidence, provided that they have a generally recognized meaning [27]. But such custom or usage must be reasonably certain and so notorious and so

* Inadmissible evidence.

generally acquiesced in, that it may be presumed to form part of the contract [28]. Both parties must be familiar with the alleged custom or usage and the onus of proving the special meaning is on the party alleging it [29].

It is important to distinguish between extrinsic evidence sought to be adduced for the purpose of construing a contract and evidence intended to be used for the purpose of showing that no contract exists, or that the contract does not correctly set out the agreement between the parties. The rule against the admissibility of extrinsic evidence applies only in the former situation. It is always possible to adduce evidence to show that a written agreement has been rescinded, or that it is not in fact a legally binding contract, for example, because of lack of capacity of one of the parties or illegality, or to prove misrepresentation, or to show that there is some unfilled condition precedent by reason whereof the contract has not yet come into effect. Similarly, such evidence is admissible to show that there is a collateral oral agreement which is not inconsistent with the terms of the written agreement.

However, no evidence outside the contract document itself would normally be adduced to add to, vary, modify or contradict the written terms. Two important applications of this rule are:

- a- Preliminary Negotiations. When the parties have entered into a final, concluded contract in writing, preliminary negotiations such as letters cannot be referred to for the purpose of explaining their intentions [30]. In one case [31], a

covering letter sent with the tender stated that the tender was "subject to" a certain term. After negotiations, a formal contract was signed which defined the contract documents without including the letter, although in the contract documents as defined, there was a reference to part of the letter for a different purpose. It was held that the term was not part of the contract.

b- Tenders. If a formal building contract has been entered into after tendering, no reference can normally be made to the tender for the purpose of explaining the contract, although it may have to be looked at "if in considering the contract it was found it depended upon the tender, that is to say, the contract in terms bound the builder to perform the work which he had tendered, or if the contract was so ambiguous, or the contract was so involved in its construction, that it was impossible to understand what was intended without investigating the tender for that purpose" [33].

2.1.4 Understanding the Rules of Construction

Over the course of time, a body of so-called Rules of Construction has been developed by the courts to assist in the interpretation of documents. A rule of construction merely points out what a court shall do in the absence of an expressed or implied intention of the parties to the contrary. It is therefore only applied to assist the court where there is some ambiguity or incon-

sistency, for if the words are plain, the court will give effect to them [6].

a- Ordinary Meaning. The court in construing a document gives words any special technical, trade, or customary meaning which the parties must have intended the words to bear. Subject to this, "the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity, or some repugnance with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further" [35].

b- Reasonable Meaning. If the terms of a contract are ambiguous and one construction would lead to an unreasonable result, a court will be unwilling to adopt that construction [36]. This rule was applied in a building contract case where the argument of the employer that, on the construction of the contract, the contractor was bound to complete in time even though extras were ordered, was rejected [37]. If, however, there is no ambiguity, the court will enforce the terms, however unreasonable they may be [38].

c- Valid Meaning. Where a clause is ambiguous, a construction which will make it valid is to be preferred to one which will make it void [39].

d- Contract Read as a Whole. The contract must be construed as a whole, effect being given, so far as practicable, to each of its

provisions. Construing a contract may involve two stages: first, the court may have to determine which documents are contractual; second, having decided which documents form part of the contract, it must give effect to all the terms and endeavour to reconcile inconsistencies by the rules of construction.

e- Written Words Prevail. Where there is a contract contained in a printed form with clauses, inserted or filled in, inconsistent with printed words, "the written words are entitled to have greater effect attributed to them than the printed words, inasmuch as the written words were the immediate language and terms selected by the parties themselves for the expression of their meaning" [40].

f- *Ejusdem Generis Rule. This rule is that where there are words of a particular class followed by general words, the general words are treated as referring to matters of the same class. Thus, in a clause permitting that an extension of time be granted to the contractor if the works were "delayed by reason of any alteration or addition, ... or in case of combination of workmen or strikes, or by default of the sub-contractors ... or other causes beyond the contractor's control", the "other clauses" were limited to those ejusdem generis with the clauses particularized, and did not therefore include the employer's own default in failing to give possession of the site [41].

g- Recitals. A recital is part of a document, usually beginning "whereas", which indicates what the parties are desirous of

* Rules that are interpreted against the creditor of an obligation.

effecting by the contract. "If there is any doubt about the construction of that document, the recital may be looked at in order to determine what is the true construction; but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative of the writing or deed" [42].

h- *Contra Proferentem Rule. In cases of ambiguity, the courts will construe a document against the party who prepared it. If there is an ambiguity in a document which all the other methods of construction have failed to resolve so that there are two alternative meanings to certain words, the court may construe the words against the party seeking to rely on them and give effect to the meaning more favourable to the other party [43].

i- Irreconcilable Clauses. The court always endeavors to resolve an apparent inconsistency, but if two clauses cannot be reconciled, it will give effect to that which states the intention of the parties. Finally, if it is unable otherwise to ascertain which clause should prevail, it will give effect to the earlier clause and reject the latter [44]. But where the succeeding clauses are not in fact repugnant to the earlier clause, and merely qualify it, the clauses must be read together [45]. In the case of a discrepancy between duplicate copies of a contract, the copy received and read by the contractor governs [46].

* Specific and/or unique rules.

2.2 SUMMARY

For anyone to understand, really understand his responsibilities under a construction contract, he must learn and clearly comprehend how construction costs are estimated. Not just partial costs, direct and indirect costs, unit costs or individual lump sums but the total, all inclusive costs of the whole of the work included in a contract. He must understand how site conditions and location, information supplied by the owner, general contract conditions, special provisions, general specifications and detailed specifications and mode of payment affect the estimated cost. He must understand that each job, no matter how similar it may seem to other jobs, has a different combination of items and quantities of work; that the make-up of each particular job dictates the special amounts of material, equipment and human resources required to build it. He must understand that adding to or subtracting from or rearranging the items or quantities of work to be done changes the cost of the whole work, not just a particular item, to some degree. The change may or may not be judged significant, but it exists. The effect of changes are generally more pronounced once work has begun than if they occur prior to organizing the work. Their real effect or magnitude is often not immediately recognized by either side.

The fact that the balance is so easily altered dictates that some allowance for change be built into any contract if it is to be a practical document. When contracts are written with too many disclaimers, they only create claims. When they are prepared with too

many carrots and too many sticks, they may become tools in the hands of twisted minds and are harmful to the owner, the contractor and the industry as a whole. Recommended are six major steps for the approach to a sound estimate in order to prevent claim disputes:

1. Investigation.
2. Planning of the work including methods.
3. Schedule.
4. Allocation and levelling of resources.
5. Estimating direct and indirect costs.

The sixth step in either tendering or submitting prices for extras is to prepare the submission which includes a decision as to how indirect costs are to be distributed, and what contingencies or markup are to be allowed and how they are to be distributed.

The only difference between the original tender and a submission for extra work or changed conditions is that the extra or change must be inserted into the tender schedule to determine if there is any impact from such a change on any other item or on the whole of the work.

Failure of either the contractor or the owner to understand the necessity and the details of those procedures will only lead to claim disputes. The owner may make a change or add work without realizing the extent of the burden he is placing on the contractor. The contractor may overvalue or undervalue his tender or any extras which occur if he is awarded the contract.

On the other hand, if the owner and/or his engineer understood

the factors governing cost fluctuation and if the contractor had exercised "preventive" cost control, the extra expenditure could either have been avoided by cancelling the change or provided for at the time of revision of the design, thereby eliminating the need for a formal claim.

It is of interest that similar situations would develop under the project or construction management system, except that the steel-setting sub-contractor would probably be forced to maintain the overall schedule, i.e. increase the size of his crew and either absorb the loss or institute the claim [4].

"Preventive" cost control, however, is not always possible. Real-life variations and interferences are generally more involved and, therefore, less obvious than the above example. Impact or ripple effect of complex or overlapping variations frequently cannot be predicted. Contractors in these cases should be expected to practice "remedial" cost control both with a view of minimizing their losses and to generating records needed for the compilation and adjudication of their claims.

It is believed that proper understanding of the factors giving rise to cost fluctuation would make owners both less inclined to order variations and/or more understanding in dealing with resulting cost increases. Unfortunately, current cost control practices of Canadian contractors are less developed than those demanded by the competitive nature of the industry or those needed to demonstrate to owners the reasons behind cost fluctuation.

CHAPTER 3

MANAGEMENT OF CLAIMS

INTRODUCTION

Claims have become such an important part of modern construction projects that an examination of their nature is justified. Two erroneous views exist as to the nature of claims and these should be quickly dismissed. First, the view of some buyers of construction services that claims are a disguised form of blackmail. Second, the view of some contractors who consider claims as a last resort for the rescue of an unprofitable contract.

There is no sympathy with either of these views. Claims must be the expression of the legitimate aspirations of a contractor finding himself in an honest contractual dispute. Of course, claims have been abused both by contractors and buyers of construction services. This abuse has led to a prevailing atmosphere of mistrust between owners and contractors with respect to claims. It is clear that no precise borderline exists between a claim based on an honest disagreement with respect to contractual requirements and a claim put forward under false pretenses. Each situation must be examined on its merits, the former type of claim is perfectly legitimate, the latter should be deplored [47].

Claims are never budgeted for and their magnitude has often caused severe embarrassment to owners and/or their consultants.

In fact, the prevention of claims by closer adherence to the original budget and schedule is one of the apparent selling points of the project/construction management system.

3.1 CRITERIA

The criteria for the prevention of claim disputes are the essence of this Chapter. Hence, a great deal of details are implemented to define each criterion individually as follows:

3.1.1 How Do Claim Disputes Arise?

Claims arise if one party to a construction contract refuses or is incapable or unwilling to fulfill his contractual obligations. A frequent example is an order for extra work or changes in the scope of works by the engineer or architect. If he considers the extra or changes in the scope of works to form part of the contract, and the contractor does not, a claim will probably be made. Such a claim will be based on a breach of contract and if the contractor's position is maintained, he would receive compensation for the damages suffered.

Claim disputes are caused by people through misrepresentation, misunderstanding or misinterpretation of clauses and disagreements, delays, etc.

3.1.2 Why Do Claim Disputes Arise?

As contractors have learned, frequently to their sorrow, the contract is often the only factor which governs the relationship with the owner. Frequently, contractors have signed contracts without

fully examining or understanding them and have later had claims rejected on the basis of language in the contract, even though the claim may be justified in value. Although contractors should not attempt to do their own legal work, they must be very familiar with all the governing provisions of the contract, not merely the engineering details and the payment clauses.

Most modern construction contracts recognize that the performance of extra or changes in the scope of works entitles the contractor to additional compensation. Accordingly, these contracts generally provide a formula for negotiating the payment for settlement of claims by direct negotiation, arbitration or litigation. Of course, claims may arise in many other forms, and a contractual provision for additional compensation will not automatically exclude breach of contract claims. Although there is some standardization of construction contracts, those used by different governmental authorities and private buyers of construction services vary widely. This report will not attempt to examine the specific language of various contracts, but will be restricted to the more frequent grounds for claims.

a- Basic Principles. The basic principles can be expressed as follows: The parties to a construction contract agree to do everything specifically called for in the contract. Generally, the contractor agrees to supply the necessary labour, material, equipment and supervision to execute the work in accordance with the drawings and specifications. The owner usually agrees

to supply the site, all required drawings, certain specified services and material, and to pay for the work performed according to the contractual payment clauses. The owner's financial obligation may be expressly stipulated in the contract, if it is a lump sum contract; alternatively, it may be determined by applying agreed unit prices to the actual quantities of work performed, or it will be determined based on the actual cost of the project, if it is a target price or cost-plus contract.

Unless the contract is very badly drawn, the parties will have agreed to execute a specific project, under predetermined circumstances, within an agreed time and for a certain or determinable price. It should follow that if there is a change in any one of the terms or conditions of the contract, some or all of the other terms and conditions must be adjusted. This adjustment may be voluntary or it may be the basis of a claim. Broadly speaking, alterations in the terms and conditions of a contract may relate either to the owner's rights or obligations, or to the contractor's.

b- Types of and Bases for Claim Disputes. With respect to performance by the contractor, the following are the most frequently encountered bases for claims:

1. Actual soil conditions differ from those the contractor could reasonably have expected, based upon the tender documents;

2. Extra work is required of the contractor;
3. There have been increases or decreases in the quantities of work to be performed;
4. The owner has insisted upon the work being performed to more demanding or otherwise changed specifications;
5. The owner has ordered the work to be performed at an accelerated rate;
6. The owner has caused the work to be performed at a rate slower than the most efficient rate.

It must be emphasized that certain contracts, by their express terms, will prevent the presentation of claims on all or some of the above bases. For example, very few Canadian contracts provide for relief in the event of changed soil conditions. Frequently, the contractor assumes all responsibility for soil conditions and a disclaimer is provided in favour of the owner. Under these circumstances, Canadian courts have almost invariably rejected claims by contractors. Other contracts provide a specific authority to the owner or architect to impose an accelerated programme without additional compensation. Yet other contracts permit an application for an extension of time in the event that the owner has caused delays, but these contracts may specifically exclude any additional compensation to the contractor.

Even in contracts which contain a formula for additional compensation, the language may be such that the contractor cannot do any extra or varied work without receiving a prior written change order. Many contractors' claims have foundered when the contractor has failed to observe this condition precedent. Finally, some contracts only require the contractor to file a notice of an intended claim at the time the contractor considers that the owner's instructions or defaults have led to increased costs; these contracts usually provide that, having filed such a notice, the contractor may proceed without a specific change order.

These examples merely serve to illustrate the importance of a careful preliminary examination of the contract prior to signing it and the importance of insisting that supervisory and field personnel observe the relevant provisions. Too many claims have been lost by reason of a failure to comply with a technical provision of the contract.

3.1.3 When Do Claim Disputes Arise?

The following are certain defaults on the part of owners which may give rise to claims:

- a- Delay in supplying the site of the work;
- b- Delay by the owner or architect in supplying the required construction drawings;

- c- Delay by the owner or architect in supplying material or services required of them in the specifications;
- d- Suspension by the owner or architect of a portion or the whole of the project;
- e- Interference in the contractor's performance by other contractors of the owner;
- f- Interference with the contractor's work by the owner or architect resulting in a delay or increased expense to the contractor;
- g- Change of prospect scope or conditions.

Each of the foregoing would be a breach of contract imposing some liability on the owner. Certain contracts, including those used by the Federal Government and the standard Canadian Construction Association contracts, provide formulas for suitable compensation in the above cases. However, it should be noted that the Federal Government contract forms require the prompt filing of written notices, failing which the contractor's rights will be lost.

Categories of Causes. Four categories of causes giving rise to increased cost in the performance of the work are the following:

- a- Causes which are deemed either by the specific contract or by the common law, to be the contractor's responsibility;

b- Causes which entitle the contractor to additional compensation only if he has received a valid change order prior to executing the extra or varied work;

c- Causes which entitle the contractor to additional compensation only if he has complied with the appropriate notice provisions of the contract;

d- Causes which may be deemed to be breaches of contract by the owner and which entitle the contractor to compensation for the damages suffered.

From the viewpoint of actual project supervision, an even simpler classification may be used:

a- Changes which must be complied with at the expense of the contractor;

b- Changes which the contractor may perform only after receipt of a valid change order;

c- Changes which require the contractor to comply with the appropriate notice provisions of the contract.

Two suggestions are in order at this stage. As soon as he is assigned to a new project, every superintendent should prepare a table setting out the possible causes of increased cost separated into the three headings just mentioned. Secondly, some of the situations which will result in increased cost and may give rise to a claim, will fall

into two or more categories. Prudent contractors will protect themselves on all fronts; for example, they will ensure that a specific change order has been received and will file a notice of claim, even in situations where these do not appear to be required.

3.1.4 Where Do Claim Disputes Start?

It is fair to say that the source of the problem is found largely in the contractual documents binding the parties, and in the role played by consulting engineers. The problem can be summarized as follows [48]:

- a- In far too many contracts between the owner and the general contractor, there is a prevailing aura of unreality;
- b- In the role of the consulting engineer, authority is too frequently divorced from responsibility;
- c- The dual role of the consulting engineer frequently leads to a conflict of interest.

Owners have tended to be excessively quick to fix the responsibility and financial risk of unknown and unanticipated factors on the general contractor. It has been suggested that consulting engineers all too frequently have sought to disclaim legal and financial responsibility for matters which are exclusively within their competence. Contractors have perhaps compromised their credibility by making questionable claims and have not resisted, individually and collectively, the imposition of which is considered to be inequitable

contract provisions. Contractors have then complained bitterly when the courts have maintained the validity of such contract clauses.

3.1.5 How Frequently Do Claim Disputes Develop?

Is their frequency so significant that the parties should always be aware of them and in fact should be expecting or suspecting claims in every corner? Is this being "claim conscious"?

In the early sixties, there were at least two general contractors in this country who were labelled with the dubious distinction of being claim conscious. In fact, one contractor earned the reputation that the first man who contacted the owner or his architect upon being awarded the contract, was the in-house lawyer, who arrived with a "Notice of Intended Claim: for any and all acts or failures of the owner/architect which may cost the contractor money".

This apparently unreasonable posture gave rise to frequent amusement among other contractors, that is, until one of those amused contractors arrived with his claim at the bar of the court and was turned away because he did not comply with the notice provisions of the contract. Being claim conscious, all of a sudden, turned out to be a virtue in the eyes of contractors, but remained something of an underhanded practice according to the owners. More and more contractors lost their action for additional compensation before courts, more and more one could hear of the necessity of preparing for claims from the day the contract was awarded.

Members of the construction fraternity must like slogans, because first they created the principle of "Preventive Maintenance"

with a view to increasing the useful life-span of construction equipment. With the appearance of claims, construction lawyers preached "Loss Preventions" through continuous awareness of possible claims, presumably to assure longevity of the construction company in question. But in the same way as the preventive maintenance principle is nothing more than a management technique, similarly claim awareness should not be elevated to a higher plateau.

Being claim conscious is a lot more than "reading one's contract" which is what legal counsel is trying to hammer into contractors at every turn. Being claim conscious is an acknowledgment that a free enterprise based society is a profit oriented society and that at the root of every commercial endeavour is the necessity of making a profit. But being profit oriented is not the exclusive domain of contractors, not should it be. Owners, at least private owners, must also be looking at the construction process as a potential profit center. When a developer is constructing an office building, he must maintain both a rigid time schedule and a predetermined budget, otherwise his venture may be a losing proposition. The duration of construction will usually determine the short term financing requirements which, in turn, will govern the financing cost of the project.

The overall cost of construction of course, determines the minimum rental rates needed to stay ahead. At the same time, however, the maximum rental rate he may get away with is governed by the market. It is easy to see, therefore, that he is going to be extremely claim conscious, namely he cannot absorb any extra cost; consequently, he

is going to resist payment of claims to his trade contractors [49].

3.1.6 Who is Liable Within the Construction's Agency

Under the legal aspects of the construction's agency and as stated in Goldsmith, OP. Cit. fn.1, pp.9: A person who enters into a contract becomes personally liable under the terms thereof unless, at the time of entering into the contract, he indicates clearly that he is doing so as an agent for another party.

If a person enters into a contract expressly as an agent for another party, only the principal, and not the agent, becomes personally liable under the contract. The agent may, however, incur personal liability for breach of warranty of authority, if it subsequently transpires that he had no authority from his principal to enter into the transaction, with the result that his alleged principal is not bound thereby [50]. So, for example, if an engineer claims to have authority to do something on behalf of the owner when in fact he is not so authorized, the contractor, although not able to make the owner liable, may be able to sue the engineer for breach of warranty of authority [51] to recover any damages which he might have suffered as the result of his reliance on the warranted authority [52].

A person may enter into a contract as agent for a disclosed principal or for an undisclosed principal. In the former case, the agent incurs no liability under the contract [53] unless and until the other party, on discovery of the principal, elects to regard the principal as bound by the contract rather than the agent [54].

It is not necessary for a party to ascertain whether a purported agent in fact has the required authority, provided that the transaction is within the scope of his ostensible authority. An agent has implied authority to do all acts which are reasonably necessary or ordinarily incidental to the execution of the act within his express authority [55].

In the case of companies, the directors are authorized to carry on the business of the company, but in many cases a managing director or a manager has authority to bind the company in its everyday transactions.

In certain circumstances, a person may be deemed to have acted as an agent for another although not expressly authorized. Such an "agency of necessity", however, arises only in rare circumstances, for example, in an emergency in order to prevent irreparable injury to the other party, and usually where some kind of contractual relationship between the parties already exists. In the context of building contracts, this situation could arise where certain emergency repairs become necessary during the course of construction without the possibility of obtaining instructions from the owner.

These general principles of agency law have particular relevance to the relationship between the owner and his architect or engineer, and to the authority of the latter to contractually bind his employer vis-a-vis the contractor and third parties. When the building owner enters into a written contract with a contractor, the authority conferred upon the architect or engineer to vary the contract work will

usually be set out expressly. It remains important, however, to determine the extent to which the architect, when carrying out his many duties on behalf of the employer, can, in the absence of express terms, commit the employer.

To the extent that an architect or engineer is an agent of the owner, his authority will depend on the specific terms of his employment, and he cannot properly act in excess of his authority. A contractor is not, however, usually familiar with the contract under which the engineer is employed, or with the precise scope of his authority; but unless he has express notice of any specific limitation on the engineer's authority, he is entitled to regard the engineer as being authorized to do anything which is reasonably necessary to enable him to carry out that which he is expressly authorized to do. But in the absence of any express authority to that effect, an engineer has no authority to waive any provisions of the contract [56] or to make what is in effect a new contract between the parties [57].

An architect or engineer has no implied authority to make a contract with the contractors binding on his employer, or to vary or depart from a concluded contract. His duty when supervising a contract is to see that it is faithfully fulfilled according to its terms; but it may, of course, be varied by the parties themselves, or by the architect or engineer under specific authority given him in that behalf, whether under the express terms of the building contract, as in the case of variations clause, or on direct instructions from the employer [58].

3.2 THE QUANTUM OF CLAIM DISPUTES

Assuming the contractor has recognized a claim situation, and has complied with all appropriate contractual provisions, he must then determine the quantum of his claim. In order to do this, he must first determine the increase in costs flowing from the claim situation.

If the contractor's claim is valid, he should receive an amount which will make his position as sound as money can provide. In practical terms, the damages suffered by a contractor will be the difference between the actual cost of the operation and what it would have cost to perform the same operation had there been no alteration.

For example, if the alteration is simply the instruction to exchange all windows from single pane to double pane, the difference between the actual cost and projected cost can be readily determined, assuming the revised windows are immediately available and the change was ordered in a timely fashion. However, the situation would change if the originally specified windows were already on the site, had been partially installed and if the revised windows had to be manufactured. The effect of this apparently simple change might be a three month delay of the work. Similarly, the contractor's damages would be increased by the cost of dismantling previously installed windows, the cost of returning them to the supplier, possible cancellation penalties, the cost of temporary windows, the increased cost of interior finishing and finally, the net increase in the contractor's overall cost flowing from a three month delay in completion.

This latter reference would include increased overhead, extended duration of temporary heating, possible escalation of labour rates, and other similar factors. The damages could be even larger if the owner insisted upon an accelerated programme, after the new windows were received, in order to make up for lost time [47].

This example demonstrates three basic principles underlying the quantum of claims:

- a- The total cost of a change is as much governed by its circumstances as it is governed by the nature of the change itself;
- b- Contractors should not accept full and final compensation for changes until they have determined the total impact of the change;
- c- The determination of impact costs can only be made if the contractor has good cost and progress records.

Each of these three principles can be examined in relation to the example given:

- a- If the order to change the windows had been received prior to the single pane windows being manufactured, the extra cost would be insignificant, namely, the difference in the purchase price. However, if the decision is delayed and the change order issued at a later period, the differential or extra cost would be increased, and would include costs arising from the impact of the change on other specific operations and on the

project as a whole. This reveals two subsidiary points:

1. The importance of analyzing every change order or drawing revision immediately upon its receipt. It is obvious that, if the change in the window specification had been ordered in time by the owner, and the delay resulted from the contractor's oversight, the latter would have no claim for impact costs.
2. The possible impact effect of every change must be measured against a properly prepared and current job schedule. Without such schedule analysis, the impact effect of changes can be easily overlooked.

b- The second principle was that the contractor should not accept a specific sum as full and final compensation for a change until the total impact of the change has been determined. Of course, this is not to say that changes should not be settled as they arise. All claims should be settled, if possible, during the project. On the other hand, if the contractor cannot establish the ultimate impact of such a change prior to determining the direct cost of the change, he must reserve his right to claim the impact costs subsequently, or risk losing them.

A two-stage settlement is recommended. The direct costs should be settled as soon as possible after receipt of the change order; the impact costs should be settled at the end of

the job, when they may be determined with a reasonable degree of accuracy. Obviously, such a two-stage settlement may not always be essential. If it is clear that a change will have no impact effects, settlement can be immediate. However, only careful consideration of each change by the contractor will show this. Owners and architects are generally not in favour of two-stage settlements. This reluctance can only be combatted with properly presented schedule analysis. In some circumstances, good schedule analysis may be sufficient to determine impact costs as well; however, this would be the exception rather than the rule. Where a contractor is relying on the two-stage settlement process, he must be careful to ensure that the owner understands his intention.

c- As a natural consequence of the two-stage settlement process, the contractor's records must be sufficiently detailed in order that he can prove impact costs after the job is completed. If job records are inadequate, the contractor may be advised to settle all costs, including impact costs, on an estimated basis.

While there are other reasons for maintaining good cost and progress reports, they are essential for the determination of impact costs. Good records are the basic tools of the contractor's daily work in planning and controlling the progress of the project. Furthermore, they are indispensable to the substantiation of any claim

which could not be settled during the job, especially breach of contract claims. Chances of success are remote in arbitration or court proceedings if the contractor does not have good cost and progress reports.

Finally, good records are necessary to the general contractor in order to protect his position vis-a-vis sub-contractors. If one accepts the principle of an impact or ripple effect resulting from a given change, one must accept the conclusion that these effects may extend to the costs and progress of sub-contractors. If, for example, a plastering sub-contractor is delayed, this will almost inevitably affect the work of the electrical sub-contractor, thereby increasing his costs.

There may be some question as to the liability of the general contractor towards his sub-contractor. It is submitted, that the general contractor could be held responsible by sub-contractors for damages suffered by them, even though the damages were not the direct fault of the general contractor, but resulted from changes originating with the owner. If this view is correct, the general contractor must be careful to include in his computation of impact costs, the cost increases of sub-contractors who may be affected by the owner's change. In practice, using the previous example, when the general contractor negotiates with the owner compensation for the window changes, he should be careful to assess the possibility of increased costs of the sub-contractors performing plastering, painting and electrical work. This estimate must be based on the extent to

which the sub-contractors may suffer damages attributable to the non-availability of the windows, and the three month delay.

Of course, sub-contractors must prove their damages to the general contractor before the latter will incorporate them in his presentation. Nevertheless, the general contractor must keep track of his sub-contractor's activities, at least in a general way, so that he may discuss and analyse the sub-contractor's claims both prior to, and during discussion with the owner. As a measure of caution, the general contractor should not finalize his claim with the owner or architect until he has reached a clear understanding with all his sub-contractors.

As mentioned earlier, the basic measure of damages is the difference between what a project actually cost and what it would have cost without the changes made. The general contractor, of course, is in the same position towards the owner as sub-contractors are towards him. The general contractor must prove that he has suffered damages. Without proper records, it is difficult, if not impossible, to prove damages. It must be emphasized that courts and arbitration boards will not award additional compensation unless the contractor can prove he suffered damages, even if the claim is accepted in principle. Basically, to obtain additional compensation, the contractor must satisfy two tests:

- a- He must have a valid claim; and
- b- He must prove that he suffered damages.

The validity of the claim will depend upon the facts of the

situation as they can be related to the language of the contract. The quantum of the claim will depend upon the availability and quality of the contractor's records. One does not wish to overstate the case; the law does not require the amount to be proven with mathematical accuracy, which will frequently be impossible. However, the contractor must offer reasonable evidence of the damages suffered.

3.3 CONSTRUCTION RECORDS

Construction costs are governed by the absolute value and the inter-relationship of three elements:

1. Resources and their utilization;
2. The duration of various operations;
3. The sequence of individual operations and the total project.

To be useful generally and particularly for claim purposes, construction records must provide the following information:

a- Information as to resource utilization, including labour, equipment and material. Records must contain information both as to the quantum and the allocation of resources. Where contractors depend on daily time cards to gather and classify this information, they must be certain that all relevant operations are properly identified;

b- The duration of an operation will be determined by the rate

of progress and the resources employed. While details with respect to resource utilization are usually recorded in daily time sheets, production rates and details of the work executed daily must be recorded on daily job logs and in the superintendent's diary. These records may be the contractor's most important sources of information, both with respect to job supervision, and in the preparation of claims;

c- The timing or sequence of operations refers to the relative position of individual operations on a time scale schedule, and their inter-dependence with other operations. This information is best collected on a detailed progress chart or time scale schedule.

In addition to the foregoing records which are essential for all construction projects, the following records may be useful for the presentation of claims:

a- Minutes of job site meetings;

b- Correspondence between the parties. Contractors are naturally reluctant to write letters. However, it must be remembered that owners, particularly governmental authorities, are far less reluctant to do so. With some owners, it is a passion. In order to properly protect his position, the contractor must overcome his reluctance to writing letters and he must ensure that in the event of any dispute, the owner's is not the only available written version;

- c- Internal memoranda;
- d- Delivery reports of permanent material;
- e- Daily force reports of sub-contractors;
- f- Photographs;
- g- Inspector's reports;
- h- Survey notes.

The contractor's chances of success with a claim dispute are greatly enhanced if the above records are kept and if they are co-ordinated throughout the project [47].

3.4 STRUCTURING OF A FORMAL CLAIM

There is no right way to put a claim together. Mention has been made earlier to the likes or dislikes of various owners, which if they are known, must always be heeded. Some public authorities, such as the Ministry of Transport in Ontario and in Quebec, have stated in more than one public statement the way they like to have claims prepared. What is of interest is that, although both departments deal with identical products, namely they both build roads (or highways), one department likes to have the claims quantified pursuant to the objective method, while the other goes to the extreme in subjectivity and audits all claims.

It would be foolhardy to disregard their expressed standards and accordingly, when dealing with those departments, the right way is their way. Outside of these two bodies, there are no other Canadian right ways and most claims may be treated in accordance with

their individual strength and/or weaknesses.

There are lawyers who have prepared a considerable number of claims and have settled on a specific format which they believe to be the only successful one. Generally, however, claims tend to assume the characteristics of the people responsible for their preparation. There are nevertheless some basic guidelines which are important to remember.

The U.S. Court of Claims normally requires contractors to prove the following three points:

1. Entitlement (or liability);
2. Causation (which is the connection between cause and effect);
3. Effect (or the quantum of damages).

It is submitted that these three parts are essential elements in any claim. Although the quantification of damages has been dealt with at length in a previous Section, it will be referred to again as much as is considered essential for a better understanding.

3.4.1 Entitlement

Contractors' entitlement to additional compensation flows from the governing terms of their contract. In general, the reasons for such an entitlement may be subdivided into three broad sections:

- a- extra or modified work
- b- changed conditions
- c- breaches of contract by the owner.

Notwithstanding the reasons however, contractors' entitlement

depends on:

- i) enabling contractual terms
- ii) supportive fact pattern.

3.4.2 Causation

Sometimes, it is easy enough to find reasons for entitlement, especially since the invention of the "fast track" method of contracting any contractor engaged on those jobs has an automatic reason handed to him on a silver platter by the owner, namely the delays in supplying drawings and required information.

(A word of caution to those contractors who sign a contract exculpating the owner from liability in case of owner-caused delay: their entitlement is not automatic, nevertheless, usually supportable.)

Unfortunately, these reasons may not necessarily have caused the damages, or all of the damages. Intervening labour strikes will often give badly needed breathing time to designers without invoking the owner's financial responsibility.

The burden to establish the link between the cause and the effect is very strict and is often very difficult if not impossible. Although it is a well-established legal principle (according to Mr. Justice Davis) that:

"such an impossibility cannot relieve the wrongdoer of the necessity of paying damages for his breach of contract and that, on the other hand, the tribunal to est-

imate them, whether jury or judge, must under such circumstances do the best it can and in its conclusion, will not be set aside even if the amount of the verdict is a matter of guess work."

Unfortunately, these guesses, or as referred to before as the "jury verdict" decisions, seldom come close to making the contractor whole. It is safe to state, therefore, that it is not enough to establish that the contractor has lost money, he must also show the connection between his losses and the reasons giving entitlement to additional compensation.

3.4.3 The Damages

Once the connecting link has been established, the contractor must do the best he can to establish the quantum of the damages, which he may do pursuant to any of the methods mentioned in the previous Sections. It is perhaps unorthodox, but most claims consultants, when called upon to evaluate a claim position of a particular contractor, would prefer to start with the contractor's cost statement.

It is beleived that the causation, i.e., the connecting link, is often easier to establish backwards, namely by establishing the areas (or operations) and the time frame where the contractor lost money and then to look for the reasons. One passing comment, the contractor's project manager is usually the most unreliable source of information concerning the reasons for the loss.

Although it is recognized that as long as the claim contains the

above three sections, namely: the entitlement, the connecting link and the quantum, that should be sufficient to prove a claim. It was learned, through experience, that it is beneficial to structure these items in a predetermined sequence not from the point of view of those who are familiar with the job, but to help those who know nothing about the project but who are usually the ones making the final evaluation.

During the last four years, claims consultants have probably evaluated as many claims on behalf of owners as they have prepared for submission by contractors. Hence, the importance of having the claim properly structured has been recognized.

This structuring may not add anything to the value of the claim, but it will reduce the time required by the uninitiated to understand the claim. Contractors should not underestimate the importance of the time limitation imposed by owners who are already upset by having to bother with a claim in the first instance.

It is submitted that, if a claim presentation does not clearly state the contractor's contentions within the first 10 to 15 pages, the contractor is risking the possibility that its claim may never be read by the person with authority to settle. Some of his subordinates may go through it, but whether they change their existing prejudices will remain to be seen.

Taking this self-imposed time limitation into consideration, a claim should contain the following sections:

- a- Summary, which should describe the job in a few paragraphs,

should state the contractor's complaints and ensuing contentions regarding entitlement.

b- Statement of facts, which should give the chronology of the job in brief, almost punch list form. This history may either be consecutive or broken down by the heads of claims, depending on the type of claims the contractor is submitting and the impression he wants to convey. A word of caution, the statement of facts should be factual and should contain no opinion or conclusions.

c- Contractor's contentions (or arguments), which is intended to set out both the reasons for the entitlement and to provide the link to the damages. This section, as is indicated by its title, is argumentative and in this, the contractor may give to it the most favourable interpretation of the facts (as long as it does not lead to distortion of the facts). This section should be broken down into heads of claims depending on the case the contractor is trying to make. Next to section 'a', this is the most important section and should be prepared with great care.

d- Costing rationale, which is the section dealing with the quantification of the damages. This section should be self-sufficient, namely that the uninitiated, after having accepted the contractor's entitlement, should be able to evaluate the corresponding additional compensation owing to the contractor.

Although this section need not contain all back-up documents, it must refer to the source from where the employed figures originate. It is submitted that inadequate calculations of damages cost more money to contractors than strict interpretation of contracts.

e- Visual aids and/or exhibits: the title, is self-evident. Contractors should remember that a picture is worth a thousand words. Graphical presentations, particularly in delay and acceleration claims are both beneficial and often essential, as it has been described in the previous section.

Sometimes it is useful to include in this section letters and/or minutes of meetings which have particularly great significance to the contractor's case. It is seldom necessary, however, to attach all back-up material referred to in the Statement of Fact.

In certain claims prepared by specialists, there is usually one additional section containing the relevant excerpts from the various contract documents. Although this is often handy, at times it may backfire if sections considered relevant by the owner are excluded [49].

CHAPTER 4

ANALYSIS OF CLAIM DISPUTES IN THE CONSTRUCTION INDUSTRY

4.1 THE HEART OF THE DISPUTES

It is fair to say that the following are the problems at the heart of major monetary disputes, particularly with respect to major civil engineering projects, with the problems which can lead to disputes of great magnitude; for example, sub-soil conditions, delays, acceleration and other impact costs.

In an ongoing relationship where the contract between the parties does not reflect the basic realities, or is heavily biased in favour of one party, there is little chance that the relationship will be a happy one. By and large, construction contracts are not negotiated, they are imposed. Contractors as a group have foolishly accepted this imposition. All too frequently, the contracts do not make sense and, as a result, if the project goes reasonably well, the owner pays more than he should; if the project goes badly, the contractor suffers a heavy loss and recriminations, claims and lawsuits follow [48].

4.1.1 Contractual Language and Owner's Information

The classic example is the contractual language between the owner and the general contractor dealing with soil conditions. One appreciates that changes are being made in this area, for example, in the Government of Canada contracts.¹⁹ In any event, the classic civil engineering contract, frequently prepared by consulting engineers,

still provides that the owner disclaim all responsibility for information given to the general contractor, that the general contractor acknowledges to have visited the site and to have made all tests as might be necessary, and that all responsibility for unanticipated sub-soil conditions falls on the general contractor. This type of clause is preposterous and has led to great bitterness. It is called "preposterous" for the following reasons.

a- On most civil engineering projects, the owner and/or consulting engineers have had ample time during the conception and planning phase to conduct thorough studies of the site. They may not have done so, but they should have. Contractors, called to tender, must do so within a time frame which makes such a proper examination impossible. In any event, it is ridiculous to suggest, as most contracts do, that each general contractor proposing to bid, carry out parallel tests, since in any case, the cost will be built into the price. As a result, the general contractor relies on the owner's information, although contractually he cannot do so and builds a substantial contingency factor into his price. If the job goes smoothly, he makes a handsome profit; if not, he takes a beating. Either way, one party loses.

b- Logically, this is an area which should fall within the responsibility of the consulting engineers, since sub-soil conditions are a fundamental part of the design function. In fact,

in order to prepare a design, even in a preliminary way, the consulting engineers must have assessed the sub-soil conditions. However, the general contract is usually prepared as though this had never happened; maybe it hasn't, but it should have.

c- If the actual sub-soil conditions were known at the time of tendering, the owner would pay the cost of difficult conditions. True, knowing the difficulties, the owner might decide to abandon or move the project. Nevertheless, it makes no sense for the general contractor to bear the financial risk of actual sub-soil conditions proving far more difficult than those anticipated.

4.1.2 Court Decisions

The courts, in a series of decisions, have maintained the validity of the disclaimer clauses, thereby giving them an aura of respectability. The true situation is better reflected upon in the fact that, in the industry as a whole, they are called "weasel clauses".

4.1.3 Delay Clauses

A second contractual provision which can have extreme consequences and which is frequently drafted in an unrealistic way, is the clause dealing with delays. Occasionally, the general contractor is required to absorb the cost of all delays, including those beyond his control. More frequently, he is entitled to an extension of time in the event of delays beyond his control, but cannot claim damages, a

most unsatisfactory form of compensation. Infrequently, either because of sloppy drafting, or in the case of a more realistic owner, a claim for damages may be made in addition to an extension of time.

Although people in the industry have long known that the impact costs arising from delays could be enormous, it is only recently that techniques have been developed to segregate impact costs. This has led to a number of large claims and some bitterly contested litigation. Presumably, the presence of onerous and unreasonable delay clauses has led to the presence of a large contingency factor in most bids, paid unnecessarily by the owner if the project goes well and probably insufficient to compensate the general contractor if it goes badly, for reasons beyond his control.

4.1.4 Cost Escalation

A third contractual provision which, in the writer's opinion, has been unrealistic for many years and has led to many problems, is the failure to recognize cost escalation by contract. Particularly in the field of labour costs where, at least in the Province of Quebec, the authority of government is supreme, it makes no sense to force the general contractor to bear such unanticipated cost increases. The result, in a situation such as occurred in Quebec only this year, is that owners either pay the increase, although not contractually bound to do so, or refuse to pay it, thereby creating resentment and financial hardship. Therefore, more consideration should be given to an allocation of cost escalation.

4.2 EXAMINING THE DELAY AND ACCELERATION CLAIMS

Delays, in general, may be divided into three categories as follows:

4.2.1 Compensable Delays

Compensable delays are those for which the contractor is entitled both to extension and financial compensation. Such delays, in general, are associated with changed conditions, extra work and breaches of contract by the owner. The usual breaches normally encountered on construction jobs are

- a- Failure to give possession of the site to the contractor in a timely manner;
- b- Delay in furnishing drawings or other necessary instructions;
- c- Late delivery of owner-furnished materials, etc.

4.2.2 Excusable Delays

Excusable delays are usually those arising from causes which were both unforeseen and beyond the control of either party. In such circumstances both parties will suffer, perhaps one party more than the other, but neither will escape unless there is a specific provision in the contract to that effect. Such causes are acts of God, strikes, unusual weather conditions, etc. In cases of excusable delays, contractors are usually entitled to extension(s) of time.

4.2.3 Non-Excusable Delays

These are delays which could have been prevented by the con-

tractor by being better organized and those resulting from situations normally considered a standard risk of contracting, such as normal weather delays, insufficiency of skilled labour, etc.

One word of caution, however: the law governing the relations between contracting parties is the contract itself. Accordingly, generalizations based on one contract should not be applied to another and contractors should be very hesitant in making assumptions as to the kind of treatment they ought to receive from owners if their assumptions are based on contracts having different terms, or based on different fact patterns.

This is not intended to set out the possible legal basis for remedies under the various contractual terms. Although some of the principles which it advocates are those usually followed by the tribunals having jurisdiction, nevertheless these principles are not put forward here as legal doctrines; they are advanced as logical contentions based on equity.

Additionally, this is restricted to the determination of equivalent extension(s) of time without relation to quantum of damages, although usually the two remedies are closely related [59].

Popular beliefs to the contrary, there are no delay claims. A delay is not a cause giving rise to a claim; it is an effect resulting from other causes, for example, the owner's failure to supply information, drawings or material in a timely or proper manner. Delays may also be caused by increased quantities, extra work, or work which must be executed to more exacting specifications than those contracted for.

Delays may be caused by unanticipated soil conditions, or by the owner's suspension of a portion or the whole of the work. Failure to provide the site, interference by the owner in the contractor's operation, or the tardiness of other prime contractors may also result in delays.

Delays are the visible expression of the losses in productivity suffered by the contractor when his planned and orderly execution is interfered with. As a general rule, any factor which gives rise to a claim will tend to reduce the contractor's productivity and will tend to delay the execution of the work. The costs to the contractor of such delays are impact costs.

On another level, delays will usually generate other delays. If one significant operation in a project is delayed, this may well delay other operations or require operations to be performed out of sequence. The effect of working out of sequence will be lowered productivity resulting in additional delays. Since these impact or ripple effects are difficult to predict, particularly when they flow from a multitude of different changes, the concept of the two-stage settlement becomes extremely important.

Frequently, when they realize the extent of the delays which they have caused, owners will attempt to make up or "buy back" some of the time lost. This buying back of time is generally referred to as "acceleration". There is no consensus amongst legal authorities as to whether an acceleration order is a change order or is a new contract. Some insist that the owner has no contractual right to order

acceleration, unless there is a specific text permitting him to do so; under these circumstances, an acceleration order would be a breach of contract. This is an area where the contractor should follow an absolute rule; no operation should be accelerated unless there is a specific written order from the owner or architect. The contractor should not be persuaded or intimidated into accelerating; such persuasion will rarely be a sufficient ground for a claim.

The effects of delays and acceleration are similar; both tend to reduce productivity. As a result, acceleration itself tends to create delays. Acceleration is normally achieved by working longer hours and engaging additional resources, both of which tend to lower productivity and increase the duration of an operation. This is not to say that an operation cannot be speeded up; however, it is almost inevitable that a certain portion of the acceleration effort will be lost in reduced productivity. These peculiarities of delays and accelerated programmes have been demonstrated in extensive time-and-motion studies. The results are not yet sufficiently broad that they can be generally relied upon; contractors must still rely on the adequacy of their own records. However, if contractors are aware that losses of productivity are real and expensive, their position may be strengthened when they negotiate with the owner the increased cost of changes [47].

4.3 EXAMINING TIME-EXTENSION CLAUSES IN CONTRACTS

How well do they protect the contractor? One should not assume anything, it can be risky:

"If in the contract, one finds the time limited within which the builder is to do the work, that means, not only that he is to do it within that time, but it means also that he is to have that time within which to do it." [5]

The above citation from a 1902 court decision may be looked upon today as a truism because most construction contracts now contain extension-of-time clauses. It must be remembered, nevertheless, that extension-of-time clauses are not usually all-encompassing and moreover, are not always interpreted in an equitable manner. Many contracting authorities still contend that, in the absence of specific contractual language setting forth excusable causes for delay or failure to perform, the parties are bound by the following rule:

"If a party to a contract undertakes an obligation possible to be performed, unless this is rendered impossible by the act of God, the Law or the other contracting party. Other unforeseen difficulties or causes beyond the fault or negligence of the obligee (owner) will not excuse him (contractor) from timely performance." [5]

4.3.1 What Are Penalties?

But what are the consequences that contractors may be facing if they fail to execute the contract on time? The answer to this question must be found within the contract which governs the particular

project. Notwithstanding the different variations possible in this regard, however, it can be generally said that a contractor who has failed to complete the project on time is liable for the damages which the owner may have suffered as the result of such delays, save and except if (and to the extent) that the contractor is entitled to extensions of time.

This principle is clearly stated (although in the negative) in Article 1072 of the Civil Code of the Province of Quebec:

"The debtor is not liable to pay damages when the inexecution of the obligation is caused by a fortuitous event, or by irresistible force, without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract."

Although the inclusion or omission of an extension-of-time clause relates in the first instance to the contractor's liability towards the owner for damages (liquidated or special), the exact language of such clauses usually sets the basis for additional compensation the contractor may be entitled to receive for delays resulting from the various causes enumerated therein.

4.3.2 What Contracts Say

Probably the two most frequently used contract forms in Canada are the Federal Government's standard contract and the Canadian Construction Association contract (CCDC-12-74).

Article 15 of the federal contract simply gives the right to

the minister, to extend the time for completion of the work upon the application of the contractor.

Article GC-8 of CCDC-12-74 gives the right to the architect to extend the contract time for such reasonable time as the architect may decide, in case of: act or neglect of the owner, architect or other contractor; or a stop-work order issued by a court; or labour disputes, fire, unusual delay by common carriers, unavoidable casualties; or causes of any kind whatsoever beyond the contractor's control.

Although the terms of these two contracts with regard to extension-of-time are totally different, nevertheless, they seem to agree on one point, which is that the determination of such "reasonable time" is left to the discretion of the owner, without giving any direction as to how such discretion is exercised.

4.3.3 Time Extensions

The difficulties necessarily attached to such an open-ended provision have been recognized in the United States for some time and are being recognized to some extent in Canada also. Accordingly, more and more contracts set out specific scheduling requirements that are to be followed by contractors during the execution of the project. At the same time, they leave the interpretation of the time extensions to such specified schedules.

It is beyond the scope of this Chapter to discuss the advantages and disadvantages of various scheduling systems, or whether schedules in general are desirable or essential. It should suffice to say that

this Chapter is based on the assumption that the contractor has either prepared a CPM at the outset of the contract, or has the necessary information available to prepare one in retrospect [59].

4.3.4 Equivalent Extension-of-Time Schedule

This is the single, most important tool that is needed to evaluate the extension-of-time owing to contractors under a specific contract. Actually, the appropriate "equivalent extension-of-time" schedule is the "as-planned" schedule adjusted to give effect to the interruption in all respects. This is very seldom one schedule, however. In fact, to be entirely meaningful, such a schedule should be prepared after the effect of any interruption becomes known. And the family of schedules needed to evaluate appropriate time extension may, therefore, be made up of several pairs of schedules, namely, the then current "as-planned" schedule and the corresponding "equivalent extended-time" schedule prepared pursuant to every major interruption, but at least subsequent to those which gave rise to changes in sequence of operation or resource utilization.

It must be remembered that such an individual extended duration schedule must be prepared using the same resource utilization as the corresponding "as-planned" schedule. In such a circumstance, the net difference between the respective completion dates projected by the two schedules is the net effect of the interruption which is being examined.

The so-determined time difference, depending on the governing terms of the contract, entitles the contractor to either extension of

time only, or extension-of-time and compensation; or conversely it represents the extent of the contractor's liability for late completion [60].

4.4 EXAMINING THE DIVORCE OF AUTHORITY FROM RESPONSIBILITY

In the traditional pattern, the source of authority on a major construction project is the consulting engineer, or, in the case of a building, the architect. That authority is exercised opposite the general contractor and his sub-contractors. What, if any, is the countervailing responsibility of the consulting engineer? He has fairly clearly defined responsibilities towards the owner, by virtue of the contract between them, frequently prepared by him. There is no contract between the consulting engineer and the general contractor; the relationship with sub-contractors is even less formal.

Every contractor has his private horror stories, where he considers that the consulting engineer abused his authority, or acted irresponsibly. This can arise in two general ways [48].

a- Frequently, the contract documents are prepared by the consulting engineer for use by the owner. Those documents give the consulting engineer clear authority with respect to the design. On the other hand, they occasionally attempt to pass to the general contractor at least a portion of the responsibility for the design. If the attempt is contractually successful, it is easy to understand how problems arise.

The following situation, presently in litigation, is an example. A Quebec municipality, wishing to install a large collector sewer, and having carried out some preliminary design work, engaged a firm of consulting engineers. Three methods of construction were considered, a horseshoe shaped concrete structure, prefabricated concrete pipe and liner plate. Apparently, the consulting engineers had some concern about the use of liner plate, and, prior to awarding the contract, opened direct communications with the manufacturer. The manufacturer indicated that in its view, no permanent supports would be necessary. Although the consulting engineers apparently remained unconvinced, the general contract was awarded on the basis of the construction of a liner plate sewer. This was done, and shortly before the expiry of the five year warranty provided by Article 1688 of the Quebec Civil Code, a collapse occurred in a portion of the tunnel. It has never been suggested that there was any defect in the actual construction carried out by the client. Expert reports appear to indicate that the collapse was the result of certain design features, coupled with unusual soil conditions, which nobody anticipated.

The consulting engineers now argue that if supports had been placed in the tunnel, there would have been no collapse. They point to a clause in the general contract and state that the decision not to install supports was the responsibility of the general contractor. Accordingly, the consulting engineers take the position that, opposite the municipality, the problem

b- It may be that the potential conflict of interest for the consulting engineer will be eliminated. It should disappear if the group performing the design function has no direct authority over the construction work. Will such a separation occur in practice? If it does occur, will other problems arise?

c- Who will have direct authority over the contractors? Unless such authority lies only in the construction manager, it is easy to envisage jurisdictional problems emerging.

d- Suppose the contractor is having problems with the flow of design data and drawings. Can he deal directly with the design group? Must he address himself to the project manager, who will have authority over the design group? Must he deal with the construction manager, and, if so, does the construction manager deal directly with the design group, or must he act through the project manager? From the contracts which have been

examined, it is impossible to determine how this process will develop. However, it is extremely easy to imagine an increasingly complex chain of authority and communications, resulting in the diffusion of decision making and considerable loss of time. It is suspected that the project manager may occupy a role analogous to a new level of government, such as the Montreal Urban Community. It is difficult to see any advantages in that. It is understood that the project management concept has been used at Mirabel International Airport. Construction claims

based on endless delays in obtaining information and decisions, are compounded by a paralysis in decision making such as during the construction of Mirabel Airport.

In the "design and build" situation, Harry Truman's principle "The buck stops here" is applicable. That principle has less application where a consulting engineer is interposed between the owner and the builder. It is anticipated that there may be an even greater dilution where new levels of consultants and supervisors appear, each of whom may seek to avoid financial responsibility. Consultants and professionals generally, including lawyers, put other people's money on the line. The only real question is whether it will be the owner's money or the contractor's.

4.8 EXAMINING A CLAIM DISPUTE SITUATION

The examination deals with those claims which cannot be settled through personal intervention and which are destined to go all the way, and, at times, can only be resolved before a formal tribunal.

The following story is credited to a well-known American claim lawyer:

"We were called in not long ago on a case involving a Government Contracting Officer who was very sympathetic to the problems and losses experienced by our client, the contractor, yet refused to negotiate for settlement. All attempts had failed and the contractor was at a loss to understand the reasons until finally he was told by

the CO in so many words that 'you haven't given me anything that I can show to my boss that will make him understand why I have to pay you two million dollars'."

This statement, which, at the face of it, may even appear frivolous, gives an excellent definition of the most frequent reason for having to make a formal claim, namely, when the owner's agent (e.g. architect/engineer) in charge of the job has no authority to negotiate a settlement.

By accepting this criterion, one might as well enlarge upon it, by stating that the larger the face value of a claim, the greater is the necessity for a formal claim, if for no other reason that the bigger the amount is, the higher one must reach with it in the hierarchy of the owner.

A claim which can be settled between individuals equally familiar with the job may never have to exceed the boundaries of a semi-formal letter. This informality cannot be maintained, however, when the negotiators on either side are one or more tiers removed from the job.

Another compelling reason must also be mentioned, however, namely, when the dispute has reached the stage of polarization due to personality conflict between the resident representatives of the parties. This is particularly true, if and when a claim has already been refused on a lower level. In fact, claims which could have been settled amicably may end up in court, simply because of an initial position taken by the owner's project manager.

A golden rule to remember, in claim's negotiation, is one, should never push his opponents into an irrevocable position, always stop before all the bridges have been burnt. Some authorities in claim negotiations believe that claims prepared for negotiation may have to be put together with greater care and that the standard of proof is more rigorous in negotiation than in litigation, simply because of the possible polarization of opinions [49].

4.9 SUMMARY AND ANALYSIS' CONCLUSION

The foregoing analysis concludes that claims are here to stay and neither can they be prevented nor should they be prevented. However, the construction industry can cope with claims as explained in the following Chapter.

CHAPTER 5

HOW DOES THE CONSTRUCTION INDUSTRY COPE WITH CLAIM DISPUTES?

INTRODUCTION

Construction disputes should be resolved as soon as they surface and should not be allowed to mature to be full fledged claims. Construction disputes can be compared to wine, the longer they are allowed to ferment, the more expensive they will get. But this is where the comparison usually ends. Wines will gain in value with age but disputes are seldom of such vintage and although disputes will also cost more with age, they will usually yield less and less in return.

The emphasis has been, throughout this paper, to point out that claims should not be looked upon as the cure-all for the problems one may encounter during a construction project. Claims are not an end in themselves and often are not even a means to the end, because claims frequently lead to shattered dreams and bitter memories.

Unfortunately, however, not all disputes can be settled on the job site and contractors often face the necessity of preparing written claims [47]. But even then, a contractor who knows the owner, can usually custom-make his presentation to suit the circumstances taking the likes and dislikes of the opponent into consideration. Succeeding with a claim against some owners may sometimes depend more often on "whom you know" on the owner's staff and not on "how your

claim is prepared".

5.1 CLAIM PREVENTION

If one accepts the foregoing causes and definition of claims, it must be readily apparent why ideal job conditions are the prerequisites of claim prevention. None of the mentioned causes should be allowed to develop, which is more often a utopian dream than a practical goal.

Moreover, the elimination of those causes may be very expensive, e.g. sufficiently exhaustive subsurface investigation to preclude unanticipated soil conditions may be both impractical and unjustifiably costly, or a rigid adherence to the original design may prevent the owner from taking advantage of a better or more economical solution which emerged after the contract award.

If these variations are so common, why could not the owner provide for such a probability within the contract? He can and he does, at times, with the insertion of the so-called exculpatory or "weasel" clause, a solution just as disreputable as some of the claims submitted by unscrupulous contractors. More generally, however, contracts contain genuine "changed conditions" and "extra work" clauses. Should not these be sufficient to prevent claims?

First, a request for additional compensation submitted pursuant to either the changed conditions or the extra work clauses is a claim according to the definition suggested. Moreover, the majority of claims arise from the interpretation and application of these clauses, not from their absence [4].

5.1.1 Owner's View

From the owner's point of view, it means getting the most value while preventing the cost from exceeding the budget, which very often represents the amount of money which can be justifiably spent, or made available, for the execution of that project.

5.1.2 Contractor's View

In the contractor's view, it means the expenditure of the least amount of effort and, therefore, money which will satisfy the terms and the requirements of the contract.

There is an inherent conflict between owner and contractor in the very purpose of cost control, which conflict can, and often does, intensify the dispute. Nevertheless, the over-riding problem rests either with the owner's lack of understanding of the makeup of construction cost and/or with the contractor's failure to set up and maintain proper cost control measures.

Construction cost is governed by three major factors:

1. Resources employed in, or required for, the execution of the project;
2. The duration of various activities, which in turn is governed by, or governs, the productivity of resources employed;
3. The sequence or timing of various activities, which in turn determines the overall project duration and governs the levelling, i.e. orderly utilization of the resources employed.

The initial determination of the magnitude and the inter-relationship of these factors governs the estimated cost of the project. Any subsequent variation in the magnitude of inter-relationship of the individual factors will give rise to commensurate variation in the magnitude of the others, or their relation to each other and to the overall cost of the project.

These variations may take many forms, the most common ones being:

1. Increased or decreased resource requirements;
2. Retardation or acceleration of various activities;
3. Working other than in the planned sequence.

5.2 THE DO's AND DONT's TO PREVENT CLAIM DISPUTES

As it was mentioned early in this report, claims arise when one or both parties to a contract fail(s) in his or their respective responsibilities. Hence, the owner and contractor should maintain a relationship based on trust and claim consciousness as follows.

5.2.1 What Owners Should Do To Prevent Claim Disputes

- a- Owners' specifications should clearly and concisely outline the work to be done, the conditions under which it is to be executed and the mode of payment.
- b- The owner should acknowledge extra work or changed conditions and agree to genuinely assess any additional direct and indirect costs resulting therefrom and to compensate its

contractor accordingly.

5.2.2 What Contractors Should Do To Prevent Claim Disputes

- a- Contractors' tenders should be based on a sound estimate prepared after a thorough study of all tender documents and all other information made available to them by the owner, as well as a thorough investigation of site conditions, and after conceiving a detailed plan, all of which should be reflected in a carefully prepared schedule outlining the sequence of execution of the work and the duration of its various parts.
- b- Contractors should properly and diligently organize and execute the work.
- c- The contractor should recognize changes and additions as they occur and notify the owner, in writing, that a change has occurred or additional work is to be done.
- d- The contractor should not proceed with the work before agreeing on the nature of the changes with the owner and the total additional compensation resulting therefrom. Failure to recognize these facts will only create claim disputes situations.

5.3 WHAT HAPPENS IF A CONTRACTOR MAKES MONEY?

If a contractor makes money on the job in spite of unnecessary or unanticipated costs, he may never know that he is entitled to additional payment. If his cost records are good and he is aware of

the situation he may decide that he is satisfied with the profit he has already made and that in the interest of good relations, he will not pursue the matter. However, the contractor may, and should, pursue it in any case.

5.4 WHAT HAPPENS IF A CONTRACTOR LOSES MONEY?

If the contractor has lost money, he will almost always pursue a known claim situation and often will review all his records to see if a hitherto unseen claim situation exists or he may simply make a claim on a compassionate basis.

5.5 WHAT HAPPENS WHEN A CLAIM DISPUTE OCCURS?

When a contractor decides to submit a claim on a job, for whichever of the above reasons, he must determine the basis of his claim and the quantum. If the contractor has prepared a proper estimate for his tender, has followed his tender stage planning in organizing the work, has diligently executed the work within normal industry standards and has kept adequate progress and cost records, he will generally have little trouble in defining a claim situation and calculating the proper, additional monies due to him. If he has failed in any or all of these prerequisites, he will likely arrive at a poorly defined claim, even when his position is favourable, and he will likely base the quantum on his known or imagined losses rather than on its real value. In either of these extreme cases the next step, all too often, is for the contractor to double or triple his

calculated value, or the amount he thinks he should get, because he says it is well known that "owners cut a claim in half and start negotiating downward from there".

5.5.1 Contractor's Attitude

Unfortunately, the contractor's belief that owners seldom take the total value of a claim submission seriously is in many cases justified, particularly when the owner is represented by a government agency of one form or another. It is not uncommon for the first offer of settlement an owner makes to be as ridiculously low as the contractor's claim is high. Instead of both sides making a real attempt to properly and reasonably judge the situation and settle accordingly the same minuet that is so much a part of labour negotiations is staged until one side either weakens or outbluffs the other.

Notwithstanding the incidence of weak and/or ill prepared claims submitted by contractors, it is every bit as prevalent for the owner's assessment of claims to be weak and illogical. It is perfectly logical and correct for an owner to want to pay only that amount which is justly owing to the contractor. It is hurting himself and the whole industry when he tries to pay as little as he can get away with.

5.5.2 Owner's Attitude

Owners in this category decide early that the best defence is offence and the first two thrusts they make are:

- a- "The contractor's bid was bad"; and
- b- "The contractor organized and ran the job in an incompetent manner and therefore any and all additional costs are his responsibility".

5.5.3 Examining the Thrusts

The first thrust can always be shown to have some foundation, however slight. The second thrust is a blatant and irresponsible play on the fact that construction, unlike manufacturing, is not a repetitive process. Each project is a custom made job which on the average, is just about complete by the time it is properly organized. There are of course degrees of this, with a high rise building at one end of the scale, and complicated, heavy construction projects at the other.

If, during the course of a job, claims for additional work or changed conditions remain within the amount budgeted for such contingencies and if relations between owner and contractor personnel remain reasonably good, then such claims are generally negotiated on a relatively amiable basis. However, should major changes take place, it is quite common for an owner's representative to try to stall a settlement on the basis that he needs more time to examine the evidence. The owner's representative either doesn't understand the situation, doesn't know how to check the cost, is hoping the problem will go away, is deliberately trying to avoid payment, or is trying to delay until the work is done, when he believes the true costs will be apparent, and less than anticipated before starting the changed

work. They seldom, if ever, are. It is generally agreed that additional costs, of whatever nature, are less when settled during the course of the work than when they are settled later.

CHAPTER 6

POSSIBLE WAYS TO SETTLE CLAIMS

INTRODUCTION

This Chapter is directed to the various ways that the parties to a construction contract can settle any claims that so very often arise during the course of construction. Primarily, attention is directed to the two main areas, namely arbitration and/or litigation. Most claims are probably settled by negotiation during constructions but more will be said of that later on in this Chapter [61].

6.1 ARBITRATION

6.1.1 Definition

Arbitration is the reference of a dispute or difference [62] between not less than two parties for determination after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction [63].

In essence, arbitration is a system which provides machinery for the settlement of disputes between parties by one or more persons chosen by the parties themselves, as opposed to the determination of such disputes by the courts.

6.1.2 The Arbitration Act, Generally

The Arbitration Act, R.S.O. 1970, c.25 applies to consensual arbitrations [64].

However, the parties must make a "submission" (a written agreement to submit present or future differences to arbitration, whether or not an arbitrator is named therein - s.1(d) The Arbitration Act) in order for the Act to apply. And in light of *Re: McNamara Construction of Ontario Ltd. and Brock University*, (1970) 2 O.R. 583 (C.A.), care must be taken in the drawing of a submission clause.

In the *Re: McNamara* case, the Ontario Court of Appeal held that an arbitration clause used for many years in the Canadian Standard Form of Construction Contract, RAIC-CCA, Document No. 12, was "merely a pathway to arbitration if both parties wanted".

The Canadian Standard Construction Document CCDC No. 12 1974 GC 16.2 now reads:

"In the event that the parties have agreed to submit such disputes to arbitration pursuant to a Supplementary General Condition to the Contract, or by subsequent agreement, either party may, to the extent that such an agreement permits, thereupon request arbitration pursuant to such provisions."

It is submitted that this clause is merely a pathway to arbitration as was held in *Re: McNamara* and as a result, the Arbitration Act would not apply to the above building contract.

The agreement or submission to arbitrate may result from either a general arbitration clause contained in the building contract which applies to any dispute arising in connection therewith, or to particularly defined disputes, or may be an ad hoc agreement made bet-

ween the parties to resolve a specific dispute which has arisen.

If the agreement to arbitrate is a "submission", then, unless a contrary intention is expressed therein, a submission is irrevocable, except by leave of the court and has the same effect as if it had been made an order of the court (s.4 The Arbitration Act).

Failure to make a "submission" renders all proceedings by way of arbitration a nullity, and an award in such circumstances will be set aside and declared unenforceable [65].

6.1.3 Staying of Court Proceedings

A common problem arising when an arbitration clause is contained in a contract is whether or not the courts will interfere and stay any action instituted by the parties.

Section 7 of the Arbitration Act states that the court has a discretion to stay any action if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the "submission" and that the applicant was at the time when the proceeding was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

The general rule is that once the conclusion is reached that the agreement for arbitration is wide enough to embrace the claims presented in the action, it is the prima facie duty of the court to allow the agreement to govern, and the onus of showing that the case is not a fit one for arbitration is thrown on the person opposing the stay of proceedings [67].

The courts are even less likely to interfere if the arbitration

is a condition precedent to an action. But where there are substantial questions of law involved in an action and an agreement to submit disputes to arbitration, the court will not exercise its discretion under this section to order a stay of the action [68].

6.1.4 Ousting the Jurisdiction of the Courts

Although persons may agree to submit their disputes to arbitration, the parties cannot, even by a mutual consent, oust the jurisdiction of the courts [69].

An arbitration clause which purports to oust the jurisdiction of the court is void and unenforceable (however, a clause which merely makes arbitration a condition precedent to the right to resort to the courts is valid) [70].

6.1.5 Whether the Decision of the Arbitrator is Final

An arbitration agreement may provide that the decision of the arbitrator shall be final — (The Arbitration Act, Sch. A, s.11). However, even an award expressed by an agreement to be final may in certain circumstances be open to review by the courts.

An award may be reviewed and set aside for the following reasons: if the award is bad on the face of it; misconduct on the part of the arbitrator such as fraud, bias or impropriety; failure on the part of the arbitrator to observe the rules of natural justice; ambiguity or uncertainty in the award and clear errors of law manifest on the face of the award; an award made outside the scope of the "submission".

6.1.6 Arbitration Procedure

The parties are at liberty to provide their own code of machinery for arbitrations under their contracts. If they do not make such provision, s.5 of The Arbitration Act states that a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in Sch.A (Sch. A contains provisions regarding the procedure to be undertaken in the arbitration).

There are no specific requirements for any procedure to be followed by arbitrators in determining a dispute referred to them except that they must act in accordance with the principles of natural justice, must not exceed the jurisdiction conferred on them by the submission and must decide the dispute in accordance with the law applicable thereto. The arbitrator should, however, as far as practicable, observe the rules applicable to trials of actions in court.

6.1.7 The Award - Enforcement

Section 13 of The Arbitration Act States:

"An award may, by leave of a judge, be enforced in the same manner as a judgement or order to the same effect."

6.2 LITIGATION

6.2.1 Types of Claims

a- Breach of Contract

(i) Damages. The right to claim damages is the usual remedy for a breach of contract. In order to recover

damages, the injured party must be able to establish that he has in fact suffered a loss and that such loss is the result of the breach of contract.

A party whose contractual rights have been violated is under an obligation to mitigate his damages, i.e. he must behave in a reasonable manner with a view to ensuring that the damages flowing from the breach are as small as possible (e.g. a contractor whose contract has been wrongly terminated, must try to find other work for his organization as quickly as possible or he will not be able to claim damages for having his plant and equipment reduced to idleness; or, an owner must attempt to re-let a contract as quickly as possible where a contractor has failed to complete).

Since in the ordinary case, it is difficult to determine what damages an owner will suffer from a failure to complete on time, building contracts often include a provision for the payment of a stipulated sum per day for completing the contract. If the clause provides for what is in fact a penalty, it will be void; if it in fact provides for liquidated damages, it will be enforceable even if the word "penalty" is used in the contract (whether the sum in question is a penalty or liquidated damages is a question of construction).

(ii) Rescission. The right to rescind a contract is the right to annul the legal effect of a contract, and to re-establish the parties thereto, as nearly as possible as this may be done, in the position they were before the making of the contract. A party to a building contract is entitled to rescind if he was induced to enter into the contract by fraudulent, innocent and negligent misrepresentations; by mistake or by undue influence or duress. The remedy of rescission is also available to an innocent party when the guilty party is in breach.

However, in order to obtain the remedy, the party having the right to rescind must be able to restore the other party to the position he was in before the making of the contract (restitutio in integrum). Nor will the remedy be available if the innocent party, with full knowledge of the facts entitling him to rescind, has affirmed the contract.

b- Quasi-Contract, Quantum Meruit

By virtue of the doctrine of quantum meruit ("as much as he has earned"), the courts will hold a person liable in certain circumstances to pay a reasonable remuneration for the work performed for his benefit, i.e. the law will imply a promise to pay a reasonable amount if the circumstances bringing the doctrine into play exist.

Since payment on a quantum meruit basis can arise only as the result of an implied or quasi-contract, the doctrine can have no application if a contract exists covering payment for the particular work in question [71].

A contractor can, therefore, recover payment on a quantum meruit basis only if either he has performed work for an owner in respect of which there never was any agreement with regard to payment or if the work has been performed in pursuance of a contract which has been abandoned by the owner, or changed so fundamentally that the payment provisions in the contract no longer have any application to the work actually performed. A contractor who himself abandons a contract without legal justification cannot claim for work done on a quantum meruit basis, unless the owner accepts or agrees to pay for it.

Once it has been established that a contractor is entitled to be recompensed on a quantum meruit basis, it is up to him to establish by proper evidence, what a reasonable remuneration for the work done would be in the particular case.

c- Tort - Negligent Misrepresentation

If, in the ordinary course of business or professional affairs, a person seeks information or advice from another who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgement was being relied on, and the person asked chooses to give the information or advice without

clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care, an action for negligence will lie if damage results [72].

Hedley Byrne, properly understood, covers this particular proposition: if a man who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another, be it advice, information or opinion, with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side into a contract with him, he is liable in damages [73].

Walter Cabott vs. The Queen (1974), 44 D.L.R. (3d) 82 (Fed. Ct.-Trial Div.) serves as a good example of the application of the Hedley Byrne principle to a building contract dispute. In that case, the plaintiff was awarded contracts by the Federal Government for the construction of fish hatcheries. At the time tenders were invited, the defendant did not disclose that several other contracts would be let for simultaneous work on the same sites. This was a matter of some importance to the plaintiff who had contracted on a lump sum basis. The lack of exclusive possession of the work site impeded efficiency, caused delays and resulted in extra cost to the plaintiff. The plaintiff sued to recover these costs from the defendant.

Mr. Justice Mahoney held at p. 98:

"I have no difficulty in finding that the relationship between the person who invites tenders on a building contract and those who accept that invitation is such a particular relationship as to impose a duty of care upon that person so as to render actionable in an innocent but negligent misrepresentation in the information which he conveys to those whom he intends to act upon it. I am further of the view that, where the information is clearly material and obviously very much in the mind of the party withholding it, as in this instance, the failure to disclose it is a breach of the duty owed."

NOTE: In Dominion Chain Co. Ltd. vs. Eastern Construction Co. Ltd. (1976), 68 D.L.R. (3d) 385 (Ont. C.A.), Wilson, J.A. (dissenting in part) held where an action is brought against an architect, engineer or builder for negligent performance of his contractual obligations to the owner, the owner's suit should properly be brought in contract only.

The decision made by the Ontario Court of Appeal in this case has been heard by the Supreme Court of Canada (Giffels Associates Limited vs. Eastern Construction Company Limited), but the judgement has not yet been rendered. However, one of the issues which the court must decide is whether it was open to the plaintiff, Dominion Chain, to frame its action against Giffels and Eastern in tort (as it did) by

reason of the negligent conduct of these defendants, notwithstanding the existence of contracts between the plaintiff and each of these defendants.

d- Seizure of Equipment and Materials

In general, an owner has no right to seize the plant, materials or equipment belonging to a contractor which he has brought on to the owner's land if the contractor abandons the contract; if the owner uses such plant, material or equipment without the contractor's consent, he must reimburse the contractor for such use.

Many building contracts, however, contain provisions giving the owner the express right to seize and use any plant, material or equipment which the contractor has brought on to the site if he abandons the contract, or if the circumstances arise which entitle the owner to forfeit the contract. An owner who wishes to exercise such a right must comply strictly with any contractual provisions relating to its exercise, and failure to do so amounts to a wrongful seizure, which in turn entitles the contractor to damages for any loss which he has sustained thereby.

6.2.2 Limitation of Actions

a- Contract

Ontario retains the distinction between simple contracts and those under seal. Where a cause of action arises on a simple contract, the limitation period is six years (s.45(1) (g) Limitations Act, R.S.O. 1970, c.246), and where a cause of action arises from a

contract under seal the limitation period is twenty years (s.45(1) (b) Limitations Act).

The limitation period starts to run on the date of the breach and when there is a competent plaintiff and defendant. It is always a matter of construction as to when the breach occurs.

b- Tort

The action for negligence is subject to a six year limitation period (Limitations Act, R.S.O. 1970, c.246, s.45(1) (g)). The limitation period starts to run in an action for negligence from the date of the negligent act although the plaintiff may at a later date have suffered damage as a result.

In *Farmer vs. H.H. Chambers Ltd.* (1973), 31 D.L.R. (3d) 147 (Ont. C.A.), the cause of action involved a negligently performed building contract. It was held that the date at which the cause of action accrued was the date of the completion of the building whether the action was framed in contract or tort. So long as the statute remains in its present form, the time must run from the date when the contract was performed irrespective of how the claim was framed.

6.2.3 The Crown as a Party to an Action

a- Suing the Crown

- (i) Her Majesty the Queen in the Right of Canada. Section 3(1) of the Crown Liability Act, R.S.C. 1970, c.c-38 states:

"The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity,

it would be liable:

(a) in respect of a tort committed by a servant of the Crown, or

(b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property."

However, section 4(4) states:

"No proceedings lie against the Crown by virtue of paragraph 3(1) (b) unless, within seven days after the claim arose, notice in writing of the claim and the injury complained of:

(a) has been served upon a responsible official of the department or agency administering the property or the employee of the department or agency in control or charge of the property, and

(b) a copy of the notice has been sent by registered mail to the Deputy Attorney General of Canada."

With respect to proceedings against the Crown in the right of Canada, the law of the province in which the cause of action accrued shall govern (s.19 Crown Liability Act).

(ii) Her Majesty the Queen in the Right of Ontario

Section 5(1) of the Proceedings Against the Crown Act, R.S.O. 1970, c.365, states:

"Except as otherwise provided in this Act, and notwithstanding section 11 of The Interpretation Act, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject:

(a) in respect of a tort committed by any of its servants or agents;

(b) in respect of a breach of its duties that a person owes to his servants or agents by reason of being their employer;

(c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and

(d) under any statute; or under any regulation or by-law made or passed under the authority of any statute."

Section 7(1) of the Proceedings Against the Crown Act states:

"Subject to subsection 3, except in the case of a counterclaim or claim by way of set-off, no action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Minister of Justice and Attorney General may

require such additional particulars as in his opinion, are necessary to enable the claim to be investigated."

Section 7(3) of the Proceedings Against the Crown Act states:

"No proceedings shall be brought against the Crown under s.5(1) (c) unless the notice required by sub-section 1 is served on the Crown within ten days after the claim arose."

It should be noted that failure to conform with the notice requirements in no way affects the limitation periods, but failure to conform with the requirement will prevent a plaintiff from bringing his claim.

b- Limitation Periods do not Affect the Crown

It should be noted that in Attorney-General for Ontario vs. Watkins (1975), 8 O.R. (2d) 513 (C.A.), it was held that s.45(1) (g) of the Limitations Act, R.S.O. 1970, c.246, which provides that an action for a "simple contract or debt shall be commenced within six years after the cause of action arises", does not bind the Crown. Therefore, because 'time does not run against the Crown', the Crown was permitted to bring an action to recover money owing to it despite the expiry of the six year period.

c- Suing Public Authorities

Section 11(1) of The Public Authorities Protection Act, R.S.O. 1970, c.374 states:

"No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof."

Section 11(2) states: -

"Subsection 1 does not apply to an action, prosecution, or proceeding against:

- (a) a Sheriff for an act, neglect or default in certifying as a writ of execution that binds lands; or
- (b) a land registrar for an act, neglect or default in connection with his duties under the Registry Act and The Land Titles Act."

There are two criteria to determine whether a body is a public authority: the degree of control exercised over it by the higher levels of Government and whether it carries out its objects in pursuance of a public duty [74].

In order for a duty to be a public duty, it must be owed to all the public alike or be an authority exercised impartially with regard to all the public. The protection does not extend to a mere

incidental or subsidiary power [75].

d- What Court - Federal or Provincial?

In light of the recent Supreme Court of Canada decision in *McNamara Construction vs. The Queen* (1977), 75 D.L.R. (3d) 273, litigants should be aware that the jurisdiction of the Federal Court (Trial Division) has certain limitations.

In the *McNamara* case, the Crown in the right of Canada entered into a contract with a construction company for the construction of a Young Offenders Institution in Alberta. This contract was preceded by a consulting contract entered into between the Crown and a firm of architects and engineers to prepare the plans and specifications upon which the construction contract was based. Alleging a breach of their respective contracts by the construction company and the firm of architects and engineers, the Crown brought actions for damages against them in the Federal Court.

Laskin, C.J.C. (delivering the judgement of the Court) held that the Federal Court had no jurisdiction to hear the claim by the Crown. The main issue in the appeal was whether the Federal Court of Canada may be invested with jurisdiction over a subject at the suit of the Crown in right of Canada which seeks to enforce in that Court a claim for damages for breach of contract.

The Crown asserted that s. 17(4) of the Federal Court Act, R.S.C. 1970, c.10 (2nd. supp.) invested the Federal Court (Trial Division) with such jurisdiction. Section 17(4) states:

"The Trial Division has concurrent original jurisdiction:

(a) in proceedings of a civil nature in which the Crown or the Attorney-General of Canada claims relief; and

(b) in proceedings ~~in~~ which relief is sought against any person for anything done or omitted to be done in the performance of his duties as an officer or servant of the Crown."

The Chief Justice held at p.278 that:

"... what must be decided in the present appeals, therefore, is not whether the Crown's action is in respect of matters that are within federal legislative jurisdiction but whether it is founded on existing federal law. I do not think that s.17(4), read literally, is valid federal legislation under s.101 British North America Act, 1867 in purporting to give jurisdiction to the Federal Court to entertain any type of civil action simply because the Crown in the right of Canada asserts a claim as plaintiff."

And at page 280 he states:

"It was the contention of the A-G of Canada on behalf of the Crown that the construction contract, being in relation to a public work or property, involved on that account federal law. What federal law was not indicated. Certainly there is no statutory basis for the Crown's

suit, nor is there any invocation by the Crown of some principle of law peculiar to it by which its claims against the appellants would be assessed or determined."

The McNamara decision was followed by Cattnach, J. in *The Queen vs. Rhine* (1977), 75 D.L.R. (3d) 730 (Fed. Ct. - Trial Div.), where it was held that the mere existence of federal law on the subject matter of an action is not sufficient to confer jurisdiction on the Federal Court of Canada. Nor is it sufficient that liability arises in consequence of a statute. Only if the statute itself imposes the liability would the Court have jurisdiction.

6.3 SETTLEMENT

The question of settlement sooner or later arises in nearly all cases except those in which the parties have developed such animosity towards one another that neither is interested in making the concessions necessary to compromise. Although many cases never reach the trial stage of an action, a party should always be fully prepared to go to trial. Nor should a party disclose too early in the action that he is willing to settle the case.

The parties to a building contract may provide a method of settling a dispute by including within the contract circumstances which will entitle an owner or contractor to terminate the contract and the remedies open to the party terminating.

Many building contracts give the owner the right to terminate in the event the contractor:

1. fails to proceed with the work with due diligence;
2. fails to make payments due to his subcontractors, supplier or material men;
3. fails to remedy defective work when called upon to do so;
4. persistently disregards instructions from the architect or engineer;
5. is adjudged bankrupt or a receiver is appointed on account of his insolvency.

Similarly, in most building contracts, the contractor is given the right to terminate in the event the owner:

1. is adjudged bankrupt or a receiver is appointed on account of his insolvency;
2. fails to pay the contractor;
3. if the work is stopped by order of the court for a fixed period.

In any individual contract, there may be a requirement for notice of default to be given or a requirement that an architect or engineer's certificate must be issued certifying sufficient cause exists to warrant termination, or a method by which and a person who determines whether or not there has been default. A party exercising the right of termination must comply strictly with the terms of the contract or he himself may be guilty of a breach of contract.

The following is an example of a termination of contract clause found in a building contract with the Crown:

TERMINATION OF CONTRACT

19.(1) The Minister may at any time by giving notice to that effect terminate the contract.

(2) The Contractor will upon receipt of a notice pursuant to subsection (1) cease all operations forthwith.

(3) If the contract is terminated pursuant to subsection (1), Her Majesty will pay to the contractor an amount equal to the lesser of:

a- the costs as agreed upon by the contractor and the engineer of all labour, material and plant supplied by the contractor as at the date of termination, or, if the contractor and the engineer cannot agree, as calculated in accordance with the formula set out in section 46 of the General Conditions less all amounts already paid to the contractor by Her Majesty and less all amounts which the contractor is liable to pay to Her Majesty, and

b- the amount calculated in accordance with the Terms of Payment which would have been payable to the contractor had he completed the work.

(4) If the contract is terminated pursuant to subsection (1) Her Majesty will pay to the contractor an amount equal to the cost as agreed upon by the contractor and the engineer of all labour, material and plant supplied by the contractor as of

the date of termination or, if the contractor and the engineer cannot agree, as calculated in accordance with the formula set out in section 46 of the General Conditions, less all amounts already paid to the contractor by Her Majesty and less all amounts which the contractor is liable to pay to Her Majesty.

(5) Subsection (3) is applicable only to a Mixed Price Arrangement and subsection (4) is applicable only to a Unit Price Arrangement.

6.4 SUMMARY

6.4.1 Arbitration vs. Litigation as a Method of Dispute Resolution

The argument for the use of arbitration that is most often heard is that it is less expensive than litigation. The writer is for the view that before any broad statement can be made as to which of the two procedures is the least expensive, it is necessary to consider very carefully the subject matter of the claim upon which a determination is to be made. For example, if a contractor is involved in a very complex matter and he chooses arbitration, it is the writer's view that in the end it is probably going to be a more expensive procedure. An arbitrator is going to cost anywhere between \$375.00 and \$500.00 per day, plus the rental of a room to hold the arbitration plus the cost of a reporter. If the matter being arbitrated is complex, one may wish to have his side of the story presented by his own lawyer or by an executive of his company whose time

is money. It seems that if the item that one wishes to have arbitrated is very simple and one expects it to be very short insofar as arriving at a decision, then it would be the writer's recommendation that one should arbitrate. Oddly enough, it is the writer's impression that in the City of Ottawa, arbitration is not a procedure readily used by contractors. It may well be that the answer to that is because much of the construction work in the City of Ottawa is done for the Government and the Government through Public Works and/or the Treasury Board does not enter into construction contracts that have arbitration clauses; see Appendix II.

Litigation, unlike arbitration, is a very formal means of resolving the differences in respect of the claim. It can be lengthy and it can be expensive but it is believed that in the complex type situation, it is more effective. If one is successful in his action, his expenses are somewhat diminished because of costs being awarded to him, which of course, his own lawyer will take into account when rendering his own account to his client. There is an added feature in litigation that is not available in arbitration and that is the procedure known as an Examination for Discovery. Briefly, this is a procedure in the Rules of Practice in Ontario whereby each party prior to trial is entitled to examine the other parties and is entitled to know all of the facts upon which the other parties will reply to prove his point at trial. The significance of this is that one should, in most situations, at the end of an Examination for Discovery be in a position to assess fairly accurately his chances of

success or failure at trial. It is at this level, (the Examination for Discovery level), that most lawyers settle the actions, and, of course, one is making the settlement having all of the facts in front of him.

Whether or not one's option is for arbitration or litigation, most cases are won or lost on the evidence except in the very unusual situation where it is only a point of law involved. Generally, however, the facts will determine the outcome.

If one starts every job with the thought in the back of his mind that before this job is completed, he may be involved in either arbitration or litigation, then it is believed that he should be in a good position if either of those situations occur. This is because one suspects that he may have problems on a particular contract down the road, then from day one, he prepares and documents each and every event so that when he is involved in a dispute, he has evidence on which his lawyer or representative can rely.

These are simply a few thoughts with respect to procedures in resolving disputes. The writer has not touched in detail the manner in which an arbitration or, indeed, litigation is conducted but one, namely arbitration, is less formal than the other and chances are that the arbitrator will have more knowledge in the subject matter than a judge. As one is probably aware, the Rules of Evidence in arbitration are not adhered to and this can work both ways, for and against. The choice as to the route to follow in having claims resolved will depend on its nature and what one thinks will be the

duration of the presentation as well as the complexities involved.

Finally, negotiation from the point of view of both parties to the contract is probably the least expensive method in settling the claim but it should be done with all of the facts at one's disposal so that any settlement is arrived at on an informed basis. Again, in order to be in a position to do that, it is imperative that one's records be kept so that if negotiations are opened up to resolve a claim, he is in a position to know exactly what he is giving away and for what reason. It is fair to say that when a settlement of a claim is negotiated that both parties end up giving up something and one can only enter into meaningful negotiations for settlement if he is prepared to give up some of his claim. If one is not prepared, then it seems that he ought to take one of the other courses of action open to him.

6.4.2 Percentage Number of Claim Disputes That Were Settled in Courts

It is extremely difficult if not impossible to obtain the actual number of claim disputes that have been settled in courts, due to the fact that most claim disputes at a later date turn out to be change orders. Hence, it is submitted that between 5% and 10% of claim disputes in Canada end up in Canadian courts. Far more often, claim disputes that end up in court are mainly against governments and/or public agents.

In the West of Canada, claim disputes are far less than in the East of Canada. This is because the East has recognized claims

earlier than the West. However, the trend for claims is picking up in the West of Canada, particularly in Vancouver, British Columbia.

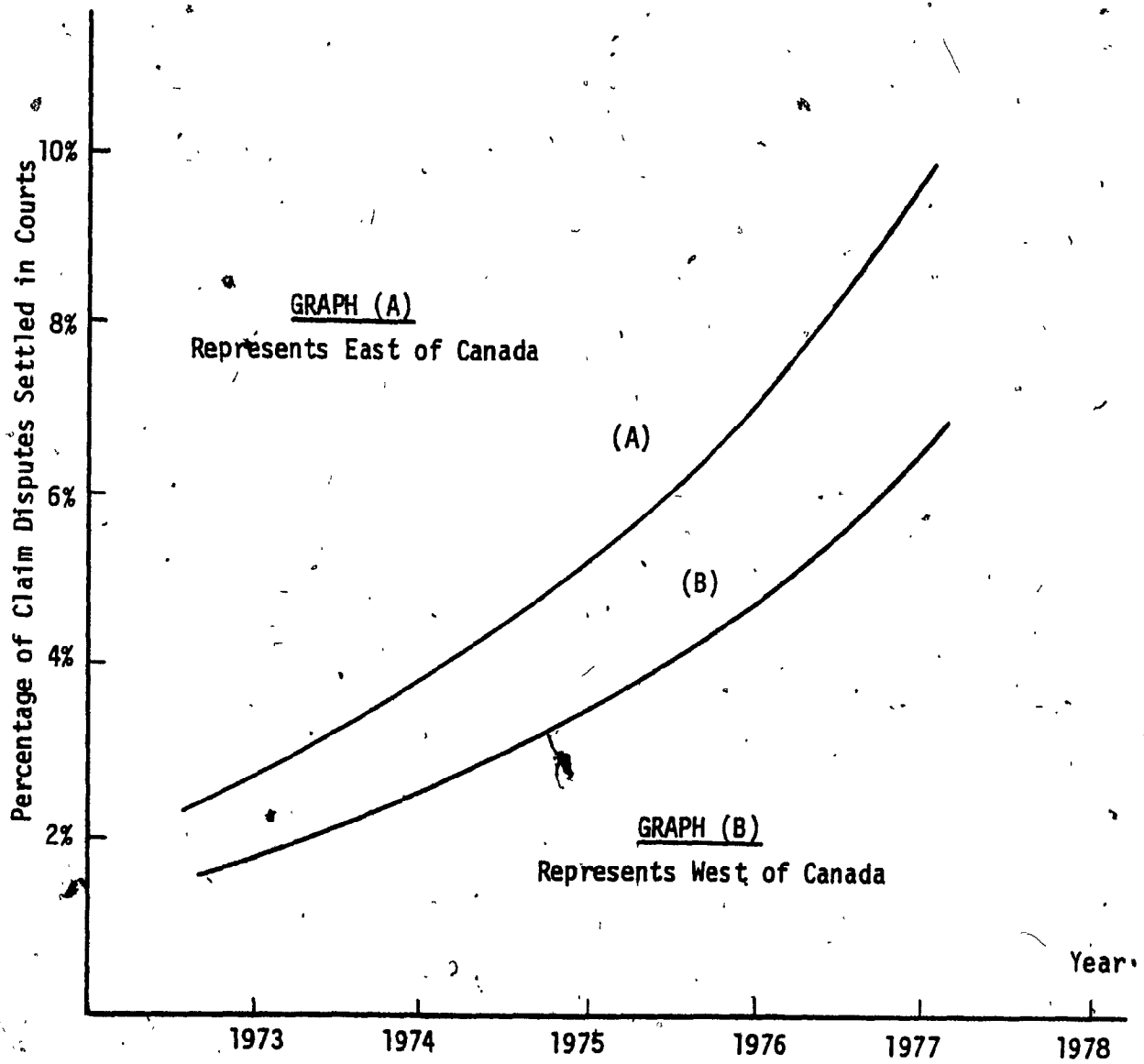
Finally, the vast majority of claim disputes are settled by negotiation between the parties concerned, particularly with sub-contractors; see Graph I.

It has been suggested by Mr. Blackie and Mr. Revay, that a good guesstimate for the percentage of claims settled in courts for the last five years would be a ratio of 5% to 10% maximum. This ratio appears to be higher in the Eastern part of Canada.

Figure 1

Percentage of Claim Disputes Settled
in Courts for the Last Five Years.

Collected Approximate Data Made by the Writer.



CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

7.1 CONCLUSIONS

Claims are not a method to obtain additional compensation, therefore, the prevention of claim disputes is extremely important simply because, where claims develop, there is always a loss of productivity. This loss of productivity costs money to all the parties concerned, i.e. the contractor, the owner, the engineer and very often, the general public.

The reason that claims have to be recognized is the increase of construction costs. The question is: can claim disputes be prevented? The answer is that claims should be reduced, but neither can they be prevented nor should they be prevented; this has to be a question of economy.

Under special circumstances and in order to prevent a claim, one must be prepared to spend a substantial amount of extra money whereby, the cost/benefit analysis may not justify the expenditure. Therefore, one might take a chance of an eventual claim situation rather than spending the money to prevent it.

For example, a pure and simple soil condition claim: in order to conduct a sufficient subsurface investigation to make sure there will be no further development in soil conditions, one would have to spend extra amounts of money in subsurface investigations that would

increase the construction costs substantially in excess of what would have been the cost of construction. Therefore, in that particular case, claims should not be prevented.

There is another area where claims are very relevant and that is the area of delay. Delay or interference claims, which generally arise from the fact that construction has started and is completed, is an area some people refer to as a fast tracking method of construction management. It is believed that it is a highly abusive area and substantial amounts of money have been wasted through ignorance, laziness, unqualified supervision, etc.

Even in that field, there are situations where claims cannot be prevented and should not be prevented because the cost/benefit analysis may not justify the expenditure as for instance, in the industrial complex and particularly the petrochemical industry.

In that direction, technology has developed so fast that the first person on the market with a new product is the one to profit before anyone else for a period of between five and ten years maximum; this is because there is no chemical product which remains competitive for more than ten years. Correspondingly, if one enters the market 6-12 months earlier than the competition, then one would benefit by it.

Once the technology is available, the owner/contractor wants to start construction without waiting for the design to be completed. In that particular case, one is going to build from hand to mouth, or as soon as the drawing is half finished, the contractor is going to

implement it in the field, resulting in it costing extra money.

It is a very inefficient way of executing construction work and it will give rise to claim disputes. However, in that particular sense, there are economical reasons for it. Then again, one does not want to prevent a claim, but rather to reduce it.

Basically, claims can be prevented, but whether they should be prevented or not is a question of economy, since sometimes it costs more to prevent a claim than to develop it. However, that does not mean that people should or should not be claim conscious.

7.2 RECOMMENDATIONS

7.2.1 From the Point of View of the Construction Industry

Fortunately, most contracts nowadays contain clauses for "Changed Conditions" and "Extra Work". Their inclusion facilitates the processing of claims, but disagreements still occur with respect to their interpretation and application.

Thus, it can be concluded that claims are here to stay and that, if processed properly, they are a sensible vehicle for handling desirable changes in the contract that were not foreseen at the time that it, and its related documents, were prepared. The procedure however, should be better understood and used, rather than abused.

The key to the successful resolution of a dispute is a good understanding of the underlying law and what constitutes a change in the contract, including a thorough knowledge of one's rights to recovery.

The key to the efficient settlement of claims are better records and an appreciation of the principles involved in the quantification of damages.

Negotiation is obviously the least expensive level at which to settle disputes and claims. Failure there may involve arbitration or litigation and a corresponding appreciation of the pros and cons and related procedures of these options for resolving disputes.

It is perhaps too much for claims to be hailed as a positive means for progressive construction practice. On the other hand, their submission should not be regarded solely as an inevitable evil, bordering on fraud and blackmail. There should be no sympathy for any contractor who seeks to compensate for inefficiency by submitting spurious claims. Then too, the contractor who sets up his Claims Unit first, before bothering to put together his construction team, may possibly have his priorities out of sequence, although it is no doubt realistic to assume that there will be at least some claims on any sizeable project.

Certainly it may be said, though, that the submission of an effective claim, well supported by figures and rationale, is the sign of an efficient contractor with a good cost control system.

Similarly, if an owner or his agents deals with construction claims and disputes knowledgeably, fairly and speedily, it is a good reflection on his general efficiency in the field of contract administration.

In summary, inasmuch as contract disputes and claims settlement

are an integral part of the established procedures for executing and administering construction projects, it behooves all concerned to be as well versed in ways and means to achieve their speedy resolution as they are in coping with other aspects of the construction process [1].

7.2.2 From the Point of View of the Law Firm

The concept of a construction contract negotiated by two equal parties and executed after hard bargaining is an illusion in the vast majority of construction projects. Where contracts are awarded by public bodies, the contract conditions are imposed by the owner in the tender documents. Inevitably, such contracts, and primarily the various disclaimer provisions, are heavily biased in favour of the owner. Prior to the signing of a contract, the contractor's attorney may be of assistance in demonstrating the significance of certain clauses and the steps his clients must take to protect their position [45].

In a general way, the following acts or omissions by contractors make it more difficult for their legal advisors to assist successfully. With rare exceptions, the contractor first consults his lawyer far too late. If this is done as a matter of economy, it is false economy. Instead of being able to influence the fact pattern, the contractor's attorney is presented with a fait accompli. The contractor, under pressure from the owner, and with the engineer's admirable desire "to get on with the job", has too often allowed a powerful bargaining position to evaporate. Most contractors will be

generally familiar with the line of cases in which Canadian courts, while rejecting claims, have said "Your recourse was to stop the job; having continued, you have lost your right to make a claim". Occasionally, the contractor has presented his claim, had it rejected, and then consults his attorney. By acting in this manner, the contractor may have seriously limited his flexibility in choosing the legal battleground or perhaps even lost his right to claim.

The second area where contractors frequently neglect precautionary steps is that of proof. Most contractors dislike paperwork, an attitude easily understood, but difficult to defend before a judge or arbitrator. Notice provisions in contracts are neglected, extra work is performed without written authorization, erroneous or biased minutes of site meetings are not objected to, self-serving letters from the owner or his representatives are left unanswered, written notes are not maintained of important telephone conversations or verbal instructions, contractual defaults by the owner are not confirmed by letter. Witnesses disappear, memories are highly fallible and, in the absence of written evidence, bona fide claims have little chance of success.

Finally, contractors' costing records, while perhaps adequate for certain purposes, are too often of little use in preparing and proving claims, especially claims for impact costs.

7.2.3 From the Point of View of the Writer

It is the writer's opinion that the prevention of claim disputes can be achieved if the parties concerned are fair to each other.

However, fairness in the construction industry is hard to achieve, but there are measures and precautions that, if employed by both the owner and the contractor, will result in reducing claim disputes by some 80%; these are:

a- From the Owner's Side

- Hiring competent key personnel during construction and granting them full authority;
- Hiring qualified engineering firms;
- Hiring or consulting legal specialists for writing or revising specifications;
- Using sound estimating procedures during tendering and good cost control during construction through consultants;
- Employing a realistic schedule for the execution of the work;
- Providing on schedule, access to site, construction drawings, services, permits, etc.

b- From the Contractor's Side

- Requesting additional information regarding the work during the bid period;
- Hiring consultants and/or experts during the bid period or whenever required; this can be ruled out if cost/benefit analysis does not justify the expenditures

- Making satisfactory site visits and assuring the quality of soil investigations;
- Hiring competent planners, estimators and cost-controllers during construction;
- Hiring competent Project Managers and key personnel and granting them full authority;
- Employing an efficient cost control system during construction;
- Monitoring and controlling the construction schedule.

c- Conclusion

Every claim situation is different. No two contracts are identical and there is an infinite variety to fact patterns. However, the basic principles upon which claims must be based and prepared are constant. Careful preparation of claims, based on full and accurate cost and progress records, will not only result in larger awards to contractors, it will also lead to more voluntary settlement of claims.

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65. Rolufs vs. Jenkins: 1937, O.W.N. 624 (H.C.).
66. Ibid.
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68. Jussem et al. vs. Nisson Automobile (Canada) Ltd. et al: 1973, 1 O.R. 697 (H.C.).
69. Scott vs. Avery: 1856, 5 H.L.Cas. 811.
70. Guerin vs. The Manchester Fire Assurance Co.: 1898, 29 S.C.R. 139.
71. Peter Kiewit Sons' Co. vs. Eakins Construction Ltd.: 1960, S.C.R. 361.
72. Hedley Byrne & Co. Ltd. vs. Heller & Partners Ltd.: 1963, 2 All E.R. 575 (H.L.).
73. Esso Petroleum Co. Ltd. vs. Mardon: 1976, 2 All E.R. 5 per Lord Denning at p. 16.
74. Howard vs. York University et al.: 1974, 8 O.R. (2d) 175 (Cty. Ct.).
75. Berardinelli vs. Ontario Housing Corporation et al.: 1977, 75 D.L.R. (3d) 348.

APPENDIX I EXAMPLES OF CONTRACT INTERPRETATION

WHAT THE CONTRACT SAID

This agreement is a fixed price contract in value of \$182,000.

Deliver one laboratory model of receiver in accordance with the specification set forth in Section 2.

The agreement is a CPFF contract with estimated cost of \$212,000 & fixed fee of \$19,000 for a total value of \$231,000.

Contract for engineering development of avionics subsystem in amount of \$257,000. Contract has requirements for submission of monthly financial & technical progress reports to the buyer.

If at any time the contractor has reason to believe that costs will exceed total value of this (CPFF) contract, the contractor shall notify the Contracting Officer in writing.

HOW THE ENGINEER INTERPRETED IT

I can spend up to \$182,000.

Receiver is finished, it works and I have inspected it. The Government technical man wants it so I'll take it with me & give it to him to save money & time. I have to make trip anyway.

This is cost type contract & the estimated cost is merely a target. If it is exceeded, the Government will pay the bill.

I must produce an excellent item of hardware. Reports on the financial status of the contract are somebody else's problem.

I told my technical monitor that we were going to overrun. That takes care of the notification, now we can get on with the job. It's a good thing I didn't tell him any sooner, before it was too late to stop.

WHAT THE CONTRACT ADMINISTRATOR SAYS IT MEANS

If the contract costs exceed the amounts budgeted for direct & indirect costs, which equals \$182,000 minus expected profit, the company profit will be reduced or eliminated.

After all company & Government inspection requirements have been met and Form DD250c completed, the receiver must be shipped to the buyer in accordance with the packing & shipping instructions in the contract.

Any costs above \$212,000 will erode the company's profit (the fee). If the total of \$231,000 is exceeded, the Government need not reimburse any of the overrun unless the buyer has given prior permission in writing for it.

Late or inadequate reports will cause the buyer to downgrade the performance of TRM. This downgrading will remain in the "Contractor's Performance Evaluation" data bank for the next three years and will affect the award of future business to TRM.

Such notice is required at the earliest time the contractor acquires such knowledge. Failure to notify the Contracting Officer will jeopardize collection of any overrun. Further, the Contracting Officer's response authorizing continued work is required to protect collection of the overrun [32].

APPENDIX II

THE SETTLEMENT OF CLAIM DISPUTESCASE STUDY

a- Copyright Action - Netupsky et al vs. Dominion Bridge Co. Ltd.

* (i) FACTS

- (Note: the following is a very condensed version of an extremely complex fact situation.)
- An architect (Hamilton) devised a novel idea of a structure which could serve the dual purpose of an outdoor stadium and indoor ice arena, the construction of which necessarily involved a high content of structural steel.
- Hamilton engaged by a contract in writing, a structural engineer (Netupsky) and together they entered plans in a design competition for the construction of what is known today as the Ottawa Civic Center.
- Hamilton (and others) succeeded in winning the contract.
- Netupsky's final solution for the frame was ingenious.
- Dominion Bridge became the steel fabricators for the job.
- The architects represented the City of Ottawa throughout the project.
- Netupsky's plans became the property of the City of Ottawa, Netupsky being paid for his plans.
- Dominion Bridge would not build its part of the structure with

the complexities for the money which the city had available, but suggested several cost-saving changes including the deletion of the pre-stressing feature.

- The changes which the architects (representing the owner) agreed upon to save costs necessitated redesigning and recalculation.

Netupsky would not do the same without immediate payment by Hamilton of a substantial sum of money.

- The architects instructed Dominion Bridge and its engineers to carry out the changes which Dominion Bridge did do.

- A layman would be unable to discern any difference between the structure built according to the final plans and one constructed from Netupsky's plans.

- Dominion Bridge engineers never denied that credit for the design should go to Netupsky.

(11) ISSUE

Whether Dominion Bridge was liable for an unauthorized use or conversion of Netupsky's plans when it redesigned to some extent, without affecting the artistic character and design, the construction of the work for the purpose of saving costs, and made copies of the plans necessary for its part in the construction?

(iii) TRIAL DECISION - 1968, 56 C.P.R. 134 (B.C.S.C.)

The Learned Trial Judge dismissed Netupsky's action, holding that the physical changes complained of, resulted from a change in the method of construction used to bring about the same shape and were not infringement.

(iv) COURT OF APPEAL DECISION - 1969, 5 D.L.R. (3d) 195 (B.C.C.A.)

The Court of Appeal reversed the trial decision and found that Netupsky had a copyright in his structural design plans which were reproduced by Dominion Bridge, and this constituted infringement as the reproduction was made without the consent of Netupsky. The Court of Appeal, in awarding \$1,000.00 damages and an injunction restraining any further reproduction, held among other things the structural design plans prepared by Netupsky were, like architect's plans, subject to copyright. Because Netupsky did not confer, either expressly or impliedly, upon Dominion Bridge or anybody else the right to make substantial changes in the plans, the Respondent was liable for infringement.

(v) SUPREME COURT OF CANADA - 1971, 24 D.L.R. (3d) 484

The Supreme Court of Canada allowed the appeal and dismissed Netupsky's action. The Court held that the plans had been prepared and paid for pursuant to the agreement between Hamilton and Netupsky. This agreement provided for changes and the basis for payment for them. Netupsky in refusing to make the changes sought, was in

breach of contract. The changes or modifications not only were not forbidden, but were in contemplation at the time the City of Ottawa, and through it, Dominion Bridge, became the licensee of Netupsky for the construction of its Civic Center.

Such a licence carried with it an implied consent to make the changes which Netupsky should have made and refused to make, and also, an implied consent to reproduce the plans in as many copies as might be necessary for the construction of the work.

The alterations made by Dominion Bridge were within the limits of the licence which should be considered acceptable.

b- Libel and Slander Action - Supreme Court of Canada
Netupsky vs. Craig (1972), 28 D.L.R. (3d) 742

In this case, when Hamilton had advised Netupsky that Dominion Bridge proceeded with the erection of the structure in accordance with the altered design, which was created after Netupsky refused to make the changes, Netupsky reacted violently by a highly provocative telegram which he sent to the Director of Planning and Works, of the City of Ottawa. The telegram stated in part that the use by Dominion Bridge of the altered design placed the whole project on an uneconomical and unsafe structural basis.

The Director of Property for the City of Ottawa requested a report regarding this matter from the defendants (respondents in this appeal). It was the reply to this letter that contained the alleged libel. The letter stated in part:

"We as architects, mindful of our responsibility for safety, chose to accept the advice of the very experienced engineers of Dominion Bridge rather than Boris Netupsky. . . We have therefore ceased to consult Mr. Netupsky. He is disgruntled that we are no longer consulting with him and is trying to force us to pay him for work that he has not done to our satisfaction. We wish to give you a firm assurance that his allegations that the revisions we have made to the structure 'places the whole project on an uneconomical and unsafe structural basis' are completely false, groundless, untrue and libellous."

The Supreme Court of Canada dismissed an appeal from a judgment of the Ontario Court of Appeal which allowed an appeal from a decision of Haines, J., whereby it was ordered that Netupsky recover \$250,000.00 and costs from the defendants. The Court held that the City's request to the architects for a report on the matter creates an occasion of qualified privilege in respect of the architect's reply. A person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege. He will be protected, even though his language should be violent or excessively strong, if having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true, and