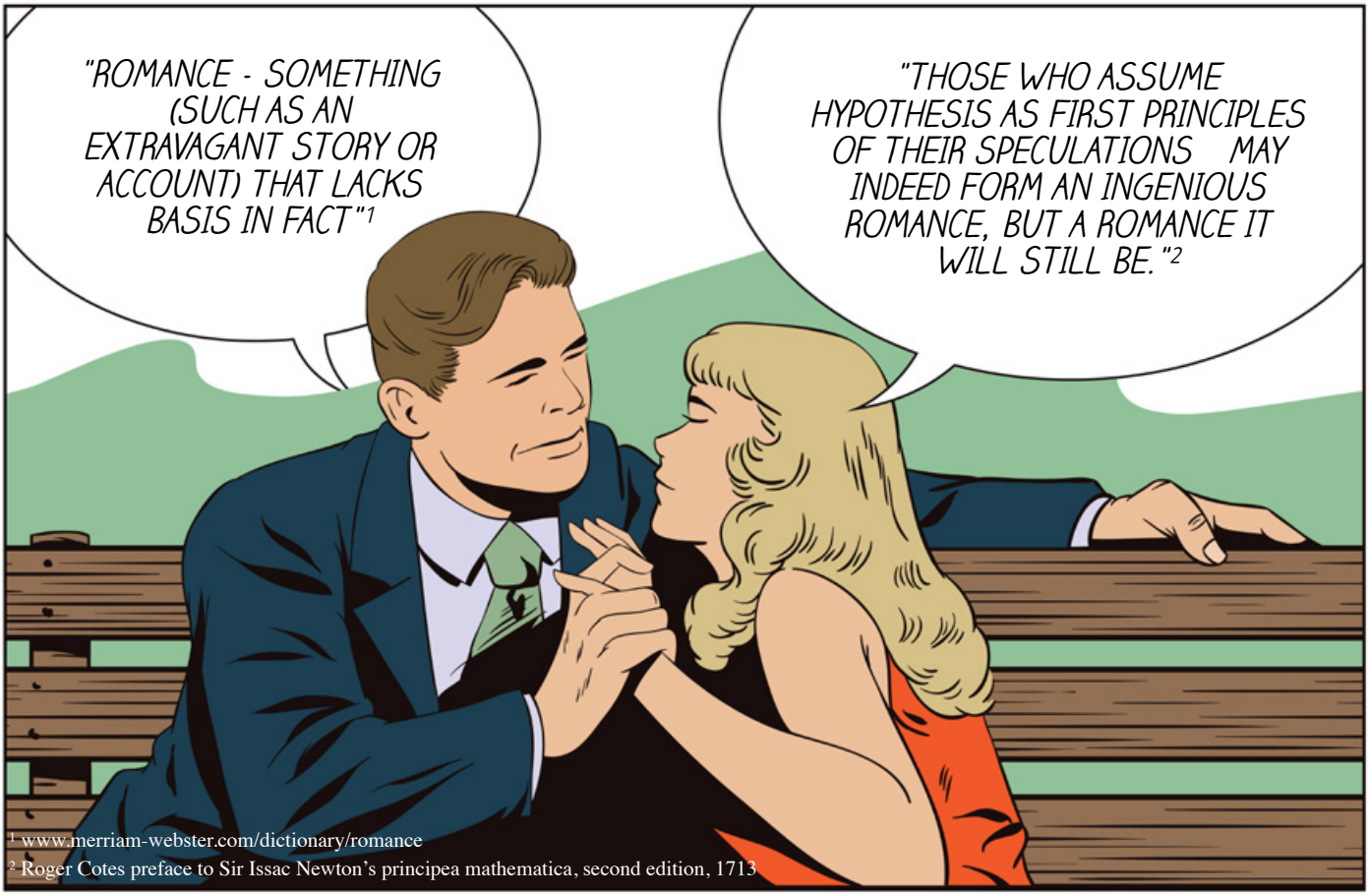

[1] www.merriam-webster.com/dictionary/romance
[2] Roger Cotes preface to Sir Issac Newton's principea mathematica, second edition, 1713

Delay analysis – fact or an ingenious romance?

RICHARD CHAMBERLAIN – DIALES EXPERT, EXPLORES THE ROMANTIC CLAIMS NOTIONS, AND EXTRAVAGANT LENGTHS, THAT SOME CONTRACTORS' CLAIMS APPEAR TO STRIVE FOR.

My first encounter with a construction romance was in 2004, in Romania. At that time, the UK construction industry was enjoying the 'Private Finance Initiative' together with the partnering ethos of Latham and Egan. As a consequence, I was searching for work as a delay and quantum expert, to assist construction projects that were in distress.

A colleague advised me that the Romanian government, with European Union (EU) grants, was investing in its railways, highways and motorways infrastructure, to link Romania to European trade routes. Further, that international contractors were queuing up to tender and execute this work.

Unbeknown to the Romanian government, there was a downside to their investment, which I found emanated from stipulations made by the European banks, specifically:

1. The tendering process was to be competitive and appointment of the contractor was driven by the lowest price.
2. The form of contract was to be Federation Internationale des Ingenieurs-Conseils (FIDIC – Red Book) which places design risk with the employer.
3. The Romanian government would fund the payments for claims and variations to the appointed contractors.

On arrival in Romania, I discovered that contractors had bid at below market prices to win work and then aggressively pursued claims associated with employer risk and related to variations for late drawings, design errors, late expropriation, unforeseen events, substantial changes in quantities, and in fact anything they could think of to recover costs from my client, the government.

These claims were baffling the Romanian government officials and their professional advisors, it was something they had never seen before and, I was told, they believed it was an international plot to take their money. My initial investigation of these claims relied on planning software calculations that were manipulated

to assist in inflating and exaggerating cost.

Both the government officials and the contractors required a quick answer to these claims. The contractors had run out of cash and the government needed to make provision and budget for the probable costs associated with the claims. Unfortunately, the answer was not quick. The stripping of claims was time consuming and, as a result, projects stopped work and terminations were served.

One contractor's belief that the planning software and claim was undeniably correct, forced a dispute to an arbitration in Paris. After the hearing, a factual model was preferred to the claim. The moral of this being that no matter how ingenious a claim, the facts will prevail.

In 2009, I found myself in an arbitration in Rio de Janeiro, Brazil and facing an innovative approach to delay analysis.

The project was the construction of a new blast furnace for an iron and steel factory. The contract was turnkey, the management contractor was German and they had engaged a local mechanical and electrical works contractor to carry out pipework.

I found that the works contractor had bid and won the work below market prices and was seeking to recover his losses with a claim based upon a management tool called 'Quality Assurance' (QA). The history of events to this claim relied upon circa a thousand notices used to record the works contractor's non-conformance (NCRs), which they alleged demonstrated management contractor design deficiency as the cause of delay and disruption to the project.

After investigation, I found the facts to reveal that the works contractor was inefficient, that there were numerous stoppages of work and that the primary cause of this was from labour unrest over low wages.

Interestingly, in the arbitration hearing, the works contractor realised that the witnesses of fact were undermining his case. Consequently, he relied upon the arbitration rules to allow him to not require me to give testimony and to appeal to a higher court.

In 2011, I was invited to assist with a claim settlement related to design, construction, and an upgrade in the production of an existing copper mine in Santiago, Chile. The contract was a bespoke engineering, procurement and construction (EPC), together with engineering, procurement and construction management (EPCM) and it made provision for reimbursable cost.

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The reimbursable cost rules were reasonable and fair. However, the contractor chose to stretch these rules to inflate and exaggerate costs, allegedly associated with the effects of an earthquake, a rock slope collapse, excessive rock blasting, unforeseen ordnance delays, and delays in tunnel construction by a nominated contractor.

These claims were planned from the first day of work. I found misleading monthly progress reports, selective photographic and works records, all linked to delay events portrayed in the planning software as critical path delay events.

After my investigation into the underlying delay events to the alleged critical path delay events, I prepared an employer's claim based upon a factual delay analysis to demonstrate that the contractor's approach was ingenious, but misleading. On this occasion, the contractor saw sense and a settlement was reached.

In 2012, I was invited to assist in the settlement of claims and disputes in the Middle East. Since then I have been involved in claims and disputes that go back to 2009 and 2010 and related to the effects of global financial meltdown.

I have found that these claims are driven by three factors, namely:

1. The tender risk of underpricing to win construction work and then gambling on trading through into a better market not being realised.
2. The claims being around for too long and negotiation has failed, with the only means of settlement being dispute resolution.
3. Subcontractors with contemporary records pressing main contractors without contemporary records for additional payment to compensate for delay and disruption.

As a consequence of the three factors above, and especially to overcome the lack of contemporary records, I have found that main contractors are reliant upon planning software to act as a substitute for the lack of contemporary records.

In a recent arbitration, I heard the tribunal refer to the planning software approach as 'patchy records' and this gives me confidence that once hypothesis is stripped and the facts are revealed, a tribunal will see through any romantic claim. ■