



# Dispute Adjudication Boards

*The answer to successful claims?*

OCAJI, Vietnam  
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## Introduction

**Tom Kapapa** BSc., MSc., MBA, Dip Arb, MRICS, MAE  
Arbitrator, Quantum & Delay Expert, Claims Consultant



I graduated in civil engineering and commercial management in 1998 and obtained my masters in project management and engineering in 2001 before deciding to change my career path to Quantity Surveying and qualified as a Chartered Surveyor (MRICS) in 2005. I have further gained by masters in business administration (MBA) from Manchester University 2009.

I have vast experience in Civil and Building Engineering projects both in the UK, GCC, South East Asia and Hong Kong where I have been involved at different levels of dispute advising contractors and employers on matters of dispute, claims or assistance in amicable negotiations and settlements upon instructions from different solicitors on infrastructure projects, Oil and Gas, water and wastewater treatment plants, desalination plants and commercial developments.

**Steven Beaumont** BSc., MSc., MRICS, MCI Arb, AMAE  
Quantum Expert and Claims Consultant



As Regional Director for Asia, Steven manages multiple client portfolios in the Middle East and Asia. Throughout his career Steven has been involved with disputes and claims with Subcontractors, Contractors, Suppliers and Employers on a number of assignments.

This has resulted in gaining extensive experience with QUANTUM analysis. Steven is a Chartered Quantity Surveyor and holds an M.Sc in Construction Law and Arbitration. In addition to being a claims practitioner, Steven lectures at the Sungkyunkwan University School of Law in Seoul Korea



## Workshop Agenda

### Vietnam 1 Day Workshop

#### Dispute Adjudication Board under FIDIC – The answer to successful claims

##### Dispute Boards under FIDIC contracts

- EPC contracts vs Design & Build
- Traditional FIDIC contracts - Red Book
- Subcontract contracts

##### Shopping from the Enemy:

- Who is the client?
- The nature of the project
- The nature of the Engineer
- What does the contract say?
- How does a successful claim look like?

##### Convincing the tribunal - CASE STUDY

- The hidden truth in every successful claim
- The tribunal wants to see evidence and facts
- Telling the truth to convince the Tribunal
- Pleading the right case and damages

##### Lack of clear strategy and its consequences

- A claim without a strategy is not a claim
- A claim is a Project - time, cost and quality
- Do not mix up the claims i.e. is it prolongation or disruption claim?
- All claims are different and should be specific
- Style over substance - why claims fail
- Preparing and managing a successful claim

##### Deciding to submit a claim

- What does the contract say?
- Shopping with the enemy
- Don't think it is going to be easy
- Emergency Arbitration vs DAB

##### Understanding what the Claim is about:

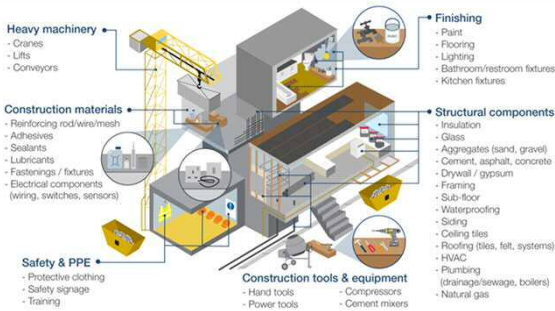
- Additional Works?
- Employer's actions or inactions?
- Breach of Contract?
- Other contractual matters?



## Contracts – where do problems start



## Example EPC – where do we start?



## Our Tender Team has won the Job!



## What is the basis of project tender prices?

- Labour
  - Materials
  - Equipment and Plant
  - Subcontractors
  - Site/Project Operational costs
  - Overheads – Head Office vs Branch Office
  - Profit
  - Risk Contingencies
- **Factors that are considered**
    - FEED sufficiency, adequacy and errors
    - Productivity/output rates
    - Delivery methods
    - Wastage
    - Specialist work/buildability
    - Level of supervision and duration
    - Risk management approach
    - Local taxes and fees or tariffs
    - Construction methodology
    - Off or on site works
    - Material availability
    - Local market conditions



## Why EPC Contracts (Silver Book)



## Bankable Contract

- Single point of responsibility with contractor bearing the risk of integrating the performance of all package contractors, including designers
- One that offers a guaranteed price by a guaranteed date – a high degree of certainty (on paper) can be attained
- Gives a turnkey product guarantee – output guarantee
- Offers restrictions on ability of the contractor to claim extensions of time and additional costs
- Administrative burdens on the owner are minimised
- Oil and Gas environment
  - complex, risky and expensive operations which usually last for a very long time.
  - projects take time, are technically complex, are of significant value, and involve a spectrum of participants with different interests
  - The potential for disputes occurring therefore in the industry remains high
- Owners are looking for a 'bankable' contract – where risk allocation between owner and contractor satisfies the lenders as well as security for the product.



## Why the bad publicity?



## The EPC Contract



- Engineering, Procurement and Construction (EPC) contract
  - emerged as the most commonly used service contract in the oil and gas industry
  - will continue to be the main type of contract used
- However despite the wide use EPC contracts, why the bad publicity?
- Contractors have suffered heavy losses
- Substantial tightening of insurance market – construction insurance has become more expensive
- EPC entity – JV issues and disputes; few contractors have the balance sheet capacity to accept (and bond) the risk of large projects hence most are in JV or consortiums
- Owners taking advantage of poor FEED (Front End Engineering Design) to incorporate their wish list
- Owners interference in the delivery of the facility



## The Problems

- Deficiency in early engineering work, including FEED, results in frequent changes in construction phase
- Overly commercially driven management decisions lead to overly ambitious targets and too much emphasis on cost reduction without enough consideration of resulting detrimental impact on quality
- Application of relatively new technology to flagship projects in harsher environments, where no project has been developed before, creates unexpected technical challenges
- Contractors have lost significant amounts of investments



**The Problems**

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- **Owner involvement**
  - Due to complexities and issues that arise during detailed design from poor FEED, the owner often feels incentivised to increase its influence and take more control in effect over the project with a view to keeping the project risk in check, e.g.
    - Poor clarity of Owner's requirements (FEED)
    - Design and Schedule approvals
    - Approved Vendor List (APL)
    - Owner provided items
  - These items are often disputed to varying degrees between owners and contractors. As the owner's involvement increases, the EPC contractor becomes more reactive and responsive rather than proactive and preventative

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**The Problems**

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- **General Problems**
  - Outside boundary limit issues – implications are often misunderstood
  - **FEED verification process?**
  - Project may be part of a programme – Major projects are often part of major modernization programmes.
  - **Understanding /identifying Rely upon data**
  - Soil data and site information – rarely very definitive in FEED; many assumptions are made around site plans without appreciation of facilities to be built
  - **Unrealistic Milestone Payment agreements**
  - **Design and construction overlap**

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**The Problems**

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- **General Problems**
  - Requirement of using several contractors – management of interface issues
  - Owners wish list – pending design changes that are rolled over to detailed design
  - Insufficient plot plan issues
  - Failure to freeze design
  - Poor change management – no clear process to accept/reject changes
  - Changes in scope not properly recorded during FEED stage and often catching team by surprise once cost overruns are established
  - JV or Consortium?
  - **Delayed approval of baseline program**
  - **Correspondence – why not keeping it simple**

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**Tea Break**

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**Deciding to submit a claim**

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**The Famous Clause 20.1**

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### Clause 20.1 [Claims, Disputes and Arbitration]

**Modern FIDIC Redbook**

- Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment.....Contractor **shall give notice as soon as practicable, and not later than 28 days after the Contractor became aware, or should have been aware, of the event or circumstances**
  - (1) Within 42 days after Contractor became aware (or should have become aware) or
  - (2) within such other period as may be proposed by the Contractor and approved by the Engineer
- ...the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed

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### Clause 20.1 [Claims, Disputes and Arbitration]

**Continuing Effect**

- If the event or circumstance giving rise to the claim has a continuing effect:
  - (a) this fully detailed claim shall be considered as interim
  - (b) the Contractor shall send further interim claims at monthly intervals
  - (c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance or within such other period as may be proposed by the Contractor and approved by the Engineer

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### Clause 20.1 [Claims, Disputes and Arbitration]

**The Engineer's obligations**

- Within 42 days after receiving a claim or any further particulars supporting a previous claim,...
- Within such other period as may be proposed by the Engineer and approved the Contractor

...the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim and **within the above defined time period**

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determination] to agree or determine (1) extension of time in accordance with Clause 8.4 [Extension of time for completion] and/or (ii) additional payment if any

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### Clause 20.1 [Claims, Disputes and Arbitration]

**Old Regime of FIDIC seen in many bespoke contracts**

**Clause 67.1 [Engineer's Decision]**

If a dispute of any kind whatsoever arises between the Employer and the Contractor .....the matter in dispute shall, in the first place be referred in writing to the Engineer

**Engineer's obligation**  
No later than the 84 day after the day on which he received such claim, the Engineer shall give notice of his decision to the Employer and the Contractor.

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### Clause 20.1 [Claims, Disputes and Arbitration]

**What happens if the Engineer fails to respond within the timeframe or rejects the claim?**

**New FIDIC Suites**

...either party (not happy) may refer to the Dispute Board in accordance with Clause 20.4 [Obtaining Dispute Board's Decision]

**Old Regime of FIDIC and seen in Bespoke Contracts**

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer or the Engineer fails to give notice of his decision on or before the 84<sup>th</sup> day after receiving such reference, then either within [ ] days shall notify intention to commence arbitration

**The Wheels fall off!**

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### Basis of Any Claim (Time, Cost, anything?)

**Event Causing the Loss, for example:**

- Change in Specification?
- Lack of access?
- Lack of approval?

↓

**Liability – by reference to Contract Agreement:**

- A demonstration of why the Event is the Employer's responsibility (Relevant Event)

↓

**The substance of the Loss:**

- Additional time on site?
- Change in methodology?
- Loss of efficiency, or more work done?

↓

**The Claim:**

- Extension to the Time for Completion; and/or
- Claim for Costs – Prolongation, Disruption, etc.

Demonstrating

Cause

and


Effect

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**Solution [lies?]**

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**The answer .....**  
**..a good claim is telling the truth[?]**

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**The Solution**

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**Records**

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**The Solution**

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**Records**

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**The Solution**

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**Records**

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**The Solution**

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**Records**

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**Clause 20.1 – “Contemporary Records”**

- Correspondence
- Meeting Minutes
- Submittals
- Method statements
- Daily, weekly, monthly site reports
- Material deliveries
- Plant returns
- Labour returns
- Progress photographs
- Programme updates
- Measurements
- Marked up drawings
- Daywork records



# Strategy

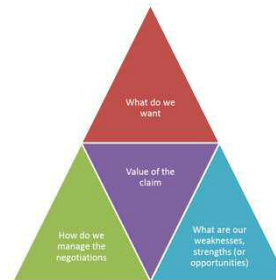


**The Strategy**

**Where we are now  
where we want to be, and  
how we can get there**



**The Strategy**



**The Cold Eye View**

.....is that all?.....

- What about.....
  - Resources required to manage the claim(s)
  - “Shopping with the Enemy(ies)”
  - Leverage – what opportunity can we leverage



# The 4 Pillars



### The 4 Pillars

Cause  
Effect  
Contractual Entitlement  
Substantiation

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### The 4 Pillars

Cause  
Effect  
Contractual Entitlement  
Substantiation

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# Tips from experience for successful claims

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### EoT – Prolongation – Disruption

	Do	Don't
Type of Claim	Identify clearly the type of claim and understand the basis of demonstrating such claims eg EOT vs Disruption	Think all claims are the same or mix up prolongation costs and disruption costs or mitigation costs to acceleration
Teamwork	Work together as a team to establish the 'compelling story'	Sit in your 'silo' waiting for someone else to complete their job – you are all responsible!
Likely Success	Be prepared for a big fight and make sure you have resources and finances	Think it is going to be easy. Imagine a project of US\$100m and you have a claim for US\$20m.
Foundation of Fact	Focus on identifying and relying on the important FACTS. Cut out the irrelevant.	Underestimate that Burden of proof is on YOU
Analysis Methodologies	Keep it simple and focus on Fact. Focus on the use (or otherwise) of principle resources and the overall effects on the planned sequence of works.	Get lost in complexity or sucked into a focus on P6 logic only. It's about the bigger picture and what the facts support.
Relevant Events	Focus on establishing and particularising the Relevant Events only. Identify Start of event, end of event and what is relevant in between.	Rush off and and look at or particularise 'everything'. It's a waste of time and just generates big pointless documents.

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# Lunch

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### Introduction

**Experienced Arbitrator, Quantum & Delay Expert,  
Claims Consultant, DRBF Country Rep. Qatar**



**Tom Kappa** "당장훈"  
정합/기술 담당 이사

이세원 및 한국지사장  
서울특별시 강남구 삼성동  
대역관로 441  
층탑 3 동 301호

M: +82 10-5289-7793  
T: +82 70-5118-1470  
F: +82 2-554-1229  
E: [tom.kappa@quantumglobal.com](mailto:tom.kappa@quantumglobal.com)  
W: [www.qls.com](http://www.qls.com)

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### Recap Claims for our Business

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- **What message do you want to get across?**
- **What reaction do we want to receive?**
- **How to present claims**
- **Do we need any visual representation of events and their impacts**
- **Type of client we are dealing with**
- **How much time and resources do we have?**

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### Some Remarks to remember

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- **Your pricing strategy will affect your claims**
- **Construction has several variants and the same applies to claims**
- **In today's markets a claim is a business requirement**
- **Successful Claims**
- **The process of preparing and managing a successful claim requires investment in time and money**
- **Records, Records, Records and Records**

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### Disputes Boards

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- **Red Book** Contractors working in international markets, such as Vietnam, will certainly encounter Dispute Adjudication Board ("DAB") contained in the FIDIC contracts
- **Silver Book**
- **Yellow Book** However questions remain as to:
  - **Why DAB exists**
  - **What it is supposed to achieve**
  - **Why it is frequently deleted from FIDIC contracts in some markets**
  - **And how does it differ from arbitration**
- **MDB 20**

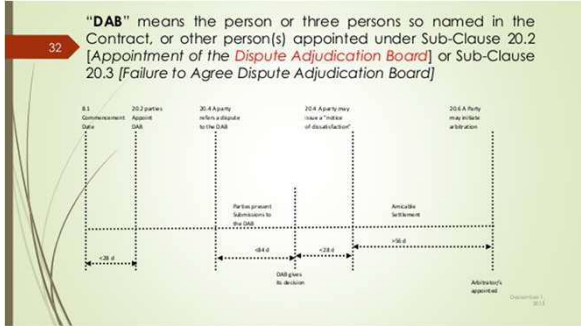



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### The Attraction of DABs

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"DAB" means the person or three persons so named in the Contract, or other person(s) appointed under Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board] or Sub-Clause 20.3 [Failure to Agree Dispute Adjudication Board]



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### Dispute Boards

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**Why they exist:**

Long history when they were first established however got more recognition when the world bank adopted their use in civil engineering construction projects

FIDIC increased popularity by adopting Dispute Board mechanism in the dispute clause, clause 20.

Dispute Boards mechanism under clause 20 were brought in to reallocate the role of adjudication of disputes which had previously belonged to the traditional engineer under clause 67.1 to an independent impartial and neutral dispute board

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### Dispute Boards

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**The main basis of**

1. **To prevent disputes**
2. **To resolve disputes**

being independent and impartial opinion throughout the duration of the project, on instruction, or opinion of ev



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### Different forms of Dispute Boards

- **Dispute Review Boards (DRB)**
  - Non-binding process
  - It is up to the parties to accept (or not) a non-binding recommendation
- **Dispute Adjudication Boards (DAB)**
  - Decision making role taking over from the traditional engineer under clause 67
  - Issues binding decision unless and until amicable settlement is reached or an arbitral award
- **Combined Dispute Boards**
  - A combination of the above two boards
  - Offers parties the flexibility of choice either to go for only recommendation (DRB) or a temporary binding decision (DAB)

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### Establishment of Dispute Boards under FIDIC

- **FIDIC**
  - Red Book is different from the Yellow and Silver Book contracts
  - The logic is in the distinction in nature of the contracts with greater off-site activities undertaken by contractor in the Yellow Book and the Silver book
- **“Standing” Board**
  - This involves appointment of the board from start of contract to deal with future disagreements
  - Allows the DB to prevent disagreements turning into disputes (dispute avoidance)
  - Allows the DB to be familiar with the project as it progress
- **“Ad Hoc” Board**
  - This involves appointment when a dispute arises
  - However the board members can be chosen from the project outset
  - Their term expires when a decision is given on a dispute referred to them

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### Common Scenario on Live Project

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### Contractor is delayed, losing money and cash flow is tight

Contractor Asked to Accept – Take it or leave it.

Contractor raises his claim.

Where's the Negotiation? Clause 3.5?

Employer:

- Engineer failing to give determination cl. 3.5.
- Engineer gives a determination which is not explained
- Decides – again with no negotiation with the parties.

Disagreement:

- Certification of works by the Engineer.
- Instruction issued by the Engineer
- Opinion of evaluation by the Engineer.

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### What Happens on Site (1)

**Contractor compelled to make a claim:**

- Something changes – is, or is going to incur cost and time.
- Contract Agreement states, he's to give notice and make claim.

**Engineer Attempts to influence claim made:**

- Focus on acceptable events – avoid contentious events and/or avoid some Engineer culpability.
- Strategy to defer decision making.
- Little or no negotiation.

**Claim first made on Engineer's terms:**

- Employer decision made: no negotiation, not sufficient, Contractor not Happy.

**Dispute Board can be asked for opinion**

**Bad faith – threaten time bar, whilst himself deferring decision making.**

**Breach – as Engineer not empowered to deal with time.**

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### What Happens on Site (2)

**Contractor finally makes claim on all issues:**

- Engineer not happy, he feels exposed.
- **Engineer attempts to rebut or dismiss claim out of hand:**
  - Doesn't want to talk about previous issues.
  - Takes further time to review and again defers recommendations.
  - Alleges existence of time bar.
  - Earlier determinations in place. Can't go back on previous decisions.
- **Engineer falls away, issue passed to Employer:**
  - Engineer reluctant to move from earlier determination.
  - Doesn't want to negotiate. Decision is 'nil' until submission is deemed satisfactory.

**Breach – as Engineer not empowered to deal with time.**

**Bad faith – threaten time bar, whilst himself deferring decision making.**

**Breach – where was the negotiation?**

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### What Happens on Site (3)

**Employer finally makes a Conditional Award or determination:**

- Contractor threatened with cessation of payments should the completion date expire.
- Ashghal allegedly can't make payments after the completion date passes.
- Formal VO needed to extend the credit limits.
- Formal VO offered to deal with time but no cost.
- Lack of cost in the VO miss-represented.
- Unwitting Contractors sign up in interim to facilitate cash flow only to find signature on VO down the line relied upon to deny liability for Prolongation Costs.

**Bad faith by Employer - bound in to the Contract to make payment.**

**Breach – Employer play fast and loose with Contractor's entitlements**

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### What About the Delay Analysis?

**Contractor presents his Delay Analysis:**

- TIA upon Engineer's request.
- Hopefully identified all Primary Delays (whether critical or not).

**Engineer Analyses the Delay Analysis. Typical approach Being:**

- Only TIA in P6 accepted as suitable analysis.
- Question Contractor logic. Everything nil, until analysis finally accepted.
- Engineer analysis never revealed.
- Liability decided before looking at the delay. No liability – not accepted as a delay.
- Refuses to explore areas of agreement /disagreement. Absolute reliance on P6.
- Engineer results tabled as fact – Fait Accompli?.

**Breach – Contract says 'programmes in p6', not 'analysis in P6. Contractor should be free to choose methodology appropriate to circumstance.**

**Breach – Contract requires Engineer to make reasoned determination to 'equal weight'.**

**Bad Faith – failure to agree what should be simple matters of fact.**

**Breach – where was the negotiation?**

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### What difference would Standing DAB make?

- **Objective and neutrality**
  - If DB consist of more than one member there's a more balanced view
  - DB are established by consensus at the time when the parties are in good relationship and focused on finalising agreement
- **Knowledge of the issues at hand**
  - The DB would be involved from the start and would be informed of the progress and issues at site
  - DB would have been able to provide necessary opinion and hold discussions with the parties
- **Trust and confidence**
  - Contractor vs Engineer = no trust
  - DB would review more carefully claims and responses and deal with the claim contemporaneously
  - The accumulation of disagreements is reduced as they can be settled as they arise

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### Where can DBs help?

**Typical Issues**

- Has a change or variation arisen?
- Is the contract delayed or late
- Is an extension of time applicable?
- Is the extension of time payable/non payable
- Are liquidated damages payable?

• **Typical issues where DBs can help**

- The Engineer is failing to issue determinations on time and additional money
- Certification of the works – completion or non-completion
- Issues of resources and productivity
- Evaluation and effects of variations
- Engineer/Employer delaying issuing necessary instructions

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## How can we make our claims successful under a DAB process?

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## Remember.....! A claim is circle that can't be made into a square

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## Tom's opinion

- How does a successful claim look like?
  - What does the contract actually say?
  - What is the claim about?
    - Additional works?
    - Employer's actions or inactions?
    - Breach of contract?
    - Difference of opinion on an issue?
  - What type of DB is constituted?
    - Standing DB?
    - Ad hoc DB?
    - 1 member or 3 member DB?
  - What resources do we have to prepare, manage and present the claim to DB?
  - How are we going to pursue the claim?
  - What do we want to achieve?
- **What are the ingredients of preparing and managing successful claims**



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## What Claim are you preparing?

- **What are the different types of claims**
- Common Claims**
- Extension of time
  - Prolongation Cost
  - Disruption Costs
  - Variation / Additional Works Claims
  - Acceleration Claim
- Other Claims**
- Mitigation or constructive acceleration
  - Head Office overhead claim
  - Finance Cost claim
  - Loss of Profit claim
  - Loss of Opportunity Claim
  - Suspension cost claim
  - Termination Claims



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## Tea Break



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## Common reasons the claim will not succeed with DB



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## Notices



- Notices are usually a contractual requirement

Failure to submit notices in the correct form is one of the most common mistakes that contractors make in relation to claims



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## The hidden truth [lies?]




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### The hidden truth (lies?)

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- Notices are required to make the Employer or his agents aware of the circumstances, in order that corrective action or mitigation measures can be considered
- Employer may make cost and/or time provisions if no corrective action or mitigation measures can be undertaken
- In FIDIC contracts, failure to submit a notice of claim within the prescribed time frames will result in the Contractor losing entitlement to any subsequent claims


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### The OHL v Gibraltar Case (Yellow Book)

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- **Notice provision redefined?**
- A variation instruction issued to increase scope of section of works
  - Section of works not on critical path when instruction issued
  - Sometime later when variations works are to start, it is then clear that the Works would be delayed
  - Contractor issues notice under 20.1
- **Judgement – when should contractor have given notice of claim for extension of time before he is time barred?**  
 “Whilst a contractor may be able to give notice at an earlier stage, the 28-day time period (for the purpose of time bar) only starts to run from November i.e. when the Works are actually delayed”


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### The OHL v Gibraltar Case

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- **Notice provision redefined?**
- This interpretation of clause 20.1 is favourable interpretation for the contractor
- Represents a different approach to the strict line taken by most English law judges
- Perhaps this is more in tune with international perspectives?
- Is there a discrepancy between “considers himself to be entitled to” and “became aware”?
- Does this suggest the 28-day period is to start from the date when the contractor subjectively considers itself entitled?
- What is clear is that (1) event or circumstance must first occur and (2) there must be awareness by the contractor



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### Baseline

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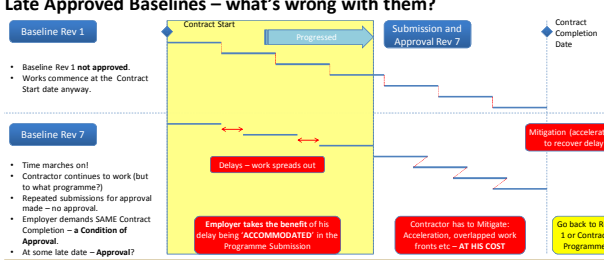
.....which baseline.....


- The effects.....
  - Baseline approved (or not) very late in project
  - The Baseline does not react to delay events
  - Improve the logic and sequence for a workable programme



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### The hidden truth?

#### Late Approved Baselines – what’s wrong with them?




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### No approved baseline

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#### Common limitations and restrictions

Restriction or limitation	DB's Position
<ul style="list-style-type: none"> <li>• Employer says ‘Contractor shall impact the Baseline’.</li> <li>• Baseline programme is poor quality or full of errors.</li> <li>• Employer reasonably withholding approval of Baseline.</li> <li>• Employer unreasonably withholding approval.</li> <li>• Employer says ‘use Approved Revision 7 Baseline Programme for analysis’.</li> </ul>	<ul style="list-style-type: none"> <li>• Rubbish. Carry out an analysis that reflects on all the key facts.</li> <li>• Correct it. Or carry out an analysis that does not rely on the P6 network logic.</li> <li>• Correct the errors in the programme.</li> <li>• Don't bother seeking approval. Stick to the Contract Programme.</li> <li>• Don't! As it probably mitigates Employer delay.</li> </ul>


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### Concurrency

#### .....Concurrent delays.....

- The effects.....
  - No or reduced Prolongation costs entitlement
  - Threat of delay damages looms
  - Contractor 'forced' to negotiate a bad deal




### The hidden truth [lies?]



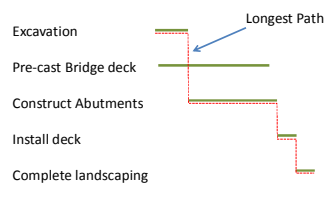
### Concurrent Delays issue






#### Typical Project

- Excavation
- Pre-cast Bridge deck
- Construct Abutments
- Install deck
- Complete landscaping

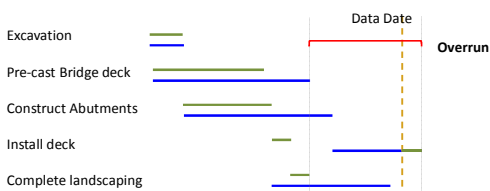




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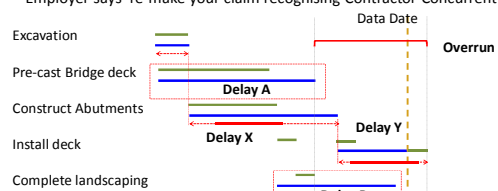
#### Interim Delay Analysis – Big Overrun, What Happened?

- Excavation – looks to be on time.
- Precast deck beams – started on time, prolonged, finished late.
- Abutments – started on time, prolonged, finished late.
- Installation – late start (driven by abutments) and then becomes prolonged.
- Landscaping – Prolonged and swapped with Deck from being last item to complete.
- As of the Analysis Date – works remain incomplete.



#### Concurrent Delay – What the Employer’s Position?

- Contractor makes claim for delays X & Y.
- Employer may accept liability for delays X and Y on the Critical Path. Offer Full EOT for the Overrun.
- Employer however alleges (but does not prove) existence of Contractor delays A & B – alleges they are concurrent to the accepted delay **sufficient to deny recovery of Prolongation.**
- Employer says 're-make your claim recognising Contractor Concurrent Delay'



### Concurrent Delay – What the Employer’s Position?

- Contractor to make his claim and to prove entitlement.
- If Employer accepts delay, Employer will award EOT only.
- Employer will however always allege Contractor is in Concurrent Delay without providing proof of such delay.  
*‘Contractor delayed elsewhere – everywhere etc – it’s all his fault’*
- Employer will allege the Contractor has not dealt with the concurrent delay in his submission.
- Employer will not accept a claim for EOT and Prolongation is a claim for EOT **AND** Prolongation. Employer will always alleged Contractor is to go away and make a second claim for prolongation, by dealing with the existence of the Concurrent Delay.  
*‘Contractor told to go and do a Concurrency Analysis.’*

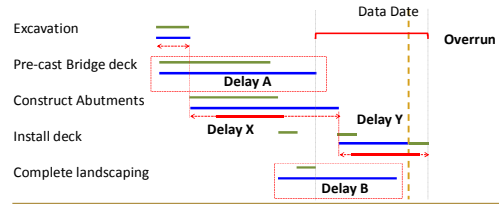


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### What Does This Delay Analysis Actually Say?

- Contractor makes claim for delays X & Y, but may miss A & B, as not on the critical path. No real issue with this.
- Delays X & Y are on the critical path – **Critical Delay**.
- Delays A & B are not on critical path – they’re **Non-Critical Delay**.
- In this example, **Concurrent Delay does not exist!**

Delay	Contractor	Liability	Employer
X	Penalty		EOT + cost
Y	Penalty		EOT + cost
A	nil		cost
B	nil		cost

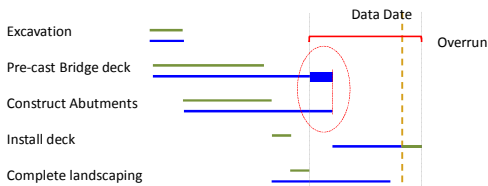


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### So What Actually is Concurrent Delay?

Key difference to analysis presented before:

- Bridge deck completion **now at same time as abutments**.
- Cannot **readily distinguish between deck and abutments** in terms of what is driving the end date.

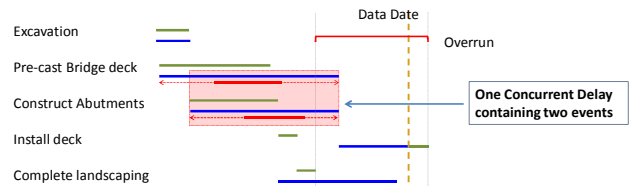


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### Concurrent Delay – In Simple Terms

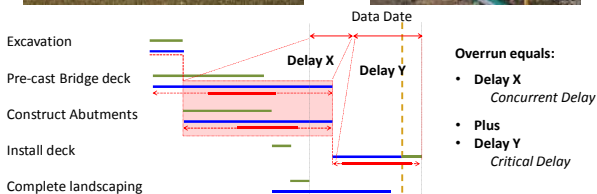
**Concurrent Delay – two or more delays, one being Contractor AND one being Employer:**

- Events acting together – but not necessarily at the same time.
- Events coming together, converging – impact is merging.
- Events being **Indistinguishable** in effect – cannot decide between the events.
- **Equal Causative Potency**.



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### Total Critical Delay for the Bridge Works



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### Liability



**Note:** Discussion so far has been about identification of the delay.

**Now what about Liability?**



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### Liability – Critical Delay

- Employer Event:**
  - Contractor receives both Time and Cost.
- Contractor Event:**
  - Contractor receives nothing.
  - Employer recovers his Penalties.

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### Liability – Concurrent Delay (SCL Approach)

**Concurrent Delay, being indistinguishable between Employer and Contractor:**

- Contractor receives **'time but no money'**:
  - Contractor gets time for the period of delay.
  - Contractor does not get compensation.
  - Employer cannot collect penalties or damages.

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### Liability – Concurrent Delay (Apportionment Approach)

**Concurrent Delay, being indistinguishable between Employer and Contractor:**

- Liability is 'Apportioned' between the parties:
  - Contractor gets some EOT and some Cost, but suffers some Penalty.
  - Employer gives some EOT and some Cost, but recovers some Penalty.
  - An equitable split?

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### Liability – Non-Critical Delay

- Employer Event:**
  - Contractor entitled to costs – disruption claim – but no EOT.
- Contractor Event:**
  - Contractor receives nothing.
  - Employer **NOT** entitled to relief from his liability for Cost arising from his other accepted delays.

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### Summary of Delay Analysis

**Critical Delay:**

- Employer Accepted** – Contractor to receive time and money.
- Contractor Accepted** – Employer receives penalties / LDs.

**Non-Critical Delay:**

- Employer Accepted** – Contractor entitled to money (disruption claim) but no time.
- Contractor Accepted** – Employer's liability to Prolongation cost elsewhere is **not reduced** by the presence of the Contractor non-critical delay.

**Concurrent Delay (delays indistinguishable):**

- Employer is denied the right to recover penalties.
- Contractor is provided protection from penalties, but
- Contractor is denied right to recover costs.
- Alternatively (in GCC) the liability may be 'apportioned' between the parties.

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# The Constituted DB

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## What you need to know

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### It's all in your hands!

- **Constitution of the DB**
  - You have an opportunity to ensure you are happy with who will deal with your case
  - Influence the proceedings and ensure your case is heard properly
  - Keep things simple and easy to understand
  - Don't tell them what to do
- **What they want**
  - They want to ensure their job is done effectively and be seen to be proactive and solving problems
  - Stick to the facts and don't make assertions that can't be evidenced
- **What about your case**
  - Make sure you understand your claim – this is a technical forum and does not need lawyers
  - Size, really does not matter – a big room with no view
  - Don't raise frivolous claims – they will fail

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### Practical challenges with FIDIC DAB

- **Establishment of the DAB and availability of arbitration**
  - The middle east markets have not taken to DABs due to concerns of independence as well as desire to resolve all matters at end of the project
  - If the decision is not to include DAB make sure that it has completely been removed from the contract
  - In the case of an ad hoc dispute board which is only appointed when a dispute has arisen, what happens when one side obstructs the formation?
  - A party unhappy with the DAB decision is unlikely to want to comply with it
- **Enforcing the decision of DAB**
  - Can their decision be considered as an arbitral award for the courts to enforce them?
  - This would require arbitrators to make an award that complies with a DAB decision. However arbitrators may be reluctant without examining the merits of a DAB decision

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### Practical challenges with FIDIC DAB

- **Getting the best results from DABs**
  - DABs work best when there is respect on both sides of the process
  - If one party simply serves a notice of dissatisfaction on every DAB decision as a matter of course – then what's the point?
  - Let the DAB to take initiative in ascertaining the facts and matters required for a decision
  - DAB process should not turn into a mini-arbitration – it is not!
  - Do not get the lawyers involved!
- **Emergency Arbitration**
  - Having the multi-layered dispute clause (Clause 20) may stop you applying for emergency arbitration
  - The affected party may not be able to apply for interim measures prior to going through a DAB process

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### Practical challenges with FIDIC DAB

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### When it all starts to go wrong!

- **Road to a potential claim or dispute**
  - The Employer imposes changes but thinks this can be accommodated in the time period
  - The Employer wants his wish list relating to future expansion
  - The Contractor thinks he has dealt with several changes which may delay the project
  - The Contractor suffers from cash flow issues
  - The Contractor is threatened with delay damages
  - The Employer starts saying there are not enough resources on site and requests for 'Recovery programmes'
  - The Contractor's banks are concerned with the risks and start putting pressure on management
  - Subcontractors start raising claims for design delays / discrepancies / reworks

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**Q&A**

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**Thank You**



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