

Construction Claims: Handling & Getting it Right

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Workshop Map

- Overview of Standard Process for Disruption
- Contractual Issues for EOT & Loss and Expense
 - A Study of PAM 2006
 - A Study of JKR Form 203 Rev. 2007
- Workshop: Prolongation Loss & Expense
- Contractor's Warranties & Variation Disputes

Construction & Time

“It has been said that the only major construction project to finish on time and to budget was a church where, presumably, divine intervention played a role”

Dr. Julian Critchlow

“Support your local construction lawyer, claims consultant and adjudicator/arbitrator, carry out projects without proper risk planning”

Belden Premaraj

Mitigation 1st ?

- Consider Mitigating Steps as 1st Option
- Disruption Minimization
 - Labour Leveling
 - Rescheduling Work Activities
 - Float Absorption/Levelling
- Disruption Assessment Handling

Determine Criticality

- Determine Criticality of Disruption vis-a-vis Time
- Use Updated WP Impact Analysis (Prospective)
 - Accurate Look Ahead Schedules
- If Completion Date not Impacted?
 - Determine Culpability
 - If Contractor Culpable : Step Up Mitigation Process
 - If Neutral Causes : Step Up Mitigation Process
 - If Employer Culpable : Productivity Claim

Productivity Loss

- Notice & Claim Limitations : Loss & Expense Provisions?
(regular progress affected & not related to date of completion)
- Total Cost Method v Estimated Cost
- Relaxing the Boyajian v US principles
- Modified : Bid & Actual Expense to Avoid Pitfall
- Generally accepted as impossible / impracticable to proof otherwise
 - Sovereign Construction Co v US

Productivity Claims

- The Measured Mile
 - Actual productivity of un-disrupted period v productivity of disrupted period
 - Actual productivity measure v estimated or planned productivity
 - Agreed planned productivity factor? Was it achieved?
- Using Industry Standards

Determine EOT Claim?

- If Completion Date Impacted!
- Determine Whether Excusable?
- Excusable = EOT Reasons in Contract
- Non-Excusable Disruption
 - Determine whether Act of Prevention
 - Otherwise : Contractor Culpable Delay
 - Step Up the Mitigation Process

Standard Forms

TNB late in supplying sub-station equipment that is to be installed by Contractor because Employer late in paying contribution

- PAM 2006
 - Is it covered?
- JKR 2007
 - Is it covered? What happens if it is not?
 - Interestingly covers delayed payment slowdown impact (indirect right to slow down with notice)

Excusable Delays

- List of Delay Causes = EOT
- Limited List on Neutral Delay Events ✓
- Limited List on Employer/Agents Culpable
Delay Events X
Why?

Time At Large

- Otherwise Unfair on Contractor
 - Dodd v Churton [1887] 1 QB 562
 - Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151
 - Thamesia Designs SB v Kuching Hotels SB [1993] 3 MLJ 25
- No LAD & Reasonable Time to Complete
- What is the End Result?

Time at Large

- Reasonable Time = EOT Time
- EOT Time = Agreed by Parties
- EOT Time = Determined by Arbitrator/Court
- LAD cannot be imposed
- Unreasonable Delays = Actual Damages
- Terms that allow Employer to unilaterally grant EOT without varying LAD right
 - Australian Std Forms (PC-1, NPWC3, AS 4300)

Avoiding Such Time at Large

- Exhaustive List of Delay Causes???
- Catch-All Act of Prevention Clause
 - *any act of prevention or breach of contract by Employer*
- Interpretation in the hand of SO/ER
- Employer includes Agents/Consultants/3rd Parties within Employer's obligation

Time at Large Claims

- Common Law Damages Claim
 - All Reasonably Foreseeable Damages
 - Direct or Indirect
 - Hadley v Baxendale Principles
- Lodge Claims with Employer Directly
- Negotiate with Employer
- Otherwise Arbitrate

Standard Form

Are there administrative requirements which affect the right to EOT?

- PAM 2006
 - Clause 23.1(a)
 - But why clause 23.10 (just being fair?)
- JKR 2007
 - Clause 43.1

Notice Requirements

- Is it a Condition Precedent?
 - Must be clear
 - Standard Forms now use words “*shall be a condition precedent*”
 - Ambiguities = *Contra Proferentum*

- Is the Notice Period Clear?
 - Forthwith, Soon Thereafter, No. of Days
 - Time Runs From? = delay commence v knowledge
 - Objective Knowledge = reasonably apparent

Notice Requirements

- Notice Period Unworkable or Impossible
 - All delay events \neq delay the Completion Date
 - Time for Analysis of Criticality
 - Notice of Events Affecting Progress
 - Required Accompaniments Effects Period
 - Particulars of Expected Effects
 - Estimate of EOT Required
 - For a reasonable estimate = Delay Event Cease
 - Mitigation requirements impact notice period

Notice Requirements

- Should the Notice be Condition Precedent when:
 - Delay event known by the Parties/SO
 - Where Delay event caused by the Employer?
 - Where Act of Prevention
- Otherwise Unfair?
- Does lack of or delayed notice prejudice Employer?
 - Only if it prevent Employer from mitigation

Notice Requirements

- Delay Event within the knowledge of the SO
 - Condition Precedent to Contractor's application
 - Condition Precedent to SO's duty to give EOT?
 - London Borough of Merton v Stanley Hugh Leach Ltd [1985] 39 BLR 51
 - PAM 2006' retrospective duty post CPC

Notice Requirement

- Delay Caused by Employer/Act of Prevention
 - Gaymark Investments v Walter Construction Group [1999] NTSC 143
- Considered Wrong by Many?
- Illogical if benefit Contractor with time at large or loss and expense?
- Logical if don't benefit Employer with LAD
- Clear contract term to create the unthinkable
“LAD despite being the cause of Delay”

Rely on Failure of Condition Precedent Notice?

- Risk of Converting LAD to Penalty - Prevention
 - Can SO issue CNC?
 - Can SO honestly state works ought to be completed by the CNC date?
 - Can Employer benefit LAD when it caused the delay?
 - The LAD becomes a penalty? Yes in Malaysia
 - Is this a genuine pre-estimate of loss when there is no loss? Cured by Informed Drafting?

Avoiding the Pitfall on Notice Requirements

- SO assess delay without prejudice to right to refuse due to lack of notice?
- Employer agrees EOT with no loss & expense?
- Employer Unilateral Right to grant EOT
- Australian Std Forms (PC-1, NPWC3, AS 4300)
- CNC based on contractual extensions and not SO's opinion?
- Employer waives LAD for the affected period?

Standard Forms

Ought the Contractor take effective steps of his own violation & cost to avoid or reduce delay?

- PAM 2006 ?
- JKR 2007?

Mitigation

- Reasonable steps = financially & resource feasible
- Actions which are in the normal course of business
- Causes an overall cost saving to Contractor rather than a mere expense
- Question of Fact, Not Law
- Burden discharged easily by assertions (evidence of ability generally lies with contractor)
- Evidential burden switches to other Party to Prove No Reasonable Mitigation

Mitigation

- Cost Incurred in Mitigation Recoverable
- Failure to Mitigate = Contractor's Culpable Delay?
 - RP Wallace Inc v The US
- Best Endeavors?
 - IBM v Rockware Glass Ltd [1980] FSR 335
 - Steps that are within the power and ability but limited to those that are in self-interest

Mitigation

- Standard Forms = Ineffective Mitigation Provisions
- Joint Effort Mitigation is Needed
 - NEC Contracts
 - Early Warning Procedure
 - Risk Reduction Meeting & Risk Register
 - Agreed Steps & Cost of Mitigation
 - Pending Determination of EOT, Cost Shared

Standard Form

When must the EOT claim be presented by Contractor and assessed by SO?

- PAM 2006
- JKR 2007

Prospective v Retrospective Assessment

- Truly Prospective – Likely/Probable Delay
 - PAM 98' : upon receipt of notice & on likely delay
- Completion Date Prospective but Retrospective Delay Event
 - PWD 203 Rev 2007 : as soon as able to estimate the length of delay
 - PAM 2006 : upon receipt of final application within 28 days after cause of delay ended
 - SIA : after delaying factor ceases and possible to decide length of EOT
- Truly Retrospective – just before or after CNC/CPC
 - PAM 2006 : within 12 weeks after CPC review and assess regardless of lack of notice

Prospective v Retrospective

- How to really consider Mitigation effects? The Mitigation success or lack of it determined later? But cannot reduce EOT previously granted?
- What about when Recovery/Catch-Up Program Issued?
- Is it agreed mitigation, best endeavour mitigation but not binding or constructive acceleration?
- EOT claim be “without prejudice” to the recovery/catch-up programs and constructive acceleration?
- Should Arbitrator’s determine based on prospective when actual delay impact can be analysed? Should there be immediate short form arbitration for delay disputes?

The Work Program

- Impacted Work Program
- A Scientific & Reasonable Method of Proof!
- Best Evidence Rule
- The Standard of Proof = Burden of Proof
- What is the Legal View? - Commentaries

John Barker Construction Ltd v London Portman Hotel Ltd

“the SO must:-

- 1. Apply the rules of the contract;*
- 2. Recognise the effects of constructive change*
- 3. Make a logical analysis, in a methodical way, of the effect of the developer’s time risk events on the contractor’s programme;*
- 4. Calculate, rather than make an impressionist assessment of, the time taken up by events”*

Mr. Recorder Toulson QC

CPN Impact

- Critical Path Impact Assessment is the accepted basis of analysis and for assessing EOT entitlements
 - Henry Boot (Construction) UK Ltd v Malmaison Hotel (Manchester) Ltd
 - Aoki Corp v Lippoland (Singapore) Pte Ltd

Approval of As-Planned Program

- Contractual Document – more weight and can bind Employer if Contractor perfect
- Non-Contractual Document – still evidentiary tool but with less weight
- Approval only on logic!
- Approval but with mitigation obligation (re-scheduling non CPN works)!
- Cuts both ways - Contractor also bound by logic.

Ascon Contracting Ltd v Alfred McAlpine (Isle of Man) Ltd

“I do not accept [the contractor’s] attempts to disown the logic links in its own program”

John Hicks QC

Float

- Does it affect the assessment of EOT?
- Date of Completion Critical Path Activities cannot have float unless:-
 - Contractor planned early completion
- Contractor Planned Early Completion
 - If delayed up to the Contracted Date of Completion = No EOT, no loss & expense, Productivity Loss?

Float

- Free Float (Finish – Start Activity to Activity Float)
- Total Float (Activity to Date of Completion Float)
- Is there a distinction between critical floats and non-critical floats?

Float

- Critical Float
 - minimum planning time required
 - minimum procurement, fabrication & delivery time required
- Non-critical float
 - time safety factor
- Critical float should be identified differently
- Temporary Works Detailing with a critical path to the Permanent Works

Float

- Non-Critical Float can be considered when assessing likely delays (ie. it can reduce truly prospective assessment)
- However, when assessing actual delays retrospectively, non-critical float that belongs to Contractor cannot be used to avoid or reduce the EOT
 - Aoki Corp v Lippoland (Singapore) Pte Ltd
 - The Royal Brompton Hospital NHS Trust v Frederick Alexander Hammond & Ors

Float & Ownership Belongs to Contractor

- EOT granted if float affected by delaying event?
- Only when the extent of the float used up results in the non-critical activity impacting the Completion Date because it caused a shift of the CP?
- But if it belongs to the Contractor, why show it in the as-planned work program?
- Silence on ownership but with float indicated in work program, should it not belong to Project by implication.

Float & Ownership Belongs to Project

- Either party may use the float period without liability for EOT
- First to use benefits
- Encourages the Contractor never to bother with early start
- Early start and delays occur : loss of productivity, efficiency & idling, not claimable?

Float & Ownership Belongs to Employer

- Contractor must progress by early start and early finish unless delayed by Employer culpable event
- Some Contracts gives right for Employer to instruct early start or otherwise, Contractor can use the float (Employer's option)
- If early start would have reduced effect of Employer culpable delay, it is to be taken into account

Properly Updated Baseline Work Program

- Work Programs & their contractual implications are not written in stone
- A work program is a living document on the progress and it must be updated to reflect the actual progress at any given time
- Actual Delays causing Actual Impacts is what the law is concerned with, not hypothetical based on the baseline work program (wishful as-planned at the commencement of the works)

Updating the As-Planned WP

- When Contractor wishes?
- When Delay Event is perceived by SO?
- When progress is found to be in variance?
- When Contractor claims or notifies of EOT?
- Any time wished and instructed by the SO?
- Periodical?
- Monitored Updating & Logic Re-checking?

Monitored & Re-checking?

- Avoid Manipulation!
- Misleading Updates due to automatic update
- Failure to reflect actual mitigation
- Failure to reflect accurately any variation impact (omission or addition)
- Allows accurate impact assessments at the appropriate time
- Pro-Contractor because claim is certain
- Pro- Employer because extent of liability is also certain


Actual Impact at the time when the Delay Occurs

- Failure to reliably update the baseline work program is not reflective of actual impact
- Purported updated as-planned work program that was misleading as to the actual situation at site cannot be relied on
- Actual progress can change the critical path
- Must reflect the actual progress and conditions existing immediately prior to the occurrence of the delay event

Actual Impact at the time when Delay occurs

- Must reflect whether contractor's actual progress is such that the supposed impacted as-planned works were at that time in fact ready to be carried out as-planned
 - Great Eastern Hotel Company Ltd v John Laing Construction Ltd
 - Royal Brompton hospital NHS Trust v Fredrick A Hammond
 - Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd

Progress Reports

- Daily & Monthly Reports?
- But are the Contents Adequate?
- Are the Veracity of the Reports intact?
- Probative Value? 
- Minutes of Site Meetings?
- Correspondence?

Contents of the Progress Report

Apart from the Normal Information:-

- Affect of the Weather on the Work Condition?
- Works Performed – Cross Referred to WP?
- The Measure of the Works Done?
- Time Spent by Resources & Down/Idle Time?
- Reason for Down/Idle Time?
- Resource Transfers & Reasons?
- Mitigation Steps?

Contents of the Progress Report

- Materials Received?
- Variation, Rectification, Inspection, Re-opening Works Identified?
- Works affected by RFI (Information & Inspection) Identified?
- Delays & Disruptions Identified & Reasons
- Resources affected by Delays & Disruptions Identified?
- Accidents & Site Visits?
- Corroboration = Progress Photographs or Videos

Veracity of the Reports

- Approved/Agreed? – COW/ PM/Consultants?
- Contemporaneity? – daily & prepared daily?
- Neutrality? – Favourable & Adverse
- Formal & Consistent – Format & Process?
- First Hand Recorder – Not hearsay? Weight?
- Security? Multiple Copies?
- Distributed & Unchallenged?
- Consistency with other Documents? External & Internal

Veracity of the Reports

- Legible Handwriting?
- Information within contradictory?
- Photographs not labeled?
- Photograph location not identified?
- Date & time of photograph not identified?
- Sub-contracted Works : no records?

Method of Impact Analysis

- Impacted As-planned Method
- As-Planned v As-Built Method
- Snapshot Time Impact Method
- Collapsed As-Built Method
- Windows/Slicing/Watershed Time Impact Method

EOT Refused?

- Mitigate Delay Effect under Protest
 - Instructed to Catch-Up/Recover Delay
 - Constructive Instruction by Threat of LAD
- All Cost Incurred in Mitigating Delay
 - Reasonably Incurred
 - Regardless of total success or partial success
 - Constructive Acceleration Claim
- Constructive Acceleration
 - Discounted by Non-Compensable Excusable Delays
 - US Law : Non-Compensable provision fails if no EOT

Concurrent Delays

“Can’t separate the wheat from the chaff”

- True Concurrent Delay
 - Contractor culpable and Employer culpable events commence at the same time to the same critical item of work and has the same delaying effect
- Concurrent Delaying Effect
 - Distinct Delays to distinct items of works which can be sequential but both result in the same critical overall delayed period

Concurrent Delays

- Sequential Delays but resulting in some shared delay period
 - Prospective Time Slice Delay Assessment, chances of concurrent delays slim in terms of dominance
 - But at the time of the shared delay period, both equally material. Q is whether the earlier delay change the critical path and later delay not critical
 - If not concurrent then one party can benefit even when at culpable fault (LAD or Loss & Expense)
- Equal Causative Potency/ Not “But For”

SCL Protocol

- Excusable delay with catch-all prevention clause
- Avoid strict condition precedent notice requirements
- Application & Assessment close to time of delay event
- Prospective determination which are retrospective delay event
- Determination based on Time Impact Analysis

SCL Protocol

- Agree on Analysis Method
- Agree on Expert to perform analysis
- Immediate reference to dispute resolution when EOT not agreed
- Non-Critical Floats to belong to Project
- Contract to stipulate ownership of float
- Sequential delay events with a concurrent effect period should be treated as concurrent
delay = x dominant delay

Compensation Handling

- Determine Compensable Under Contract?
- Contract Silent = Common Law Damages Claim
- Total Exclusion of Claims for Prolongation!
- Is it a Fundamental Breach?
- Fundamental Breach = Act of Prevention
- Malaysian Law : Cannot be Excluded
- English Law : Can be Excluded (Unless Consumer)
- US Law : Total Exclusion Not Applicable where
 - Not in Contemplation of Parties, Caused by Active Interference by Employer, Fraud or Bad Faith, Willful conduct of Employer, Duration of Delay Unreasonable

Compensation Handling

- Limited Excuses Compensable?
- Effective Limitation providing not Act of Prevention
- Common Law Damages = Contractual Limitation
- Common Law Damages Excluded?
- Loss & Expense Claim Handling

Notice Requirements

- Prospective Cost Impact?
 - Likely to Incur
- Retrospective of Delay Impact?
- Retrospective of Cost Impact?
- Condition Precedent?
- Stipulated Period or General Phrase?

Claim & Assessment

- Purely Prospective Estimates?
- Retrospective Delay Event?
- Retrospective of All Cost Impact?
- Time to Time Retrospective of any Cost Impact?
- Time Limitation on Claim?
- Partially Retrospective & Partially Prospective

JKR Form 203A (2007)

- Limits compensable events in EOT provision
- No Loss & Expense:-
 - Neutral Events & Market Forces Events
 - Delayed Interim Payments
 - Delayed Site Possession (90 days > Contractor option = terminate or proceed)
 - Delay by NSC (seek indemnity)

JKR Form 203A (2007)

- Other Unstipulated Acts of Prevention = Common Law Damages
 - No “*and no other delays*” provision (contained in JRK Design & Build 2007)
 - No “*no common law rights*” provision but
 - Pembinaan Lim Tuck Chui v Dr. Leela Ratos Medical Centre
- Condition Precedent Notice & Claim Provision
 - But only for claims under the provision

JKR Form 203A (2007)

- Only Direct Loss & Expense (no definition)
- Notice: 30 days from Occurrence + Estimate
- Claim : < 90 days from CPC
- Claim : Full Particulars + Supporting Source Docs
- Silent on when to be Assessed & Paid
- Presumption : Final Cert (Int. Cert only value of works)
- (JKR Design & Build 2007 = >90 days CPC)

PAM 1998/2006

- Limits Loss & Expense to Stipulated Events
- No Loss & Expense :
 - Neutral Events & Market Forces Events
- Covers all Acts of Prevention (Catch-All)
- No need for Common Law Damages
- PAM 2006 same except:
 - more stipulated events
 - some neutral events – antiquities etc
 - recognize common law rights expressly ?

PAM 1998/2006

- Condition Precedent Notice = Delay & Claim Prospective or Claim Retrospective?
- Notice : Reasonably Apparent of Delay + Direct Loss & Expense (Incurred or Likely to Incur)
- Confusion : Notice v Claims
- Assessment upon Notice? Cost Prospective?

PAM 1998/2006

- Notice with Claim = Post Incurred
- SO assess claim on own information?
- Makes “*Likely to Incur*” Redundant
- PAM 2006 : distinguish notice & claim
 - Condition Precedent for Both
 - Notice: <28 days from occurrence of Event + Estimate
 - Claim: <28 days from end of Event

PAM 2006

- What about Loss & Expense during Prolongation Period?
 - Waiver of Claim?
 - Can't Waive what not Incurred as Yet?
- Assessment Time to Time
 - recognizing post incurrence claims
- PAM 2006 : upon claim <28 days from end of Event : Otherwise Waiver?
- Payment in the Interim Certs

Record Keeping & Verification

- Substantiation with Claim
- Access to Records
- Mitigation Requirements
- Must assist the SO to ascertain the Actual Loss & Expense
- Impossible to Ascertain – Use Best Evidence Rule
 - providing certain that loss or damage is incurred

JKR Form 203A (2007)

- Supporting Docs
- Vouchers
- Explanations
- Calculations

PAM 1998/2006

- 1998:
 - Relevant Information Substantiating to enable QS to form Opinion + any additional details requested
- 2006:
 - Complete Particulars + Necessary Calculations
 - Contemporaneous Records
 - Access to all books, documents, reports, papers or records + like docs from sub-cons

Source Supporting Documents

- Invoices
- Payment Vouchers
- Contracts & Agreements
- Wage Slips
- Claims & Payment
- Sub-Con evidence

Delay Event Retrospective

- Idling Labour or Unproductive Labour
- Idling or Unproductive Plant & Machinery
 - Actual Lease & Hire Rates
 - Self-owned: Wear & Tear/Maintenance
 - Self-owned Project Specific : Depreciation
- Idling or Unproductive Site Management
 - Specific Delayed Work Activity Supervision
- Idling or Unproductive use of Temporary Works
 - Fabrication Facility, Scaffolding Rental, Formwork etc
- Abortive Works
- Learning Curve Productivity Impact
- If Total Suspension = all Direct & Indirect Cost

Prolongation Period Retrospective

- Recurring Preliminaries
 - Actual Cost
 - Extrapolated Formula Based Claims?
- Turn-over related Fixed Expense Preliminaries
 - Performance Bond
 - Insurance Extension
- Fixed Expense Re-Usable Preliminaries
 - Contractor owned Site Cabin, Toilet Facilities etc
 - Wear & tear and maintenance cost

Prolongation Period Retrospective

- Site Management
 - Overall Project Supervision
 - Project Dedicated
 - Multi-Project Dedicated : Pro-Rata
- Incremental Cost
 - Material Price Increases
 - Only if Early Procurement & Storage not Reasonable
 - Contracts that do not pay for materials at site which are brought prematurely to site
 - Labour Increased Rates
 - Forced by Market Forces/Climatic Working
 - Not Volunteered Additional Rates

Prolongation Period Retrospective

- Material Claims
 - Expired or Deteriorated Shelf Life Consumables
 - Unproductive Double Handling & Wastage
 - Loss of Bulk Discounts
 - Storage Cost
- Financing Cost
 - Increased Bank Charges
 - Additional Funding + Interest
 - Actual Financing Cost unless Exorbitant due to Lack of Creditworthiness
 - Burden of Proof (difficult if packaged financing)

Overheads Unabsorbed During Prolongation

- Loss of Opportunity to Absorb Overheads in other Projects
 - Limited Resources v Infinite Resources
 - Other Projects Available v Recession
 - Otherwise, overheads maintained & lost in any event
- Cost is Incurred but not Practical to ascertain Actual Allocated Cost
- Best Evidence Rule – Formula based Claim

Overhead Claims

- Hudson Formula : Criticized
 - Uses the Allocated Overhead Cost & Profit in Contract Sum
 - Presumes sum allocated at tender is what was actually expended and achieved
 - Profit would have been earned from the prolonged works : Opportunity Loss
- Emden Formula : Less Criticized
 - Profit Lost : Opportunity Loss
 - Average Profit : Not Actual Project Profit

Overhead Claims

- Eichleay Formula: Most Acceptable
 - No Profit Element : No Uncertainty
 - Uses Actual Overheads
 - Pro-rates to Value of all Projects to Value of this Project during the Contract Period
 - Uses same factor : Revenue from the Projects
 - Apple for Apple Comparison
- What happens when no total Apple for Apple Comparison on Revenue? Some PFI Projects?
 - Use other apple to apple comparisons
 - Cost of all Projects v Cost of this Project
 - Lilly Ames Co v US

Issues that Reduce Cost Claimed

- Contractor Culpable Cost Increments
 - Lack of Efficiency & Productivity
 - Failure to Mitigate
- Variation Work Double Recovery
 - Rationalized Schedule of Rates
 - Market Rates = + HQ cost + preliminaries
 - Discounting Factor must be Assessed
- Unproductive Plant & Machinery
 - Reduced Wear & Tear or Maintenance
 - Discounting Factor must be Assessed

SCL Protocol Loss & Expense

- Entitlement to EOT not Automatic Compensable
- Non-Compensable Neutral Excusable Events
 - shared pain (EOT but no compensation)
- Retrospective Assessments of Loss and Expenses
 - exposes overcompensated prospective EOT
- Actual Additional Cost Incurred
- LAD for Prolongation Loss & Expense Encouraged

SCL Protocol Loss & Expenses

- Prolongation due to Variations
 - agree or assess loss and expense soon after completion of the variation
- Tender allowances of limited relevance due to “actual incurred”
- No tender allowance but can still claim actual incurred loss and expense
- Tender allowances only for assessing cost of prolongation or disruption caused by variations performed in different conditions or circumstances

SCL Protocol Loss & Expenses

- Concurrent Delays = X Loss & Expense
- Unless additional Cost caused by the Excusable Event from the Non-Excusable Event can be separated
 - affected duration of the Excusable Event is longer
 - Excusable Event Impacted Activity has special prolongation cost impact (ie. seasonal impacted work)
- As-Built v As-Planned Method of Assessing is Required
- Assessment to focus on Delaying Period & not Prolongation Period
- General Duty to Mitigate Applies

SCL Protocol

Unabsorbed Overheads

- Dedicated Overheads to the Project with thorough Records
- Unabsorbed Overheads claimable unless Excluded by Contract
- Evidence of Loss of Opportunity to Recover Unabsorbed Overheads Required
- When Actual Proof Unfeasible = Use Formula
- X Hudson formula
 - presumes that the tender costing was adequate,
 - includes elements of profit
 - includes elements of other cost that are being recovered under the direct loss and expense claim
- Emden or Eichleay formula Preferred

SCL Protocol

Unabsorbed Overheads

- Discount value of variations (except for materials) that contribute to delay
 - if the variations are more than 10% of the entire contract valuation
- Can agree to use Tender or Contract Price Allowance for Overheads as Basis for Claim
- X Loss of Profit as an Opportunity Loss
- If the Contract allows Recovery of Opportunity Loss
 - Discount for risk involved in earning that profit
 - Loss of Profit extrapolated from the previous 3 years audited accounts

Malaysian Protocol? Loss & Expenses

- Assessment periods:
 - Idling /Suspension Related cost as soon as delaying event is over
 - Recurring preliminaries monthly during the prolonged period
 - Incremental Cost as and when incurred
- Common law damages deemed excluded if specific provisions exist for Prolongation claims
- Even if Common Law Rights are maintained expressly in the Contract, Common Law Damages cannot cover expressed Non-Compensable Excusable Events

The Claim Tactics

- The Solomon Syndrome
 - Exaggerate the Claim so that the Middle Figure is Agreed
 - Causes the SO to take the complete opposite view
- The Clandestine Cost Plus
 - Actual Cost v Estimated Cost
 - Was the Estimate Perfect?
 - Was the Planned & Reasonable Productivity Achieved?

The Claim Tactics

- The Veneer of Precision
 - Hidden Claims Rolled Up
 - The figures are always in decimals
- Double Bubble
 - Hidden overlapping claims
 - Variations with profit & HQ v Loss & Expense with Profit & HQ
- Throw Enough Something will Stick



The End

Q & A