



**Loss & Expense :  
Getting it Right**

beyond law...we innovate solutions

**belden**

# Standard Processes when any disruption occurs

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

# Disruption Assessment Handling

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- Determine Criticality of Disruption on Time
- Updated WP Impact Analysis (Prospective)
- 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

# Delay Assessment Handling

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- 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

# Non-Excusable Delay but Act of Prevention

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- Time At Large : X Contract Mechanisms
- Determine Reasonable Time to Complete
- Appropriate Impact Analysis
- 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

# Excusable Delay Claim Handling

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- Notice Requirement for EOT
- Prospective or Retrospective EOT Claim
- Early Warning Mitigation Processes
- WP Impact Analysis & Progress Reports
- Await Assessment on EOT?
- Assessment: Fixed Period or Reasonable Time
- Otherwise :
  - Time At Large
  - Common Law Damages

# Excusable Delay Claim Handling

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- 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

# Excusable Delay Claim Handling

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- 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

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

# Claim & Assessment

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- 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)

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- 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)

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- 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)

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- 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

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- 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

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- 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

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- 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 1998/2006

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- 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

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- 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)

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- Supporting Docs
- Vouchers
- Explanations
- Calculations

# PAM 1998/2006

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- 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

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

# Delay Event Retrospective

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- Idling Evidence
  - Site Diary
  - Daily, Weekly, Monthly Reports
  - Kong Cards
  - Correspondences
  - Head Count/Equipment Count
  - Acknowledged Records
  - Offer to Inspect/Ascertain

# Delay Event Retrospective

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- Idling Labour
  - Full Time
  - Foreign Workers & Levy
  - Labour Sub-Con
- Idling Plant & Machinery
  - Actual Lease & Hire Rates
  - Self-owned: Time Based Maintenance
- Idling Site Management
  - Project Specific
  - Allowances
  - Travel Cost
  - Rented Vehicles

# Delay Event Retrospective

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- Recurring Preliminaries (Total Standby)
  - Site Office
  - Branch Office (Project Specific)
  - Utility
  - Project Housing
  - Fabrication Facility & Temporary Works Yards
  - Scaffolding & Formwork Rental
  - Storage Yards
  - Contractor owned Site Cabin, Toilet Facilities etc (wear & tear and maintenance cost)



# Delay Event Retrospective

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- Materials (Total Standby)
  - Consumables (shelf life expired)
  - Unproductive Double Handling & Wastage
  - Loss of Bulk Discounts
- Financing Cost (Total Standby)
  - Project Specific Facility
  - Severable & Identifiable Facility
  - Project Drawdown Interest
- Unabsorbed HQ (Total Standby)
  - Practicability of Finding Replacement Work
  - Eichleay Formula

# Delay Event Retrospective

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- Sub-Con Claims (Total Standby)
  - Idle Claims
  - Storage Claims
  - Production Optimum Losses
- Idling Claims (Partial Standby)
  - Delayed Critical Work Specific Items
- Loss of Optimum Production (Partial Standby)
  - Own/Sub-Con
  - Temporary Works
  - Fabrication Yard

# Prolongation Period Retrospective

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- Recurring Preliminaries
  - Similar to Idling Preliminaries List
- Site Management
  - Project Specific & Full Period Staff
  - Multi-Project Dedicated : Pro-Rata
  - Increased Wages (Standard & Inflationary)
  - Standard Bonuses
  - Petrol Allowances – Site Office Travel only
  - Project Specific Vehicles – Depreciation (market rates)

# Prolongation Period Retrospective

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- 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
  - Storage Cost
  - Unproductive Handling & Wastage
  - Special Price Loss
- Reasonable Increased cost
  - Labour Increased Rates
  - Forced by Market Forces/Climatic Working
  - Not Volunteered Additional Rates
  - Standard Allowances & Bonus
  - Labour Sub-Con & 3<sup>rd</sup> Party Contract New Terms (Effluxion of Time)

# Prolongation Period Retrospective

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- Financing Cost
  - Increased Bank Charges
  - Extension of Period of Facility Cost
  - Additional Funding + Interest
  - Time Related Interest
  - Actual Financing Cost unless Exorbitant due to Lack of Creditworthiness
  - Burden of Proof ( difficult if packaged financing)

- Machinery & Plant
  - Entire Project Period Machinery & Plant
  - Actual Hire/Rental
  - Own : Time Based Wear & Tear & Maintenance
  - Own: Project Specific : Depreciation
    - Market Value v Accounting Treatment
- Turn-over related Fixed Expense Preliminaries
  - Performance Bond
  - Insurance Extension

# The Claim Tactics

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- 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

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- 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



# Global Claims

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- No nexus between specific causes to specific effects to specific loss.
- Total costs claim
  - one lump sum claim for all causes to effects
  - actual costs minus planned costs
- Rolled up claims
  - many causes to one effect
  - many causes to many effects

# Global Claims

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- How the Courts were won at pleading stage
  - construction claims are highly complicated
  - many overlapping causes causing overlapping effects
  - impracticable or impossible to accurately apportion damage to particular causes/effects
  - impracticable or impossible to link causes to effects
  - perhaps influenced by the belief that at the hearing
  - experts will crystallize the nexus
  - evidence of the facts will support the nexus

# Global Claims

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- Courts insist on evidence of nexus
- Warned that if one cause fails or one effect fails – all fails (causes, effects & sums)
- Many causes to one effect, one cause proven is sufficient for the total costs claimed

# Global Claim Fails Unless

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Boyajian v US principle:

- Nature of Delays & Costs: Impossible / Impractical to Determine Accurately
- Contractor's bid or estimate realistic
- Actual Cost is reasonable
- Contractor in no way responsible for added cost
- Modified Bid Estimate & Actual Cost?
  - (Great Lakes Dredge & Dock v US)

# Issues that Reduce Cost Claimed

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- 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

# Overheads Unabsorbed During Prolongation

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- 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

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- 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

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- 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



# SCL Protocol Loss & Expense

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- 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

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- 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 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

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- Concurrent Delays = X Loss & Expense
- Unless Loss & Expense for each critical delay can be separated
  - affected duration of the Excusable Event is longer
  - Excusable Event Impacted Activity has special prolongation cost impact (ie. seasonal impacted work or fabrication work)
- Assessment to focus of Delaying Period & not Prolongation Period
- General Duty to Mitigate Applies

# SCL Protocol

## Unabsorbed Overheads

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- 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

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- 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

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- Assessment based on cost incurred when the effect of the delaying event occurred rather than prolonged period
- Except for the actual recurring site overhead cost and the unabsorbed HQ overhead cost & other incremental cost
- 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