

Rapid Real Time Dispute Resolution Process Construction Industry Time for Best Protocols?

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by

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CIPAA Act 2011 Bill

- Passed in Dewan Rakyat – 2.4.2012
- 2nd reading – presently in Dewan Negara (formality)
- Then Royal Assent
- Then Gazette
- Then Binding – Regulations from Minister
 - Expect binding by end of Year

Parties & Industries

- Every Construction Contract made in writing
- All types of construction in/partly in Malaysia
- Sub-Structure & Super-structure & M&E
- Oil & Gas industry included
- Temporary Works & Earthworks
- Construction Consultancy Contracts
- Material, Equipment & Labour supply
- Foreign Companies
- Government

Parties & Real Time

Not Include:-

- Natural Person
- Building less than 4 storey high and only for occupation
- Real Time
 - Payment Claim : Immediately After Due Date or Any Time Later
 - Decision is it still Real Time?

What Disputes?

- Payments: payments under the Express Terms
 - No reference to due & payable
 - Can Challenge Failure to Certify or Under-Certification
 - Variations: Not Agreed & No Payment Time Stipulated?
 - Termination Provision: No Payment Till Loss Assessed?
- Default Payment Provision (if none in contract)
- Even final certificate payment or final account payment
- No Conditional Payments (Void)
 - “Pay-If-Paid”
 - “Pay-when-Paid” or
 - “Pay-when-Funds/HDA Available”
- What about Pay-when-Certified or Pay-when-Notified?? 5

What Disputes

- Adjudication Response
 - Delays & LAD
 - Design Defects or Defective Works
 - Set-offs/Back-charges
 - Not Variations
 - All other Disputes that Diminish or Extinguish the Obligation to Pay or the Amount Payable

Rapid

- See Chart
- Approximately 100 -105 working days
- Rapid? Other Jurisdictions 14 days – 28 days (plus extensions of equivalent amount)
- Only Temporary Decision & Binding
 - Can be reversed in Arbitration or Court
 - Set Aside by High Court : no jurisdiction, fraud or bribery, no natural justice, not independent
 - Can have Concurrent Proceedings

Adjudicator's Powers

- Determine Procedure : limited documents & hearing time
- Draw on own knowledge & expertise
- Appoint Independent Expert (cost?)
- Inquisitorial on Facts & Law (subject to natural justice)
- Award financing cost & interest

Adjudicator's Powers

- Extend time on Pleadings
- Decide even if no Certificate issued
- Decide Time when Adjudicated Payment to be made
- Open up even final & conclusive certificates
- Inquisitorially take the initiative to ascertain:-
 - Facts
 - Law

Dangers of Adjudications

- Res Judicata on Response for next Payment Claim? No for Continuing Matters (delays etc)
- Dangers of Piece-Meal Issue by Issue Adjudications which can reverse effect of prior Adjudications
- Dangers of Differing Number of Adjudicators for same Project (different contractual interpretations)
- Events Post Decision giving rise to a right of Set-off is Lost?

Fast Track Arbitration

- Fast Track Rules 1st Edt. 2010 : MIArb & KLRCA
- Now 2nd Edt. 2012
- 100 day Arbitration : Society of Construction Arbitrators
- Other Jurisdictions: catching on
- 1st Successful Arbitration Concluded

Rapid

- See Chart
- Previously : 140 days or max 180 days
- Now: 160 days or max 200 days
- Hearings: 6 days or max 10 days
- Final Determination
 - Subject to Section 42 (domestic): High Court can remit, set aside or vary
 - Truly Final (international)

Real Time?

- Concurrent with Statutory Adjudication
- After Statutory Adjudication
- Suitable for Disputes that have been adjudicated
- No need for Full Blown Arbitration
 - Evidence & Submission Done Before
 - Second Round Hearings
 - Second Bite at the Cherry

Arbitrator's Power

- Can Limit & Dictate:
 - Documents, Discovery, Witnesses, Experts, Cross-Examination Issues, Witness Statements only, Time for Cross-Examination & Re-Examination
- Apply Specialist Knowledge
- Appoint Independent Experts (with consent)
- Order Inspection for Tribunal
- Conduct Questioning of Witnesses or Experts
- Hot-Tubing of Experts

Fast Track

- Heavy Reliance on Documents
- Less Reliance of Full-Blown Oral Evidence
- Inquisitorial Approach to Evidence
- Evidence Presentation Crucial
- Contract Terms & Standard of Proof
- Areas of Complex Disputes in Quick Time?

Inquisitorial Approach Adjudicator

- Adjudicator has 45 w. day or 61 days
- Adjudicator's List of Issues & Observations (after Adjudication Reply/Response)
 - Identify pertinent issues to be determined & parties contentions
 - Identify matters relating to the pertinent issues where documentary material, clarification & elaboration is required
 - Allows parties to comment

Inquisitorial Approach Adjudicator

- Adjudicator's Observations
 - Narrative of Background, History & Contractual Arrangements
 - Introductory questions
 - Assumptions made from Documents or Representations
 - Incomplete Documents
 - Specific questions
 - Highlight Uncertainties

Inquisitorial Approach Adjudicator

- Adjudicator's Observations
 - Highlight what considered irrelevant
 - Specific Documentary Request
 - Category of Documents : Sampling
 - Highlighting Issues or Specific Matters within the Issues that requires witnesses
 - Observations on the Law Applicable
- Procedural Suggestions

Inquisitorial Approach Adjudicator

- Responses to the Adjudicator's List of Issues & Observations – exchanged
- Documents Requested – exchanged
- Each Party to Comment on Other's Responses
- Each Party to Comment on the Documents
- If too much is produced by one or both parties, issue of agreed extension for comments

Inquisitorial Approach Adjudicator

- The Meeting : Not Hearing
- Adjudicator controls and ask questions in the form of a dialogue
- Adjudicator goes through the List of Issues & Observation, Responses & Comments
- Each Party than allowed to orally state its observations on the issues and questions that require answers (limited time)
- Adjudicator allows short responses & can make further queries

Inquisitorial Approach Fast Track Arbitrator

Difference

- Must allow witness statements & cross-examination albeit limited time
- Must allow submissions on facts & law
- Limited to only matters pleaded
- But other processes of List of Issues & Agreed Narratives & Observations can Adopted

What Guides An Inquisitorial Approach?

- The Contract Terms & Provisions
- The Documents Available
- Who has the burden of proof on each issue (prove on balance of probabilities)?
- Who has the evidential burden (does the evidence or analysis corroborate)?
- Type of evidence that satisfies the evidential burden?

Contract Sets Controls

- Do the Contract provisions set the standards?
 - Who has the burden on each type of foreseeable disputes such as EOT/Variation/Defects?
 - Type of evidential documents that satisfy the burden?
 - The standard of analysis for the evidence?
 - The method of assessing the entitlements?
- Otherwise, each Inquisitor may Differ
- Limited Time to Convince the Inquisitor – Inquisitor's Own Perceptions Prevails

Complex Disputes

From Payment or Adjudication Response:-

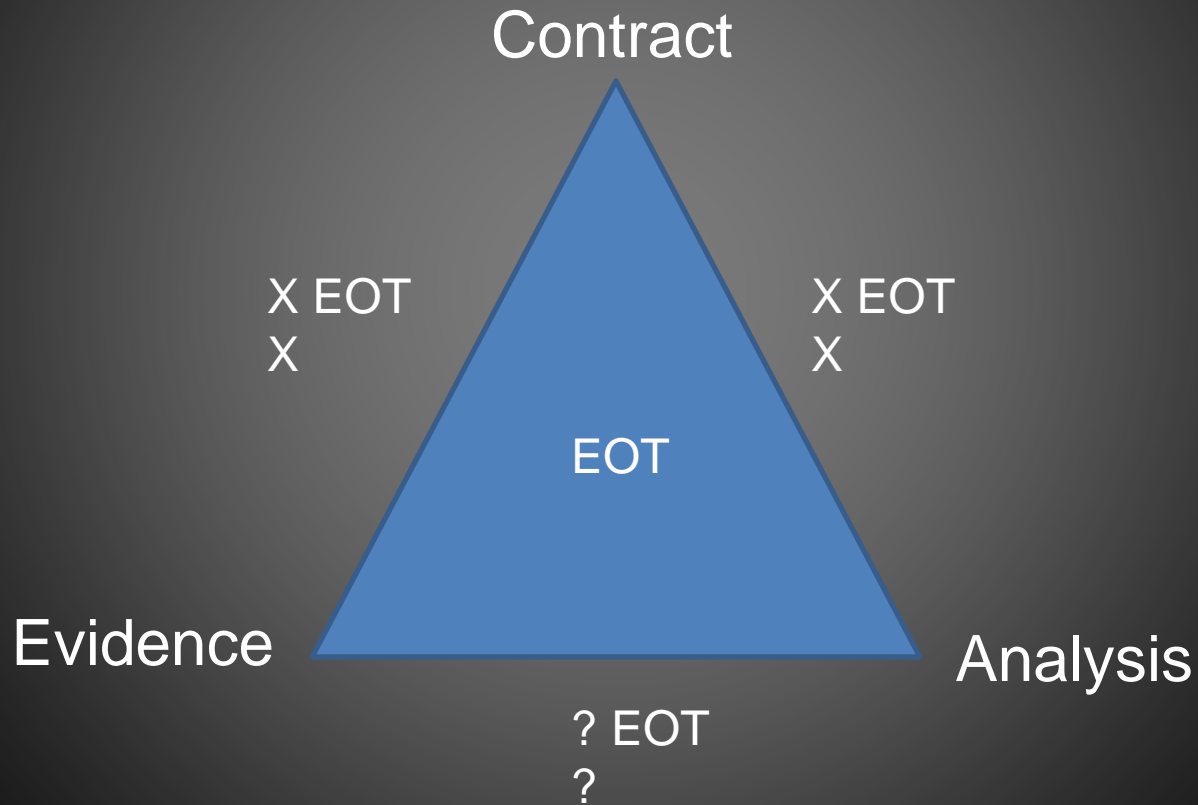
- Is the Contractor in Culpable Delay?
- Is the Contractor entitled to EOT?
- Is the Employer entitled to LAD?
- Is there a claimable disruption & loss of productivity or acceleration?
- Is the Contractor entitled to Loss & Expense?
- Are the claimed additional works Variations?
- Is there a Design or Workmanship Defect?

Delays & EOT

- Not Real Time – Delay Event
- Only when LAD imposed
- Delay Event Retrospective
- During Prolongation Period
- Contractual Issues
- Evidentiary Issue
- Critical Impact Analysis



The Trinity



The Contract

- Excusable Delay
- Condition Precedent Notice
- Mitigation
- Prospective or Retrospective Analysis
- Evidentiary Requirements

Excusable Delay

- EOT Entitlement
- Best Practice = “catch all act of prevention”
- Avoid Time at Large arguments
- Contractor Friendly but also Employer Friendly

Notice

- Condition Precedent, why?
- Effective Tool?
- Early Warning Tied to Mitigation
- Is there an effective Mitigation Procedure?
- If not, then administrative weapon
- If Delay – Evident to All?
- If Delay – Act of Prevention
- Is LAD a penalty?

Avoiding LAD = Penalty

- SO assess delay without prejudice to right to refuse due to lack of notice?
- PAM 2006 : within 12 weeks after CPC review and assess regardless of lack of notice
- Employer agrees EOT with no loss & expense?
- Employer Unilateral Right to grant EOT
- CNC based on contractual extensions and not SO's opinion?
- Employer waives LAD for the affected period?

Best Practice Protocol

- Early Warning Condition Precedent + Mitigation Mechanism
- Absurd Term: No Early Notice = Agree to Accelerate at own Cost if Employer Culpable Delay

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

Prospective v Retrospective Assessment

- Truly Prospective – Likely/Probable Delay
 - How to really consider Mitigation effects?
 - Unless Recovery/Catch-Up Program Issued
 - Without prejudice recovery/catch-up programs and constructive acceleration
 - PAM 98' : upon receipt of notice & on likely delay

Prospective v Retrospective Assessment

- 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
 - Real Time Processes

Best Practice Protocol

- Clear Clause on When EOT to be Assessed
- Binding on Adjudicator & Arbitrator
- Application & Assessment close to time of delay event = True Impact Analysis?
- Less Mitigation Effects?
- Prospective Completion Determination but retrospective Delay Event

The Evidentiary Burden

All the Crowd would shout back

“Yes, yes, we believe you.”

But as the trapdoor snapped open,
the Crowd would yell

*“But you ain’t got no proof...
and given that the burden of proof is on you,
you can hang”*

Cause to Effect

“Proxima Causa”

“Causes are spoken as if they were as distinct from one another as beads in a row or links in a chain, but – if this metaphysical topic has to be referred to- it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain but a net. At each point influence, force, events precedent and simultaneous, meet, and the radiation from each point extends infinitely.”

*Lord Shaw of Dunfermline,
Leyland Shipping v Norwich Union Fire Insurance Society*

Proxima Causa

“The test is what an informed person in the building industry (not the man in the street) would take to be the cause”

Judge Bowsher QC

**P&O Developments Ltd v The Guy’s and St.
Thomas’s NHS Trust**

The Work Program

- Adequately Detailed As-Planned Base Work Program
- Logic Checks & Approval
- Assess & Identify Co-operation Logic Dates
 - Instructions, Information, Approvals, Reviews, 3rd Party Co-ordination
- Identify Floats & Logic – Check Hidden Floats

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

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 – Best Practice

- 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
- Ownership of Non-Critical Float to be Identified

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

Updating the As-Planned WP

- Recognise Base WP is a living & evolving tool
- Recognise Time & Impact evolving
- How to Indentify

- Up-dating Requirement
 - When Impacted? Too late? One Party Beneficial
 - Periodical + Look Ahead WPs + When Impacted

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

Balfour Beatty Construction Ltd v The Mayor & Burgesses of Lambeth

“the foundation must be the original program (if capable of justification and substantiation to show its validity and reliability as a contractual starting point) and its success will similarly depend on the soundness of its revisions on the occurrences of every event, so as to be able to provide a satisfactory and convincing demonstration of cause and effect. A valid critical path (or paths) has to be established both initially and at every later material point since it (or they) will almost certainly change”

Leighton Contractors (Asia) Ltd v Stelux Holdings Ltd

“The Arbitrator found against Leighton on actual delay. She further held that, given Leighton’s pleaded case and the facts as found by her, she did not have to concern herself with “likely delay” under cl.23. In those circumstances, it is not surprising that the Arbitrator found time slice methodology of little help. Stressing prospective delay regardless of actual delay, time slice methodology would have been of limited relevance.....”

Hon. Reyes J


Quality of Factual Evidence

Skanska Construction UK Ltd (formerly Kvaerner Construction Ltd) v Egger (Barony) Ltd

“It is evident that the reliability of Mr Pickavance's sophisticated impact analysis is only as good as the data put in. The court cannot have confidence as to the completeness and quality of the input into this complex and rushed computer project.

Judge David Wilcox

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 or Slicing Method

Impacted As-Planned

- Treats the As-Planned Non-Updated Program as written in stone
- Critical Path never changes
- Can be based upon updated as-planned programs although it could reveal delays by Contractor
- Ignores the actual happenings in the site except for the delay events claimed
- Assumption that Contractor has been perfect with zero problems and exactly on schedule but for the claimed event
- Even so, why not updated? If not obliged? Some factual evidence of Contract inefficiency will destroy the method

As Planned v As-Built

- Comparison of As-Planned & As-Built with some identification of what caused the delay
- Superficial method
- Fails to consider knock-on effects
- Concurrent delays are ignored

Time Impact Method

- Can be manipulated!
- Danger if it ignores some actual facts
- Need to be aware of actual progress when relevant delaying event actual impact being considered
- Prior delays could have been recovered
- Prior delays could have actually had lesser impact than projected on program
- Preferred Choice – Contractually Stipulated?

McAlpine Humberoak Ltd v McDermott International Inc

“the Judge dismiss the Defendant’s approach to the case as being a retrospective and dissectional reconstruction by expert evidence of events almost day by day, drawing by drawing, TQ by TQ and weld procedure by weld procedure, design to show that the spate of additional drawings which descended on McAlpine virtually from the start of the work really had little retarding or disruptive effect on its progress. In our view, the Defendant’s approach is just what the case required.”

Llyod L.J.

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 but both result in the same critical delay period
- Strict Prospective Time Slice Delay Assessment
 - Chances of concurrent delays slim

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
 - If not concurrent then one party can benefit even when at culpable fault (LAD or Loss & Expense)

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Hon. Reyes J

Leighton Contractors (Asia) Ltd v Stelux Holdings Ltd

“The analysis pressed by Mr. Menyhart (Leighton’s expert) focused on the prospect of delay resulting from an event at a given time, regardless of whether in retrospect the event had actually caused delay. The Arbitrator rejected Mr. Menyhart’s analysis entirely. In contrast, the Arbitrator found the evidence of Mr. Foan (Stelux’s expert) more helpful. He also used “time slice” methodology. But his approach was different in focus. The Arbitrator observed that Mr. Foan “does not consider off-site delays until they affect “on-site” activities and then only to the extent that they do....”

Hon. Reyes J

Best Practice

- Agree on Analysis Method
- Agree on Expert to perform analysis
- Immediate reference to dispute resolution when EOT not agreed
- Don't wait for Payment Claim – During Prolongation Period & Adjudication

Adoption of Best Practices

- Amend Conditions of Contract?
 - Consider pro-active provisions in NEC Contracts
 - PFE Change Management Supplements (Pickavance & Fenwick Elliot amendments to JCT98”)
- Adopt under Amplification & Explanatory Terms under the Bills or Schedule

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 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 of 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

Other Protocols Loss & Expenses

- 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



The End

Thank You

Q & A