

The logo for NAVIGANT, featuring the word in a bold, sans-serif font with a stylized white triangle above the letter 'A'.

NAVIGANT

Construction Claims in the Gulf

ICES CPD Event – 12/2012

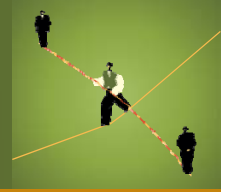
ADMC Auditorium

19 December 2012



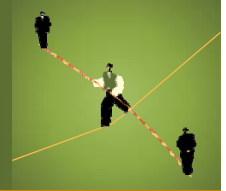
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Context



- » Aftermath of 2008 / 2009 financial crisis
 - › Some settlements but many claims now in arbitration / local courts
 - Suspension and termination
 - Exodus of personnel (and knowledge)
 - Payment issues (Insolvency ?)
 - Unresolved variation accounts and claims
 - Subcontractor vs. Main Contractor
 - › Quality factors
 - Relationships / hope for negotiated settlement
 - Many claims prepared quickly
 - Complex factual matrix
 - Lack of personnel / records
 - Reluctantly commenced formal dispute proceedings

New reality



» Culture changes

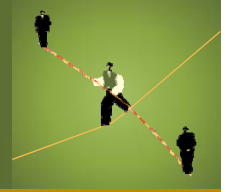
- › Taboo of disputes reduced (not extinguished)
- › Ability to settle changed
- › Greater accountability
- › Need to show value achieved
- › Maturity ?

» Markets

- › Workloads improving regionally – still competitive / lower margins
- › Return of Inflation
- › Future overheating ?
- › Financial / political uncertainty

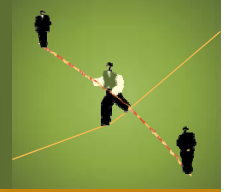
» Lessons to be learnt

What does a Claim do ?



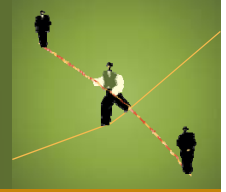
1. A did or did not do B
2. B caused C to happen
3. C involved or affected the resources, D (and not for any other reason)
4. D cost E
5. E, under the Contract or at Law, is the liability of A

Evolution



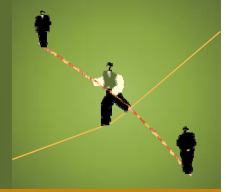
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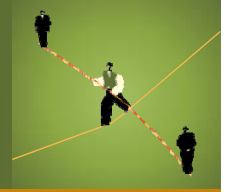
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Causal Linkage



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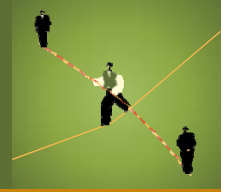


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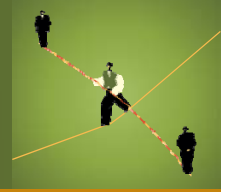
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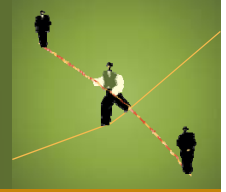
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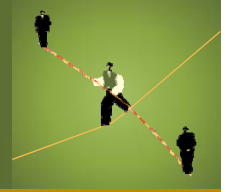
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- ✓ ✗ 2. B caused C to happen (and not some other cause)
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Causal Linkage

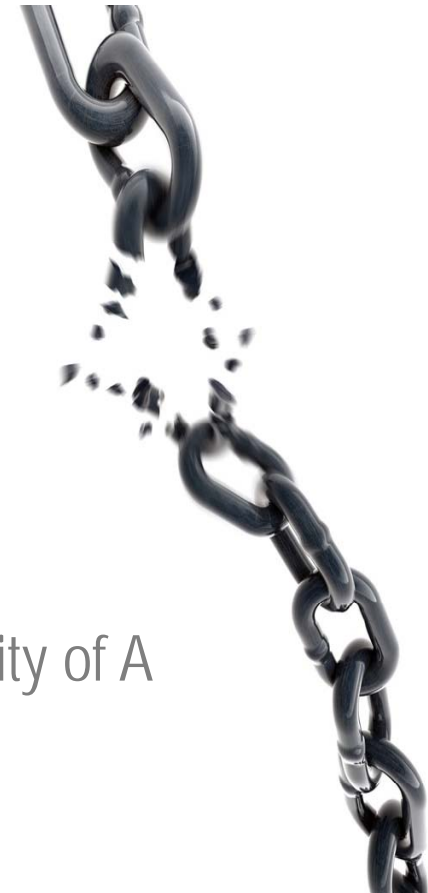


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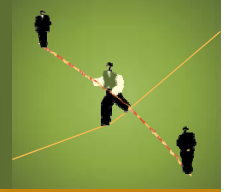
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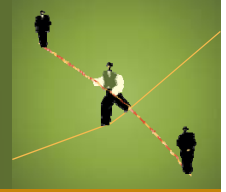


Typical Components



- » Delays to completion
- » Delays to Work
- » Increases in cost and resources
- » Changes
- » Allocation of risk
- » Delays to payment
- » Delays to certification
- » Termination / suspension

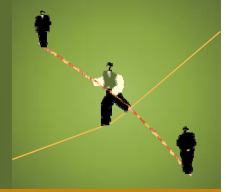
Authority for a Claim



- » Claim under the Contract – a Clause that allows for or provides for a claim
 - › Eg. FIDIC – Clause 42.2 – Failure to give Give Possession
 - If the Contractor suffers delay and/or incurs costs from failure...of the Employer to give possession..... The Engineer shall.....determine
 - (a) any extension of time....and
 - (b) the amount of such costs...
- » Claim for Breach of Contract
 - › Failure of someone to do something or doing something in excess of that provided under the Contract for which there is no express procedure to claim eg. failure to give approval
- » Claim at Law (other than Breach of Contract)
 - › Pursuant to a provision of the Civil Code or some other part of the law (eg. acting in bad faith, enforceability of pre-agreed damages)

Procedural clauses do not give entitlement in their own right

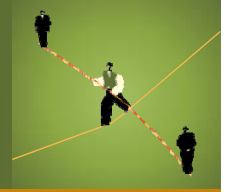
Delay / Prolongation Claims



- » Delay analysis (usually a component)
 - › Different types of analysis (subject in its own right)
 - Often need for regularly updated programmes
 - Logical programmes
 - As Built records / progress reports
 - › Analysis / result can be confused and expensive to ascertain if problems with the above
 - › Records, records, records – who did what, when and why ?
 - › Identification of when delay occurred
 - › Identification of concurrent delays
 - › How to deal with concurrent delays
 - › Acceleration ?

- » Sole purpose of an EoT is to deal with delay damages / penalties

Delay / Prolongation Claims



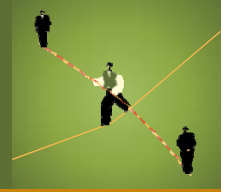
- » Time does not always equal money
 - › Clause 44.1 (b) – EoT – any cause of delay referred to in these conditions
 - CI 6.4 – Delayed issue of Dwgs – Time and cost
 - CI 12.2 – Obstructions – Time and cost
 - CI 27.1 – Fossils – Time and cost

 - › Clause 44.1 (d) – EoT – delay, impediment or prevention by the Employer
 - Money ?

 - › Clause 44.1(e) – EoT – Other special circumstances (not Contractor default)
 - Money ?
 - [Force Majeure under FIDIC 99 allows cost for some events]

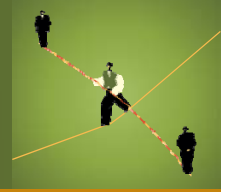
 - Breach of Contract / Legal claims (loss of profit / revenue ?)

Prolongation Costs – Periods of Delay



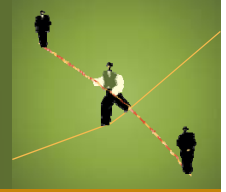
- » Use the correct periods of time
 - › Period when delay actually occurs
 - Site running costs (not preliminary prices)
 - Direct additional HO costs
 - › Overrun period (between original / extended completion date)
 - Insurances / bonds
 - Escalation / inflation
 - HO Overhead / formulae claims
 - Financing claims
 - › Identify periods of concurrent delay
 - SCL Protocol
 - Apportionment

Prolongation Costs – Operational costs



- » Extended running costs
 - › Critical delay periods
 - › Non-critical delay periods - prolongation of specific items – eg. tower cranes
 - › Site running costs
 - Need Cost ledgers – need to prove cost – invoices
 - Separate running costs from mobilisation / demobilisation
 - Separate time related costs from work related costs
 - › Head office Costs
 - Specific resources allocated and involved with Project – need some sort of record
 - Procurement
 - Specific Management
 - › Activity Prolongation – certain trades – supervision etc.

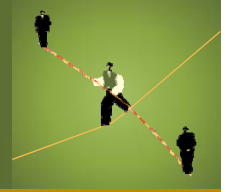
Prolongation Costs – Escalation



» Escalation / inflation

- › Function of delay ?
- › Delay in completion - Overrun period – outside risk of original contract period in price
- › Delay in procurement – within Contract Period – usually complex / unclear
- › Concurrency
- › Duty to mitigate
- › Evidence

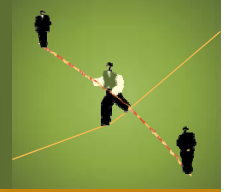
Prolongation – Loss of Contribution



» Lost Head Office overheads

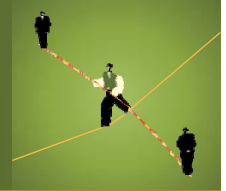
- › The A – Team were tied up on the Project
- › But for the delay in completion they would be earning operating profit / overhead contribution elsewhere
- › Uses a formulae
 - Variety to choose from
- › Some controversy – trying to predict the future – accepted in the US and lesser degree the UK
- › Tests to satisfy
 - Constraint
 - Proof that other work turned away / reduction in overhead recovery – drop in turnover
 - That resources were finite – couldn't hire another A Team
 - No increase in turnover that could pay for lost contribution
 - No change in market conditions to affect possibility of contribution

Prolongation Costs - Financing



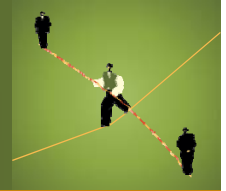
- » Funding of construction over a longer period ?
 - › Release of retention
 - › Comparison of cashflows
 - Speculative
 - › Proof of loss / cost – Financing costs
 - › Current economic conditions
 - Low interest rates
 - Worth the hassle ?

Acceleration



- » Instructed acceleration - a variation
 - › Agreement to accelerate with liability for costs
 - › Clause 51.1 (g) – Change in sequence, timing of the works
- » Or just told to hurry up ?
- » Constructive acceleration
 - › Legally complex / uncertain
- » To calculate cost (if not pre-agreed cost and resource)
 - › Need to know exact delays and causes
 - › Need to know which resources overcame which delays
- » If no agreement / instruction to accelerate then why are you doing it ?
 - › Calculated risk
 - › Value for Money ? - usually woefully underestimated

Disruption - 1



» Difficult

› Definition

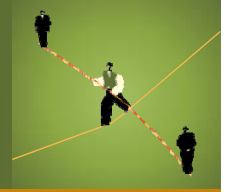
- Took longer / cost more because of some change in circumstance
- Usually complex – many factors
- Records, records, records
 - Webcams / Technology
 - Detailed records – contemporaneous allocation of resource to activity and location
- Clause 51.1 (g) – Change in sequence, timing of the works

› Level of return ? - Cost of labour / Cost of plant

› No easy answers – lots of books full of impractical advice

› Home of the Global Claim

Disruption – 2

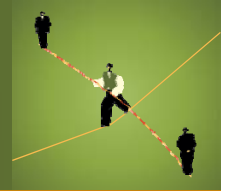


» Global Claim

- › Total cost / resource less planned cost / resource
- › Circumstances in which appropriate / successful – very rare
 - Impossible to otherwise calculate
 - No other causes / Contractor default
 - Planned resource / cost was realistic
 - Additional costs / resources realistic
 - Mitigation

- › Don't do it - Credibility ?
- › Reversal of burden of proof ?
- › Amongst other things, only works if you are perfect

Disruption – 3



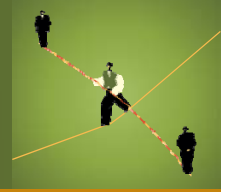
» Measured Mile – Project data

- › Find undisrupted work
- › Compare with disrupted work
 - Need to know which resources were doing what and when
- › Better than global claim
 - But ensure that both disrupted / undisrupted periods are not contaminated (or make proper allowance / adjustment)

» Measured Mile – Industry data

- › Oil & Gas industry good at this because of QA - can usually retrospectively rebuild project from data – Civils and Building Industry is not
- › Few studies – how is the performance of MEP installation in Idaho relevant to Dubai ?

Finance Claims

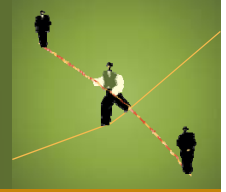


- » Legal issues in UAE / GCC
 - › Get legal advice on what is admissible
 - › Potential distinction between claim for
 - Financing Cost
 - Claim for Interest

 - › When does it run from ?

 - › Penalised if you don't borrow money ?
 - NB – Not a reason to borrow it !

Conditions Precedent



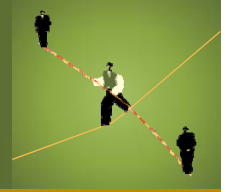
» Notices

- › A need to alert the Engineer / Employer
 - Mitigating action
- › No reason not to get them in – if you are not sure whether any effect then say so but rectify as soon as possible
- › Sanctions vary under different contracts - Legal issues re. relying on procedural issues to escape liability – degree of prejudice
- › Don't give opportunity for argument and at least open dialogue (argument ?) on topic

» Particulars

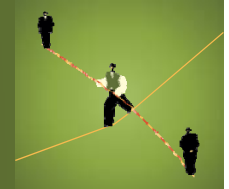
- › Similar issues apply – submit as soon as you are able – if not possible (or only partially possible) then say so
- › Level of detail – enough for the Engineer to do his job – sufficient for arbitration ?
- › Balance of probability – be methodical and helpful

Interim Certificates



- » Insolvency / Suspension / Termination
- » Defects
 - › Deduct fairly from interim certificates
 - Measure of deduction
 - Price of work in Contract Price or
 - Cost of remedial Work by a third party ?
 - › Insolvency / Termination
 - › Back to back Subcontracts
- » Valuation of Preliminaries
 - › Time related
 - › Work related
 - › Contractor delay / dispute delay
 - › Rebase preliminaries

Consequences



It is perfectly clear that some of the elaborate literary efforts put forward as... claims are works of fiction rather than fact. It is all too easy for a contractor who finds at the end of a contract that he has lost money to exaggerate the minor delays inevitable in large-scale work and to distort the real sequence of events by alleging delay caused by the engineer when in fact he was not in any case ready to do the work involved. The result is a wildly exaggerated... claim costed out in the vaguest possible way. Provided his lawyers create the maximum confusion at the arbitration about what actually happened on the works (and the standard arbitration procedure almost seems designed to help to that end ...) he can hope for a substantial award from an arbitrator.

It is grossly unfair both to employers and contractors that the mechanism to determine the actual full costs..... to a contractor, and to divide them from the costs due to his own inefficiency, is lacking more often than not.

A party to a dispute, particularly if there is arbitration, will learn three lessons (often too late): the importance of records, the importance of records and the importance of records. It is impossible to exaggerate the extent to which lawyers can find unexpected grounds, often quite real, on which to cast doubt on evidence if it is not backed by meticulously established records. It must also be remembered that the arbitrator will know nothing about the history of the work, which must be reconstructed... with all its complexities and nuances, from the records available.

Questions



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