

CONTRACT MANAGEMENT UNDER THE FIDIC RED BOOK 1999

**Pakistan Engineering Council
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بن نخيرة
ومشركوه
BIN NAKHIRA
& PARTNERS

Speaker:

Stephen Osuhor **BSc, MRICS, MCI Arb**



- Director based in Driver Trett's Dubai office.
- Over 25 years' industry experience in consulting, private and public organisations across a wide range of sectors in the United Kingdom, United Arab Emirates, Oman, Qatar and Asia Pacific.
- Particular skills in dispute resolution, contract administration, commercial management, and risk management.
- Has acted as party-appointed quantum expert in arbitration proceedings and carried out independent expert determinations.

DRIVER TRETT - COMPANY OVERVIEW

- Global construction consultancy
- Established in 1978
- Stock exchange listed PLC (AIM 2005)
- Market leader in construction expert witness, disputes, planning, and commercial
- Over 450 global staff
- Network of offices across Americas, Asia Pacific, Europe, and the Middle East
- Global reach with projects undertaken worldwide

GLOBAL PRESENCE



WHAT WE DO



Our dispute and advisory team, delivering high-level commercial and claims support, procurement advice, contractual and strategic advice, and the full range of planning and programming services.

World-class quantum, delay, and technical experts for litigation and provision of internationally experienced adjudicators, arbitrators, and mediators.



Provision of project management alongside transaction advisory services to clients for the delivery of concession projects using PFI, PPP and DBFO procurement options.

Our project controls team, delivering commercial management, quantity surveying, and planning services throughout the project lifecycle.



TODAY'S AGENDA

10:00	PEC Opening Remarks
10:05	Introductions
	FIDIC
	Role of the Engineer
	Variations
	Claims
	Notices and Time Bars
11:30	Tea Break
11:45	Managing Claims
	Delay and Disruption
	Acceleration
	Effective Presentation of Claims
13:00	Lunch / Prayer Break
14:00	Negotiation and Settlement of Claims
	Dispute Resolution
	Arbitrating – Special Considerations
16:30	PEC Closing Remarks

STATING THE OBVIOUS

Q: What is common to every project?

A: Contracts! Whether with a client, a contractor, a subcontractor or a supplier.

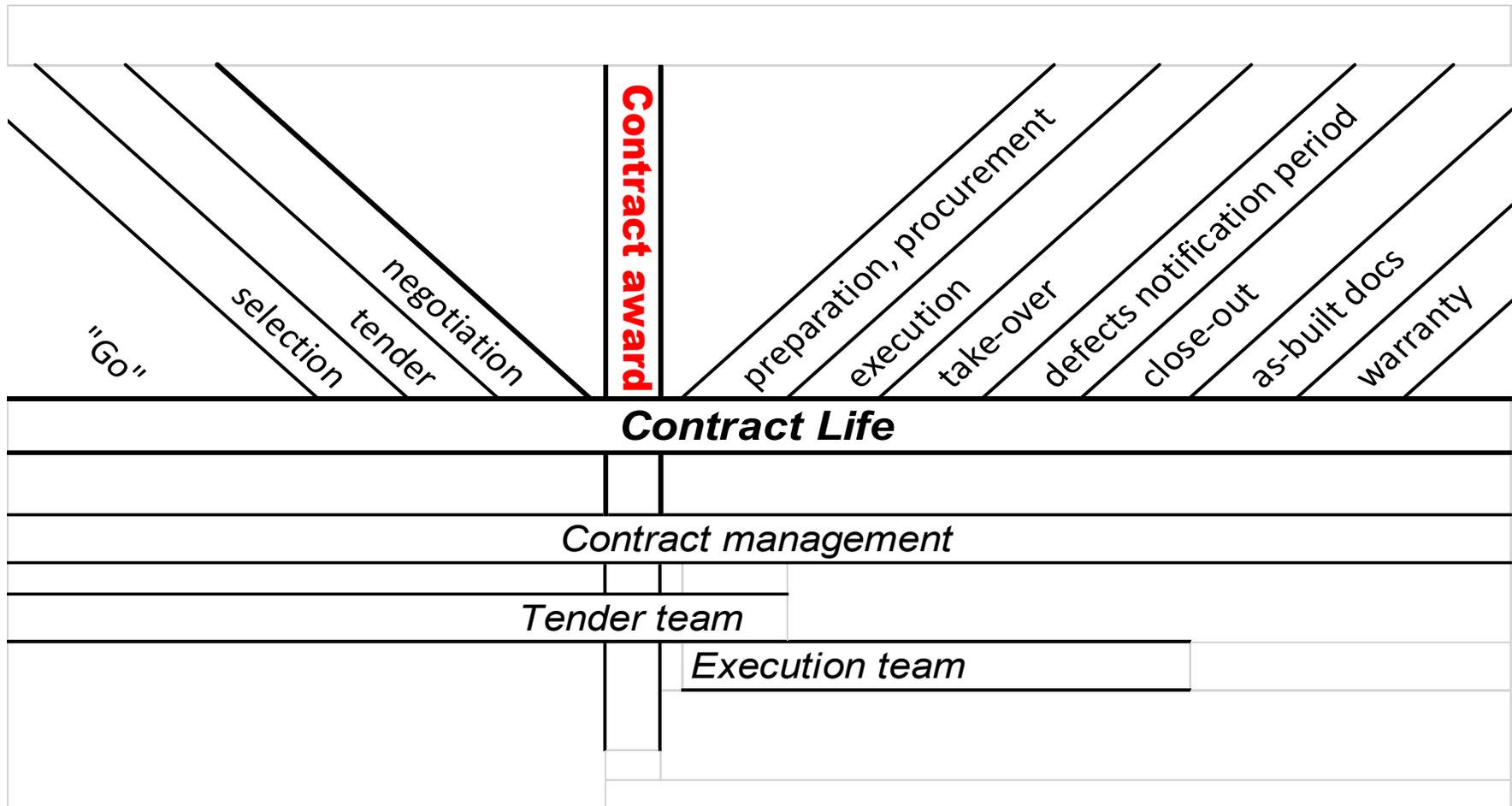
Q: What is a Contract?

A: Simply speaking, it is an agreement that sets out roles and obligations of the Parties.

Q: What is the objective of a contract?

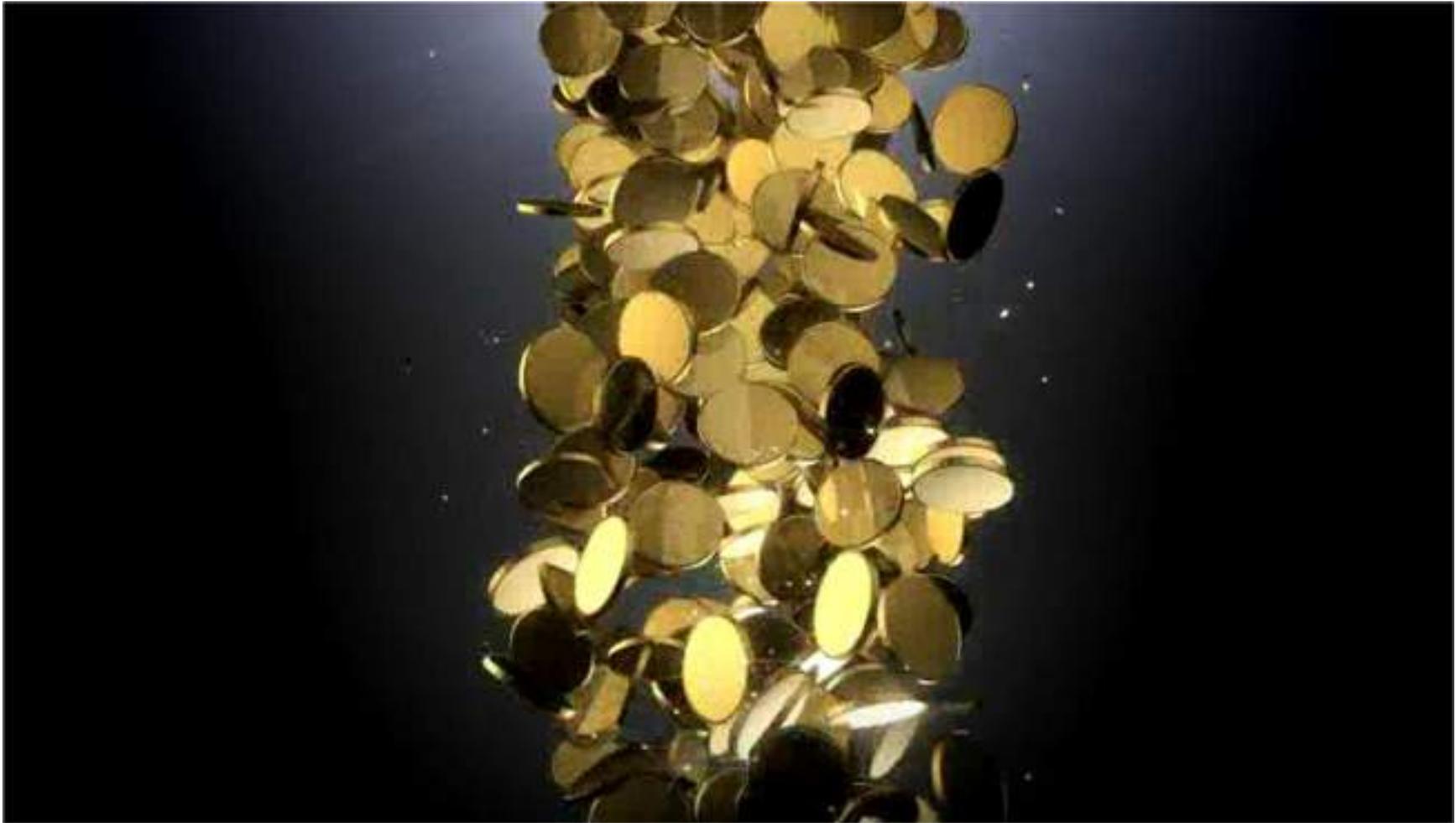
A: To assist the Parties in achieving a successful outcome.

A CONTRACT HAS A LIFE CYCLE



Always consider projects from 'Cradle to Grave'

THE CONTRACT CONTROLS ENTITLEMENT



INTRODUCTION TO FIDIC



WHO IS FIDIC ?

→ **Fédération Internationale des Ingénieurs – Conseils**

French for: International Federation of Consulting Engineers

→ members are **national associations** of consulting engineers of over 60 countries with original founding members from France, Belgium and Switzerland.

→ located in Geneva, Switzerland since 1913. UK joined 1949, USA joined 1958.

→ private organisation with no governmental or international law functions or powers but with great influence in international construction.



Blue



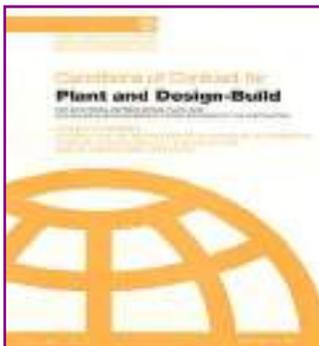
Green



Red



Pink



Yellow



Silver



Gold

SUBCONTRACT: Conditions of Subcontract for Works of Civil Engineering Construction

New 2013 edition finally out for use.

WHITE BOOK: Client / Consultant Model Services Agreement

→ 1st Edition 2006 (3rd Ed. 1998 still used)

→ for design and consultancy services

SUB-CONSULTANCY AGREEMENT:

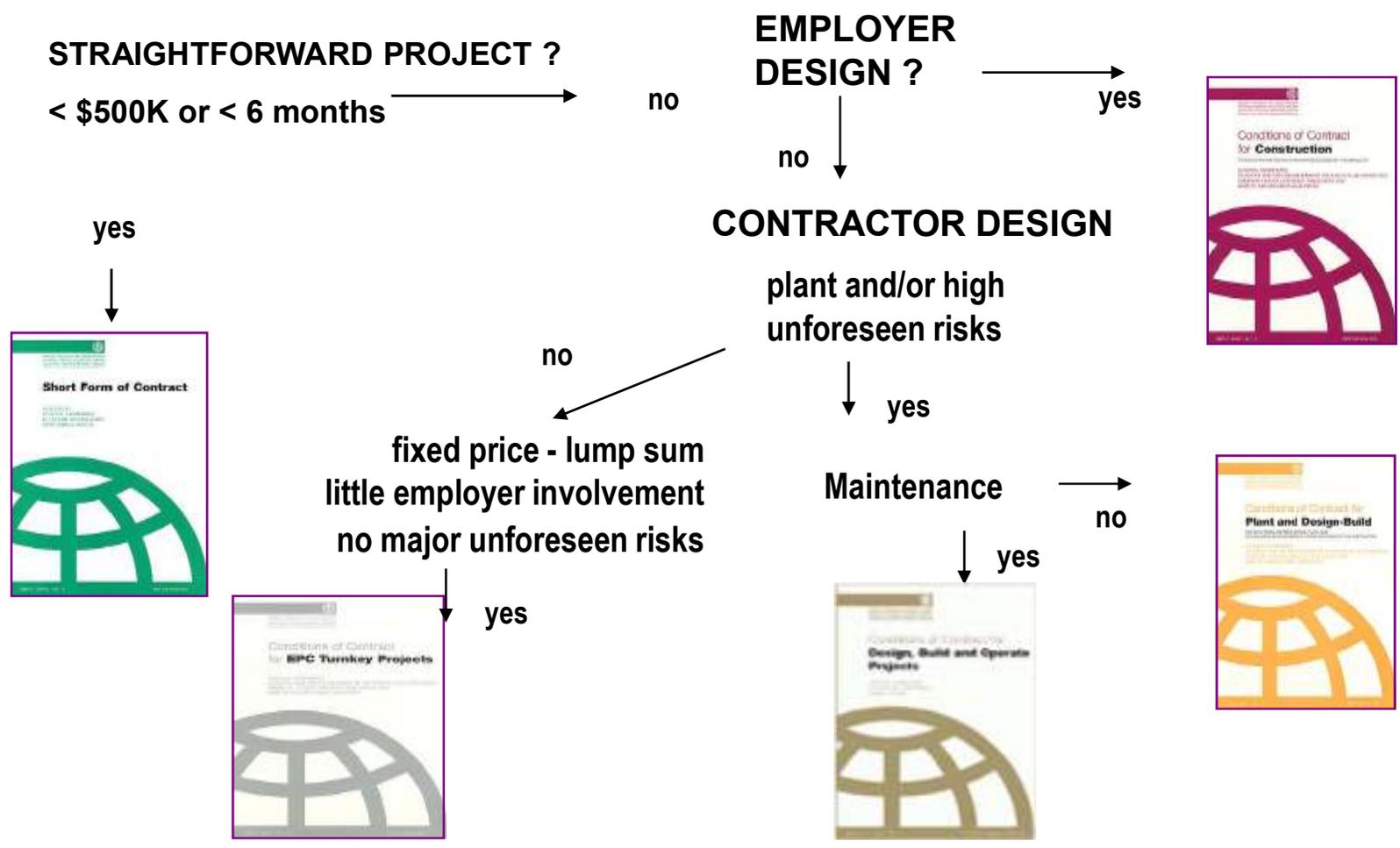
→ for Sub-Consultancy Agreements between Consultants and Sub-Consultants

Joint Venture Agreement:

→ for Joint Ventures of Consultants / Designers

→ based on an older edition of WHITE BOOK

→ new edition being prepared



System and Construction of a FIDIC Contract:

Components of a FIDIC Contract:

1. the General Conditions:

- there are specific General Condition in each BOOK
- the General Conditions themselves always remain unchanged
- contain all legal provisions necessary for a proper construction contract
- structured with 20 main headings (one for each different main topic) and different numbers of sub-headings in each main section

2. the Particular Conditions:

→ contain all additions, deletions and / or changes to the General Conditions.
The changes are made in the following format:

Sub-Clause 19.4 Consequences of Force Majeure

Insert at the end of the third paragraph:

"The Contractor may not invoke Force Majeure if he is already in default at the time of the force Majeure event."

Delete the words "under Sub-Clause 8.4" in subparagraph (a) and replace by:

"Under Sub-Clause 8.4 (a)"

"Delete Subparagraph (b)"

→ therefore gives a good overview over all changes of the General Condition

3. Appendix to Tender:

- contains all insertions to be made into the General Conditions or the Particular Conditions regarding
 - Times, Dates, Amounts, Percentages
 - the names and addresses of the parties and the Engineer
 - the choice of law and the applicable dispute resolution mechanisms

- for each entry in the Appendix to Tender there is a reference in the General or Particular Conditions

- each section in the Appendix to Tender refers to a specific Sub-Clause in the General or Particular Conditions

4. the Form of Agreement:

- short two page document containing:
 - the parties to the contract,
 - the formal conclusion of the contract itself
 - the contract documents and their order of precedence

- sometimes not used and replaced by the Letter of Acceptance
(this needs to be stated in the tender documents)

- usually signed after the (legal) conclusion of the contract (which is by acceptance of the Contractor's offer by the Employer – through a letter of acceptance or otherwise)

5. other Model Appendices to the Contract:

- such other appendices (e.g. forms of Guarantees) might or might not be used by the Parties

→ to know the **full and true content** of a FIDIC Contract, you need to look at:

- the ***General Conditions*** of the respective FIDIC BOOK, wherein the ***Definitions*** clause should always be consulted
- the ***Particular Conditions*** for the respective project
(for any changes that might have been made to the General Conditions)
- the ***Appendix to Tender*** for the respective project, and
(for the specific information given there in respect to certain clauses in the GC or PC)
- the ***Contract Agreement*** for the respective project.

This structure of a FIDIC Contract:

- makes it easier to evaluate the changes made by the Employer to the "usual" General Conditions in the tender stage of a project (for a QS or a lawyer)
- BUT...makes the handling of the contract at the site more difficult
- Therefore...create a **consolidated version** of the contract by incorporating all changes made in the Particular Conditions and all additional information contained in the Appendix to Tender into the General Conditions for every day use on site

Legal Character of the FIDIC Contract

- FIDIC Contracts are neither a legal system of its own nor laws
- FIDIC Contracts are Standard Forms of Contract operating under a specific (usually national) legal system
 - chosen by the Parties (provided for in Sub-Clause 1.4 and the Appendix to Tender) OR
 - According to the relevant place of arbitration or litigation

Legal Character of the FIDIC Contract (cont.)

- Classification has a number of practical implications:
 - Clauses have to be interpreted in light of applicable law
 - Example: Term “Subcontractor” (defined in Sub-Clause 1.1.2.8) might include “suppliers” (not explicitly defined in the Red Book) in certain countries
 - Example: Time limits
 - Legal questions not answered in the contract have to be decided according to the applicable law
 - Example: Who is the Employer in case the branch of a company is named in the contract?
 - Example: What are the requirements for a written notice

Legal Character of the FIDIC Contract (cont.)

- Implied terms – rules that will apply to the contract not expressly stated in the contract
 - Example: Decennial Liability, Good Faith, Equality and Fairness
 - Under Chinese law – “Good faith”: “*In exercising rights and performance obligations, each party shall act in good faith*”.
 - Good faith examples:
 - Cooperate among the Parties for proper execution of the contract;
 - Notify the other contracting party within a reasonable period of time
 - To act reasonably and avert abuse of discretionary power or rights
- Certain clauses may not be valid under applicable law
 - Example: Model guarantees annexed to the Red Book are not valid under German law
 - Example: Certain payment methods are not valid under Russian law

Legal Character of the FIDIC Contract (cont.)



- Other considerations that will impact your Contract:
 - Letter of Intent

 - Uniformity of Contract Documents
 - Contract Agreement, General Conditions of Contract, Particular Condition of Contracts, etc.)

 - Applicable laws for Construction Contracts in Pakistan:
 - Pakistani Law
 - Law of England and Wales
 - Civil Law – Laws of the Middle East, Swiss and France
 - Chinese law

Legal Character of the FIDIC Contract (cont.)



-
- No need for site engineer to know all implications of applicable law in respect to the contract

BUT

- YOU should be aware of such implications
 - Seek advice from lawyers and Driver Trett

TECHNICAL EXPLANATIONS OF CONTRACT TERMS

- the sections of the General Conditions are referred to as CLAUSES
e.g. - Clause 2 "The Employer"

- the individual sub – sections are referred to as SUB-CLAUSES
e.g. - Sub - Clause 4.10 "Site Data"

- all terms spelled with capital first letter are **defined terms** and are either defined in
 - Sub-Clause 1.1 of the General Conditions,
 - additions made in the Particular Conditions or
 - (although this should not be done) somewhere else in the contract

- e.g. "...the instructions given by the Engineer (the "**Engineer's Instructions**") are to ..."

The Role of the Engineer in FIDIC

→ there is a third party involved in the Contract....

The Engineer:

is appointed by the Employer (usually in the Particular Conditions) to administer the contract

is employed by the Employer through a separate contract (usually not known to the Contractor)

has all powers set out in the Contract (i.e. the contract between Employer and Contractor) in respect to the Contractors

Relation between Engineer, Employer and Contractor:

- usually all communication from the Employer to the Contractor and vice versa will be **via the Engineer.**

- the duties of the Engineer described in the Contract are duties the Engineer:
 - owes to the Employer (as his Employer in the consultancy contract between Employer and Engineer)
 - and not to the Contractor (with whom the Engineer has no contract of any kind)

- therefore all disputes relating to acts or omissions of the Engineer are disputes between the Employer and the Contractor:
 - parties to DAB proceedings: Employer and Contractor (Sub-Clause 20.4)
 - parties to arbitration proceedings: Employer and Contractor (Sub-Clause 20.6)

- contractually speaking, the Engineer is part of the Employer.

The person of the Engineer:

- the Engineer named in the Contract is an individual, can be a company
- the Engineer will usually appoint Assistants or Delegates to do the work on site (e.g. a Resident Engineer), who usually are qualified engineers
- the powers of these Assistants or Delegates are described in Sub-Clause 3.2
- in large projects there is usually a whole team working for / as the Engineer
- the Contractor can make **reasonable objections** to a replacement Engineer (Sub-Clause 3.4)

The duties of the Engineer:

- has the power to give **instructions** to the Contractor resulting in Variations (Clause 13) or other instructions (Sub-Clause 3.3), e.g. regarding the correction of defects
- has the power to make **determination** (meaning Decisions). Before making a determination the Engineer shall consult with the Parties
- there is no need for the formal consent of the Employer to any determination made,

although:

- the Engineer is employed (and paid) by the Employer and will therefore be cautious to decide "against" the Employer

The Engineer :

- is part of the Employer's personnel (Sub-Clause 1.1.2.6), this also includes all employees or assistants of the Engineer
- shall be deemed to act for the Employer (Sub-Clause 3.1 (a))
- however, the Engineer has the duty to make a "**fair determination**" under Sub-Clause 3.5
- under the RED BOOK 1987 and the older contracts, the Engineer had a **dual role** as:
 - representative of the Employer and
 - independent certifier

this was changed in the 1999 edition, with the exception mentioned above

Is managing a “FIDIC Contract” different?

- No and Yes...
- They are international thus...
- FIDIC contracts are more procedural, more administrative and...therefore require very pro-active contract administration.

Q: Why don't we read 'The Contract' properly?

A: *"The Contract is complicated, it is too long and very hard to read" or "We didn't get a full copy"*

Q: What would be the solution?

A: *Assign a specific resource to facilitate the project teams understanding of the contract and to make sure the contract and its content is used proactively – a 'Contract Administrator'*

VARIATIONS



What is a 'variation'?

In simple contractual terms it is an instructed change to the baseline (and agreed) scope of work.

Subject to the contract wording, it should generally include *time* impact as well as *money* impact.

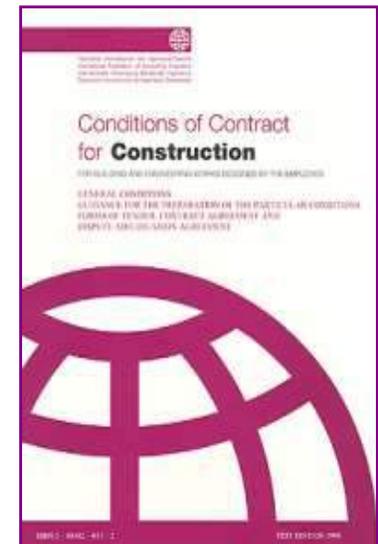
Variations

- Sub-Clause 13.1 (a) to (f) sets out the types of changes that can be made i.e. authority for variations
- Instructions outside the scope of Sub-Clause 13.1 (a) to (f) would not constitute a variation under the Contract
- However, Sub-Clause 3.3 requires all instructions to be complied with
- There are limited instances where a Contractor can object i.e. *"give notice...(with supporting particulars) that...cannot readily obtain the Goods required for the Variation"*

Variations

Sub-Clause 13.1 (a) to (f) provides for

- a) Changes to the quantities...
- b) Changes to the quality...
- c) Changes to the levels, positions and/or dimensions...
- d) Omission of any work...
- e) Any additional work...necessary for the Permanent Works...
- f) Changes to the sequence or timing of the...works



Valuation of variations

Sub-Clause 13.3 provides for a Contractor's proposal to be requested prior to an variation being instructed

Otherwise, Clause 12 sets out valuation principles

Good practice dictates...

- Contract rates for **similar** work
- Contract rates as a basis for **dissimilar** work
- Cost plus reasonable profit for **quite different** work

Recognising changes and the subsequent actions

1. Read the contract to understand the parties' obligations
2. Monitor the obligations
3. Document the change **and give the required notice**
4. Maintain records
5. Isolate the time and cost effects

Variations – Legal

- Starting point: Terms of the contract
 - Applicable law will apply when:
 - Absence of express agreement
 - There is no operative price adjustment mechanism
 - Lump-Sum Price – adjustments are limited
 - Contractor not entitled to increase if arises merely out of the execution of the original works
 - Civil law: Risk that work proves more difficult than expected is borne by the contractor:
 - Example,: unforeseen ground conditions or more expensive due to price escalation
 - Why have this approach: Need to protect inexperienced employers from claims for additional payment
-

Variations – Legal (cont.)

- Lump-Sum Price – Common Law
 - Developer has not define the works accurately Courts infer contractor’s promise to do all that is necessary to complete the job
 - Example: *Williams v. Fitzmaurice* [1858] 157 ER 709:
 - the contractor undertook to build a house and scope of work did not mention floors, contractor not entitled to additional payment for floors since it was inferred the floors need to be completed.

Variations – Legal (cont.)

- Common law: “Conditions Precedent”
 - oblige the contractor to strictly comply with terms of the contract to get paid
 - Can lead to undesirable results
 - Developer runs into difficulties with prevention principle (legal maxim that a party cannot benefit from its own wrong) if developer issues variation that causes delay
 - Contract prevents contractor to claim EoT since it failed to comply with EoT provisions
 - Developer will lose right to claim LDs
 - UK Courts disfavour such clauses – developer will lose right to claim
-

Questions?

CLAIMS



What is a 'claim'?

In simple contractual terms it is a request for reimbursement, from one party to another, of the money and / or time consequences flowing from an *event that the contractor was not required to anticipate*.

EMPLOYER'S CLAIMS [Sub-Clause 2.5]

If Employer considers it is entitled to payment, under any Clause, or otherwise and or any EOT of the Defects Notification Period, the Employer or Engineer shall give notice to the Contractor detailing event or circumstance.

EMPLOYER'S CLAIMS [Sub-Clause 2.5]

Notice shall be given as soon as practicable after the Employer becomes aware of event of circumstance or event giving rise to the claim.

Any EOT of the DNP shall be given prior to its end.

Questions?

DETERMINATIONS [Sub-Clause 3.5]

- Engineer consults Parties to reach agreement.
- If NO agreement, Engineer to make **FAIR** determination.
- No time period given.
- But Sub-Clause 1.3 [Communications] states that determinations shall not be unreasonably withheld or delayed.

Contractor's claims

- Clause 20.1 provides for and sets out procedure
- Claims include:
 - Delayed Drawings or Instruction – clause 1.9
 - Late Access or Possession – clause 2.1
 - Setting out reference point errors – clause 4.7
 - Adverse **unforeseeable** conditions – clause 4.12
 - Extension of Time – clause 8.4
 - Interference with tests – clause 10.3
 - Variations – clause 13.3
 - Change in law – clause 13.7
 - Force Majeure – clause 19.4

CONTRACTOR'S CLAIMS [Sub-Clause 20.1]

If Contractor considers it is entitled to EOT and / or additional payment, under any Clause, it shall give notice to Engineer detailing event or circumstance.

Notice **MUST** be as soon as practicable but **NO LATER THAN 28 DAYS** after becoming aware, or should have become aware of event of circumstance.

FAILURE WILL RESULT IN LOSE OF ENTITLEMENTS AND NO CLAIM!!

CONTRACTOR'S CLAIMS [Sub-Clause 20.1]

Contemporary records must be kept.

Within **42 days** of becoming aware, or should have become aware, of event **(NOT DATE OF NOTICE)** fully detailed claim to be submitted.

CONTRACTOR'S CLAIMS [Sub-Clause 20.1]

If event is ongoing then:

- a. this claim submission will be considered interim,
- b. further updated interims submitted monthly,
- c. send final claim 28 days after effects of event ends.

CONTRACTOR'S CLAIMS [Sub-Clause 20.1]

Within **42 days** of receiving a claim, Engineer to respond with approval or disapproval and detailed comments.

He may ask for further particulars but must respond on the principles.

Contractor entitled to payment of those parts of claim that are sufficiently substantiated.

CONTRACTOR'S CLAIMS [Sub-Clause 20.1]

If Contractor complies with requirement to submit notice within 28 days, but fails to comply from then on, then an EOT or additional payment maybe reduced due to failure preventing the investigation of the claim.

Payment is a major source of disputes:

- Compliance with contractual time limits is essential - Engineer certificate within 28 days (Sub-Clause 14.6) and payment within 56 days (Sub-Clause 14.7)
- If withholding amounts, document and explain the reasons – be prepared for challenge
- Properly substantiated Statements (Sub-Clause 14.3) are easier to defend
- Cash flow is vital to completing the project

NOTICES AND TIME BARS



Notices and Time Bars

- FIDIC Requirements for Notices

- Characteristics:

- Written paper / electronic original
- Identified as a notice and refer to the relevant contractual provisions
- Delivered or transmitted in accordance with Sub-Clause 1.3
- Low requirements regarding contents (See Sub-Clause 20.1):

“The Contractor shall give notice to the Engineer, describing the event or circumstances giving rise to the claim.”

- Notices for amicable settlement and dispute resolution
-

Notices and Time Bars (cont.)

Obrascon Huarte Lain SA v. Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC)

- Established minimum requirements for a valid claim:
 - Made by notice in writing to Engineer
 - The notice describes the event or circumstance relied on
 - The notice is intended to notify a claim for EOT (or additional payment or both) under the contract or in connection with it, AND
 - It is recognizable as a “claim”

Notices and Time Bars (cont.)

- Time Bars – FIDIC Red Book 1999 Sub-Clause 20.1:

- If the Contractor fails to meet the notice requirement under FIDIC:

*“If the **Contractor fails to give notice of a claim** within such period of 28 days, **the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.**”*

- Sub-Clause fully excludes the Contractor’s claims, while releasing the Employer from all related liability
-

Notices and Time Bars (cont.)

- Common law – UK Courts view time bars as advisory and not mandatory
 - If contract clearly states that a party will lose the right to bring the claim if it fails to comply with the time deadlines
 - *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem nv* [1978] 2 Lloyd's Rep. 113:
 - House of Lords held that a notice provision should be construed as a condition precedent, and so would be binding if:
 - 1) it states the precise time within which the notice is to be served, and
 - 2) it makes plain by express language that unless the notice is served within that time the party making the claim will lose its rights under the clause.
-

Notices and Time Bars (cont.)

- Civil Law Perspective – Under most civil laws contractual time bar provisions are generally valid
 - However, principles such as good faith, undue exercise of rights or preclusion of rights may prevent Employer from relying on time bar in specific circumstances
 - Possible scenarios include:
 - Employer knows of or is responsible for circumstances giving rise to Contractor's claim
 - Parties engaged in negotiations regarding matters related to claim, without the Contractor giving an express notice
 - Parties handled (multiple) previous claims without the Employer invoking time bar provisions even though it could
-

Questions?

MANAGING CLAIMS



- We are managing change
- A change that gives rise to:
 - a claim
 - an entitlement
- We are attempting to avoid disputes
- But always consider that every action taken will be viewed by an Arbitral Tribunal.

In essence:

If you are submitting claims for time and/or money

- Put the receiver in the position where they cannot afford to say NO!

If you are defending claims from another party

- Have the confidence to say NO!

Understanding

- of the Contract
- of the allocation of risks
- of the obligations of the Parties'

- Recognise the notice periods and any other time requirements

Understanding

- Apply the Contract (others will...)
 - Reporting
 - Programme updates
 - Applications for entitlements

By complying with FIDIC externally knowledge will be gained for internal benefit

Understanding

"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim."

This requires current knowledge!

Invest in resources not claims consultants and external lawyers

Understanding

The alternatives to dealing with entitlements at project level:

- cash flow
- uncertainty
- disputes leading to Arbitration
 - timescale
 - costs

Understanding

- A document demonstrating an entitlement prepared at the time need not rival 'War and Peace'
- A document demonstrating numerous entitlements after the event generally written with Arbitration in mind will generally rival 'War and Peace'

Understanding

- Contracts such as FIDIC demand that entitlements are valued as the work proceeds
- Small bites can be tastier than a large mouthful that is hard to swallow (by the Engineer/Owner)
- Adjustments to the Owner's budgets and expectations

Understanding

Press the re-set button

- At the outset price, time, scope and risks are allocated and understood
- Consider that the agreement of the entitlement as revising the original price, time, scope and risks
- Understand the revisions and move on

Claims

- What are we trying to achieve?
- How can we achieve it?
 - Money (cost or with profit)
 - Time
- Records, records and more records
- Claims files – a necessity or not?

Claims

- Step by step
 - Legal / Contractual
 - Merits
 - Evaluation
- Time before money

Claims under the Contract or in Law?

- Exclusive Remedies Clauses
- Know the Law governing the Contract

Claims - Key Documents

- The importance of the Baseline Programme – sword and shield
- Reporting Procedures – information given without claims in mind?

Claims – principles of presentation

- C =
- E =
- J =
- E =
- S =

Claims

- Include all possible monetary impacts relevant to the event/variation
- Omissions can have a cost/value
- The avoidance of Global Claims

Delegates Question

What is the primary, or fundamental reason for including an Extension of Time clause within a construction contract's terms and conditions?

Is it:

- a) To allow the Contractor to adjust his programme?
- b) To act as time-regulator upon the Contractor's Prolongation claim?
- c) To permit the Employer to amend his project budget?
- d) To restore the contractual date at which the Employer may commence deduction of delay related damages
- e) To provide the date to control the re-issue of the Contract Programme

Goals

- Mitigate / negate the imposition of LDs
- Obtain EOTs with / without costs
- Payment for additional works / changes in circumstances
- Attain certainty of outcome

Questions?

DELAY AND DISRUPTION



DELAY AND DISRUPTION

Critical path analysis / progress reviews:

However simple (such as a date line) you should identify:

- Own culpability
- Others culpability

Take action accordingly.

Overlapping Culpability often referred to a "**concurrency**" however...

SCL Delay & Disruption Protocol: October 2002 (para 1.4.6)

"...The term 'concurrent delay' is often used to describe the situation where two or more delay events arise at different times, but the effects of them are felt (in whole or part) at the same time. To avoid confusion, this is more correctly termed the 'concurrent effect' of sequential delays..."

Put simply...

"two or more events which cause delay running side by side"

Keane et al, *Delay analysis in Construction*, 2008, Wiley Blackwell, p.203

Approaches to concurrency

- 'But For' test: Contractor's favourite! "But for" the additional work there would be no delay
- Apportionment: Two competing delays of "*equal or relative causative potency*"
City Inn v Shepherd Construction
- 'Dominant Cause': Possible to assess which event is dominant
Fairweather v Wandsworth
- Strict Contractual: 'Relevant Event' (Employer Risk) versus another event
Henry Boot v Malmaison

DELAY AND DISRUPTION

Delay -v- Disruption

- Delay to Completion: delay to the Contract Completion Date
- Delay to Progress: delay to progress, without causing a delay to the Contract Completion Date
- Disruption: disturbance, hindrance or interruption of normal work progress, resulting in lower efficiency or lower productivity

Disruption does not necessarily result in a Delay to Completion or a Delay to Progress

Identifying the Extent of Delays and Disruption

- 1) There must be a plan
- 2) Progress must be measured
- 3) Deviations must be identified
- 4) A forecast must be made and corrective actions developed

Control is not just monitoring progress. It is comparing planned and actual performance and deriving corrective action

The Original Plan / Programme

- Compliance with contract provisions
- Level of detail (balance)
- Review method and logic
- Define responsibilities (different subcontractors etc.)
- Identify critical path
- Consider resource and cost loading

DELAY AND DISRUPTION

Measuring Progress – some tips:

- Measurements should be appropriately precise – critical activities deserve more precision
- Measurements should be relevant – aligned to Master Programme
- Consider frequency of collection – must be useful but balance against cost
- Consider accuracy required – balance accuracy against cost

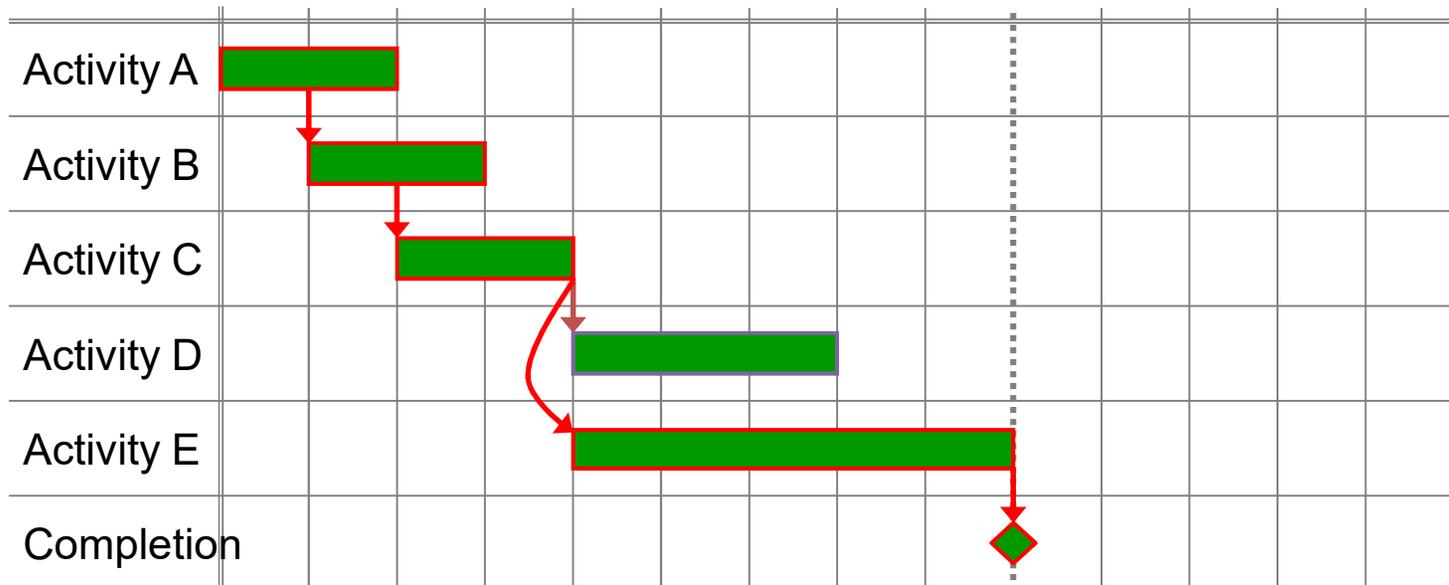
Remember: progress measuring and trend analysis is not an exact science

Delay analysis techniques:

- Time extensions after completion of project retrospective):
 - Impacted As-Planned
 - Time Impact Analysis
 - Collapsed As-built
 - As-planned -v- As-built
 - (plus Windows Analysis)
- Time extensions during currency of project (prospective)
 - Impacted As-Planned
 - Time Impact Analysis

Impacted as-planned method:

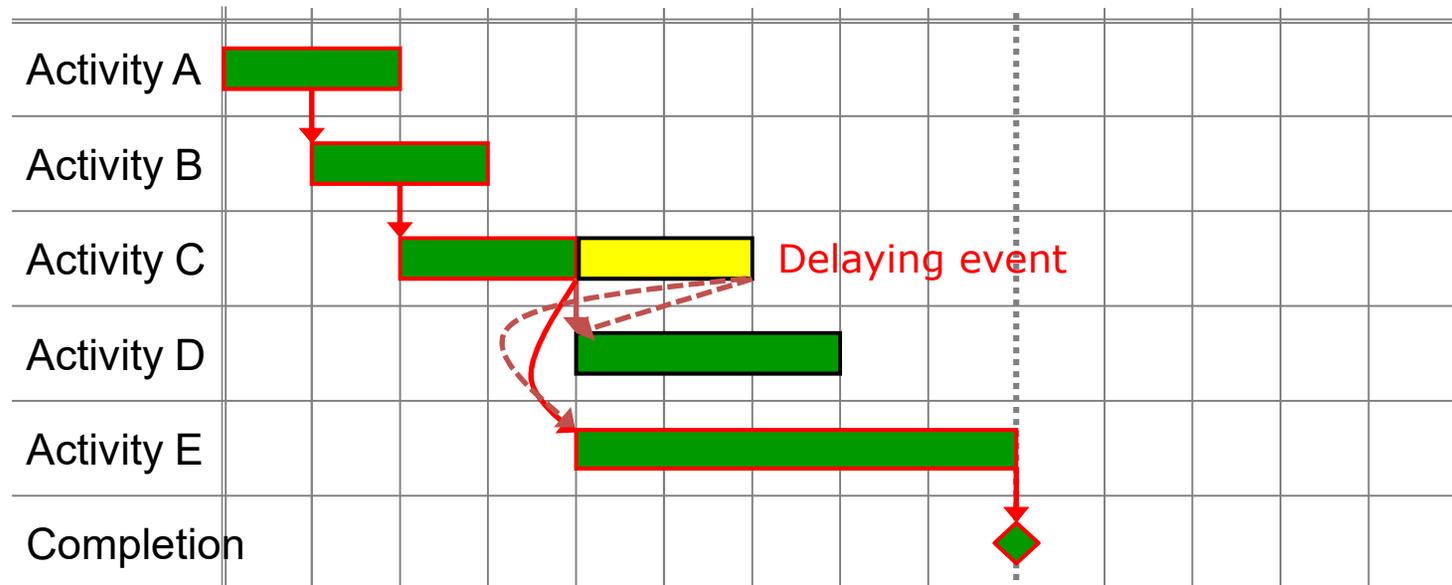
- ❑ The as-planned programme



DELAY AND DISRUPTION

Impacted as-planned method:

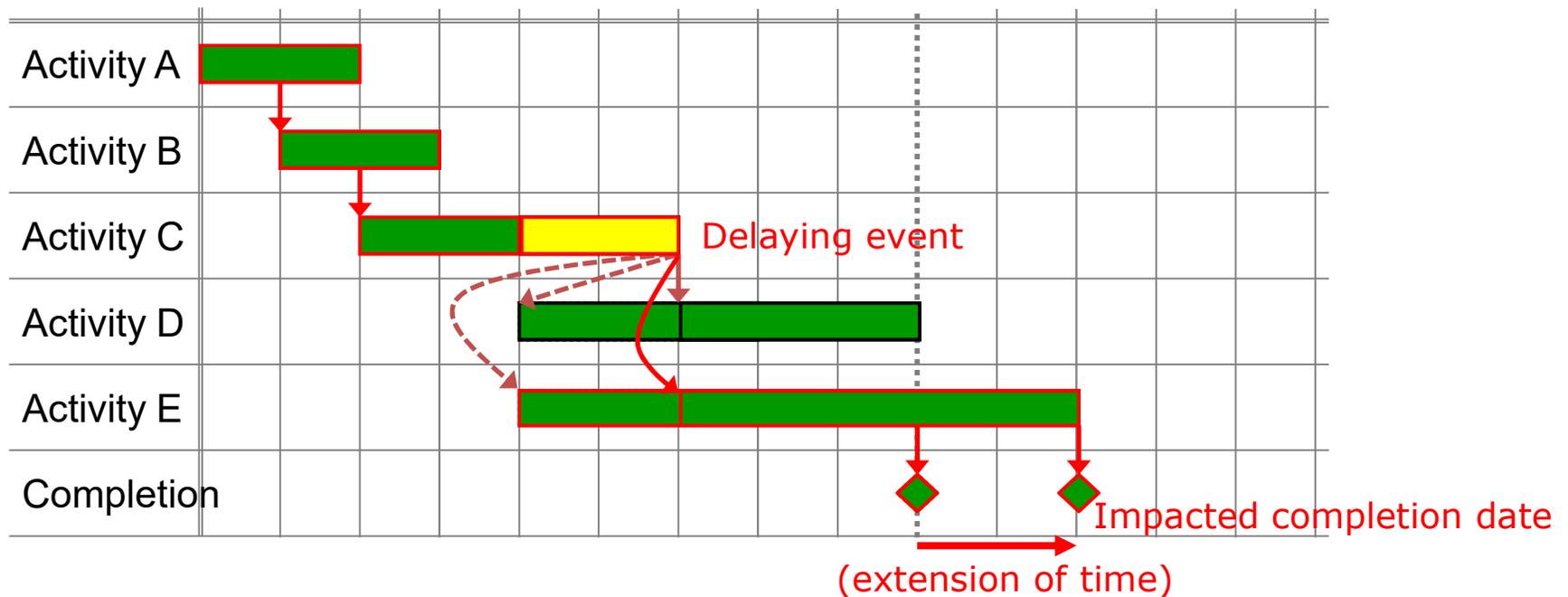
- Impact (add) the delaying event



DELAY AND DISRUPTION

Impacted as-planned method:

- ❑ Reschedule the programme



Impacted as-planned method:

- Advantages
 - Quick
 - Simple to carry out and understand
 - Transparent
 - As-built programme not required
 - Can demonstrate acceleration and mitigation

- Disadvantages
 - Theoretical conclusions
 - Requires a reasonable and robust as-planned programme
 - Ignores actual progress
 - Can hide concurrent delay

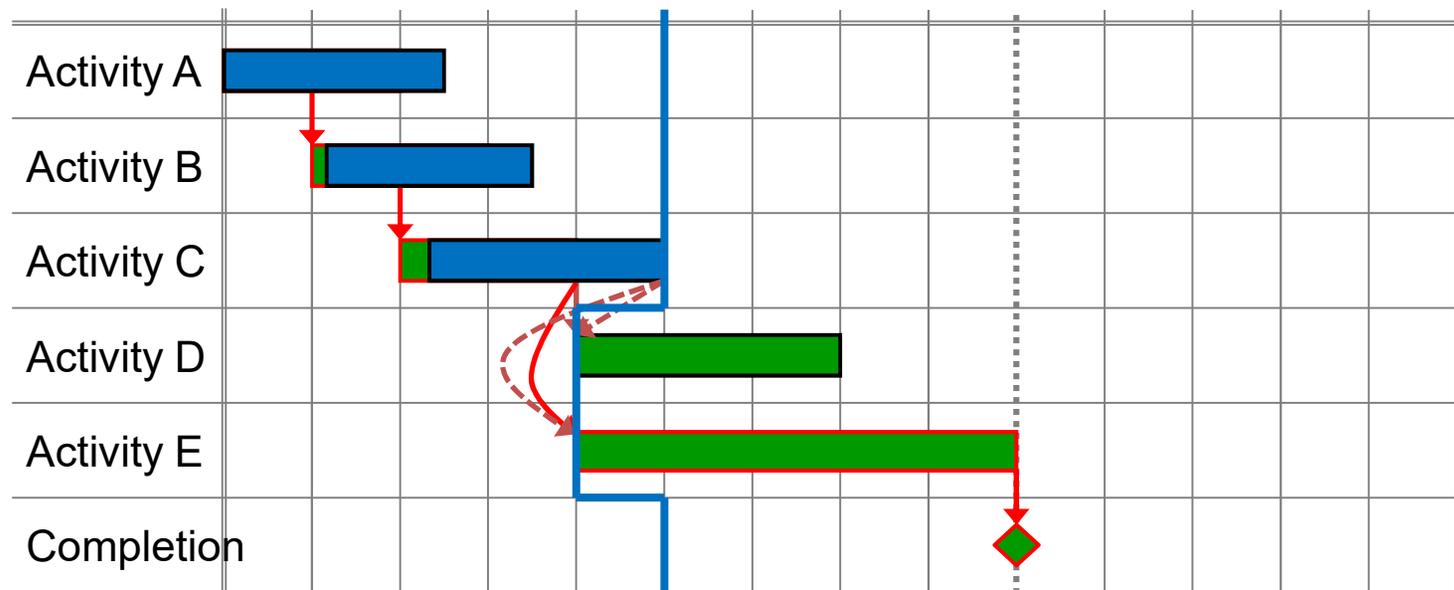
Time impacted analysis method:

- The as-planned programme



Time impacted analysis method:

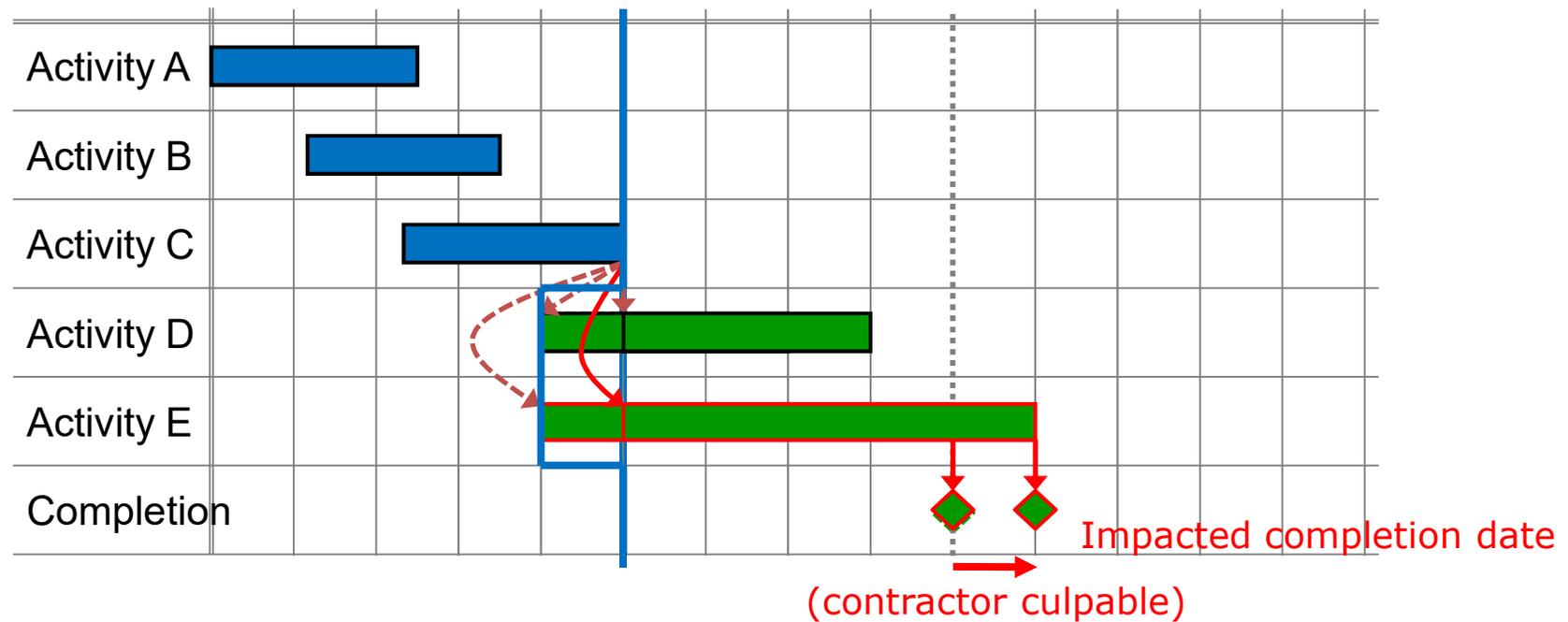
- Update the programme with actual progress



DELAY AND DISRUPTION

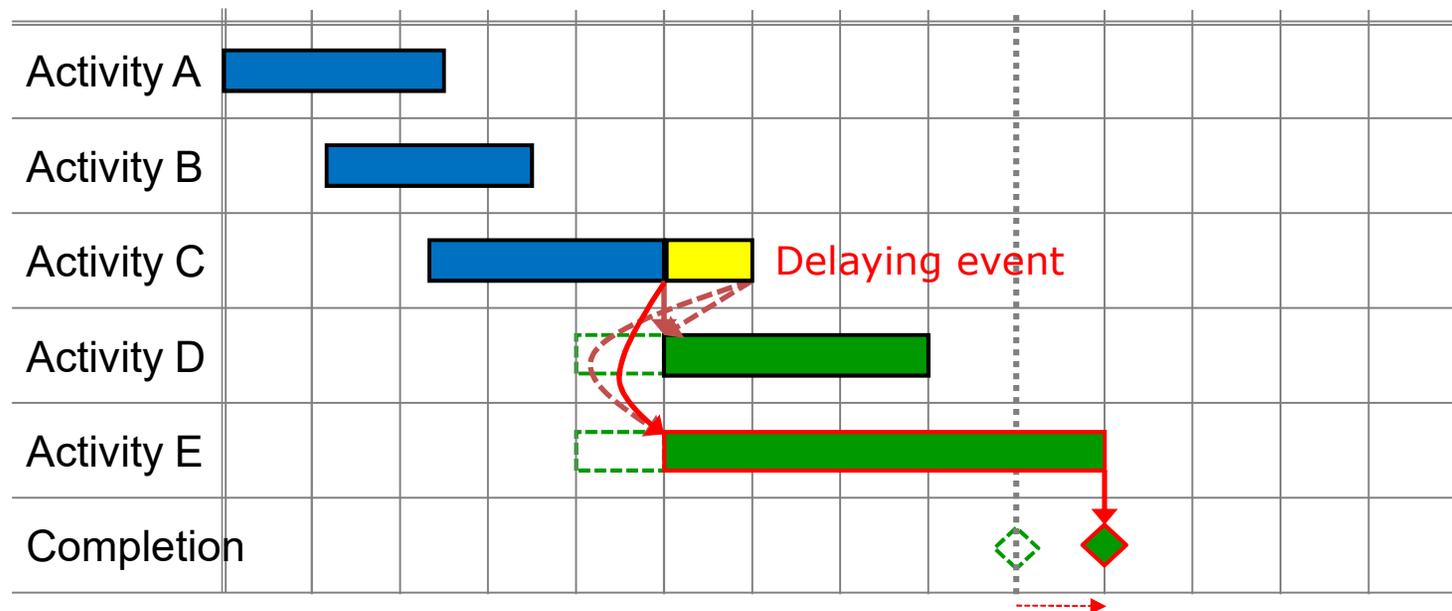
Time impacted analysis method:

- ❑ Reschedule the progressed programme



Time impacted analysis method:

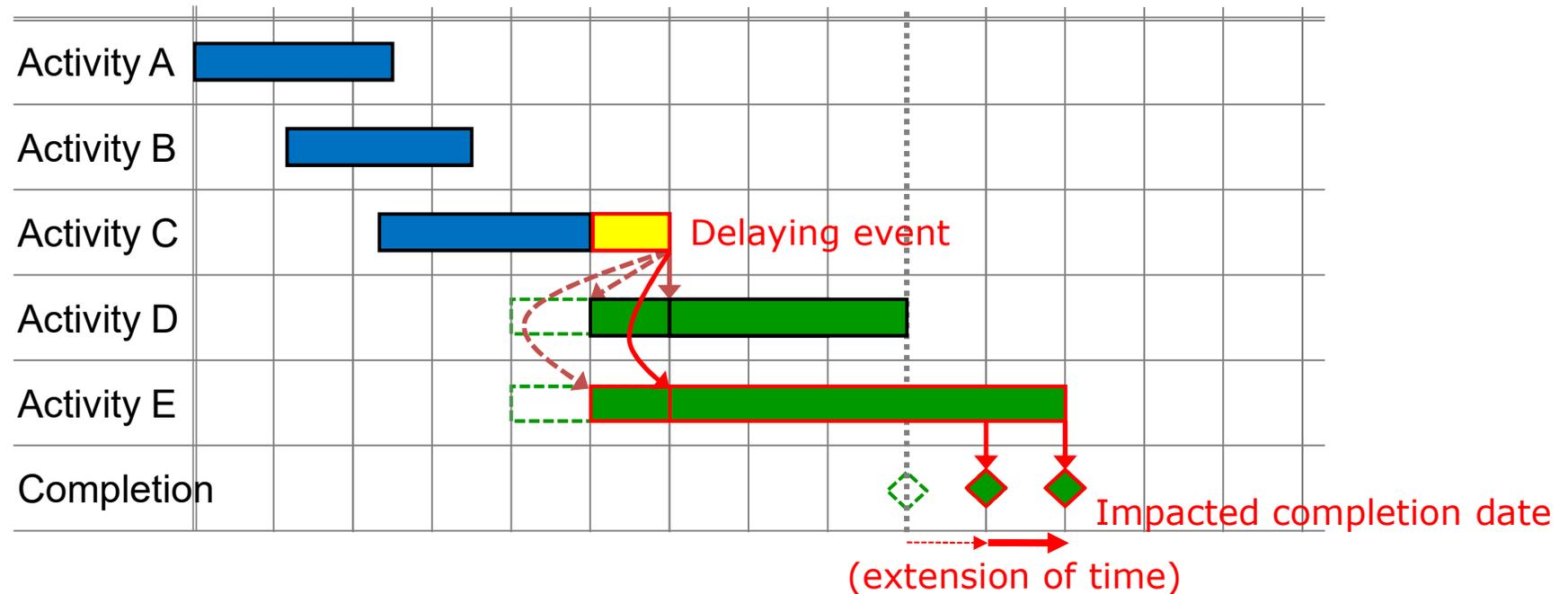
- Impact (add) the delaying event



DELAY AND DISRUPTION

Time impacted analysis method:

- ❑ Reschedule the programme



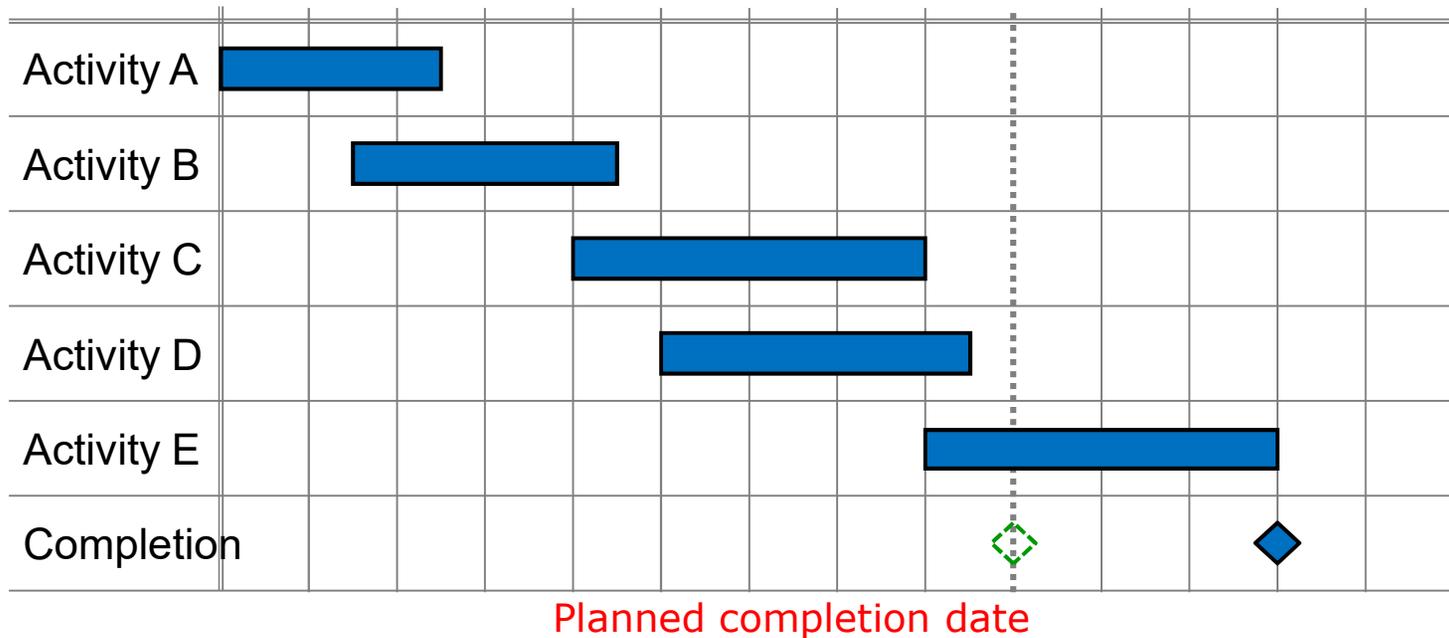
Time impacted analysis method:

- Advantages
 - Simple to carry out and understand
 - Relies upon actual progress
 - Can demonstrate acceleration and mitigation
 - Method required by EEC/NEC forms

- Disadvantages
 - Theoretical conclusions
 - Requires a reasonable and robust as-planned programme
 - Time consuming
 - 'Black-box' syndrome on large complex projects

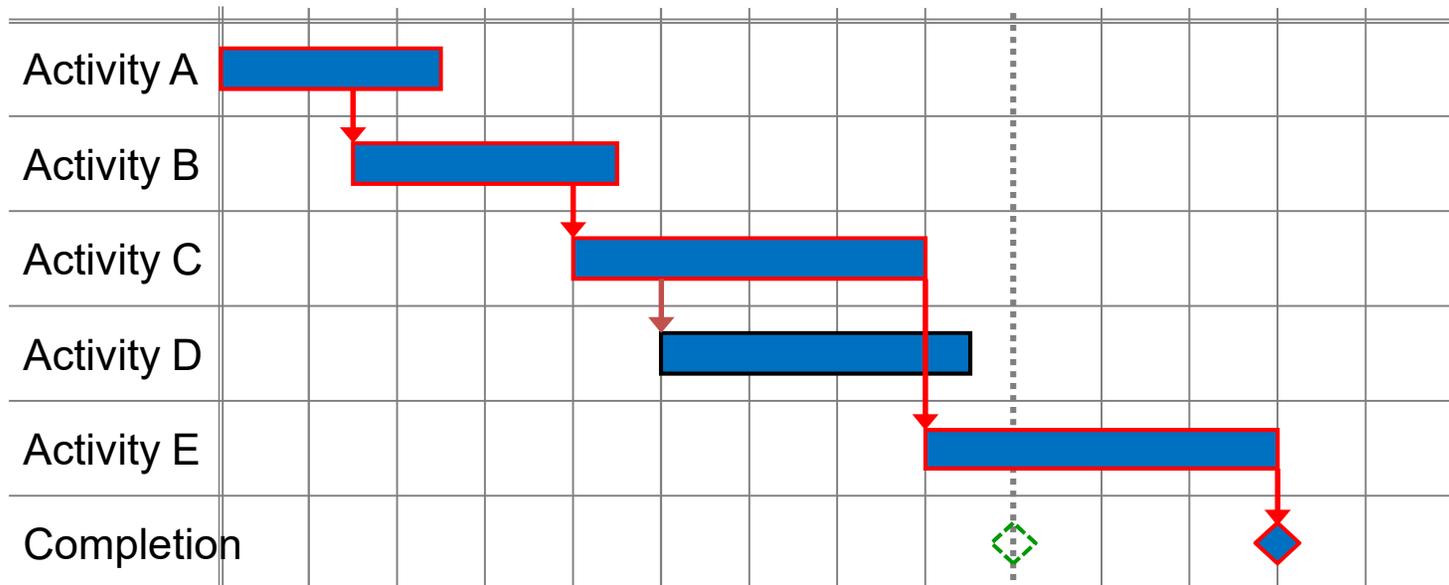
Collapsed as-built method:

- Plot the as-built programme



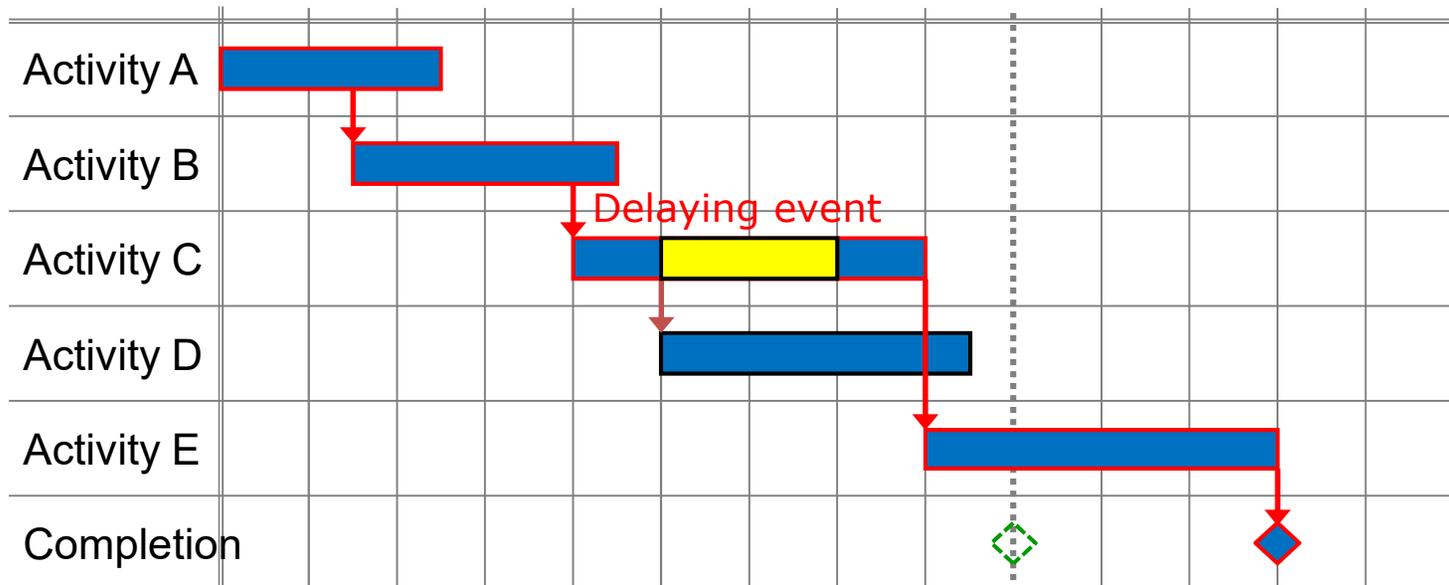
Collapsed as-built method:

- ❑ Determine the actual logic between the activities



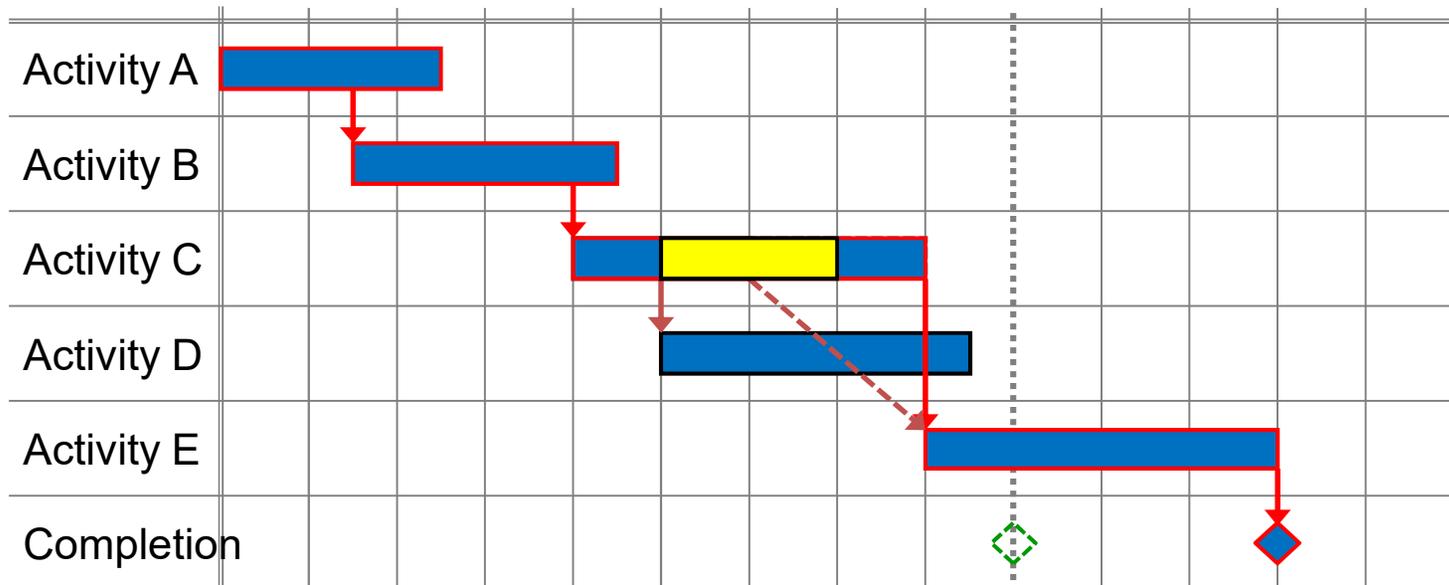
Collapsed as-built method:

- ❑ Identify employer risk event



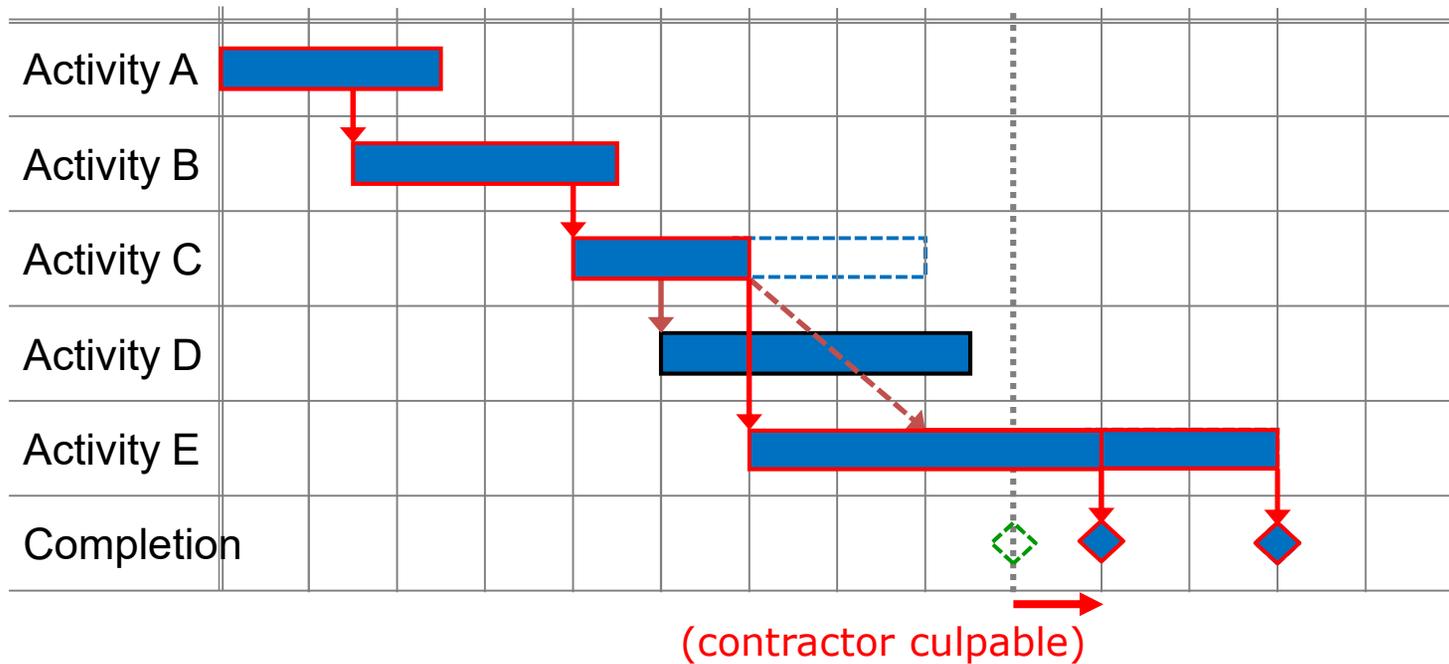
Collapsed as-built method:

- ❑ Remove employer risk event



Collapsed as-built method:

- ❑ Reschedule the programme



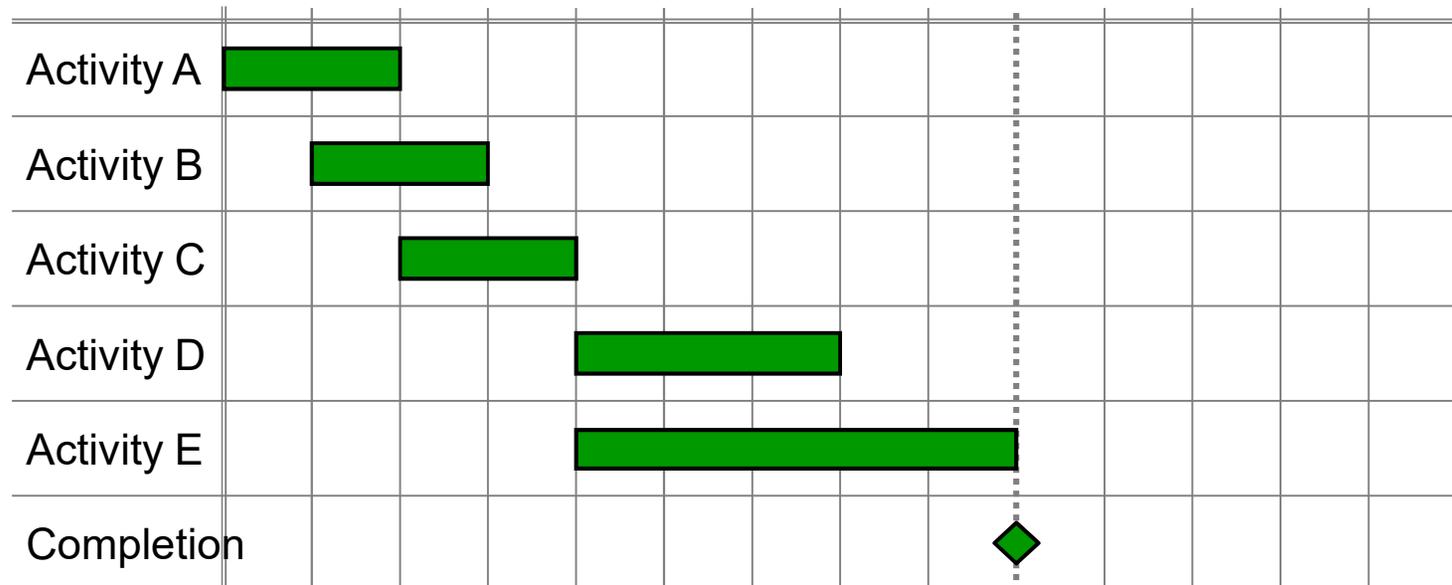
Collapsed as-built method:

- Advantages
 - Simple to understand
 - Relies upon actual progress
 - Does not require an as-planned programme

- Disadvantages
 - Subjective assessment of as-built logic
 - Detailed as-built records required
 - Time consuming
 - 'Black-box' syndrome on large complex projects

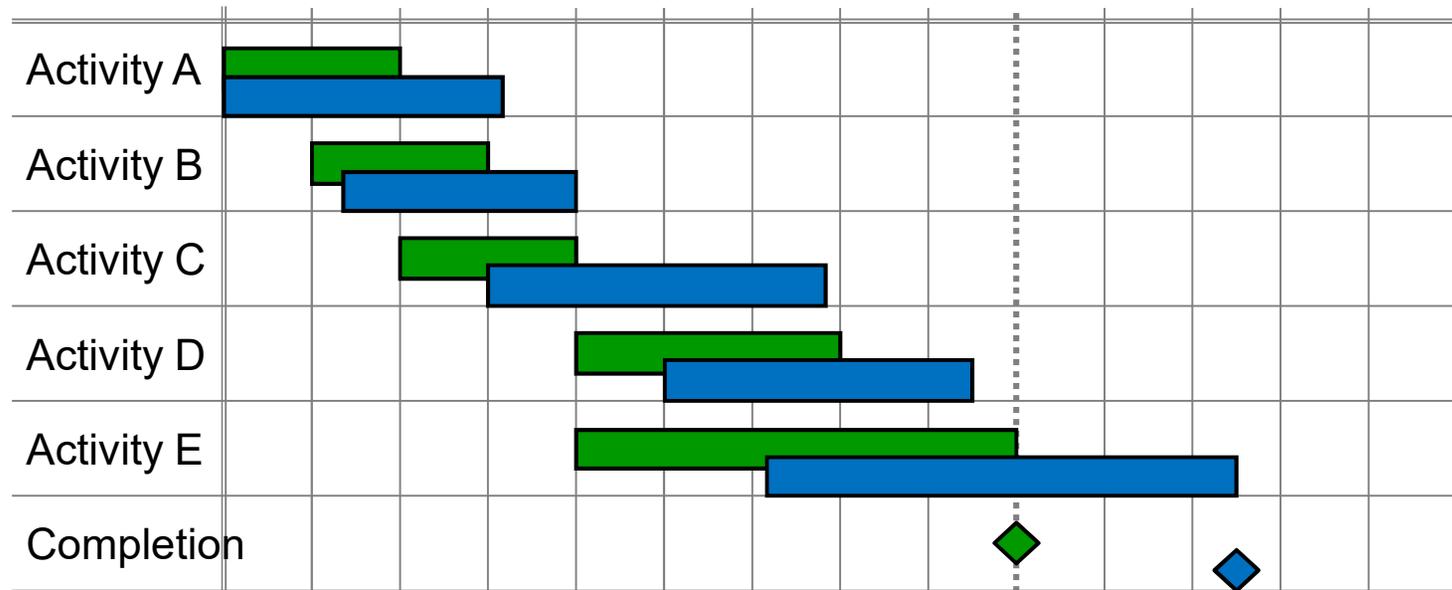
As-planned v as-built method:

- ❑ The as-planned programme



As-planned v as-built method:

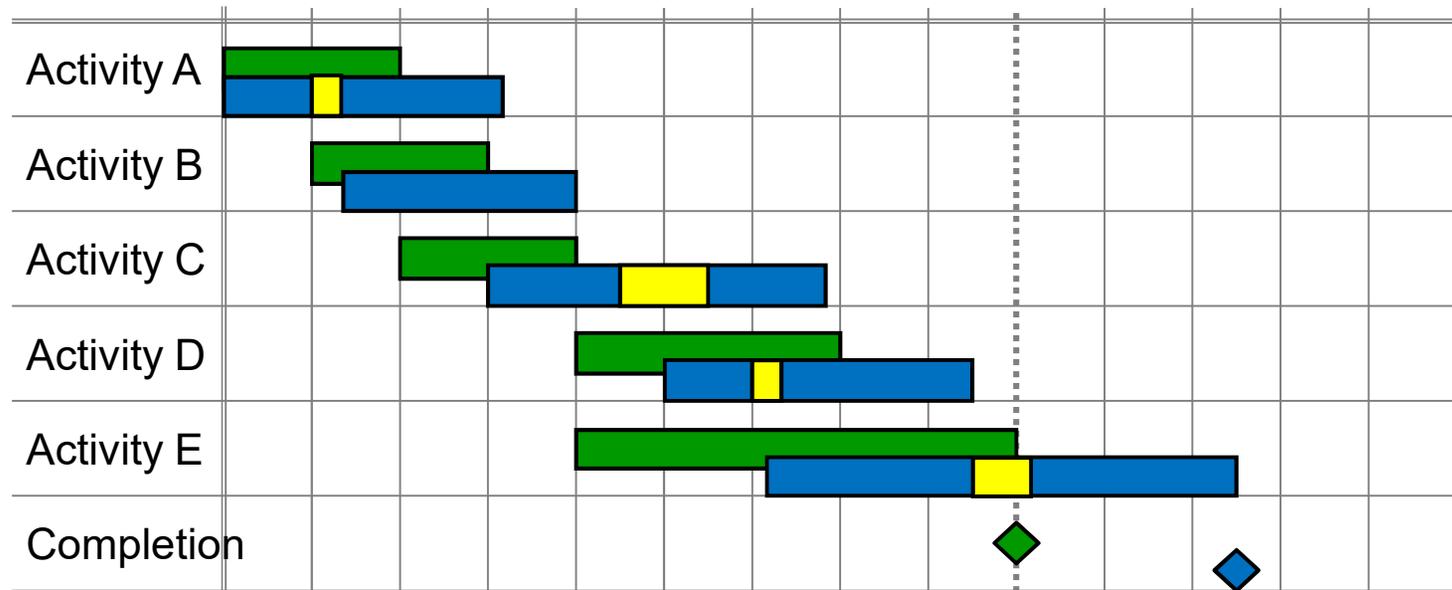
- Plot the as-built programme



DELAY AND DISRUPTION

As-planned v as-built method:

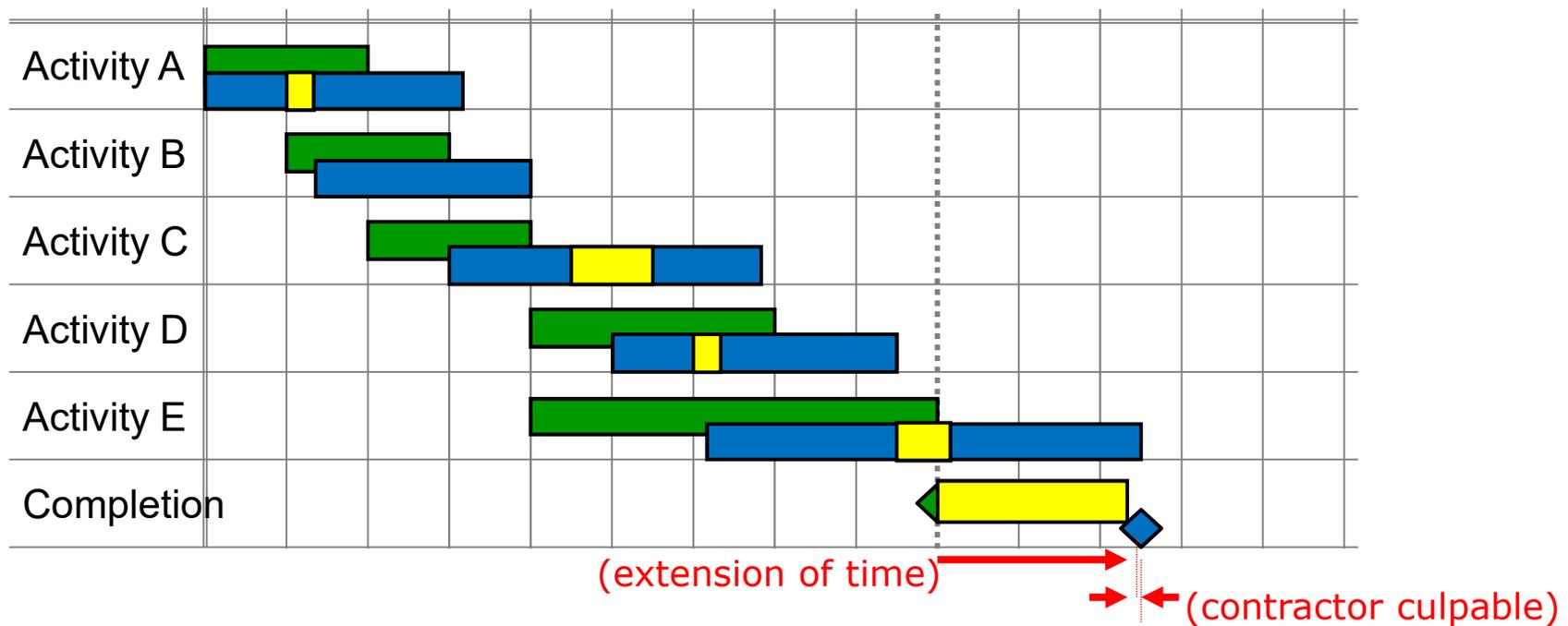
- Identify the employer delay events



DELAY AND DISRUPTION

As-planned v as-built method:

- Assess delaying effect of events



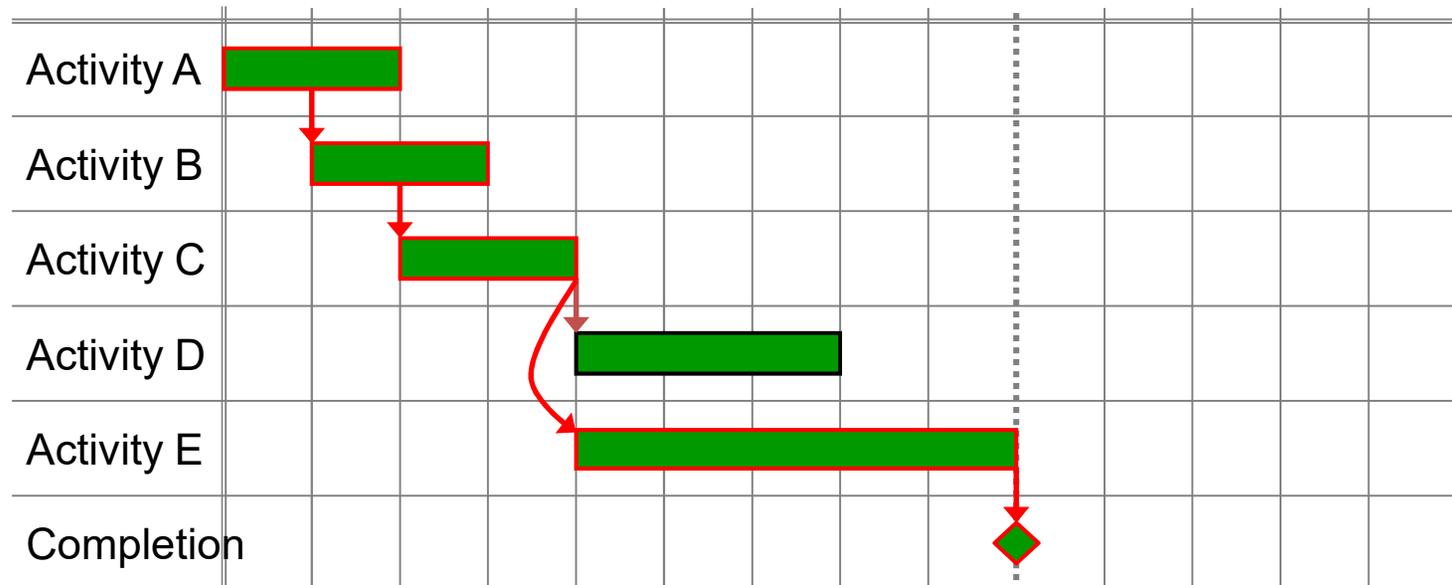
As-planned v as-built method:

- Advantages
 - Simple to understand
 - Transparent
 - Does not require a networked programme
 - Relies upon actual progress

- Disadvantages
 - Subjective assessment of critical delays
 - Depends totally on expert opinion
 - Requires as-built programme

Windows analysis:

- ❑ The as-planned programme



Windows analysis:

- Divide the programme into 'windows' or 'time slices'



Windows analysis:

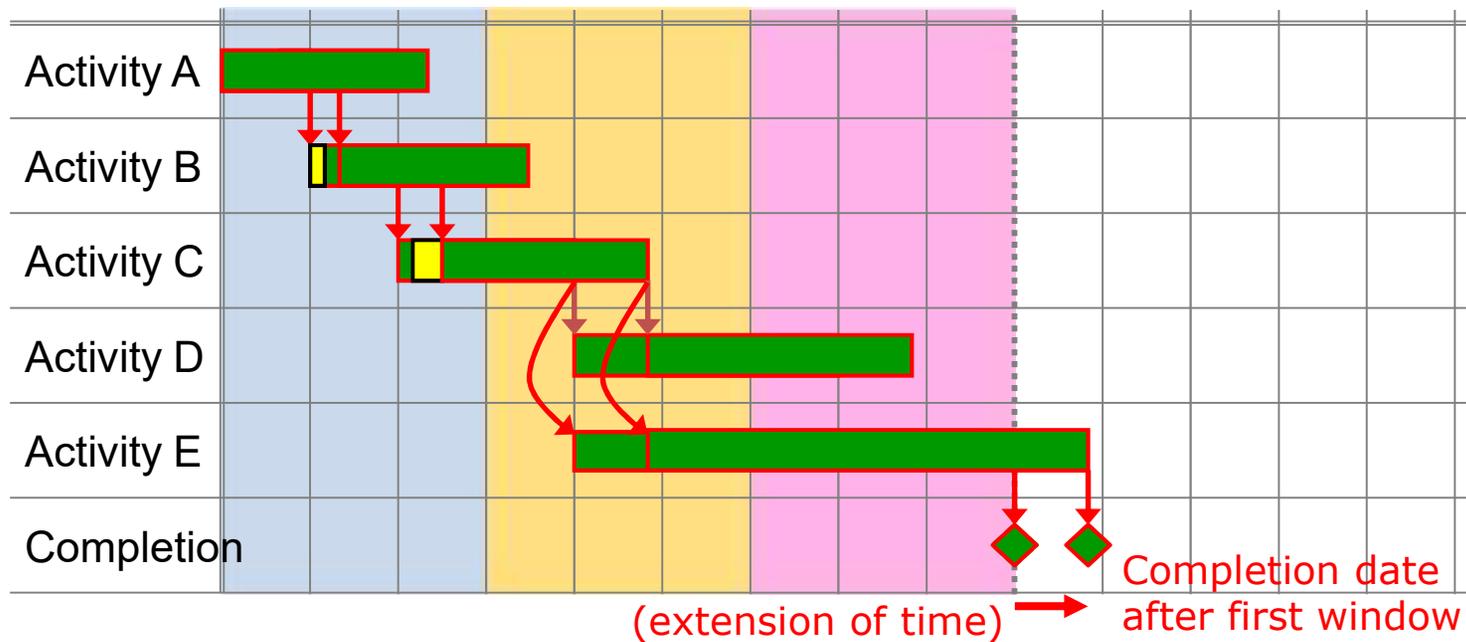
- Impact the delaying events in the first window



DELAY AND DISRUPTION

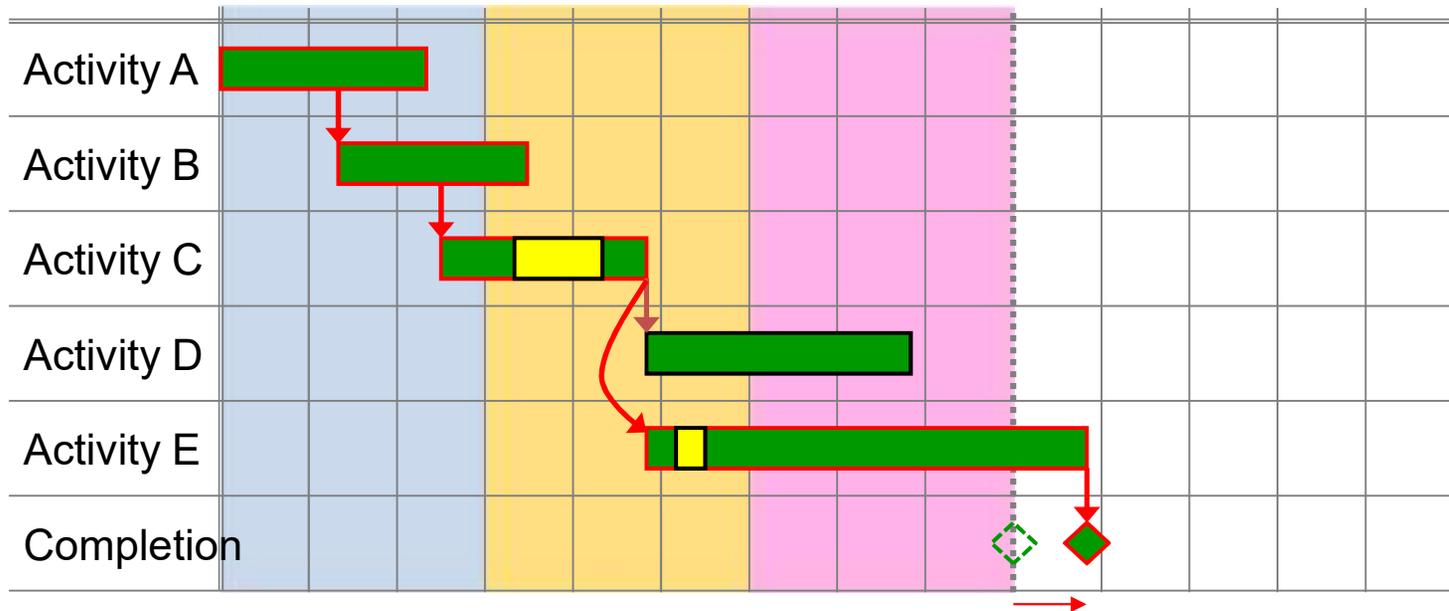
Windows analysis:

- ❑ Reschedule the programme



Windows analysis:

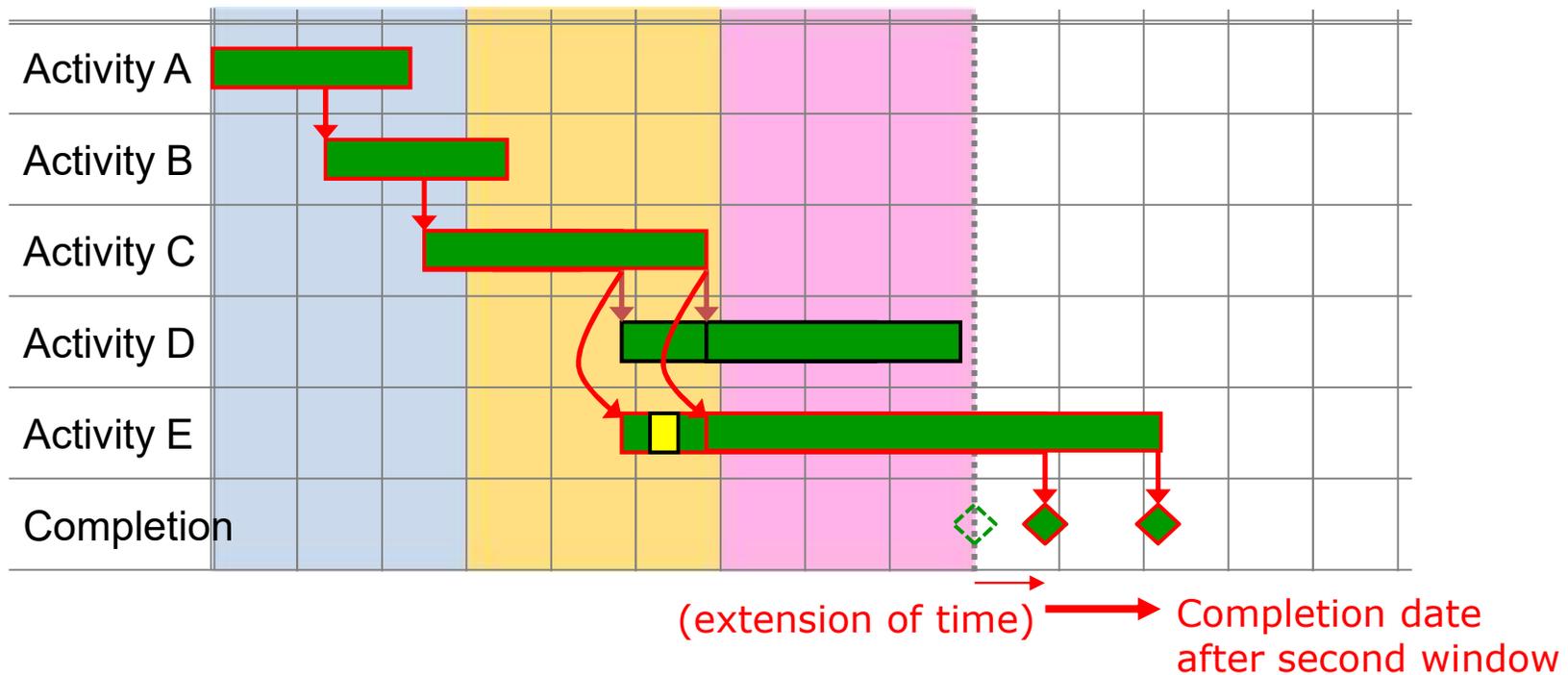
- Impact the delaying events in the second window



DELAY AND DISRUPTION

Windows analysis:

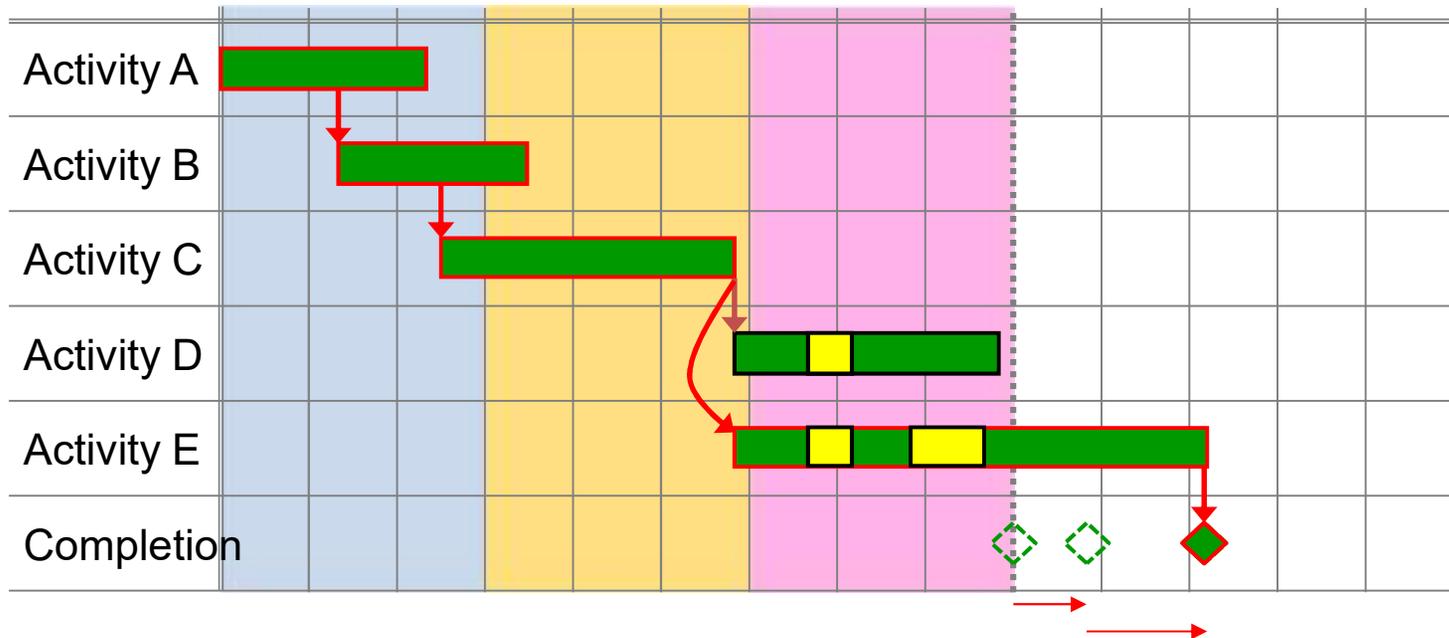
- ❑ Reschedule the programme



DELAY AND DISRUPTION

Windows analysis:

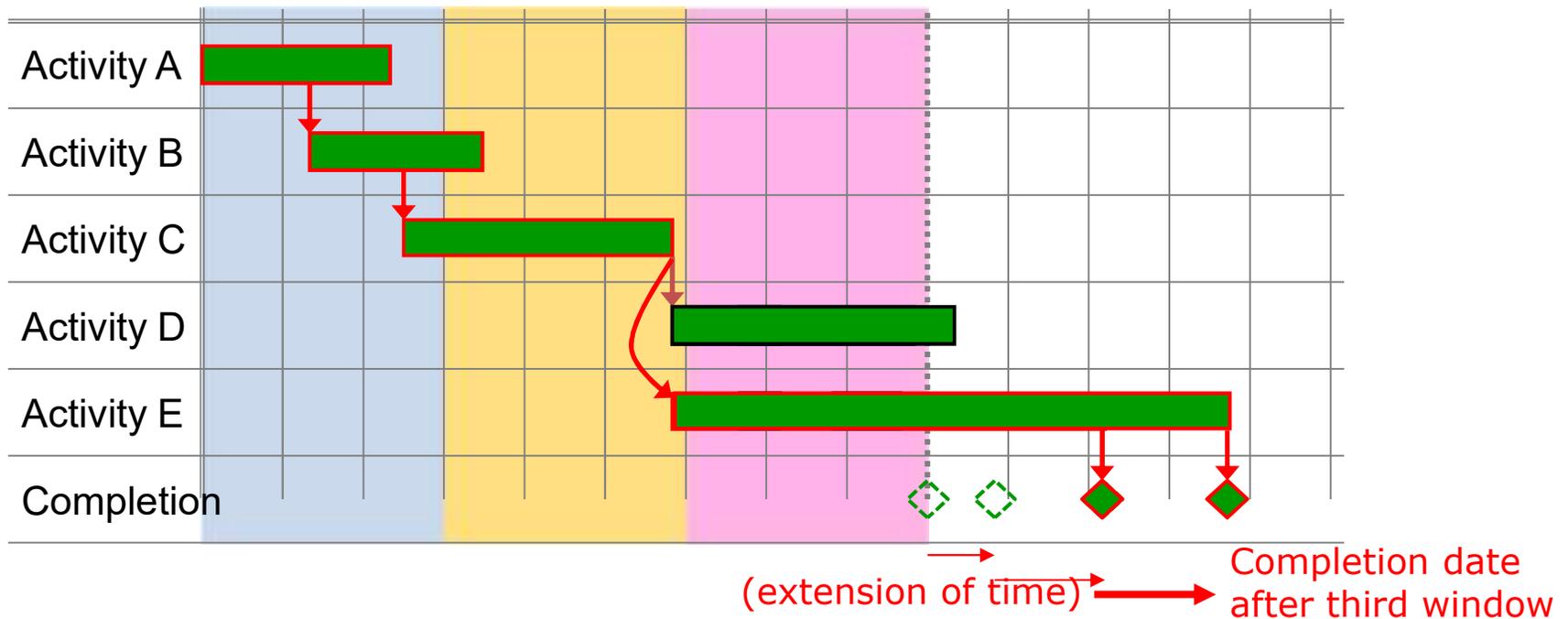
- Impact the delaying events in the third window



DELAY AND DISRUPTION

Windows analysis:

- ❑ Reschedule the programme



Windows or Time Slice method:

- Advantages
 - Dependent on which primary method is adopted
 - Effective at dealing with a large number of Events

- Disadvantages
 - Dependent on which primary method is adopted
 - Does not impact Events individually, only collectively
 - Accuracy decreases as window duration increases
 - A sequence of global claims?

DELAY AND DISRUPTION

- Delay analysis methods:
- Which technique should be used?
- Consider:
 - Contract conditions
 - Records available
 - Time available
 - Case law
 - Value of dispute
 - Most practical and common sense approach in circumstances

DELAY AND DISRUPTION

Assessing Disruption – Measured Mile:

Disruption quantified by comparing the affected disrupted productivity rate to an unaffected productivity rate

Quantifying Disruption – Measured Mile:

Unimpacted Measured Mile

Work accomplished = 1000m³

Work-hours expended = 20,000

Productivity rate = $20,000/1000 = 20$ work-hours/m³

Impacted Time Period

Work accomplished = 500m³

Work-hours expended = 12,000

Productivity rate = $12,000/500 = 24$ work-hours/m³

Lost productivity: $500 \times (24 - 20) = 2,000$ work-hours

Conclusions:

- Get the basics right and managing risks will be easier
- Use the right technique at the right time
- Disruption is a productivity (cost) issue, which may or may not cause delay
- Quantifying delay and disruption is not an exact science

Evaluation of Delay and Disruption

- Cause of Delay (i.e. Variation or Breach)
- Consider Contract Provisions
- Costs or Damages?
- Particularise Costs for Each Individual Delay
- Distinguish between Activity Related and Time Related

Claim Items – Delay and/or Disruption

- “Loss and/or expense”
 - At site
 - Off-site
 - Head office costs allocated to site
 - Head office costs/overhead
 - Outsourced eg design?

Claim Items – Delay and/or Disruption

- At site/preliminaries
 - Supervision
 - Engineering
 - Management
 - Cabins
 - Phones
 - Copiers
 - Time allocated plant
 - Time allocated labour
 - Disruption to labour and plant

Claim Items – Delay and/or Disruption

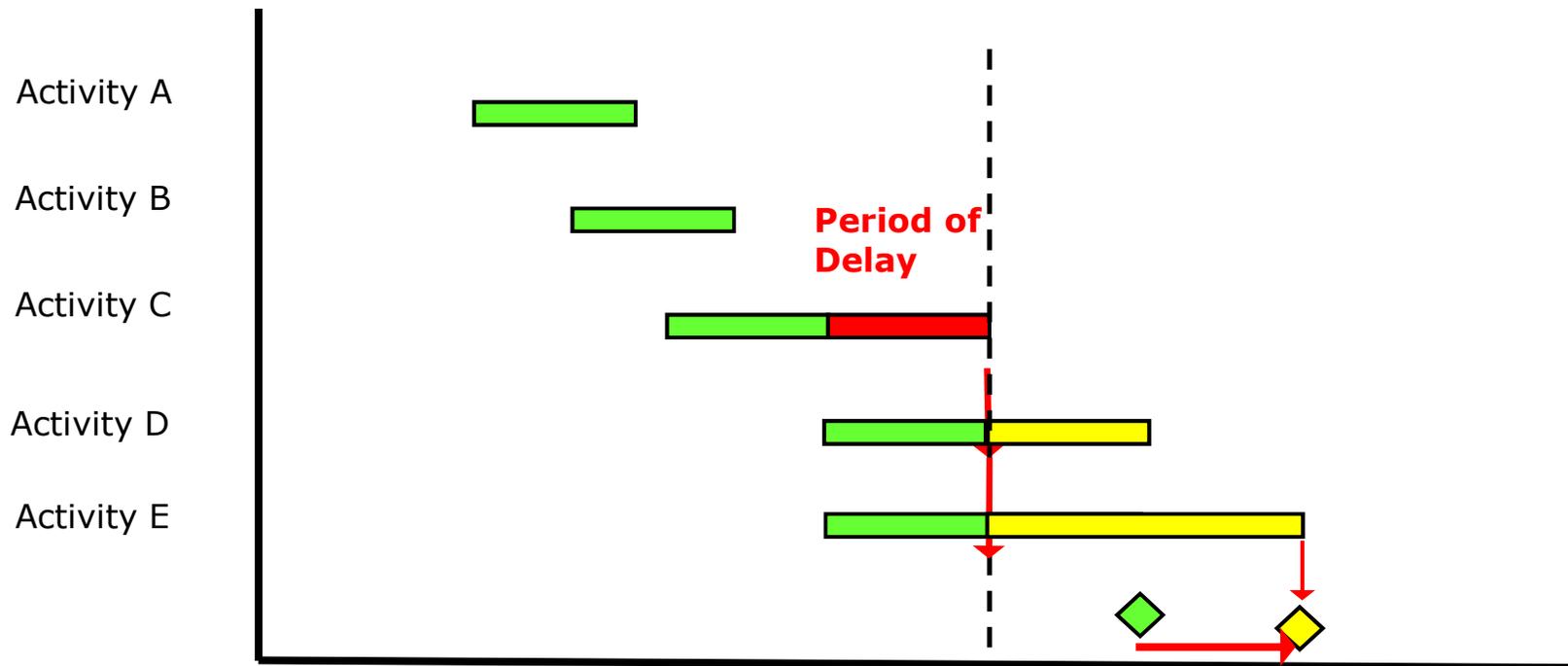
- Off-site
 - Procurement, Engineering and Management Costs
 - Head Office Overheads and Profit?
 - Interest / Finance Charges?
 - Claim Preparation Costs?
 - Outsourced Costs

Evaluation of Delays

- Establish the true costs/damages that flow from each delay
- Distinguish between time-related costs and activity-related costs
- Identify the actual period in which the delay occurs

DELAY AND DISRUPTION

Assess Time-Related Delay for the Period in which the Delay Occurs



DELAY AND DISRUPTION

Evaluation of Delays - use of a "Scott Schedule" to identify effects of each delay

Delay Reference	Description	Delay Claimed	EOT Awarded	Period Still Pursued	Explanation of Entitlement	Supporting Data	Contract Clause Applicable
D1	GMP Fit Out Works	10.6 weeks	7 Weeks	3.6 weeks	The Outstanding EOT is in respect of the delay incurred due to late receipt of AI10, and the outstanding design information (TQs raised resulting therefrom (TQS Outstanding August 03 on AI10). Note also original Contract Works suspended on AI7 re: Room Data	TQ No 3 dated 6 January 2007. Letter reference abc dated 10 January 2007. As-built Programme item D1	
D2	Further Variations to Additional Fit-Out Works	3 weeks	2 weeks 3 days	1 week	PFO Additional Variations total 37 number. Vos completed after 14th November Date include: Partitions - Complete 05/12/03 Bulkhead - Complete 05/12/03 Door 18 - Complete 03/12/03 Alarm Relocation - Complete 09/01/04 Heaters - Complete 20/01/04	VO 10 dated 6 March 2007. Letter reference def dated 10 March 2007. As-built Programme item D2	
D3	Basement DPM	6 weeks		0 6 weeks	In respect to EOT entitlement delays run concurrent with PFO Variations. 4 weeks delay accepted by SB albeit that no loss and expense has been acknowledged.	Letter reference xyz dated 14 April 2007. As-built Programme item D3	

Delay and Disruption – Legal

Time at Large

- What is it?
 - If a delay event occurs as a result of the employer’s fault
 - The contract does not allow the completion date to be extended
 - The original completion date and any LDs fall away
 - Time is put “at large”.
- Common law – UK perspective:
 - Courts have decline to introduce or modify EoT mechanism
 - Instead, declare provisions unenforceable and Contractor has a reasonable time to complete the works and the employer is no longer entitled to LDs

Delay and Disruption – Legal (cont.)

Time at Large (cont.)

- Civil law perspective:
 - Time at large is not recognized under Civil law systems
 - Courts will find a solution using principles of contractual interpretations (Good Faith, Fairness and Equality).
 - Will result in preserving the contractual framework governing the time for completion and delay penalties interpreted through the lens of principles of contractual interpretation

Delay and Disruption – Legal (cont.)

Prolongation Costs

- Claim for damages for additional costs result of the delay – loss of opportunity
- Common Law – UK perspective:

Van Oord UK Limited, Sicim Roadbridge Limited v Allseas UK Limited [2015] EWHC 3074 (TCC)

- May be entitle to EoT and prolongation if contractor can establish:
 - Default on the part of the Principal
 - Incurred actual loss and expense as a direct result
 - No recovering under any other provision of the contract
 - No other provision in the contract preventing recovery.
-

Delay and Disruption – Legal (cont.)

Prolongation Costs (cont.)

- Civil Law perspective:
 - No statutory provision that recognizes entitlement to additional payment
 - Time related costs are recoverable as a component of a damages claim
 - Principle of good faith will play a role
 - Normally would have to prove – 3 elements:
 - Breach by the Employer / Main Contactor
 - Damages suffered by the Contractor
 - A direct casualty exists between the breach and damage.

Delay and Disruption – Legal (cont.)

Concurrent Delay

- Civil Law Perspective:
 - In general, no express provision for concurrency
 - Adopt a more flexible approach to causation
 - Must look to the contract for any requirements
 - Bear in mind principles of Good Faith, Fairness, and Equality
 - “*Time but not money*” approach – Good Faith
 - Common law approach – UK perspective
 - Key case: *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR 32
 - Contractor may be entitled to EoT for the full period of concurrency barring any contrary contractual provision
-

Delay and Disruption – Legal (cont.)

Disruption – To Recover

- Experiencing disruption does not mean the contractor is entitled to recover – difficult to prove
 - Standard forms do not expressly address recover for disruption
 - Civil Law perspective to establish a disruption breach:
 - Contractual breach – implied terms or statutory provisions
 - Actual damages
 - Causal link
 - Common Law – UK perspective:
 - Disruption damages are possible
 - Contractor will have prove disruption costs caused by employer breach of contract or if contract provides for recovery
-

Questions?

ACCELERATION



The SCL Protocol says...

A Contractor may claim its costs arising out of acceleration measures to overcome all or parts of delay or disruption if the Employer is responsible.

The claim must explain the legal basis for entitlement, whether under the contract or at law.

Payment should be based on the contract terms, or the Employer and Contractor should agree the basis of payment before acceleration measures are commenced.

...and

A Contractor is not entitled to claim prolongation compensation for any period of Employer delay that has been avoided by acceleration measures.

When a Contractor is considering acceleration measures as a result of not having received an EOT [‘constructive’], steps must first be taken to resolve any dispute about entitlement to an EOT.

The full costs of acceleration are not necessarily recoverable.

SCL Protocol Definitions

Acceleration

Application of additional resources or alternative construction sequences or methodologies to achieve the planned scope of work in a shorter time or execution of additional scope within the original planned duration

Constructive Acceleration

Acceleration following failure by the Engineer to grant an EOT when there is entitlement, which then requires the Contractor to accelerate to meet the prevailing completion date.

Types

Prospective Acceleration

The Employer or Engineer requests or instructs the Contractor to adopt acceleration measures and the Contractor provides a 'proposal' for such measures.

Retrospective Acceleration

Acceleration measures have been implemented without any prior agreement or instruction.

Acceleration Agreement must include:

1. Full details of the accepted 'proposal'.
2. What happens if the contractor fails to implement some of the measures.
3. What happens if the contractor fails to achieve intermediate targets and/or the revised completion date.
4. Payment terms.
5. Any changes to existing contract terms.

Also consider FIDIC Red Book 1999

Sub-Clause 8.3 [Programme]

“The Contractor shall promptly give notice...of specific probable future events or circumstances which may...delay the execution of the Works.”

and

“The Engineer may require the Contractor to submit an estimate of the anticipated effect of the future event or circumstances, and/or a proposal under Sub-Clause 13.3 [Variation Procedure]”

FIDIC Red Book 1999 continued **Sub-Clause 13.2 [Value Engineering]**

“The Contractor may, at any time, submit to the Engineer a written proposal which (in the Contractor’s opinion) will, if adopted, (i) accelerate completion...”



In order to pursue an acceleration claim, the Contractor must have accurate and detailed records of resources employed on the project.

Evaluation must be rooted in fact and logic.

Contractor's must bear this is mind **BEFORE** any claims arise – the procedures and systems for cost recording and reporting must be in place at the start of the project.

Sub-Clause 20.1 [Contractor's Claims]

“The Contractor shall keep such contemporary records as may be necessary to substantiate any claim”

and

“the Engineer may...monitor the record-keeping and/or instruct the Contractor to keep further contemporary records”

Sub-Clause 6.10 [Records of Contractors Personnel and Equipment]

“The Contractor shall submit, to the Engineer, details showing the number of each class of Contractor’s Personnel and of each type of Contractor’s Equipment on the Site. Details shall be submitted each calendar month, in a form approved by the Engineer”

Sub-Clause 4.21 [Progress Reports]

“Each report shall include...the details described in Sub-Clause 6.10”



The Contractor needs to consider:

- What is the position of the Works just prior to implementing acceleration?
- Who's delay is being mitigated?
- Is it actually possible to accelerate certain elements of the works – e.g. RC works or long lead procurement items
- Are the subcontractor's and the design team on board?
- Is there sufficient resources available, and if so will they be effective?

When developing an acceleration proposal:

- Agree in advance the start and end of the acceleration measures;
- Be very clear on the expected outcomes and also the likelihood of their success – consider the risks in certain approaches!
- Focus on the activities that matter, i.e. the critical path.
- Clearly identify if there are obligations by the Employer.
- Agree on the method and frequency of monitoring and reporting.

When revising the 'acceleration' programme

- Undertake various 'what if' scenarios and properly assess the outcomes;
- Often if a solution is simple, it will work;
- Avoid intricate or unwieldy logical relationships;
- Keep activities short and manageable;
- Be ready to revise and adapt to changing scenarios;
- Focus on the critical activities; and,
- Make it achievable.

Various approaches can be taken when considering acceleration:

- Optimal resource (more is not always better)
- Design based initiatives:
 - 1) Permanent works – consider alteration of design
 - 2) Temporary works
- Operational alternatives:
 - 1) More efficient ways of working
 - 2) Resequencing – Plan an alternative way of working
- Concessions – this may require agreement with Employer and Engineer

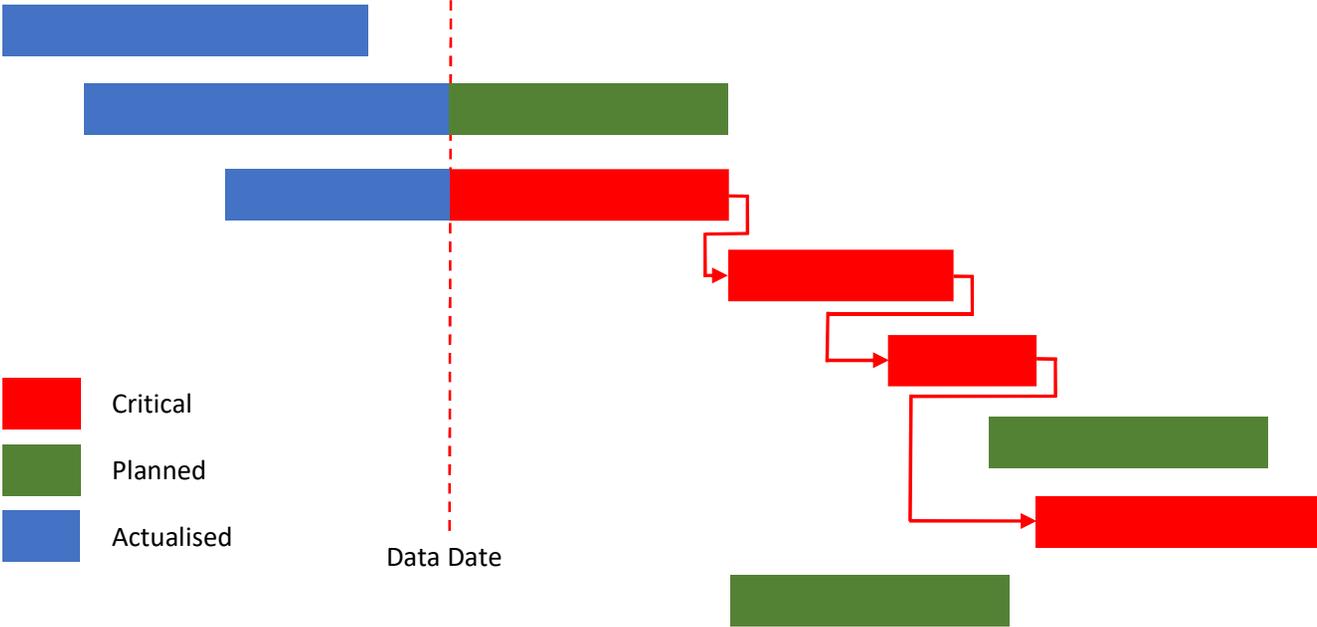
Monitoring acceleration measures...

The SCL Protocol says...

*"The programme should be updated to record **actual progress, variations, changes of logic, methods and sequences**, mitigation or acceleration measures and any EOTs granted. If this is done, then the programme can be more easily used as a tool for **managing change**..."*

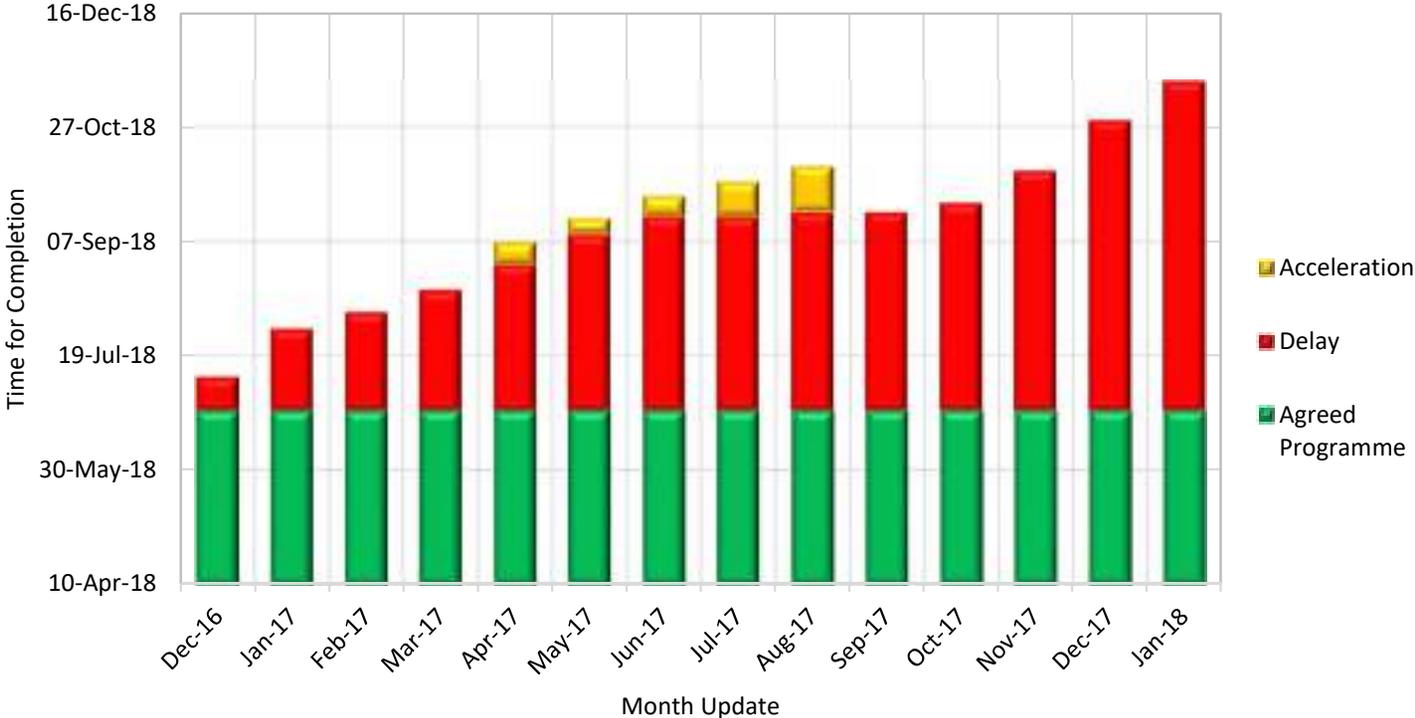
[emphasis added]

Monitoring with a Critical Path Network programme



ACCELERATION

Project Performance



ACCELERATION

Typical costs in an acceleration claim are:



1. Increased construction labour costs for overtime, additional shifts or reduced efficiency.
2. Increased construction equipment maintenance costs associated with longer working hours.
3. Increased construction equipment expenses associated with serving additional resources and overtime work.
4. Cost of additional materials e.g. less reuses from formwork.
5. Expediting material deliveries e.g. air freight.

6. Additional subcontractor costs e.g. in order to expedite activities it might be necessary to use subcontractors instead of the Contractor's own labour force.
7. Increased site supervision and site expenses.
8. Increased head office overhead expenses directly related to the acceleration e.g. direct management time.
9. Loss of productivity due to overtime working, increased gang sizes, stacking of trades and re-sequencing of work.

It must also be recognised that when faced with acceleration, the contractor is obliged to mitigate the costs whenever reasonable.

For example, this may involve the following measures:

1. Using a larger labour force rather than incurring overtime.
2. Using additional equipment rather than more labour.
3. Reducing the site overheads if the project or major activity is completed earlier.

ACCELERATION

Difficulties arise when the agreed acceleration measures are adopted but then only partially successful – often due to other subsequent delay events or disruption.



In our experience...

- More often than not prospective acceleration fails.
- Project teams rarely know how to approach acceleration.
- Retrospective acceleration is often poorly performed and targets the wrong areas.
- Little time is given to mitigation planning.
- Rarely is there agreement on actual progress.
- Records, records, records.

Preparing acceleration claims:

1. Recognise the type of acceleration and adopt appropriate measures to protect entitlement.
2. Evaluation must be rooted in fact and logic.
3. Detailed records are necessary for measurement and substantiation.
4. Maintain appropriate cost recording and reporting systems right from the start of the project.

Legal Entitlement – Acceleration

- Most common dispute: Constructive Acceleration
 - Not recognized in statutory provisions most jurisdictions
 - Contractor can still recover:
 - Breach of Contract Terms
 - Implied Terms
 - Civil Law perspective – must prove:
 - Breach – Employer / Main Contractor breached the terms (or implied terms – Good Faith) of the contract
 - Damages – Contractor suffered damages (i.e. additional costs incurred due to accelerating the works); and
 - Link – A direct causality exists between the breach and damage.
 - Common Law – UK perspective: no recognized
-

Legal Entitlement – Acceleration (cont.)

- Things to consider when establishing legal entitlement for Acceleration:
 - Comply with contractual requirements for submitting notices and claims
 - Claims are full and detailed – Global Claims?
 - If request for EOT is ignored or rejected, provide notice of your claim to the employer or main contractor
 - If you choose to accelerate, provide notice of your intention to claim the costs of the acceleration
 - Silence is acceptance in some Civil Law jurisdictions
 - Obtain express instruction to accelerate and entitlement
 - Records...Records...Records...and more Records!!!!!!!!!!!!
-

Legal Entitlement – Acceleration (cont.)

- Records (cont.) for Acceleration:
 - Minutes and records of meetings
 - Correspondence between Employer/CA and Contractor
 - Monthly bank statements
 - Invoices
 - Variation orders
 - Changes in design
 - Site logbooks, diaries, and daily records
 - Photographs and videos
 - Progress reports
 - Attendance sheets
 - Time schedules with supporting reports
 - Records of contractor's personnel and equipment

Acceleration Agreement

- Use to “wrap up” or expunge all outstanding claims for EOT and loss and expense
 - Addendum or separate agreement?
 - Must contain essential terms:
 - Payment amount
 - How and when payment is due
 - Changes to existing contracts – design or specification
 - Treatment of retention
 - Other considerations:
 - Authorized signatory
 - Dispute resolution mechanism – Same / Separate / None
-

Questions?

EFFECTIVE PRESENTATION OF CLAIMS



PRESENTATION OF CLAIMS

Presentation of The Claim

The Success of a claim can often turn upon a well presented document

The burden of proof of any claim rests with the claimant

Three most essential items for successful claims:

- Good Records
- Good Records
- Good Records

PRESENTATION OF CLAIMS

Claims – principles of presentation

- Cause
- Effect
- Justification
- Evaluation
- Substantiation

PRESENTATION OF CLAIMS

Presentation of The Claim

Vital contemporaneous supporting evidence might include :

- Tender / Contract Information
- Works Records Sheets
- Daily Record of labour and plant, staff etc
- Materials received / issued records
- Drawings Register

Presentation of The Claim

- Correspondence and Meeting Minutes
- Site Diaries
- Site Instructions
- Variation Orders
- Dayworks

PRESENTATION OF CLAIMS

Presentation of The Claim

- Photographs (dating facility essential)
- Agreed measurements of works
- Delay Notices
- Claim Notices
- Material Orders / Invoice

PRESENTATION OF CLAIMS

Presentation of The Claim

- Subcontract Accounts
- Cost Reports
- Programme Updates

PRESENTATION OF CLAIMS

Contract Administrators (with the project teams) must:

- understand the importance of record keeping and make sure adequate records are kept...
- and make clear the importance of such record keeping to everyone concerned
- and keep records in a systematic and consistent way, so these records will be retrievable at later stage.



PRESENTATION OF CLAIMS

Presentation of The Claim

A claim should be presented in such a way that it is not essential to trawl through a massive amount of correspondence / records to understand the case

A claim should be able to be read and understood without reference to other documents, although the other documents will be essential to evidence the facts presented within the text of the claim

Presentation of The Claim

A well presented claim should fall conveniently into sections, each one with its own important part to play in the overall presentation

An example format could be:

1. Introduction
2. Executive Summary
3. Contractual Terms
4. Planned Sequence of Construction
5. Actual Sequence of Construction
6. Events and their Affects upon the Sequence of Construction
7. Programme Affects
8. Evaluation

Claims from the Employer

- Limitation of Liability and Caps
 - Damages for Delay
 - Performance Damages
 - Availability Damages
 - Insurable Events
- Consequential Damages
- Loss of Profit, Opportunity etc

Questions?

NEGOTIATION AND SETTLEMENT



Preventing Claims from Becoming Disputes

- Claims and (to a certain degree) disputes are normal in construction projects
- They are not per se bad, but simply need good management to prevent their escalation. Therefore:
 - Install an effective claim management process from day-one and maintain it throughout the entire project. Clear decision tree to handling claims and disputes
 - Ask the other side to provide clear contacts for claim related issues
 - Make sure the FIDIC dispute management bodies (standing DAAB) are set up at the beginning of the project and not only after a claim has escalated

Preventing Claims from Becoming Disputes (cont.)

- Claims tend to turn into disputes where the result is uncertain
 - Effective claim management should:
 - Ensure claims are well founded – such claims tend to remain undisputed
 - Keep good records – allocate sufficient resources to “paper trail” / minimise staff changes
 - Ensure strict compliance with notice requirements – Contractors should not fear to issue notices and Employers should not be affronted to receive them
 - Seek legal and / or expert advice early – this can clarify viability of claim and help to make claim waterproof
 - Keep commercial channels open – stay tuned for pragmatic solutions
-

Negotiation and Settlement

- Claims Negotiation and Settlement – Key Points to Consider:
 - Agenda to include “settlement”
 - Meeting “without prejudice” or open
 - Participants fully authorised to settle
 - Be realistic – the alternatives (to settlement) are horrific
 - Settlement Agreement
 - Document everything!
 - Part of Contract process
 - Issue notices according to contract

Negotiation and Settlement (cont.)

- Dispute Resolution – Methods – Advantages / Disadvantages:
 - Alternative Dispute Resolution
 - Mediation
 - Adjudication
 - Others
 - Arbitration
 - Litigation
 - Know your contract...

Questions?

DISPUTE RESOLUTION



Dispute Resolution

- Main causes of disputes in the construction and infrastructure sector globally?
 - Cost overruns, scope changes and payment disputes
 - Delayed projects or non-performance issues
 - Design and quality errors

Dispute Resolution (cont.)

- Key causes of construction disputes in Pakistan?

S No.	Factors	RII	Rank
1	Ambiguities in specs and drawings	0.96	1
2	Ambiguities in contract documents	0.85	2
3	Award of Contract at Low bid Criteria	0.84	3
4	Design change	0.84	3
5	Issues of variation in contract documents	0.83	4
6	Claim damages for late payment issues	0.82	5

*extract from research paper by Farooqui, Masood and Saleem NED University of Engineering & Technology, Karachi

Dispute Resolution (cont.)

- Dispute Management – Objectives
 - Not the same for every project, may include:
 - Speed
 - Cost
 - Justice
 - Enforceability
 - Maintain commercial relationships
 - Complete the Project
 - Certainty
 - Need to understand the project and the parties to decide on priorities
-

Dispute Resolution (cont.)

- The RED BOOK provides for a three step dispute resolution process:
 - Dispute Adjudication Board (DAB) in Sub-Clause 20.4
 - Amicable Settlement in Sub-Clause 20.5
 - Arbitration in Sub-Clause 20.6
- Nothing prevents the Parties from negotiating an amicable settlement
 - Before referring any dispute to a DAB, OR
 - During any proceedings between the Parties

Dispute Resolution (cont.)

The Role of the DAB:

- Each Party can bring before the DAB "*any Dispute between the Parties*" (Sub-Clause 20.4)
 - "*dispute*" includes any legal, commercial or technical disagreement concerning the contract, e.g. as to:
 - a determination made (or not made) by the Engineer
 - any certificate or any instruction of the Engineer
 - any remeasurement or valuation
 - DAB is to decide such dispute brought before it under Sub-Clause 20.4
-

Dispute Resolution (cont.)

Procedure of the DAB:

- DAB has the right to demand from the Parties all additional information, access or other means it deems necessary to make the requested decision
- Further procedural rules for the DAB are included in the Annex to the model "*General Conditions of Dispute Adjudication Agreement*" annexed to the General Conditions.

Dispute Resolution (cont.)

The Effect of a DAB decision:

- Any decision of the DAB is ***preliminarily binding*** on the Parties until it is revised by a settlement or an arbitration award
- Any decision of the DAB becomes ***finally binding*** on the Parties in case no Party gives a notice of dissatisfaction within 28 days after receiving the decision to the other Party
- DAB decision and a timely notice of dissatisfaction are conditions precedent for arbitration

Dispute Resolution (cont.)

The Nature of a DAB decision:

- It is not an arbitration award
- It is obviously not a court decision
- Most likely it is some kind of settlement agreement (entered into by not issuing a notice of dissatisfaction)
- Breach of Contract if breached

Dispute Resolution (cont.)

Composition of a DAB:

- DAB has either one or three members (the default number is three)
 - Criteria for the suitability of member is laid down in the "*General Conditions of Dispute Adjudication Agreement*" annexed to the General Conditions
 - Experienced in the kind of work carried out
 - Experienced in the interpretation of contracts
 - Fluent in the contractual communication language
 - Independent of both parties
 - DAB members usually Quantity Surveyors or comparable professionals
-

Dispute Resolution (cont.)

Appointment of the DAB:

- Appointed jointly by the Parties according to Sub-Clause 20.2:
 - One member by each Party
 - The chairman by the two other members
 - Appointed at the time stated in the Appendix to Tender – ideally at the beginning of the project
 - DAB members and Parties enter into agreement specifying the rights and duties of the DAB members (a model contract is annexed to the General Conditions)
 - Both Parties pay half the DAB's remuneration / expenses
-

Dispute Resolution (cont.)

Amicable Settlement

- After a notice of dissatisfaction has been handed in, the contract (Sub-Clause 20.5) asks for amicable settlement talks to be held
- If no solution has been found within 56 days (even if no attempt has been made), arbitration proceedings may commence
- Parties are free to shorten or extend that period by agreement

Dispute Resolution (cont.)

Arbitration

- Preconditions for the commencement of arbitration proceeding under a FIDIC RED BOOK contract are:
 - DAB decision (unless no DAB exists at the time of the dispute)
 - Notice of Dissatisfaction in regard to such decision given in time
 - No amicable settlement within 56 days

Dispute Resolution (cont.)

Arbitration (cont.)

- Arbitration shall be conducted (Sub-Clause 20.6):
 - International Chamber of Commerce
 - Three arbitrators
 - In the language of communication of the contract
 - At the place of arbitration specified in the contract
- Parties are free to agree the elements to a DR clause
- Other elements include:
 - Final and Binding
 - Procedural rules

Dispute Resolution (cont.)

Other Considerations:

- Evidence from DAB proceedings can be brought into an arbitration.
- Arbitration might be conducted only to enforce a DAB decision
- DAB comes with a significant cost that should be taken into account at tender stage
- Once DAB proceeding have been started this might lead to arbitration on that issue in the middle of the performance of the contract

Questions?

ARBITRATING SPECIAL CONSIDERATIONS



Arbitrating – Special Considerations

- Issues when Arbitrating
 - Legal capacity to conclude Arbitration Agreements
 - Satisfying preconditions to Arbitration
 - Obtaining payment without resorting to Arbitration
 - Pressure tactics for force payment or early settlement
 - Use of Litigation Funding
 - Use of insurance coverage to your advantage in a dispute
 - Disputes with governmental entities
-

Arbitrating – Special Considerations (cont.)

Legal Capacity

- Arbitration is seen as exceptional
- Higher threshold of authority is required
- Authority to enter into contract is not same authority to conclude arbitration agreement
- Granted only by special power of attorney, memorandum / articles of association, or a shareholder's resolution

Arbitrating – Special Considerations (cont.)

Preconditions to Arbitration

- Arbitration clauses commonly include preconditions to commencing arbitration
- Preconditions to arbitrate are permitted
- Preconditions include time periods for good faith negotiation or mediation, expert determination, DAB, or conciliation
- If preconditions are not satisfied or fulfilled then it is not possible to resort to arbitration
- Legal principle: the contract is the law of the parties

Arbitrating – Special Considerations (cont.)

Preconditions to Arbitration (cont.)

- Another consideration – written notice is a contractual notice:

*“18.1 If any dispute, controversies, or claims between the Parties arises out or in connection with this Agreement [. . .] the Parties shall endeavour to settle that Dispute amicably by negotiation. **Negotiations shall be triggered by one Party sending the other a written notice setting out the basis for the Dispute.** In the event that no agreement is reached within thirty (30) days after the date on which a Party notifies the other that a Dispute exists [. . .] such Dispute shall be determined by arbitration in accordance with the provisions of sub-clause 18.2.herein.”*

- Written notice cannot be issued by Counsel to satisfy precondition to arbitration
-

Arbitrating – Special Considerations (cont.)

Tactics to obtain payment

- Tactics to consider:
 - Mitigation through chamber of commerce
 - Demand letters – legal notice
 - Seek attachment orders
 - File criminal complaint
 - Supply Chain Financing
- Special consideration: Settlement Agreement
- Insurance Coverage over your final award or court judgement

Arbitrating – Special Considerations (cont.)

Litigation Funding

- Third-Party Funding – unrelated party provides funding to another party for a legal case in return for a payment of some kind upon successful conclusion of the case
 - How to use it:
 - Spread your risk
 - Pursue multiple claims rather than just one claim
 - Take the costs of funding a dispute off your balance sheet
 - Use of working capital
 - Permissible in the Pakistan
 - Strategy to obtain monies owed to you!
-

Arbitrating – Special Considerations (cont.)

Using Insurance to Win

- Insurance on your dispute
 - Arbitral Award Default Coverage
- Why obtain such coverage?
 - Applies pressure
 - You obtain leverage
 - Guarantees payment
- Where to get it?

Arbitrating – Special Considerations (cont.)

Disputes with Governmental Entities

- Other options for arbitration against governmental entities:
 - Bilateral Investment Treaties / Multilateral Investment Treaties
 - OIC Agreement
 - Pakistan-China BIT
- Use of insurance to gain leverage
- Enforcement of Arbitral Awards and Court Judgements against governmental entities

ARBITRATING – SPECIAL CONSIDERATIONS

Questions?

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THANK YOU

Dispute Resolution Clauses

A GOOD ARBITRATION CLAUSE – Two cardinal rules

(1) Keep it simple:

“English law – arbitration, if any London according ICC Rules”

(2) Avoid ambiguity/confusion:

“Binding arbitration in Stockholm, under the laws of the Russian Federation and the State of New York”

Dispute Resolution Clauses (cont.)

Bad Clauses:

- (1) *“In the event of any unresolved dispute the matter will be referred to the International Chamber of Commerce.”*
- (2) *“All disputes arising in connection with the present agreement shall be submitted in the first instance to arbitration. The arbitrator shall be a well-known Chamber of Commerce (like the ICC) designated by mutual agreement between both parties.”*

Dispute Resolution Clauses (cont.)

Bad Clauses (cont.):

(3) *“Any and all disputes arising under the arrangements contemplated hereunder ... will be referred to mutually agreed mechanisms or procedures of international arbitration, such as the rules of the London Arbitration Association.”*

(4) *“For both parties is a decision of Lloyd or Vienna stock exchange binding, and both will subjugate to the International Chamber of Commerce.”*

Dispute Resolution Clauses (cont.)

Bad Clauses (cont.):

(5) *“In case of dispute (contestation), the parties undertake to submit to arbitration but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction.”*

(6) *“Disputes hereunder shall be referred to arbitration, to be carried out by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard for the law of the place of arbitration.”*

Dispute Resolution Clauses (cont.)

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From *Exmek Pharmaceuticals SAC v Alkem Laboratories Limited*
[2015] EWHC 3158 (Comm.)

"Article 13: PROPER LAW

The proper law of this Agreement is the law of the UK, and the Parties submit to the exclusive jurisdiction of the Courts of the UK and of all Courts having jurisdiction in appeal from the Courts of the UK.

Article 14: ARBITRATION

All disputes and differences whatsoever which will at any time hereafter arise between the parties in relation to this Agreement which the Parties using their best endeavors in good faith cannot resolve shall be referred to arbitration before any legal proceedings are initiated. The arbitration shall be conducted in the UK in accordance with the provisions of the law in the UK in effect at the time of the arbitration and shall be conducted by one or more arbitrators appointed there under."

Dispute Resolution Clauses (cont.)

Good Arbitration Clause:

Use the model clause of the chosen arbitral institution; e.g., the LCIA clause:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [city, or country].

The language to be used in the arbitral proceedings shall be [...].

The governing law of the contract shall be the substantive law of [...].”
