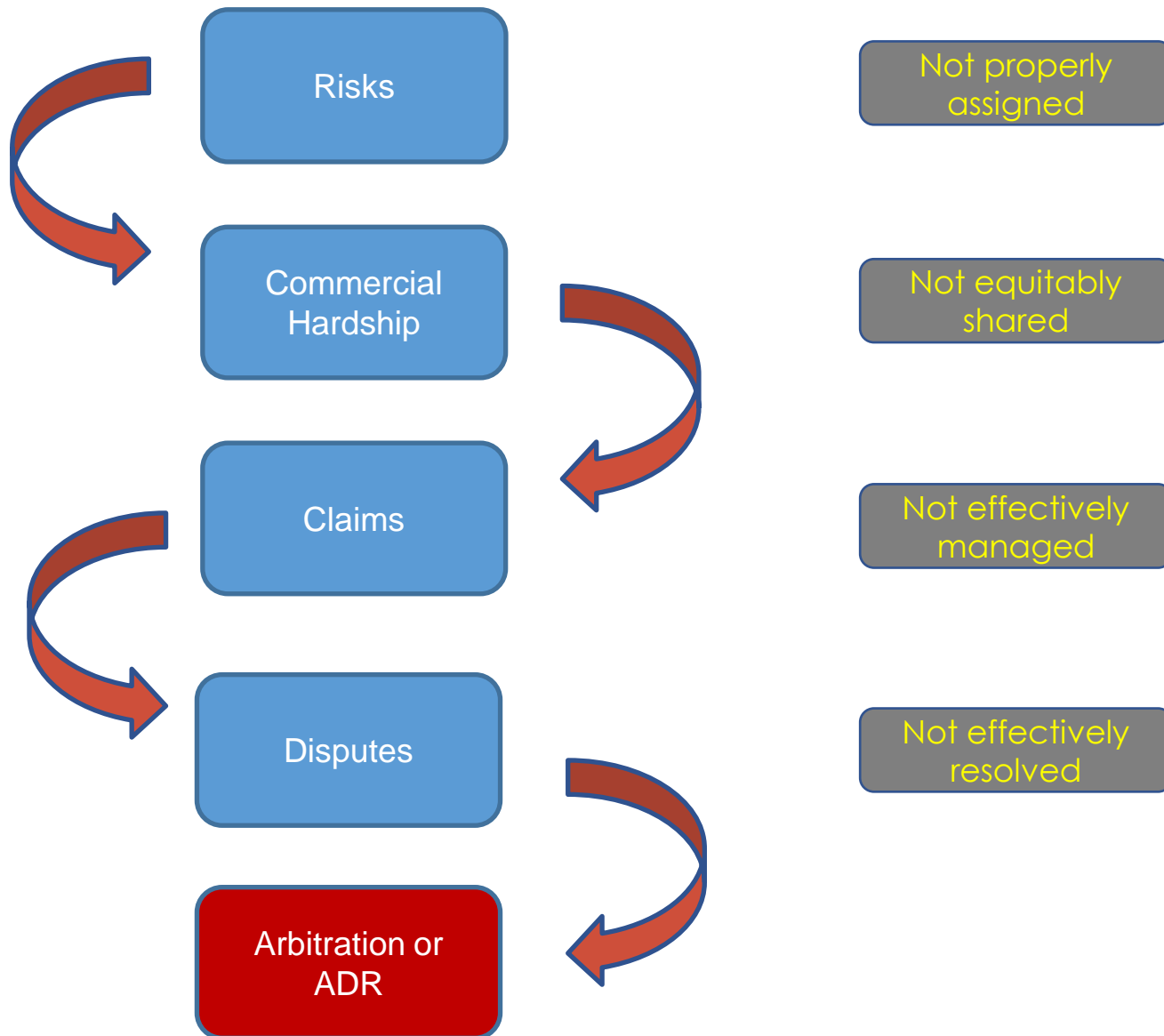




# **CONSTRUCTION DISPUTES 101**

**David Lockwood  
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Managing Director**

# The Dispute Spiral



# Balancing Risk

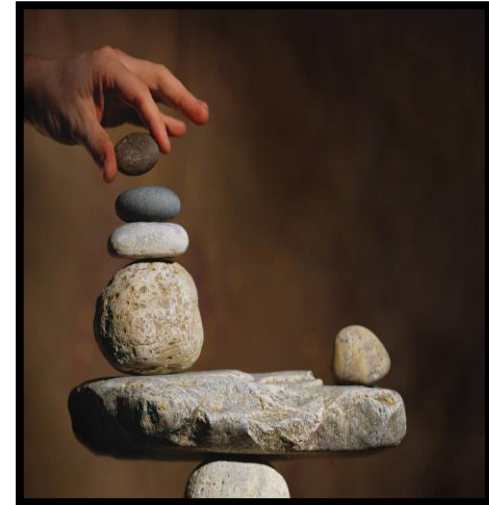


# 1 Risk should be allocated to the party most able to control it.

# 2 Risk outside the contractor's control should be allocated to the employer.

# 3 Risk should not be allocated to a party who may be unable to sustain the consequences.

# 4 Risk allocation should encourage good management by the party who carries the risk.



# 5 The party who is not carrying the risk should be motivated to manage the consequences of the occurrence of the risk in an effective and equitable way.

# Allocation of Risk Responsibility



Employer Culpable

Contractor Culpable

Shared (neutral)

Delayed Drawings  
Delayed Licenses  
Delayed Access  
Incorrect Setting Out  
Contractor Suspension  
Delayed Approvals  
Direct Contractor or  
Supply Item Delays  
Tests on Completion  
Additional Scope  
Stand-by Time

Failure to submit  
Program, PB and APB  
Delayed Mobilization  
Delayed Procurement  
Rate of Progress (slow)  
Failed Tests (re-test)  
Failure to remedy  
Defects

Authority Delays  
Unforeseen Conditions  
Changes in Law  
Force Majeure  
Fossils  
Global shortages of  
materials

Con entitled to  
Time + Cost + Profit

Employer entitled to  
Cost ONLY

Con entitled to  
Time + Cost ONLY

Employer act of prevention – Contractor default or Neutral Event ?

# A Myriad of Conflicts (Risks)



1. Changes in Contract work Scope
2. Changes in Specifications
3. Differing in unusual site conditions actually encountered
4. Suspension of Work
5. Variation in quantities
6. Damage due to natural disasters and force-majeure
7. Re-inspection and acceptance
8. Termination for the convenience of the client
9. Possession prior to completion
10. Escalation of price due to inflation
11. Acceleration of work progress
12. Currency fluctuation effect
13. Ambiguity in specifications and drawings
14. Delayed Access
15. Drawing Errors
16. Standby time
17. Delay of Owner Supplier Materials
18. Changed legislation / laws
19. Poor project management and/or lack of owner involvement in the project
20. Projects with aggressive costing that causes profit pressures on contractors

# Claim Definition



- Claim is an assertion of a right to compensation for losses or increased costs
- Claims are for extension of time and/or additional payment under express or implied terms of the Contract
- Claims must be made via mandatory notices under the Contract stating full details and contemporaneous information to properly demonstrate entitlement.
- Standard Forms of Contract have specific claim clauses that describe the procedure and process – some have separate Employer and Contractor claim clauses (refer flow chart example)

# Arbitration Inefficiencies



## Parties

- Poor record keeping during the contract lack of referencing and document control
- Parties keen to present their case and over-load the Expert with information
- Slow response to Q&A by appointing Party
- Format of the documents huge file and in different formats
- 80/20 Rule 80% of the information is contained within 20% of the materials (perhaps)
- Slow appointment process and terms of reference
- Lack of priority and lack of focus on claims with strong merits by Party

## Expert

- How competently can the Expert apply the 80/20 rule ?
- Expert Q&A process efficiency in determining missing or incomplete information
- Does the expert have actual expert knowledge of the country and location – how steep is the local learning curve – Vietnam is not Singapore (Decrees, Ordinances, Decisions, Multi-Development Bank Funding, State Audit Committee, Indices, costs norms)

# Working Efficiently with Experts



## Deriving Maximum Value from Experts

- ✓ Clear scope definition and terms of reference what is included / excluded between SOC and ER – avoid duplication ?
- ✓ Clear communication of time-lines conveyed to all parties – “ SMART” realistic and achievable
- ✓ Expert to convey objectively to the tribunal the essence of the case using 5 step approach or similar
- ✓ Avoid wasted resources on claims with little or no merit (lack of contractual entitlement lack of records and evidences)
- ✓ Apply 80/20 rule for expert efficiencies with documentation and evidences



# Types of Expert



## Shadow Experts

- ✓ Appointed by parties – extension of parties
- ✓ Not neutral so not normally required at hearing
- ✓ Support the party in preparing a “professionally” prepared claim
- ✓ Advices on strengths and weaknesses of claim heads and priorities
- ✓ Advises on Claim Head supporting documents and evidences

## Witness of Fact

- ✓ Project Directors, Project Managers and Engineers engaged on-site
- ✓ Loyalty to Employer and not expected to be neutral but based on facts not opinions
- ✓ Language and communication problems (not “court room” people)
- ✓ Can be cross examined but not always good witnesses

# Types of Expert



## **Tribunal Appointed Witness**

- ✓ Takes instructions from Tribunal and better control of terms of reference and time-lines
- ✓ Wholly supports the tribunal in technical matters and ease of understanding the claim
- ✓ Fully neutral perspective and must demonstrate objectivity
- ✓ Attends hearing and is cross examined

## **Party Appointed**

- ✓ Takes instructions from Parties normally one for each side and “can be battle of the experts”
- ✓ Supports the tribunal in technical matters and ease of understanding the claim
- ✓ Quasi neutral perspective and better to demonstrate objectivity
- ✓ Attends hearing and is cross examined by Counsel some-times “hot-tubbing”

# Competences of Experts



## Hard Skills

- ✓ Relevant technical domain knowledge (quantum vs delay, tunnel vs bridge, county and location)
- ✓ Ability to convey strong and weak points early and prioritize claims from high to low chance
- ✓ Ability to convey whether contemporaneous records are sufficient or gaps and omissions
- ✓ Ability to advise on proper demonstration of entitlement “cause and effect”
- ✓ Ability to advise on proper presentation of quantum and delays

## Soft Skills

- ✓ Verbal and written communication huge volume of information condensed into readable report
- ✓ Oral communication conveying findings in objective and logical way

# 6 Step Approach to EoT Claims Preparation



Step # 1 – Establish the Base-line (planned)

Step # 2 – Compare and analyze the As-built (actual)

Step # 3 – Using CPM Delay Analysis and Window Analysis and identify Delay Events and determine “Cause & Effect” for each event

Step # 4 – Demonstrate Contractual Entitlement using CoC and Mitigation Measures (legal requirement) and determine likely success factor

Step # 5 – Compile Evidence and prepare Chronologies for each Claim Head

Step # 6 – Prepare Quantum for prolongation and mitigation (acceleration)



# Critical Success Factor – Comprehensive Evidences and Contemporaneous Records

Correspondence

Emails

Minutes of Meeting

Instructions / Notices

Rolling Programs

Progress Reports

Site Diary

Correspondence

Manpower Charts

Equipment Deliveries

Labor Contracts

Photos and BIM Models

Invoices / Sub-Contracts

Overhead Costs

S.O. and PO's

Demob Records

**RECORDS – RECORDS – RECORDS to Demonstrate Delay for TIME + COST Claims**

# 5 Step Approach to Claim Evaluation for CA's



Step # 1 – Contractual validity under the Contract – check and verify

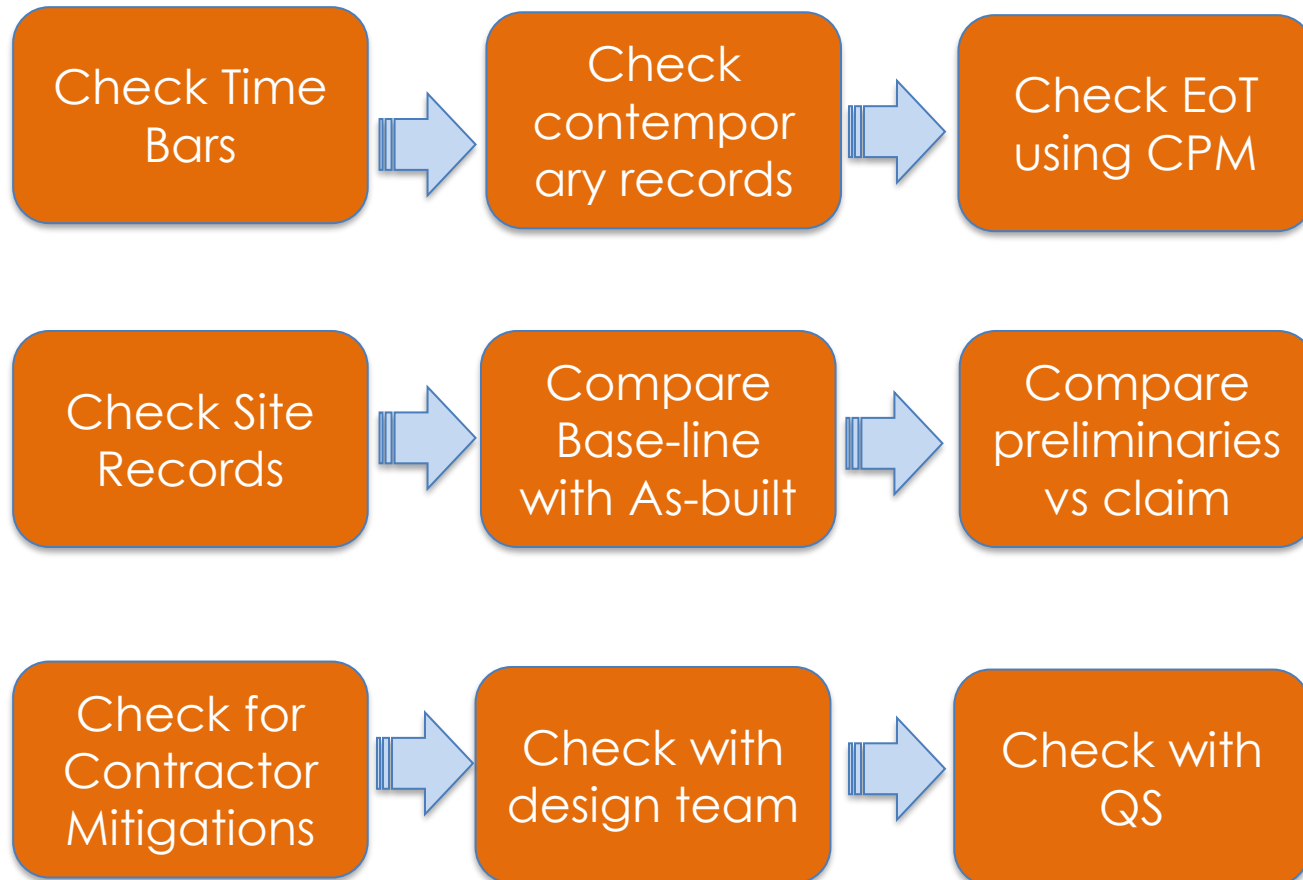
Step # 2 – Technical validity time, quality or cost obligations – check and verify

Step # 3 – Evaluation and proper demonstration of entitlement (logical, fair and reasonable) – check and verify

Step # 4 – Issue Q&A or attend meetings asking for supporting contemporary records and additional information

Step # 5 – Issue detailed assessment and make fair and reasonable determination of claim validity and recommend for payment or rejection

# Claims “101” Check-List



# Contractual Notices



## What form should the notice take?

- What matters need to be notified?
- How much detail needs to be given?
- What type of evidence needs to be with the notice?
- When does the notice need to be given?
- The form of notice: oral, or written? If written, does it need to be given in a special or agreed format? To which address does it need to be sent.
- How often (if at all) does the notice need to be up-dated?
- To whom should the notice be given: the employer, engineer, lenders or any other interested parties?

A Condition  
Precedent

**Beware !**

Time Barring  
Risk