



## Webinar:

The Long View: What parties to long-term project contracts need to know about disputes (and avoiding them)

25 March 2021 | 11:00am (UK Time)

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25 March 2021

## THE LONG VIEW:

# WHAT PARTIES TO LONG-TERM PROJECT CONTRACTS NEED TO KNOW ABOUT DISPUTES (AND AVOIDING THEM)

Gordon Nardell QC, Twenty Essex

Sue Kim, Director, HKA

# SPEAKERS



**Gordon Nardell QC**  
**Twenty Essex – London & Singapore**

- Gordon is a barrister specialising in international litigation and arbitration
- Extensive experience of claims by and against state bodies including PPP projects, as counsel and arbitrator
- Advises on regulatory and contract issues

**Sue Kim**  
**Director, HKA**

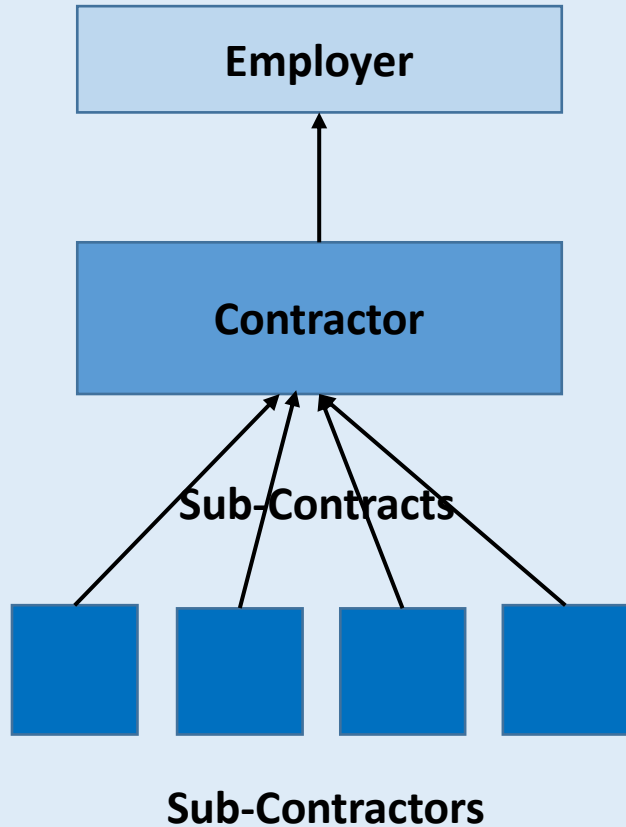
- Sue is a Chartered Quantity Surveyor, FRICS, (UK-trained) and a qualified architectural engineer (South Korea-trained) with 20 years of experience in the engineering and construction industries.
- QS Quantum expert in litigation and various ADR.
- Called to the Bar of England and Wales in 2020.

# TODAY'S TOPICS

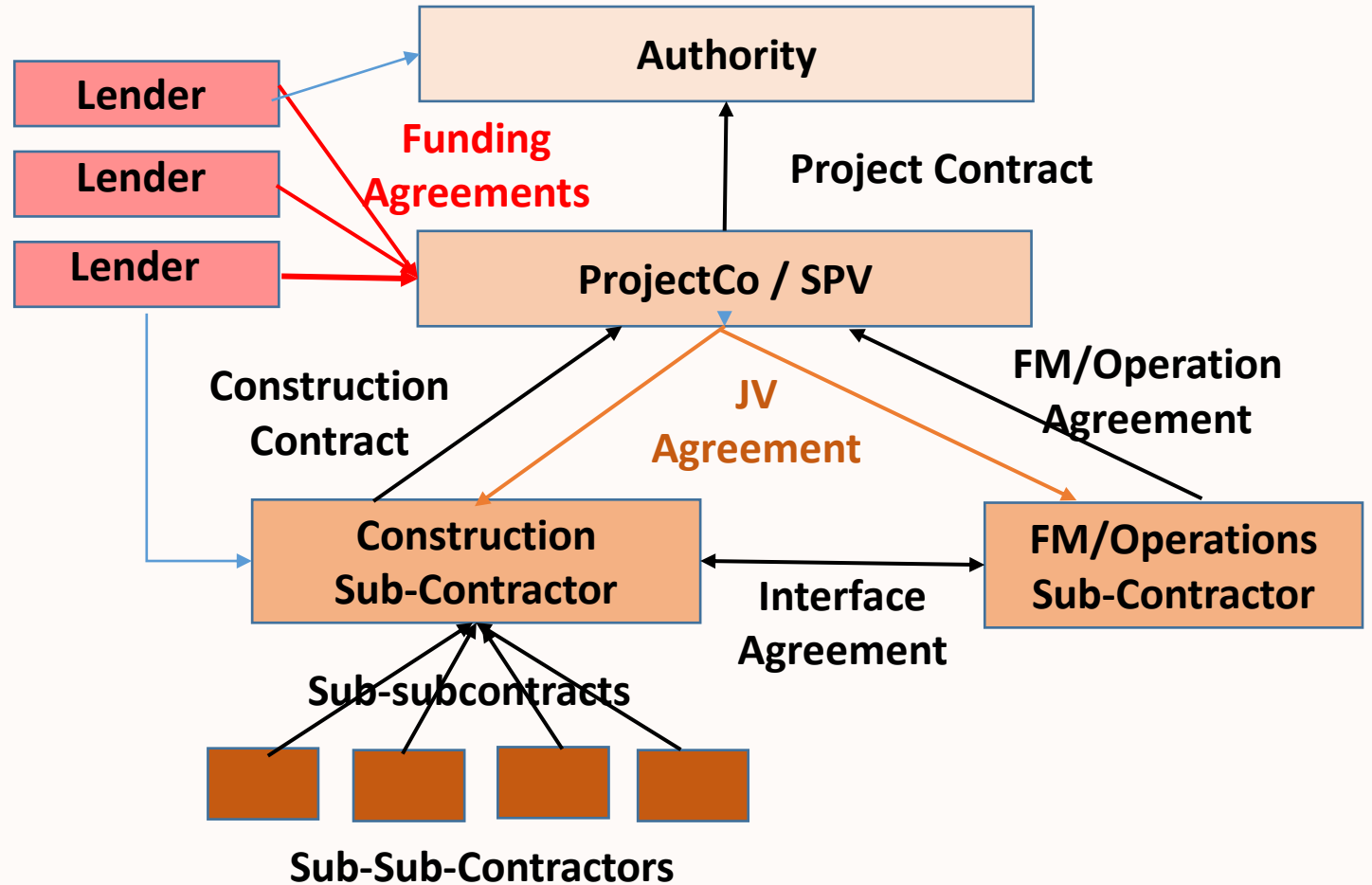
1. **Setting the scene**
2. **Common causes of disputes**
3. **Claim procedure and tactics at the construction stage**
4. **Claims at handover and the operational/services stage**
5. **Termination – risks and issues**
6. **Dispute resolution and avoidance methods**
7. **Moving the goalposts – potential BIT claims?**
8. **Q&A**

# SETTING THE SCENE - OVERVIEW

## Traditional Construction Project



## Long-term PPP Project



## Relationship with the standard form of construction contracts

### Standard Form Contract

- FIDIC Silver Book, FIDIC Yellow Book, NEC ECC, IChemE and IMechE contracts and less often PPC 2000.

### Bespoke Contracts with amendments:

- **Risk profiles** – risks relating to cost, programme, design, site, planning and permit procurement
- **Price** - circumstances when a claim for additional costs can be made
- **Time** – circumstances when an extension of time can be granted
- **Performance guarantees** – fitness for purpose in relation to materials, equipment, design
- **Liability** – a cap, exclusion of loss of profits and consequential losses
- **Completion / take-over requirements** – a phased series of testing and commissioning, snagging, penalties and termination
- **Interface issues** – transfer of performance risks between construction and operating contracts

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# COMMON CAUSES OF DISPUTES

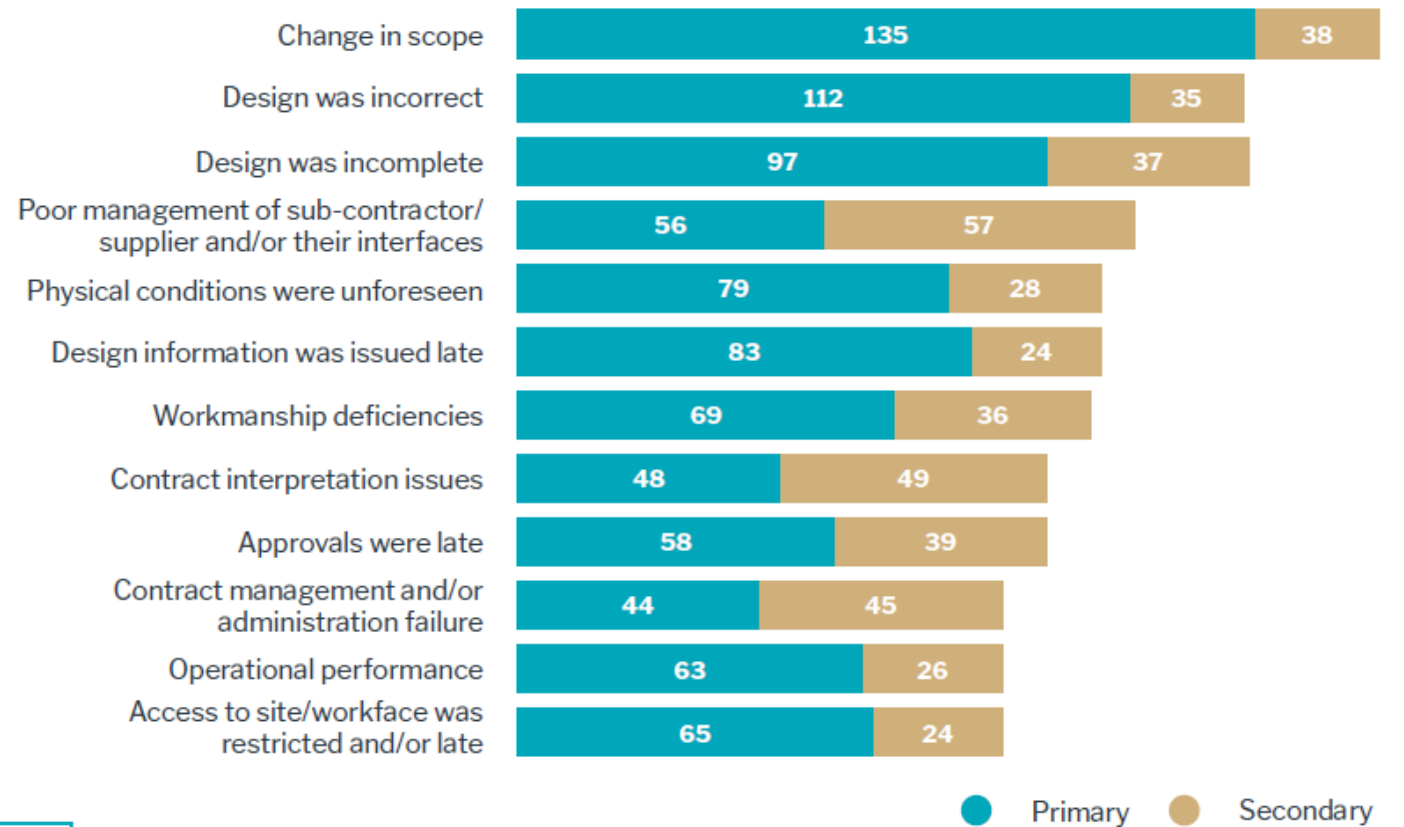
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# COMMON CAUSES OF DISPUTES

HKA – CRUX REPORT

Global top causes of claims and disputes for project data collected in 2020



[CRUX Interactive Dashboard | HKA](#)



# COMMON CAUSES OF DISPUTES

## Americas: Causes of claims and disputes for project data collected from 2018-2020

Cause of claim and dispute	Primary	Secondary	Score
Change in scope	84	40	124
Design was incomplete	74	28	102
Physical conditions were unforeseen	73	28	101
Design information was issued late	66	31	97
Poor management of sub-contractor/supplier and/or their interfaces	58	38	96
Contract management and/or administration failure	56	38	94
Design was incorrect	73	21	94
Contract interpretation issues	54	38	92
Workmanship deficiencies	62	28	90
Claims were spurious, over-inflated, opportunistic and/or unsubstantiated	44	33	77

## Asia Pacific: Causes of claims and disputes for project data collected from 2018-2020

Cause of claim and dispute	Primary	Secondary	Score
Change in scope	95	24	119
Access to site/workface was restricted and/or late	46	16	62
Contract management and/or administration failure	30	31	61
Contract interpretation issues	31	27	58
Design information was issued late	34	16	50
Poor management of sub-contractor/supplier and/or their interfaces	21	28	49
Design was incorrect	32	16	48
Claims were spurious, over-inflated, opportunistic and/or unsubstantiated	22	22	44
Design was incomplete	28	12	40
Level of skill and/or experience	19	21	40

## Europe: Causes of claims and disputes for project data collected from 2018-2020

Cause of claim and dispute	Primary	Secondary	Score
Change in scope	84	27	111
Contract interpretation issues	64	46	110
Design was incorrect	79	20	99
Poor management of sub-contractor/supplier and/or their interfaces	47	46	93
Contract management and/or administration failure	55	32	87
Level of skill and/or experience	41	42	83
Design information was issued late	52	21	73
Design was incomplete	50	19	69
Workmanship deficiencies	38	26	64
Physical conditions were unforeseen	40	23	63

## ME&A: Causes of claims and disputes for project data collected from 2018-2020

Cause of claim and dispute	Primary	Secondary	Score
Change in scope	166	53	219
Contract interpretation issues	79	66	145
Design information was issued late	99	33	132
Contract management and/or administration failure	42	84	126
Design was incomplete	89	29	118
Approvals were late	58	52	110
Access to site/workface was restricted and/or late	83	20	103
Cash flow and payment issues	55	47	102
Poor management of sub-contractor/supplier and/or their interfaces	33	53	86
Level of skill and/or experience	36	39	75

## Key Questions:

- ***To what extent each party bears the risks &***
- ***which risk is foreseeable at the time of the contract award.***

# COMMON CAUSES OF DISPUTES

## ▪ The stalled project problem

- Built project fails completion/commissioning tests
- No “handover” to operations/services phase
- Whose fault? Termination?
- Mismatching obligations

## ▪ The services phase

- *Changes in cost, regulatory framework*
- *Breakdown in relations? Change in political wind?*



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# CLAIMS PROCEDURE & TACTICS – CONSTRUCTION PHASE

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# HOW TO 'AVOID' DISPUTES – PRACTICAL TACTICS

- **Better contract drafting**
- **Proactive right from the start**
- **Earlier engagement**

## Examples:

- **Provisional Sum**
- **Time-Bar Clauses**



# PROVISIONAL SUM IN LONG TERM CONTRACTS

## 1. What is Provisional Sum?

- *Midland Expressway v Carillion Construction* [2006] EWCA Civ 936

## 2. Why do we have a Provisional Sum?

- Allowance in budgets (employer) and programmes (contractor)

## 3. PS under Standard Forms of Contract

- JCT, ICC, **FIDIC 1999 & FIDIC 2<sup>nd</sup> Edition 2017** – c.f. NEC

## 4. Problems with PS – uncertainty & valuation

## 5. Practical Considerations when including PS in contracts – clear drafting



# CONDITION PRECEDENT

1. What is meant by Condition Precedent – a time bar clause?
2. Why do we have a time bar clause?
  - *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC) at para [103]
3. Time bars under Standard Forms of Contract - JCT, **NEC**, ICC, **FIDIC 1999 & FIDIC 2017**
4. Both bespoke and standard form contracts commonly include express procedures for submitting claims for time, money or other relief, which stipulates time limits.



# CONDITION PRECEDENT – NEC3/NEC4

Clause 61.3 of the NEC3/4 ECC: a condition precedent

*“The Contractor notifies the Project Manager of an event which has happened or which is expected to happen as a compensation event if:*

- *the Contractor believes that the event is a compensation event **and***
- *the **Project Manager has not notified the event** to the Contractor.*

*If the Contractor does not notify a compensation event **within eight weeks of becoming aware** that the event has happened, the Prices, the Completion Date or a Key Date are not changed unless the event arises from the Project Manager or the Supervisor giving an instruction or notification, issuing a certificate or changing an earlier decision.”*

## ***Northern Ireland Housing Executive v Healthy Buildings (Ireland)*** [2014] NICA 27

- The time bar did not apply in circumstances where the employer should have notified the consultant of an event but failed to do so.
- clause 61.3 'is an exclusion clause in favour of the employer...and falls to be construed *contra proferentem*'.

# CONDITION PRECEDENT – FIDIC 2<sup>ND</sup> EDITION 2017

5 time bar clauses in relation to Claims and dispute resolution process and 1 time bar in relation to amounts due in the Final Payment Certificate – with consequence of failure to comply with time-bar obligations

- 1) Sub-Clause 20.2.1: Notice of Claim “... **as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or the event of circumstance**”
- 2) Sub-Clause 20.2.4: Fully Detailed Claim
- 3) Sub-Clause 3.7.5: Dissatisfaction with Engineer’s Determination
- 4) Sub-Clause 21.4.1: Reference of a Dispute to the DAAB
- 5) Sub-Clause 21.4.4: Dissatisfaction with DAAB’s decision
- 6) Sub-Clause 14.14: Cessation of Employer’s Liability

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

- FIDIC Yellow Book 1999 Sub-Clause 8.4 (Extensions of Time clause) entitles the Contractor to claim an EOT if it “***is or will be delayed...***” - “retrospective delay” or “prospective delay”



# CONDITION PRECEDENT – KEY CHANGES IN FIDIC 2017

- 1) Time bars apply to both Parties c.f. similar wording exists in the 1999 editions (clause 20.1), but only in relation to contractor claims.

## Clause 20.2.1 Notice of Claim

***“If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.”***

- 2) Definition of ‘contemporary records’ (Sub-clause 20.2.3)
- 3) Statement of contractual/legal basis for the claim - part of the fully detailed claim submission (Sub-clause 20.2.4)
- 4) Circumstances that the claiming Party can challenge in justifying late submission of a Notice of Claim (Sub-clause 20.2.5)

# CONDITIONS PRECEDENT IN PROJECT AGREEMENT

## ▪ Notice requirements for claims

- Information required; nature, amount and “contractual basis” for claim
- Must give notice within stipulated time

## ▪ The courts’ approach:

- Generally treated as condition precedent, even if not expressly characterised as such. Strict compliance required
- Common law: certainty favoured over fairness/flexibility – *Heritage Oil & Gas Ltd v. Tullow Uganda Ltd* [2013] EWCA Civ 1048, *Teoco Ltd v. Aircom Jersey4 Ltd* [2018] ECA Civ 23; *Maeda Corp. V. Bauer Hong Kong Ltd* [2020] HKCA 830
- Civil law systems?
- Advisable to make express provision



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# CLAIMS AT HANDOVER/ SERVICE STAGE

# CLAIMS FOR LATE COMPLETION/DEFECTIVE PERFORMANCE

## 1. Claims for late completion at construction stage

- **Practical Completion** – defined in the contract?
- LD without cap, LD with cap, general damages or general damages with cap

## 2. Defective performance of operations/services

- **Penalty points**
- **Deductions from the Unitary Charge** - based on the extent and duration of the unavailability
- *Compass Group UK and Ireland Ltd v Mid Essex NHS Trust* [2012] EWHC 781 (QB)



# VALUATION OF PROJECTS AT FINAL HANDOVER

Areas for disagreement between the State and the Concessionaire

At handover to public authority **at the end of concession period**, how to value those projects that have been historically 'problematic' or poorly performed?

- Problematic due to financial issues – cashflow, loss of profit?
- Problematic due to patent or latent defects which impact on the future lifecycle of the asset.
- Problems with the service provided during operation stage?
- The Authority's unrealistic expectations as to what will be handed back

**Do you need Experts – Quantum, Technical or Accounting Experts?**

# SERVICES/OPERATIONS: DEDUCTIONS AND THE PENALTY RULE

- Clawbacks and deductions: computation v. compensation
- The English rule against penalties:
  - *Cavendish Square Holding BV v. Al-Makdessi* [2015] UKSC 67
  - Prescribed consequence of breach unenforceable if “out of all proportion” to legitimate commercial interest
  - Only applies to **secondary** obligations.
  - Can contractor “cherry pick” within pricing formula?
  - Governing law where penalty rule codified: India/Malaysia



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# TERMINATION

# TERMINATION - INTRODUCTION

- **It's complicated! But...**

- Authority termination – convenience v. contractor default
- Termination for convenience tantamount to buyout of unexpired term.
- Termination for unsubstantiated contractor default: repudiatory breach!

- **Battleground areas:**

- Proving contractor default – contractual terms + facts/evidence
- What are authority obligations on exercising right to terminate? Good faith?
- Avoiding termination





# TERMINATION – PROVING CONTRACTOR’S DEFAULTS

FIDIC Silver Book 2017, Clause 15.2, details the 6 circumstances which gives the Employer the right to terminate the Contract for contractor default.

- **“abandons the Works or demonstrates an intention not to perform the Contractor’s obligations under the Contract (15.2(b));**
- **without reasonable excuse fails to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension] ...; (15.2(c)); “**

But not enough!.

Always require a substantive factual case to prove contractor default & support the grounds for termination.

**Difficulty in proving: “without reasonable excuse fails to proceed with the Works”**

- *West Faulkner Associates v London Borough of Newham* 71 BLR 1
- *SABIC UK Petrochemicals Ltd v Punj Lloyd Ltd* [2013] EWHC 2916 (TCC)
- *Hill v London Borough of Camden* (1980) 18 B.L.R. 31, CA
- *Rickards v Oppenheim* [1950] 1 K.B. 616 at 628, CA

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# METHODS OF DISPUTE RESOLUTION AND AVOIDANCE

# AVOIDING DISPUTES: TERMINATION

If an authority cannot terminate its contract, what else can it do to better its position? E.g.

- Reducing the scope of the works or services ,
- Exercising contractual rights more stringently, e.g levying deductions, to encourage better service delivery by SPV,
- Refinancing the project (with low interest rates)
- Taking certain services out of the scope (e.g. soft FM services);
- Putting in place stronger performance monitoring and enforcement mechanisms to incentivise improved performance.
- **Lender step-in right; novation**

# AVOIDING TERMINATION - LENDER STEP-IN RIGHT OR NOVATION

- 1) Lenders' step-in rights may be either permanent (novation) or temporary (step-in/out).
- 2) Lenders' rights under the funders' direct agreement (with the authority)
  - to step-in to rectify the problems which give rise to the Authority's termination right and/or
  - novate the Project Agreement to a suitable substitute contractor

## Strength of the funders' position

*Tees Esk and Wear Valleys NHS Foundation Trust v Three Valleys Healthcare Ltd [2018]  
EWHC 1659 (TCC)*

- The giving of a prior notice of termination from the Authority to a funder was a condition precedent to terminating a private finance initiative (PFI) project agreement

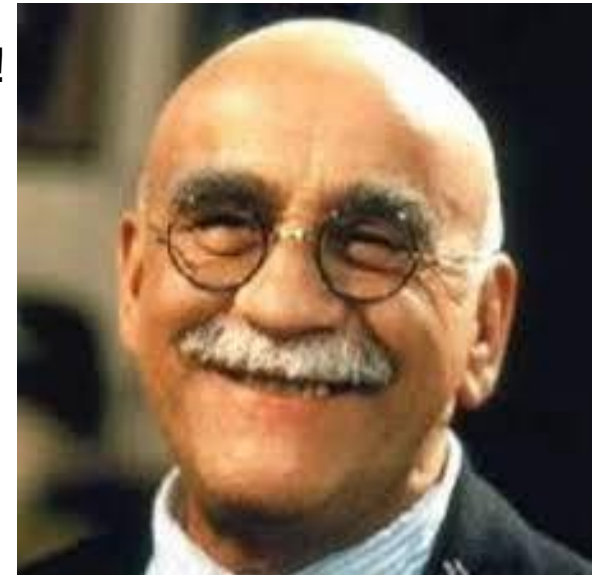
# TERMINATION, NEGOTIATION AND GOOD FAITH

## ▪ Good faith principles

- Express provisions of long term contracts
- Common law: “relational” contracts and implied terms
- Scope limited by Court of Appeal in *Compass Group v. Mid Essex NHS Trust* [2013] EWCA Civ 200
- Termination for unsubstantiated contractor default: repudiatory breach!

## ▪ Good faith and dispute strategy:

- Laying the audit trail: emphasise flexibility, avoid intransigence
- Options? Who foots the bill for flexibility?



# TIERED DISPUTE RESOLUTION CLAUSES

Tiered dispute resolution procedures

- 1) Negotiation "in good faith" between senior personnel
- 2) Adjudication, Mediation or Expert Determination, DAB or DAAB
- 3) Arbitration or Litigation as a last resort.

## Final thoughts...

- 1) These structured procedures encourage the parties to avoid escalation of their disputes.
- 2) Plan in advance and work together, with all involved – funders, stakeholders and advisors – on both sides, to identify the critical issues that may arise and the best means of resolving them.
- 3) **Negotiation, mediation and standing DB** can be very effective at resolving disputes relating to the day-to-day operation of various infrastructure projects, rather than resorting to more formal means of adversarial dispute resolution approaches – **a win-win for all parties.**
- 4) Does adjudication really work for complex non-construction issues?

# GOVERNMENTS BEHAVING BADLY: DO YOU HAVE A BIT CLAIM?

## ▪ Bilateral Investment Treaties

- Designed to protect investments by nationals/corporates of one State on the territory of another
- Guarantees against expropriation and arbitrary/unfair treatment
- Arbitration clause
- Joint ventures in energy/extractives/infrastructure typical subject-matter
- Costly but may be effective where ordinary remedies problematic



# CONTACT

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# QUESTIONS



# NEXT WEBINAR

22 April 2021

**UK and European Leaders in Construction Law:  
Hungary for Construction?  
How to Win Adjudications?**

With:

Kim Franklin QC, Crown Office Chambers

DR. Gabriella Galik, KCG Partners Law Firm

# Case Law



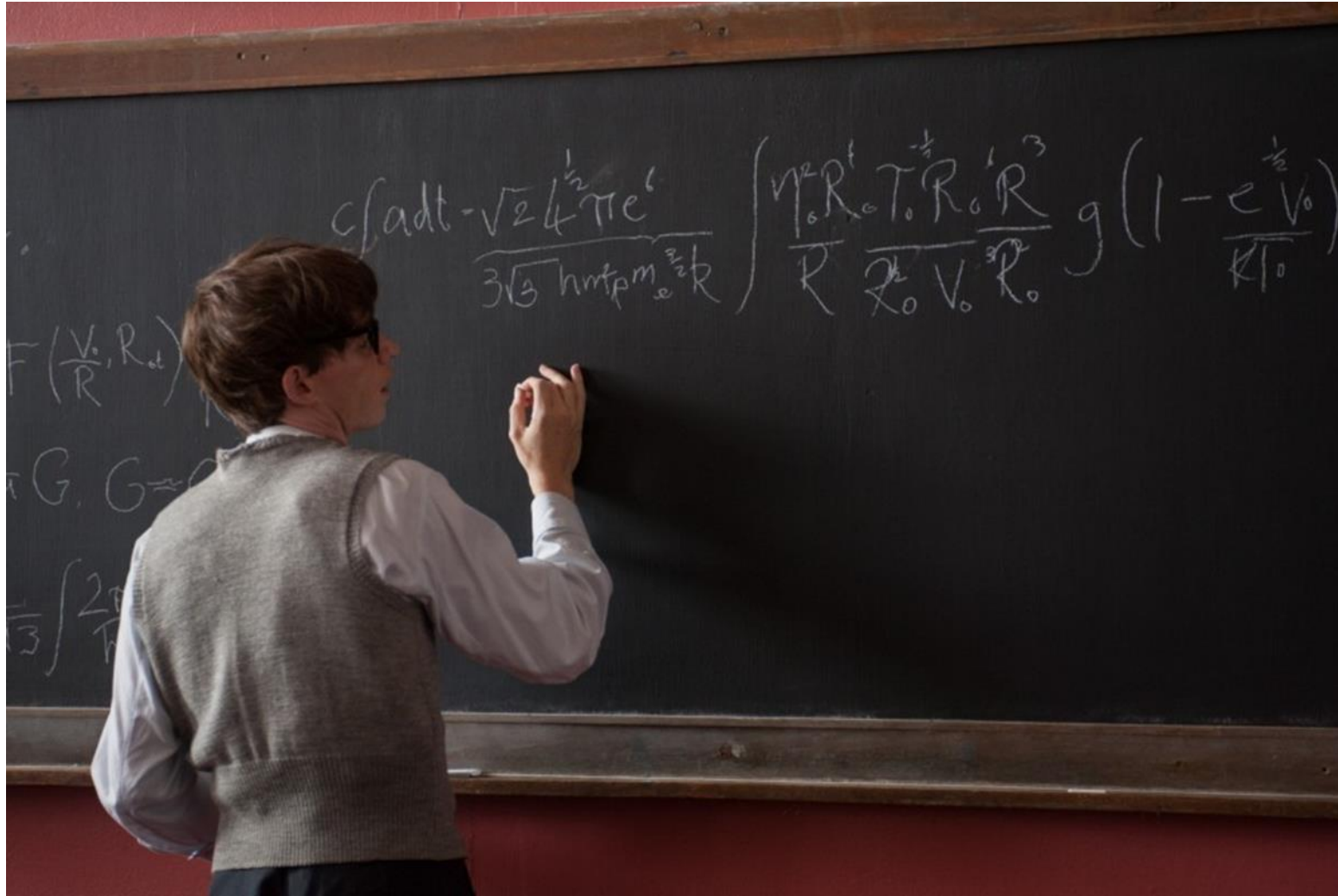
# JSM Construction v Western Power Distribution



# Bechtel Limited v High Speed Two (HS2) Limited



# GHS Global Hospitality Ltd v Beale



# Ex Novo Ltd v MSP Housing Ltd



# Motacus Constructions v Paolo Castelli





# Naylor & Ors v Roamquest Ltd



# Optimus Build Ltd v Southall



# Blackpool BC v Volkerfitzpatrick Ltd



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**Thank You**



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