

Successful Arbitration of International Construction Disputes

Risk Management in Underground
Construction

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Facts & Figures

- From 2019 to 2020, the average value of construction disputes increased significantly across the globe – from \$30.7M USD to \$54.26M USD
- Consensus was that the overall number of disputes remained relatively the same
- Most disputes were settled through party-to-party negotiation
- The global average length of time to resolve disputes dropped from 15 months to 13.4 months

2021 Global Construction Disputes Report – Arcadis

Facts & Figures

- In terms of industry sectors, disputes arising from construction/engineering and energy historically generate the largest number of ICC cases – in 2020, almost 40% of all filings
- Preliminary 2021 statistics show a lower number of filings than 2020 but a sharp increase in the average amount in dispute (\$184M vs \$54M)
- Average duration of proceedings in ICC cases that reached a final award in 2020 was 26 months, with the median duration being 22 months)
- Considering the impact of the pandemic on the construction industry in 2020, it is not surprising that force majeure and third-party impacts landed in the top three causes of disputes

Impacts of the COVID-19 Pandemic

- Turbulent times for the construction industry
- Many projects around the world affected in some form or another by delays, disruption and cost overruns arising directly or indirectly from the pandemic, such as:
 - Government-imposed lockdowns
 - Workforce shortages (including reduction in migrant workers)
 - Materials shortages
 - Supply chain impacts
 - Travel restrictions
 - Health and safety requirements
 - Border closures
 - Export restrictions
- More than 60% of survey respondents encountered project impacts due to COVID-19
- As the pandemic played out, many projects continued and did not see significant impacts; other projects were stopped while some were canceled before they began
- Infrastructure projects were less affected than building projects

Impacts of the COVID-19 Pandemic

- Many contracts did not directly address the impacts of a global pandemic
- Some owners viewed the pandemic as *force majeure*, meaning that in most cases a contractor would be entitled to a non-compensable time extension
- On the other hand, many contractors viewed it as an owner-directed change where – in the face of a force majeure event, the owner directed continued performance, thereby entitling the contractor to a time extension as well as its damages
- Other theories included “change in laws” and “frustration of purpose”
- In many cases, the parties simply reserved their rights, and these disputes will need to be resolved, in some instances through arbitration

Inflation and the War in Ukraine

- Global economy was just starting to recover from the pandemic – then comes inflation and Russia’s invasion of Ukraine
- Both have impacted the global construction market
- U.S. construction costs are the highest in 50 years
- Contractors and owners feeling the effects of increased construction costs in just about every category
- Continuing issues with availability of materials, price increases, supply chain and other delays
- Economic sanctions against Russia affecting imports and exports – oil, natural gas, metals
- Increasing inflation and escalation of construction costs along with materials shortages and supply chain issues can cause project delays and even cancellations – and certainly claims and disputes

Guiding Principles (and purported advantages) of Arbitration

- Party autonomy
- Expeditious and cost-effective
- Decision-makers who know the industry
- Confidentiality
- Finality
- Enforceability

AGENDA

- Selection of Arbitrators
- Dealing With Risk Allocation Provisions
- Discovery
- Fact Witness Issues and Concerns
- Expert Witness Issues
- Site Visits
- Effective Hearing Presentation

SELECTION OF ARBITRATORS

- Very important to get arbitrators with a construction contracts and disputes background - preferably as practitioners
- Arbitrators who have an appreciation for the construction process and related issues (Example: limitations of liability)
- Interview candidates
- Seek to reach agreement on tribunal president
- ICC appointments often do not have the experience profile we need

In-house counsel want arbitrators with:

- Expertise in the subject matter
- Specialization in the project's industry sector
- Experience in the region or country
- Cross-disciplinary expertise (e.g. technical and financial)

**2006 Queen Mary University Study*

DEALING WITH RISK ALLOCATION PROVISIONS

- Risk allocation provisions in EPC contracts
- Can potentially narrow the issues or in some cases completely dispose of the case
 - Limitation of liability
 - Waiver of consequential damages
 - Warranty periods
 - Contractual and/or statutory time limits on claims
- Under the ICC rules a party can make an "application" to the arbitral tribunal for “the expeditious determination of one or more claims or defenses, on grounds that such claims or defenses are ***manifestly devoid of merit*** or fall manifestly outside the arbitral tribunal's jurisdiction.” The arbitral tribunal has full discretion to decide whether to allow the application to proceed
- Any realistic chance tribunal will grant such motions?
- Submit them anyway early in the process?

EXAMPLES

Contractual claims limitation period:

“Contractor’s liability on all claims of any kind shall terminate in two (2) years after the expiration of the Warranty Period whether such claims are based on contract, tort (including negligence and strict liability), warranty or otherwise and whether such claims are for any and all losses or damages arising out of, connected with or resulting from this Agreement or from the performance or breach thereof or for services covered or furnished pursuant to this Agreement.”

*Contractual repose periods, or claims survivability provisions, negotiated by sophisticated parties are presumed to be reasonable and are generally enforced (with recognized exceptions) by most courts.

EXAMPLES

Cap on total liability:

“Contractor’s aggregate liability to Owner on all claims of any kind under or in connection with this Agreement or Contractor’s performance or non-performance of the Services or other work required, covered by or furnished pursuant to this Agreement, whether based in contract, tort (including negligence and strict liability), warranty or otherwise, shall not exceed one hundred percent (100%) of the Contract Price.”

EXAMPLES

Mutual waiver of consequential damages:

“Neither Party nor any of its contractors or agents providing equipment, materials or Services for the Project shall be liable to the other Party or any of its contractors or agents, whether based in contract, tort (including negligence and strict liability), warranty or otherwise, for any special, indirect, incidental or consequential loss or damage, including loss of use, loss of actual or anticipated profits, loss of business opportunities, and each Party hereby releases the other Party and its contractors and agents from any such liability.”

DEALING WITH RISK ALLOCATION PROVISIONS

Illustrative Case #1:

- Project: hydro power plant in Panama
- Pressure tunnel collapse
- Claimant: a Panamanian power provider
- Respondent: an EPC consortium of Swedish, French, and American power industry construction, engineering and technology companies
- Allegations of design and construction deficiencies
- Damages claim: \$450M USD
- Contract calls for ICC arbitration in Miami
- New York law applies
- Claimant's claims
 - Were submitted outside the limitations period
 - Totaled more than the aggregate cap
 - Contained substantial consequential damages
- Issues fully briefed early in the proceedings

DEALING WITH RISK ALLOCATION PROVISIONS

Illustrative Case #1:

Result:

- Tribunal deferred “until all the evidence is in”
- Case settled after mediation prior to arbitration hearings

DEALING WITH RISK ALLOCATION PROVISIONS

Illustrative Case #2:

- Project: hydro power plant in Panama (different from Case #1)
- Headrace/pressure tunnel leaking a billion liters per day
- Claimant: a Panamanian power provider
- Respondent: an EPC consortium of Danish, Swedish, and French power industry construction, engineering and technology companies
- Damages claim: in excess of \$180M USD
- ICC arbitration in Miami/New York law applies
- Claimant's claims were arguably barred or waived pursuant to various contractual limitations provisions and a prior settlement agreement executed during the project
- Issues fully briefed early in the proceedings

DEALING WITH RISK ALLOCATION PROVISIONS

Illustrative Case #2:

Result:

- Respondent's application denied without prejudice to resubmit
- After 2 ½ weeks of hearings and the last of Claimant's factual witnesses had testified, and prior to presentation of damages, we renewed the application to dismiss the claims
- Tribunal gave Claimant the opportunity to call any additional witnesses relevant to the application to dismiss – which Claimant did
- Tribunal then adjourned the hearings, and established a briefing schedule on the application
- Final Award – Claimant's claims dismissed in their entirety, and Respondent awarded its attorneys fees and costs

DISCOVERY

- ICC minimal discovery approach can be a real problem in construction cases
- Especially for the owner where there are claims involving delays and disruptions
- Contractor will typically have all the info on schedule, etc. If owner cannot get that info, puts him and his experts at a real disadvantage
- Owners - argue that the playing field needs to be leveled so both experts have all the info and can give the tribunal an informed opinion
- Same goes for cost/damages analysis

Fact Witness Issues And Concerns

- In construction, key witnesses are often off to other jobs - sometimes far more important to the company than the arbitration
- Clients don't like key people diverted from the business for long periods of time; the witness statement process can be very demanding
- Consulting agreements with former employees
- Witnesses don't have the opportunity to get comfortable - immediately cross-examined – consider agreeing to a short intro of the witness before cross

Expert Witness Issues

- Construction disputes almost always involve experts – engineering and technical, design and construction, scheduling and delay, damages
- Use and efficacy of party-appointed experts in international arbitration is sometimes questioned
- Do parties have a fundamental right to use party-appointed experts?
- Party-appointed expert has a duty to the tribunal to be independent and objective
- Use of the expert as a consultant in preparation of claims and defenses – less “independent?”
- How to address concerns re: expert’s independence/objectivity – Weight given to the expert’s evidence? Sanctions?
- Tribunals generally avoid addressing this concern directly
- Two examples

Expert Witness Issues

- Should there be disclosure of communications between expert and counsel, working papers and draft reports?
- Sometimes covered by privilege or work product
- At a minimum, experts should include in their reports their instructions, issues they have been asked to address, information and materials provided, and persons they have spoken with
- Alternatives to party-appointed expert*:
 - Tribunal-appointed expert selected by the parties (most favored after party-appointed)
 - Single joint expert selected and appointed by the parties
 - Tribunal-appointed expert selected by the tribunal (least favored)
- Issues of foreign law – expert testimony or legal submissions?

**Expert Evidence in International Arbitration Saving the Party-Appointed Expert*
Bryan Cave Leighton Paisner Annual Arbitration Survey 2021

Experts

- Joint Expert Reports
 - Meeting of experts (by area of expertise) after reports submitted
 - Typically counsel cannot participate, but may listen in
 - Could be “refereed” by a member of the tribunal
 - Results documented in Joint Expert Report
 - How useful as a practical matter?
 - Will agreements between experts be binding on the parties?
- “Hot-tubbing” or more formally “concurrent evidence”
 - Opposing experts appear together by area of expertise with tribunal asking questions and leading discussion between them
 - Goal is to encourage open and frank discussion between the parties and narrow the disputed issues
 - Can replace cross-examination completely or take place before or after the cross-examination of the experts by opposing counsel

Site Visits

- Can be useful in construction disputes
- Cost-benefit analysis
- Tribunal with party rep's, experts, counsel
- Must be carefully considered and planned with detailed protocol:
 - Logistics (travel, accommodations, agenda, safety)
 - Participants
 - No advocacy
 - Who can speak with tribunal
 - Role of counsel
 - Recording
 - Is everything seen, heard and said evidence?
- Good reference:

ICC COMMISSION REPORT

Construction Industry Arbitrations

Recommended Tools and Techniques for Effective Management

2019 Update

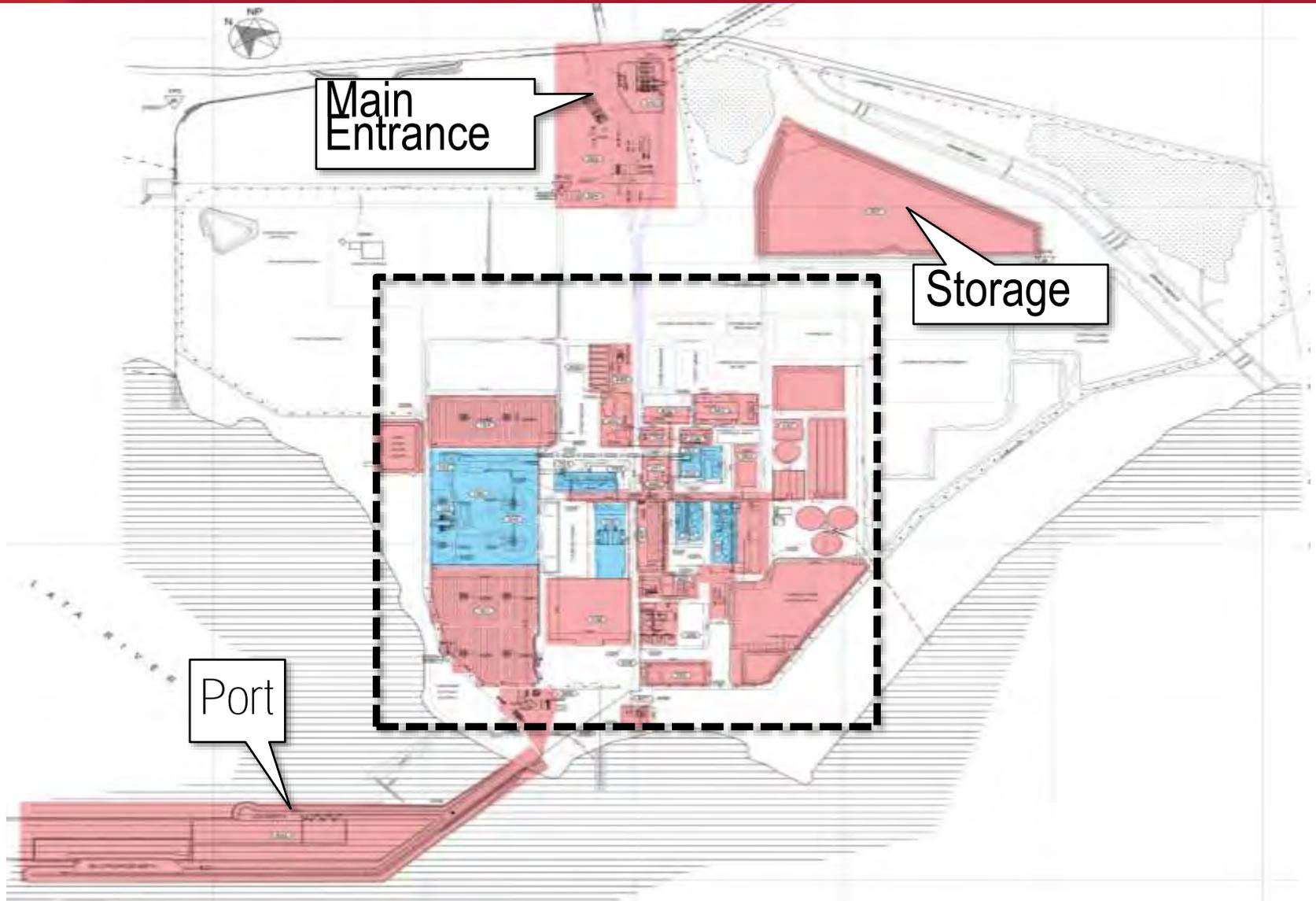
Site Visits



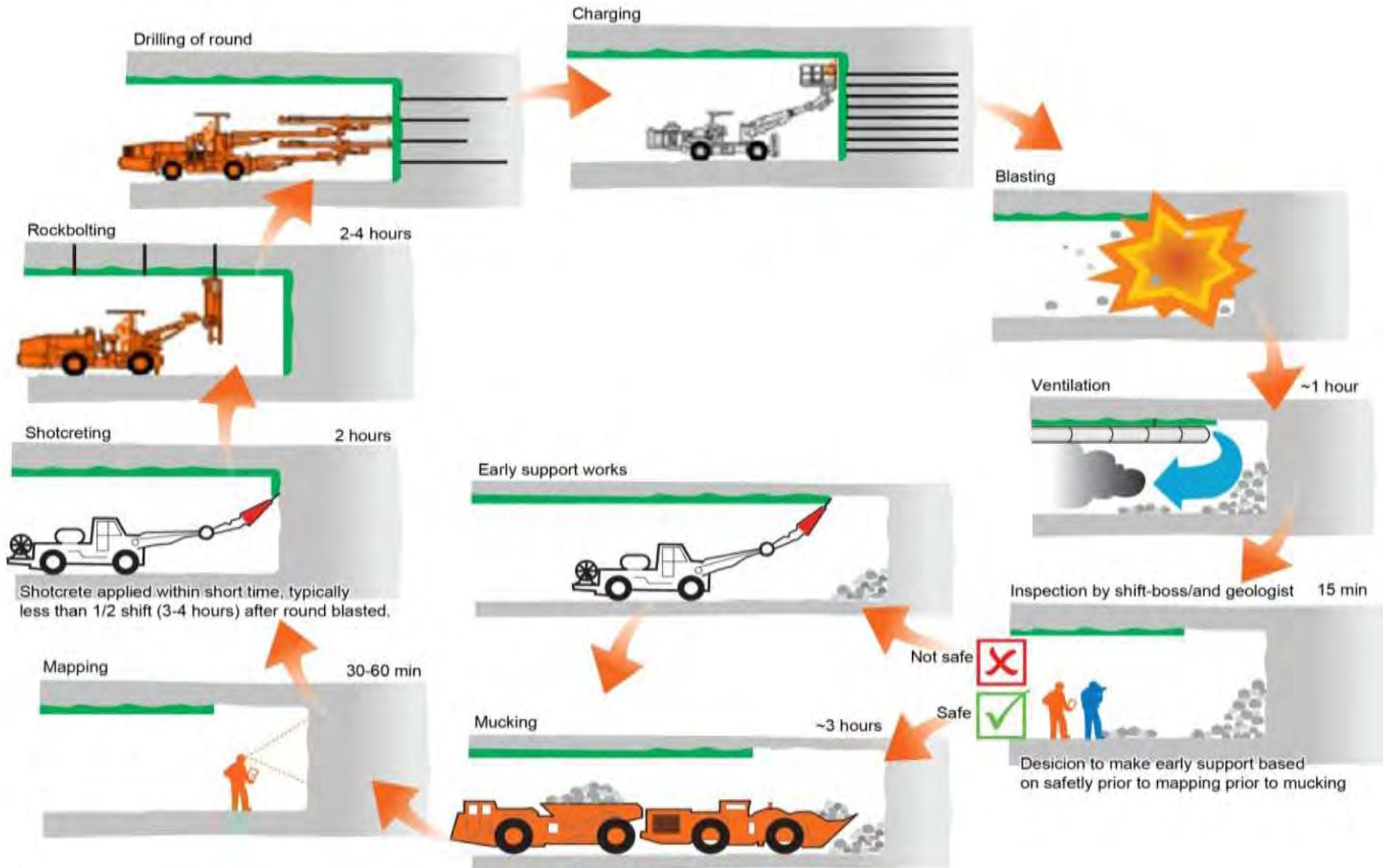
EFFECTIVE HEARING PRESENTATION

- Make the complex simple
- Use graphics, photos, videos, etc. – seeing is often better than hearing
- Focus on the contract and on universal construction concepts and principles
- Let experts have time to make a presentation (guided by counsel) before being cross-examined
- Most of all – if there is a way to reach a reasonable settlement without resort to this process – do it!

GRAPHICS – PROJECT LAYOUT

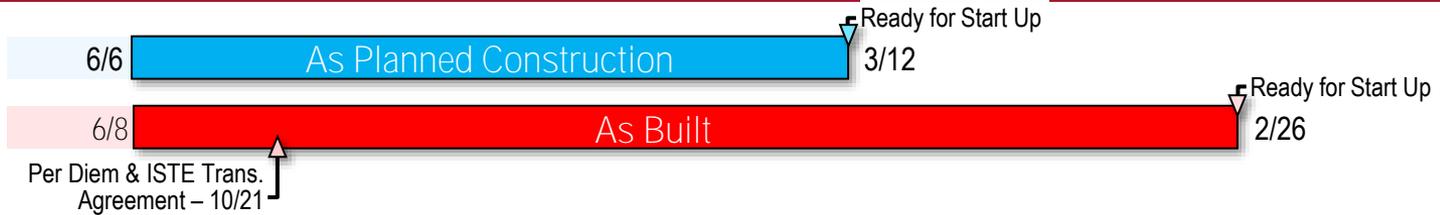


GRAPHICS – THE CONSTRUCTION PROCESS



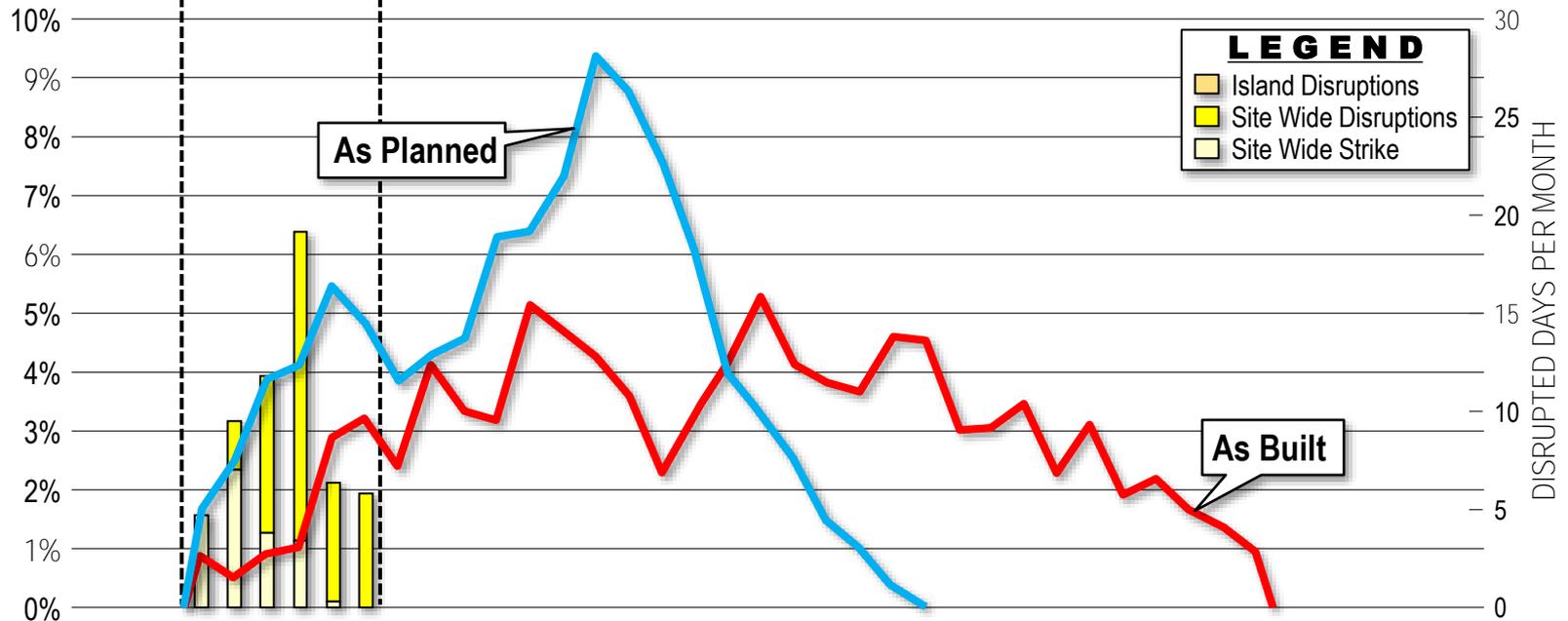
GRAPHICS – ANALYSIS OF CONSTRUCTION DELAYS & DISRUPTIONS

Chronology of Significant Labor Events

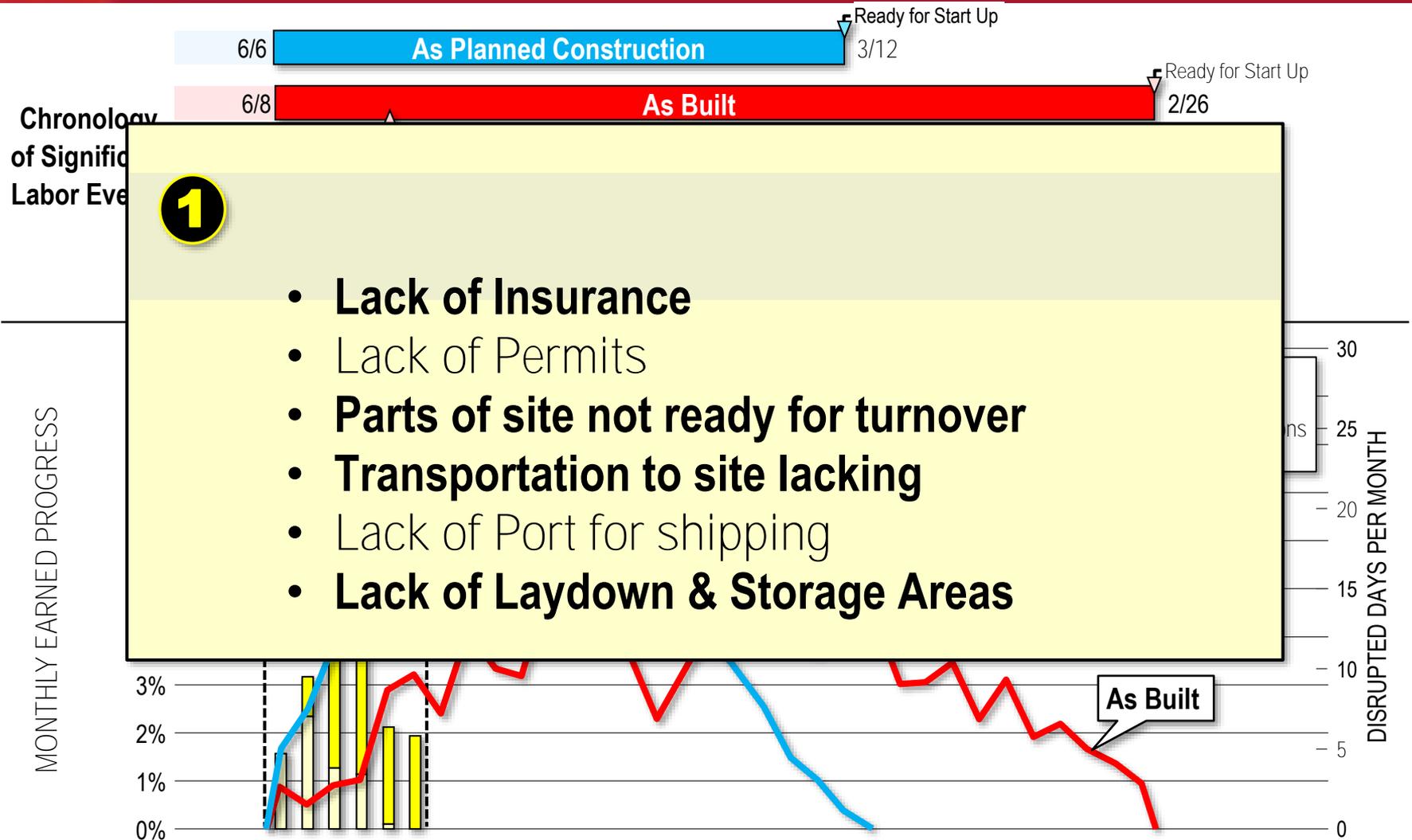


1 2011 Strikes & Lack of Facilities

MONTHLY EARNED PROGRESS



GRAPHICS – ANALYSIS OF CONSTRUCTION DELAYS & DISRUPTIONS



GRAPHICS - TIMELINE

Warranty Key Dates

November 19, 2003 Substantial Completion/Commencement of Original 3 Year Warranty Period/Commencement of NY Statute of Limitations Periods for Tort (3 years) and Breach of Contract (6 years) Claims.

September 21, 2006 Claimant Contends Warranty Work Performed on Canal Road Slope and That This Work Extends Warranty for Tunnel (Disputed).

September 21, 2009 Expiration of Warranty Period Connected to Disputed September 21, 2006 Canal Road Slope Work.

November 19, 2009 NY Statute of Limitations Expires for Breach of Contract Claims.

November 19, 2006 NY Statute of Limitations Expires for Tort Claims/Original Warranty Period Expires/2 Year Survival of Claims and Repose Period Starts.

August 7, 2010 According to Claimant, collapse in the Tunnel occurred which is the premise for Claimant's claims.

August 22, 2011 Filing of Claimant's Original Request for Arbitration.



November 19, 2003 - November 19, 2006
 • Original 3 Year Warranty Period.

November 19, 2006 - November 19, 2008
 2 Year Survival of Claims/Repose Period for Original Work Warranty.

• 3 Year Statute of Limitations Period for Tort Claims.

November 19, 2003 – November 19, 2009
 6 Year Statute of Limitations Period for Breach of Contract Claims.

September 21, 2006 - September 21, 2009
 Warranty Period for Work on Canal Road Slope *if* Respondents Performed Repair Work (not maintenance) on September 21, 2006.

September 21, 2009 - September 21, 2011
 Survival of Claims/Repose Period for Work on Canal Road Slope *if* Respondents Performed Repair on September 21, 2006.

Pertinent Time Periods

- Warranty Period
- Survival of Claims/Repose Period
- Statute of Limitations Period

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Randy Hafer is a partner with Kilpatrick Townsend's Construction and Infrastructure Projects Team. The Team has been named national Construction Team of the Year three times by *Chambers USA* and by *Best Lawyers*.

Randy was named to the *Legal 500 US Hall of Fame for Construction (including Construction Litigation) in 2020*. He was named “*Atlanta Lawyer of the Year*” in 2018 and again in 2020 for *Construction Litigation and Construction Law* by *The Best Lawyers in America*®.

Throughout his entire 37-year career, Randy has focused his practice exclusively on issues related to the construction industry. He has been involved in matters all over the United States and internationally on a wide variety of construction projects, including power plants (nuclear, conventional, solar, hydro), mass transit systems, tunnels, wastewater treatment plants, airports, mining facilities, bridges and highways, hospitals, office buildings, sports arenas, and manufacturing and processing facilities.

He works directly with construction project participants to avoid disputes and effectively and efficiently resolve, on a “real-time” basis, those disputes that cannot be avoided. He is well-versed and experienced in negotiation, mediation, arbitration, dispute boards, and other forms of construction alternative dispute resolution (ADR). Randy has also helped create and has successfully implemented customized dispute resolution processes to fit the particular needs of a project when other more traditional ADR procedures are not working.

Randy is a fellow of the American College of Construction Lawyers, a member of the International Institute for Conflict Prevention and Resolution (CPR) Construction Advisory Committee, a Dispute Resolution Board Foundation member, and a panel member on the American Arbitration Association’s Roster of Arbitrators and Mediators.