

Preventing disputes (in the Green Forest)

By Alina Oprea

PART A

Castor the Contractor signed a FIDIC 1999 Red Book Contract with Tiger the Employer, to build a dam on the Blue River, in the middle of the Green Forest. The dam will allow the Tiger to go on the other side of the river and will create a lake where fish will grow – you know, the Tiger likes very much eating fish... The Monkey signed a Contract with the Tiger, to supervise the works as the Engineer.

Within 28 days after the Commencement Date the Tiger proposed the Elephant to be the DAB, since he met him at a conference where the Elephant had a presentation about a successful project, where he was the DAB, and he seemed very clever to the Tiger. “I want him to be our DAB in our future Contract for the dam”, thought the Tiger at that time. And now the time had come, and the Tiger proposed the Elephant as the DAB.

Castor the Contractor objected, since he thought that the Elephant is too big and once he saw an Elephant trying to walk on a dam made who knows when and the dam collapsed – so much work and that one destroyed it...! And, in fact, he knew the Turtle for many years and he seemed very philosophical to him and wants to have the Turtle as DAB.

Discussions were held between Castor, Tiger and Monkey the Engineer, and Monkey confirmed that he knew the Elephant from other contacts, when he was a junior Engineer and the Elephant was also the DAB, and that the Elephant has a good reputation. The Elephant was, eventually, accepted by Castor and the tripartite DAB agreement was signed.

The works commenced, with Castor having with him his cousins and brother castors. About 20 castors, ready to work on the new dam, with their teeth ready to cut the trees. But the Tiger only managed to give them access to the site on one side of the river – on the other side the Black Panther Bagheera owns the land... More than that, when inspecting the river just after the Commencement Date, Castor found that the river bank to which he had access was swampy and the ends of the dam cannot be built as he thought, but needed special preparation of the foundation layer in order to execute the ends of the dam as shown in the drawings. This would cost more and Castor already saw the profit he expected decreasing... Castor was worried... “Ssssubmit claaaaimssssssssss”, heard Castor a voice from nowhere, while he was talking with his cousin Castorous about the catastrophic news... “What? What? Who is there?” “ Issssssss meeeeeee, the Sssssssssssneke Corneliussssss”

They look around and suddenly something slinky slides from the leaves. “Corneliussssssss is my name”, said the creature and smiled, his eyes looking right into Castor’s eyes. “I’ve heard you accidentally... I can help you not only to not lose money, but to win a fortune! Let’s make claims together! You have a perfectly valid claim for lack of possession of site – Sub-clause 2.1 - and a very good one for unforeseeable physical conditions as per Sub-clause 4.12- the site data were not correct, as well,

therefore we have Sub-Clause 4.10 here, as well! We will be rich! I will get you 13 million nuts and 1 year extension of time, and all these for just a million nuts – I will change them into frogs at the Green Forest market, and I will live in luxury all my life..., continued Corneliussss, this time in his mind only.

Castor and Cornelius made the deal and 2 claims were quickly notified:

1. Claim no. 1 for lack of possession of site, according to 20.1, 2.1 and 8.4: they asked 4 million cost and profit and 6 months extension of time
2. Claim 2 for unforeseeable physical conditions and not enough information from the Employer's side, under 20.1, 4.12, 4.10 and 8.4 – 9 million nuts were requested and a further extension of time of 8 month

Tiger was puzzled when receiving the 2 notices and saw the amounts of nuts claimed, and realizes that not only he will get his fish later than expected, but this will cost him much...! He became enraged, and his growl trilled the Green Forest ...! This will never happen! The castors will feel the fear!

A lisp came from the frozen forest and a mountain moved towards Tiger. "You called a site visit?" said Elephant the DAB. Tiger looked at the mountain in front of him – he was so tall, that Tiger was not able to see the sun anymore.

"I called a DAB site visit, yes..." babbled Tiger... "Here I am" said the Elephant, smelling around with his trunk under the branches falling down up to the juicy grass. And here is the Castor, too, said he, when his trunk revealed trembling, but in the meantime furious Castor – he must get all those millions promised by Corneliussss and work relaxed in the time extended as foreseen by his claim expert...

"What is the status? No site possession, except for one side of the river...? Hm... Unforeseeable physical conditions...? Acceleration...? Let's see, one by one" said Elephant the DAB. And he started to listen to the Parties and ask questions:

When should Tiger give site possession according to Appendix to Tender? Ah, from the beginning, on both sides of the river... When does Tiger think that he will obtain the permission of Bagheera the Black Panther to use the land for the end of the dam of that side? In 3 weeks, as promised last Monday, when Tiger saw Bagheera hunting on his part of the river. Mr. Castor, if you have the site possession in 3 weeks now, will the works be delayed? Actually not, we plan to finish the site organization and the identification of the sources of trees exactly at that time.

Further, the DAB asked about the preparations Castor was making in order to start the works. "We have a big problem here", said Corneliussss, raising the head over the heads of Castor and Tiger and adjusting his eyeglasses. Only the head of Elephant was higher than Corneliussss' head. "We were not informed by the Employer here – said he and his voice faltering a little bit – that the soil is swampy on the two river banks. We encountered unforeseeable physical conditions and we are entitled to time and money – including profit, stated Corneliussss the snake and a little light blinked rapidly into his eyes.

“We stated in the Technical Specifications that the soil on the two river banks is not homogeneous and swampy areas might be found... It is at page 6 – said the Wild Cat, the project manager from the Employer’s side.

“Mr. Castor, did you work before in the Green Forest?” asked the DAB. “I own the company, said Castor with pride, and see all the dams along the Blue River...? We made them and they are rock solid, even they are made of cut trees and mud!”

“The soil, how was the soil...?” asked the DAB. “Muddy and wet like hell, all along the river was like that” answered Castor, without giving any chance to Corneliusss to intervene, despite his desperate becks.

“Are there other matters of concern,” asked Elephant the DAB?

“Site possession will be given in 3 weeks time, exactly when the Contractor will be ready to start the works there, after completing his site organization”, summarized the Wild Cat, looking proudly to his boss, Tiger the Employer. Since there will be no delay to the Time for Completion because of site possession, the Contractor’s claim 1 had no merit, therefore no entitlement, added the Cat. No word came from Castor the Contractor. Only Corneliusss moved a little, enough for getting out from Castor’s view.

“You knew the site conditions, since you made all those dams”, said Tiger, “and I am sure that, as experienced as you were, and even though you were not asked during the Tender period if there possible be a mistake in the drawings showing direct foundations on such a soil, you already planned to do them using sheet-piling, like you did for all the foundations of the dams in the Green Forest! No unforeseeability here, Sir, you cannot invoke 4.12” said Tiger and added: “According to Sub-clause 4.11, your tender price should be sufficient to cover all the works and the fulfillment of all the obligations you have under the Contract.”

“The million is gone” thought the snake. “I should have known” thought Castor the Contractor. “Wait a moment, but Castorous made the offer, and he knew about the soil – he was the project manager on most of the other dams...” “Castor looked into Castorous’ eyes and understood: the money was there, in their offer, it will not be lost in the end.

Corneliusss alone remained sad and his head was hanging along a branch which ended within the grass. “My million...”

“Matters of concern...?” asked the DAB again. “No matters of concern” answered the Parties with confidence and surprised finding that their worries were gone. “No matter of concern” they repeated.

And for the first time Castor the Contractor was not upset by not having the Turtle as adjudicator. What possibly could he have him done better than that in avoiding disputes...?

PART B

The works, then, started – possession of site was given as promised, in 3 weeks – but the works were delayed because of the additional temporary works Castor and his team had to do for the foundations. The money was in the Contractor's Tender, but the time was not taken into consideration... This led to not complying with the Time for Completion, and Tiger instructed Monkey the Engineer to apply Delay Damages as per Sub-clause 8.7, in a percentage of 0.1% of the Contract Price (estimated at that time) per day. The Engineer deducted, in the IPC, the amount for 30 days of delay, calculating the total amount of Delay damages as being (30 days x 0.1 % of the estimated Contract Price per day) and Tiger paid the reduced amount of nuts. Corneliusss was Castor excited: CLAIM!!!! Corneliusss made quickly a claim stating that Tiger was in breach of Contract when applying Delay Damages without a formal claim from the Employer, as per sub-clause 2.5. Tiger howled that it is not like that, and he is obviously entitled to do this and he did it correctly – it is clearly described how to calculate the amount for the Delay damages in Sub-Clause 8.7. Monkey the Engineer sustained him, and stated the same. Corneliusss convinced Castor the Contractor that he had to submit the dispute to the DAB. The DAB received the position papers from the Parties, according to the procedure described in the Sub-clause 20.4, and after 84 days of papers submissions, reading, visiting the site and having a hearing of 2 days, in order for Corneliusss to explain in length the position, sufferance and the entitlements of his Client, Castor the Contractor, finally the DAB made the decision: Tiger the Employer did not follow the contractual procedure when applying Delay Damages, and must pay back the money to Castor the Contractor. Tiger was furious, but understood where he failed. Castor was satisfied that no money was lost, but realized that he had to pay Corneliusss an amount of nuts almost as big as the Delay Damages were. All of them realized that they've lost time fighting instead of thinking deeper from the beginning... All of them except Corneliusss, hardly refraining his body from dancing and his eyes from shining with joy...

“All these could have been avoided in case they knew the Contract provisions better or if they would have jointly asked my opinion on the interpretation of the Sub-clause 8.7...” said Elephant the DAB for himself, trooping away among the trees of the Green Forest...

QUESTIONS

Part A

Questions:

1. Was Castor correct in objecting to the nomination of the Elephant by Tiger the Employer?
2. Who is ultimately responsible for the design error?
3. Is this really a case of unforeseeable physical conditions, or at least only partly a case of unforeseeable physical conditions?
4. What was Castor's duty at law to speak up during tender in the legal jurisdiction you come from?
5. Does it matter if Castor priced direct foundations or sheet piling?
6. What should the DAB have decided if the discussion with the DAB had not led to settlement?

Part B

1. How fatal really is failing to follow Sub-Clause 2.5 in this case?

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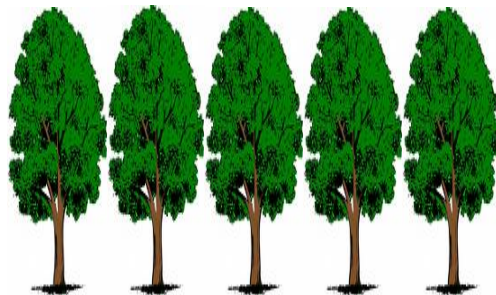
By Alina Oprea



Engineer



Employer



Green Forest



Contractor



Employer's

Project
Manager



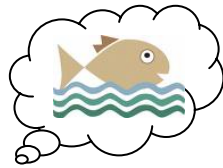
Claims Expert



DAB

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Employer



Contractor

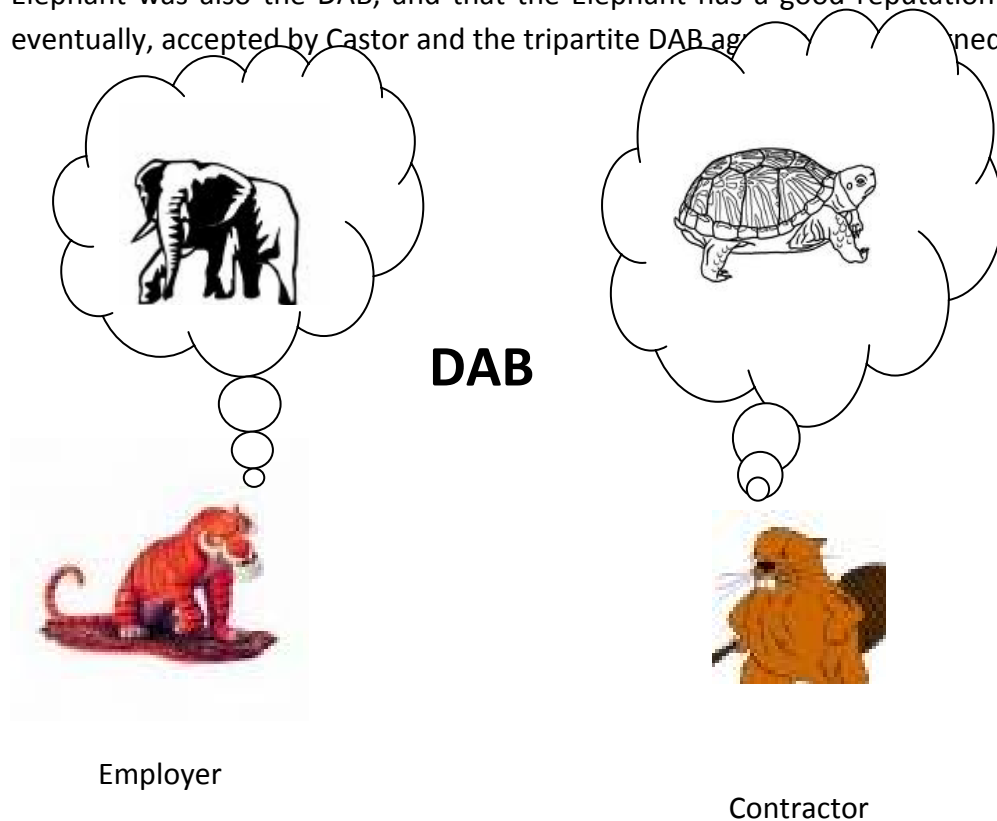


Blue River

Within 28 days after the Commencement Date the Tiger proposed the Elephant to be the DAB, since he met him at a conference where the Elephant had a presentation about a successful project, where he was the DAB, and he seemed very clever to the Tiger. “I want him to be our DAB in our future Contract for the dam”, thought the Tiger at that time. And now the time had come, and the Tiger proposed the Elephant as the DAB.

Castor the Contractor objected, since he thought that the Elephant is too big and once he saw an Elephant trying to walk on a dam made who knows when and the dam collapsed – so much work and that one destroyed it...! And, in fact, he knew the Turtle for many years and he seemed very philosophical to him and wants to have the Turtle as DAB.

Discussions were held between Castor, Tiger and Monkey the Engineer, and Monkey confirmed that he knew the Elephant from other contacts, when he was a junior Engineer and the Elephant was also the DAB, and that the Elephant has a good reputation. The Elephant was, eventually, accepted by Castor and the tripartite DAB agreed.



The works commenced, with Castor having with him his cousins and brother castors. About 20 castors, ready to work on the new dam, with their teeth ready to cut the trees. But the Tiger only managed to give them access to the site on one side of the river – on the other side the Black Panther Bagheera owns the land... More than that, when inspecting the river just after the Commencement Date, Castor found that the river bank to which he had access was swampy and the ends of the dam cannot be built as he thought, but needed special preparation of the foundation layer in order to execute the ends of the dam as shown in the drawings. This would cost more and Castor already saw the profit he expected decreasing... Castor was worried...



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They look around and suddenly something slinky slides from the leaves. “Corneliusssss is my name”, said the creature and smiled, his eyes looking right into Castor’s eyes. “I’ve heard you accidentally... I can help you not only to not lose money, but to win a fortune! Let’s make claims together! You have a perfectly valid claim for lack of possession of site – Sub-clause 2.1 - and a very good one for unforeseeable physical conditions as per Sub-clause 4.12- the site data were not correct, as well, therefore we have Sub-Clause 4.10 here, as well! We will be rich! I will get you 13 million nuts and 1 year extension of time, and all these for just a million nuts – I will

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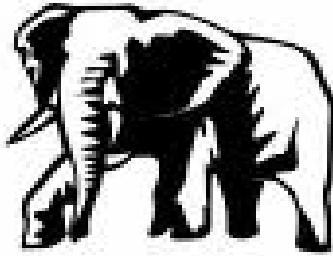
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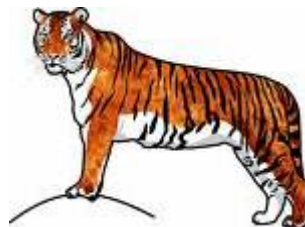
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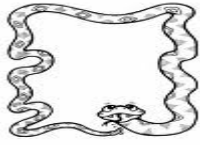
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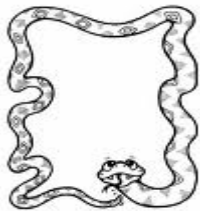
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Questions:

1. How fatal really is failing to follow Sub-Clause 2.5 in this case?
2. Should Sub-Clause 2.5 contain a time bar?