

ICP

Time: Winning Delay Claims

Athens, May 2019

The gamble

Uncertainty during the project...

- Should the contractor gamble it will get an EOT, or spend its own money accelerating?
- Should the Employer give an EOT or gamble that the pressure of no EOT will secure "free" acceleration?

Both gambles risk derailing the project.

What do you do?



Delay and/or disruption

Both are the effect of events but different:

- Impacts;
- Governing provision (in contract and/or default position at law);
- Substantiation;
- Remedies.

May have claims for both, with some overlap.

May have claims for only one.

May have two entirely separate claims.

Losing the right to LDs: the Prevention Principle

- England and Wales: *Multiplex Construction v Honeywell Control Systems* (2007)

"...The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing.

In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date if the employer has by act or omission prevented the contractor from completing by that date. Instead time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time..."

- Most jurisdictions have a means to achieve an equivalent end: waiver, estoppel, good faith

Case study 1: Termination

- Employer withheld payment because relevant milestones not met
- Contractor suspended performance for non-payment
- Employer terminated the contract on ground of Contractor's default
- LD provision required the Contractor to pay:

“the penalty at the rate of 0.1% of undelivered work per day of delay from the due date for delivery up to the date [Employer] accepts such work”.

Could the Employer claim LDs for delay to incomplete milestones?

Holding onto LD entitlement

Employer may not lose its entitlement to LDs if there is:

- concurrent delay; and/or
- failure to comply with condition precedent notice provision.

Case study 2: VO to remove Employer culpable delay

The Facts

- Substation for an offshore windfarm
- Milestone 8 included a requirement for Contractor to carry out pre-commissioning tests.
- The Employer failed to provide power for the tests so Contractor sought an EoT.
- The Employer instructed a change *"to mitigate the concerns raised by Contractor in fulfilling its obligations.."* Employer effectively assumed responsibility for the tests.
- Contractor failed to achieve Milestone 8 for reasons other than the pre-commissioning tests.
- The Employer levied liquidated damages.

What the contract said

"...A Variation instruction/request may include an instruction/request to:

- (i) revise the Works, which may include additions, **omissions**, substitutions and changes in the scope, quality, form, character, kind, position, dimension, level or line and changes in any method for carrying out the Works;
- (ii) revise any elements of the Works already completed in accordance with the Contract; or
- (iii) re-program the Works in order to complete the Works or any part thereof as the Employer may reasonably require

...

A Variation ... to omit or delete any part of the Works may relate to an omission for any reason whatsoever...

... the Employer shall be entitled to arrange for any such omitted Works to be carried out and/or completed by other entities."

Was the instruction valid?

- Can the owner exact LDs?
- Is the Contractor entitled to an EOT? Prolongation costs?

Case study 3: Express provision for concurrent delay

“If on receiving a notice and particulars...

.1 any of the events which are stated to be a cause of delay is a Relevant Event; and*

.2 completion of the works or of any Section has been or is likely to be delayed thereby beyond the relevant Completion Date

.3 and provided that

(a) The Contractor has made reasonable and proper efforts to mitigate such delay; and

(b) any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account;

then...the Employer shall give ...[such EOT] as he estimates as to be fair and reasonable.”

(*Definition of Relevant Event included various acts of Employer's default and prevention)

The Facts

- The works were delayed .
- the contractor applied for an EOT, relying on various Relevant Events.
- A partial EOT was allowed.
- A portion of the EOT was refused because two of the employer-caused delaying events were concurrent with delays for which the contractor was responsible.

Had the contractor contracted away concurrent delay?

Is the Contractor likely to be entitled to an EOT?

- Common law countries?
- Civil law countries with codes influenced by Roman Law (eg Continental Europe, Former Soviet Union/CIS, Latin America, China, Japan, etc)?
- Civil law countries influenced by Sharia law (eg the Middle East, Afghanistan, Sudan, Brunei and Indonesia)?

But is there a bigger danger?

- What if there had been no concurrent delay but the contractor had failed to mitigate?

“provided that

(a) *The Contractor has made reasonable and proper efforts to mitigate such delay; and*

(b) *any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account;*

then...the Employer shall give ...[such EOT] as he estimates as to be fair and reasonable.”

Case study 4: a clearly drafted time bar

- Notice within 7 days was a condition precedent:

"no entitlement to an EOT and any principle of law or equity which might otherwise render the date for practical completion unenforceable shall not apply."

- Subcontractor failed to issue required notices.

Could the main contractor reject the subcontractor's claim for an EOT and/or prolongation costs?

Choice of Delay Analysis Methodology

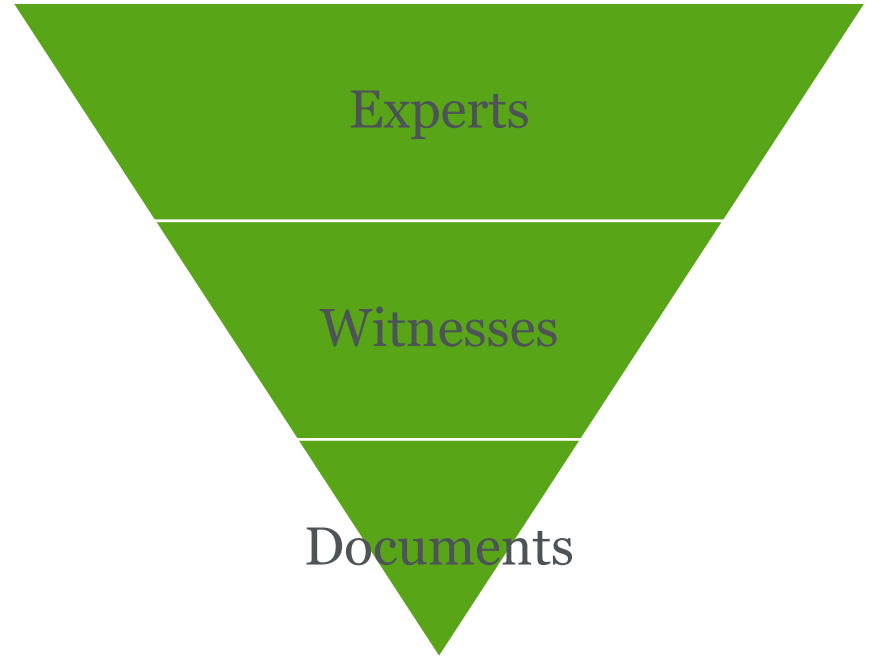
Methodology	Analysis Type	Critical Path Determined	Delay Impact determined	The question it answers
Impacted As-Planned	Cause & Effect	Prospectively	Prospectively	What effect would this event(s) have had on the completion date assuming everything else went exactly as planned?
Time Impact	Cause & Effect	Contemporaneously	Prospectively	What was the likely effect of this event(s) on the completion date judged at the time it was instructed / arose?
Time Slice Windows	Effect & Cause	Contemporaneously	Retrospectively	What was the contemporaneous or actual critical path to completion throughout the works and what were the causes of delay?
As-Planned vs As-Built	Effect & Cause	Contemporaneously	Retrospectively	What impact did the event(s) have on the sequence of activities as planned at the outset of the project?
Retrospective Longest Path	Effect & Cause	Retrospectively	Retrospectively	What was the as-built critical path to completion, viewed retrospectively, and what were the causes of delay?
Collapsed As-Built	Cause & Effect	Retrospectively	Retrospectively	But for the event(s) when would the completion date have been achieved?

How to win

A pyramid



Not a funnel



Case Study 5: Unhelpful / inadequate programmes

Employer Delay

- Employer was very late (7-10 months) in providing back energisation to three units.

Contractor delay

- Contractor was late with cooling water.

The Problem

- The Engineer took an extreme view – he granted no or inadequate EOTs.
- Before issuing PAC, Employer took/was deemed to have taken each unit into use.
- Employer exacted £millions in LDs, threatened calls on the bond and accused Contractor of "Contractor's Misconduct".

The commissioning sequence

1.

Cold Commissioning

- Individual items
- Rotor barring
- Motoroll
- GT protection tests



**Cannot proceed without
Back Energisation**

2.

Hot Commissioning

- First fire
- No load tests
- Synchronisation to the National Grid
- Steam blow
- Steam to set



**Cannot proceed without
Cooling Water**

3.

Tests on Completion

- Demonstration Tests
- 30-day Reliability Tests
- Performance Guarantee Tests

The Programmes

Clause 6.3 First Supplemental Agreement:

- *"The parties acknowledge and agree that the Revised Programme is the agreed current Programme for the Works showing the Time for Completion of the Works and each Section...."*

The Revised Programme

- It showed the Contractor needed 9.5 months from back energisation to commission each unit (284 days for 2 units, 287 days for the third unit).
- Employer's delays had, in fact, made it impossible for the Contractor to get anywhere near the then Time for Completion for each unit.

BUT the Contractor's programmes

- focussed on its activities only and so had placed cooling water on the critical path.

The EOT provisions: time but not money

- Clause 26.1

*"For the avoidance of doubt, the fact that delay caused by an event listed in this Clause 26.1 is concurrent with another delay of which the Contractor takes the risk **shall be disregarded** for the purposes of determining the Contractor's entitlement to an extension of the Time for Completion or a Contractor Key Date."*

- Clause 17.4

"The Contractor shall not be entitled to an adjustment to the Agreement Price for any loss and/or expense relating to any period of Price Adjustment Delay which is concurrent with another delay of which the Contractor takes the risk."

Clause 26.1: Two routes to an EOT

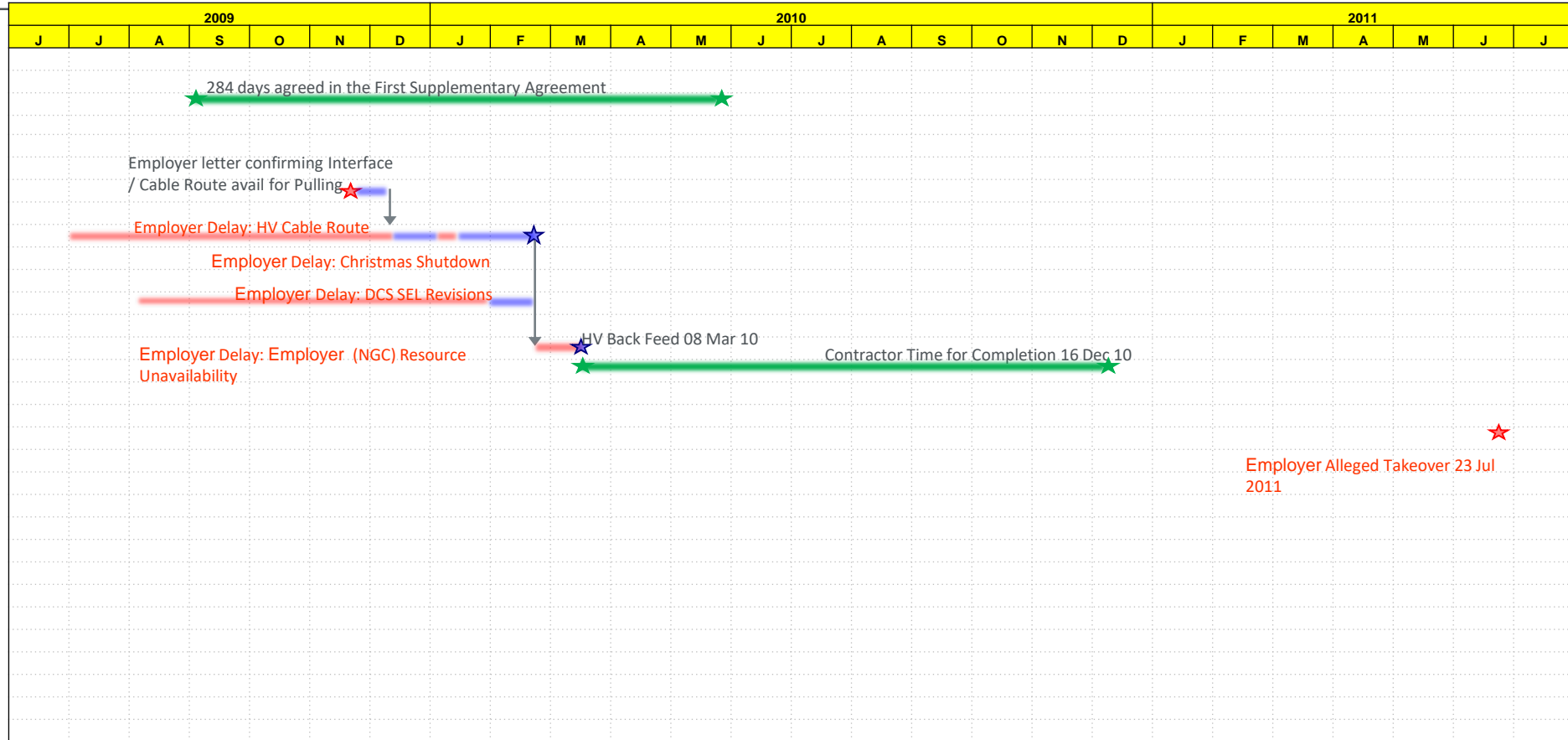
- First (Reactive) route – whatever EOT is produced by a CPA

*"The Engineer **shall** after receipt of a fully substantiated claim for an extension of Time for Completion or Contractor Key Date that demonstrates the critical path has been affected, and **after due consultation** with the Employer and the Contractor, deny or grant the Contractor **from time to time**, either **prospectively or retrospectively**, such extension of Time for Completion and/or Contractor Key Date as may be justified."*

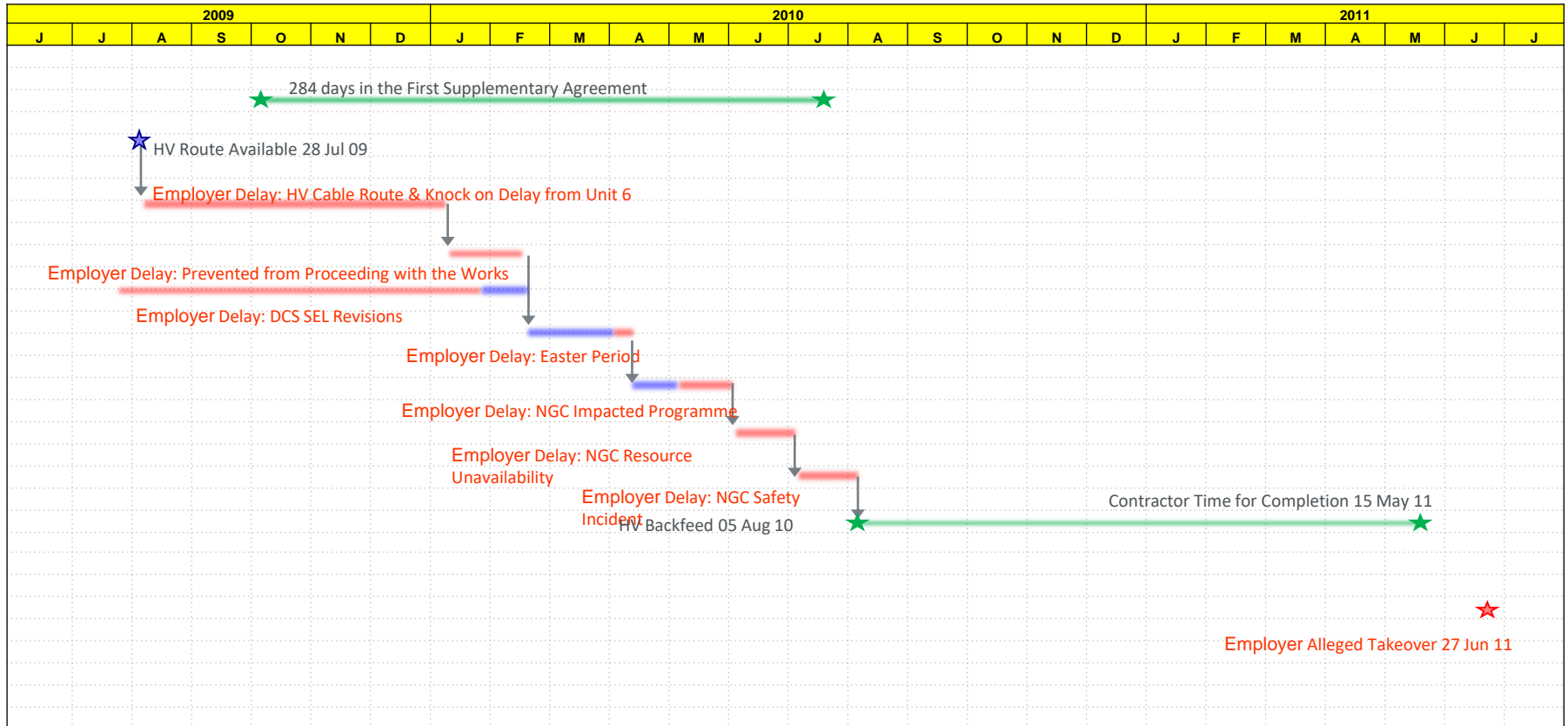
- Second (Proactive) Route – whatever EOT is fair and reasonable

*"The Engineer **shall** in its absolute discretion, but **after due consultation** with the Employer and the Contractor, grant the Contractor **from time to time**, either **prospectively or retrospectively**, such extension of Time for Completion and/or Contractor Key Date as he may consider to be fair and reasonable."*

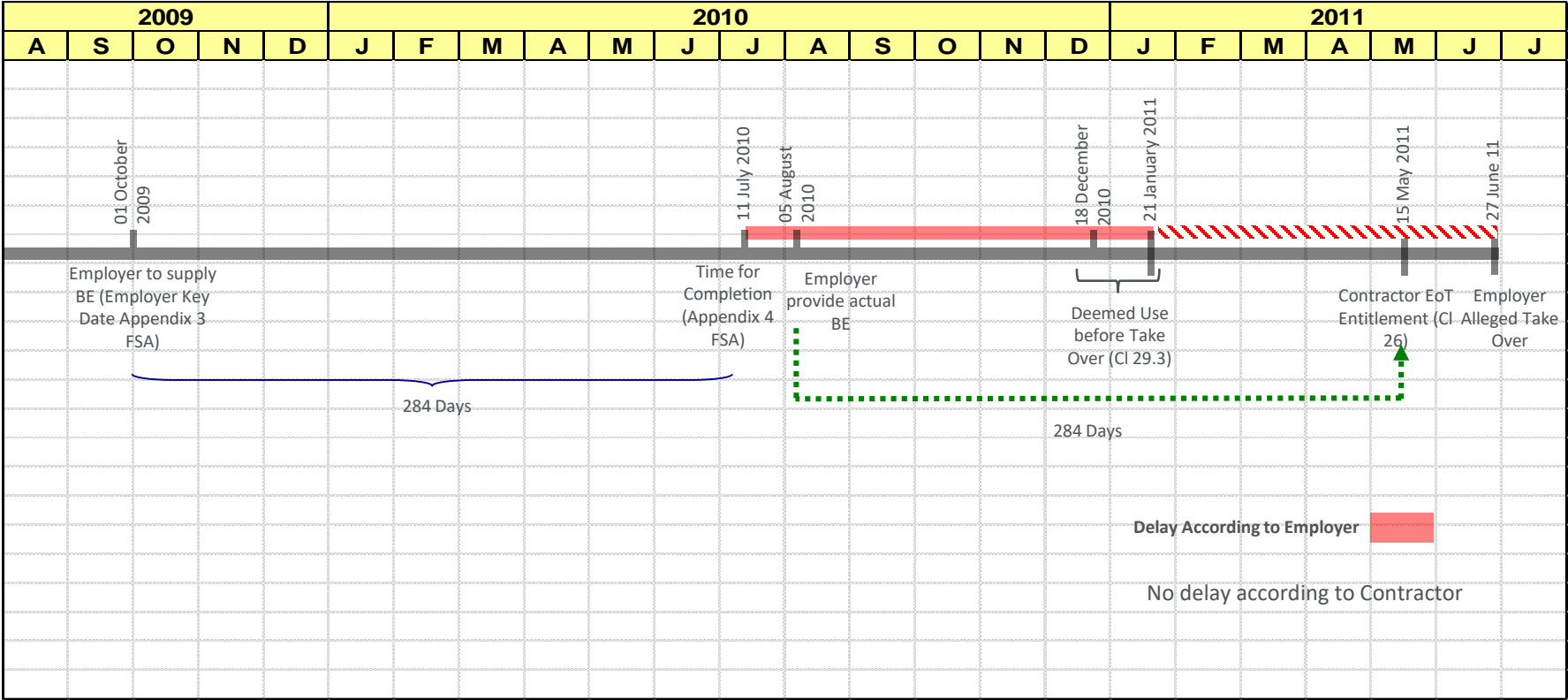
Measuring Contractor's entitlement – Unit 6



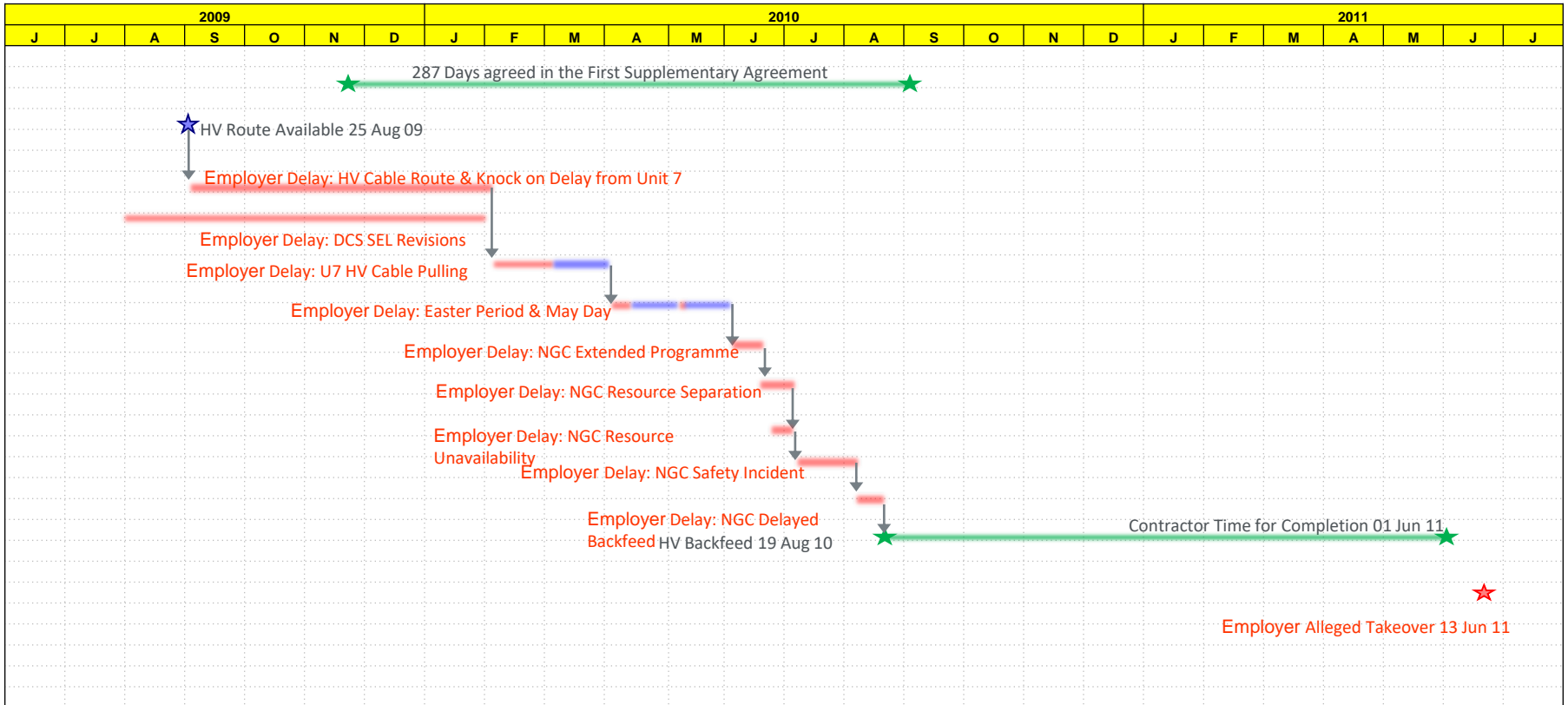
Measuring Contractor's entitlement – Unit 7



Measuring entitlement to LDs – Unit 7



Measuring Contractor's entitlement – Unit 8



Measuring entitlement to LDs – Unit 8

