State of the insurance market for major projects in the Middle East

26 SEPTEMBER 2012

LEADERSHIP, KNOWLEDGE, SOLUTIONS...WORLDWIDE.

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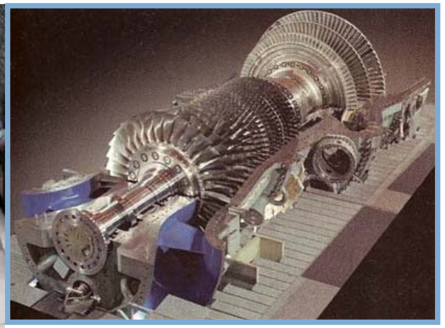
Marsh Construction & Infrastructure Practice
Middle East

Overview of key risk issues in construction and role of insurance

- Construction activity in Middle East
- Connecting the dots….
  - Indemnity
  - Insurance
- Risk spectrum
- Construction insurance market – current ‘state of play’
- Procurement strategies
- Further thoughts on post construction issues

Construction activity in Middle East



Middle East
Continuing drivers for growth ………… despite the geopolitical headwinds !

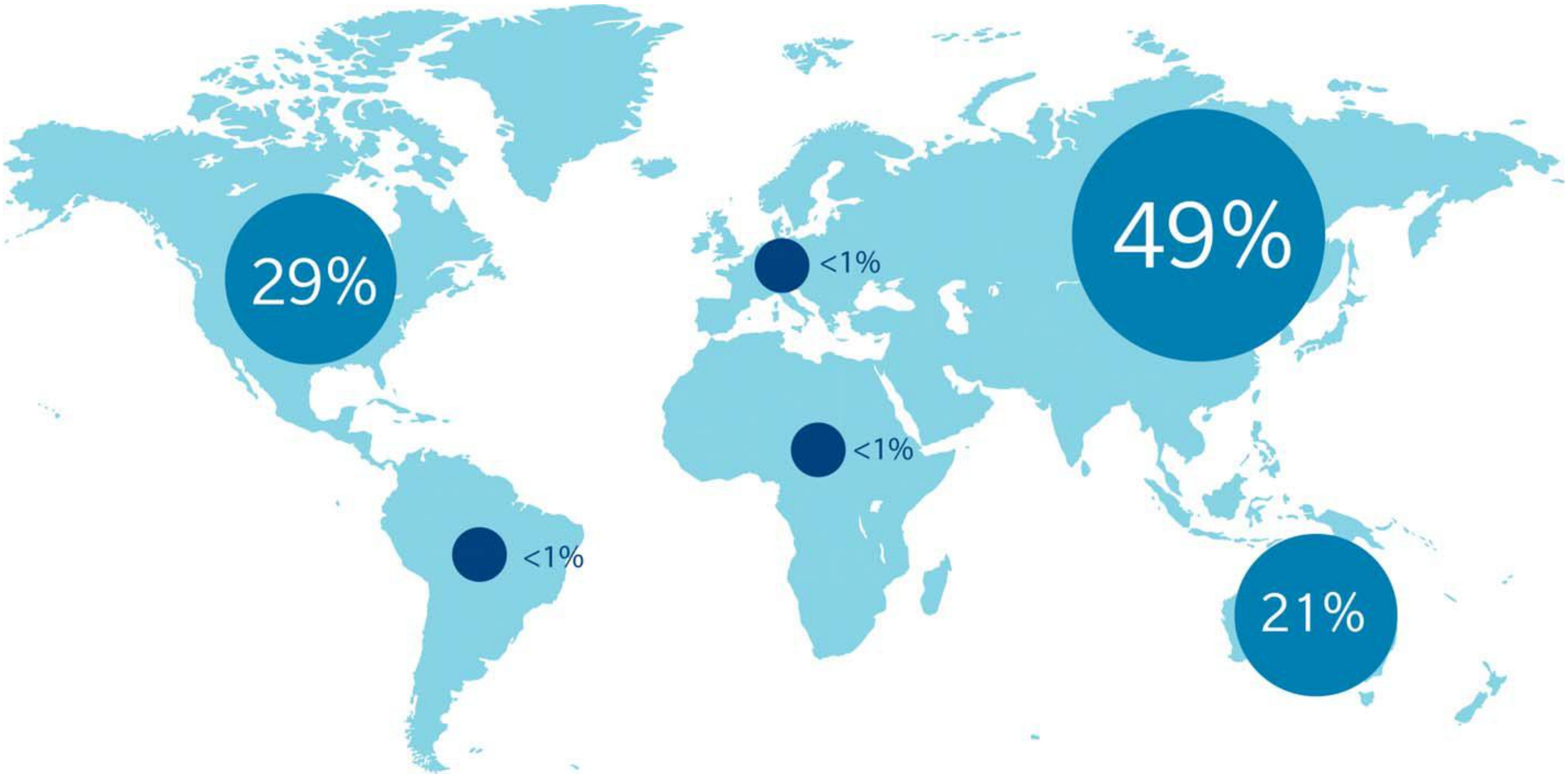
- Abundance of accessible hydrocarbon reserves vs. global demand
- Access to competitive feed stock for development of petrochemicals industries (the route to diversification)
- Geographical location relative to the markets of the East & West
- Population growth and developing economies

A risk landscape with some distinct characteristics …

Essential features of the evolving regional risk landscape …….

- Low exposure to Nat Cat
- Good separation
- Better than average risk management / engineering
- High physical values and getting bigger !
- Interdependencies across the value chain
  - contingent business interruption
  - risk compounding

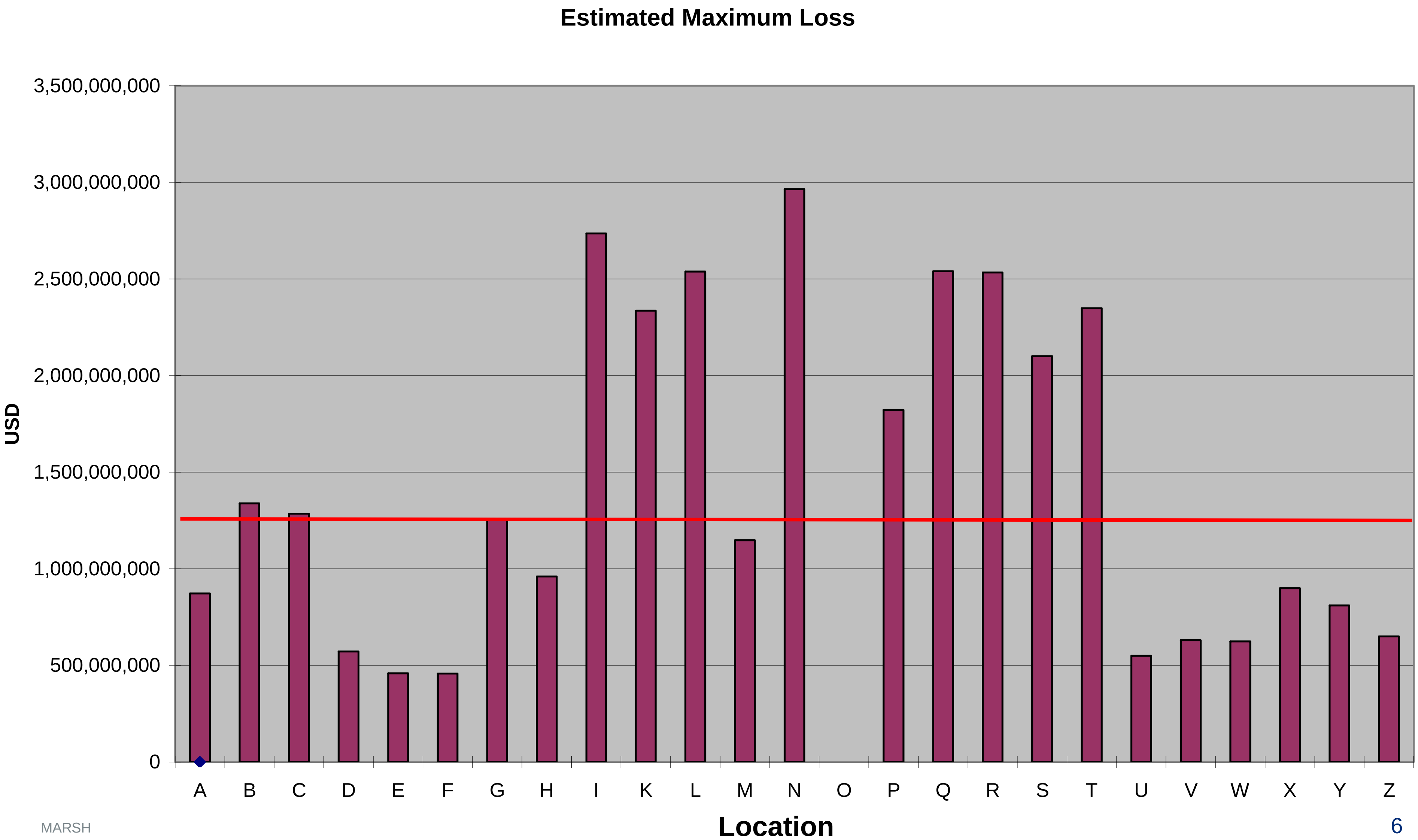
Worldwide Natural Catastrophe Disasters 2011
Percentage Distribution of Insured Losses per Continent



Underwriters like doing business here – the GOM offset !!!!

Physical values

Bigger EML values ……………………. limit vs. available capacity ?



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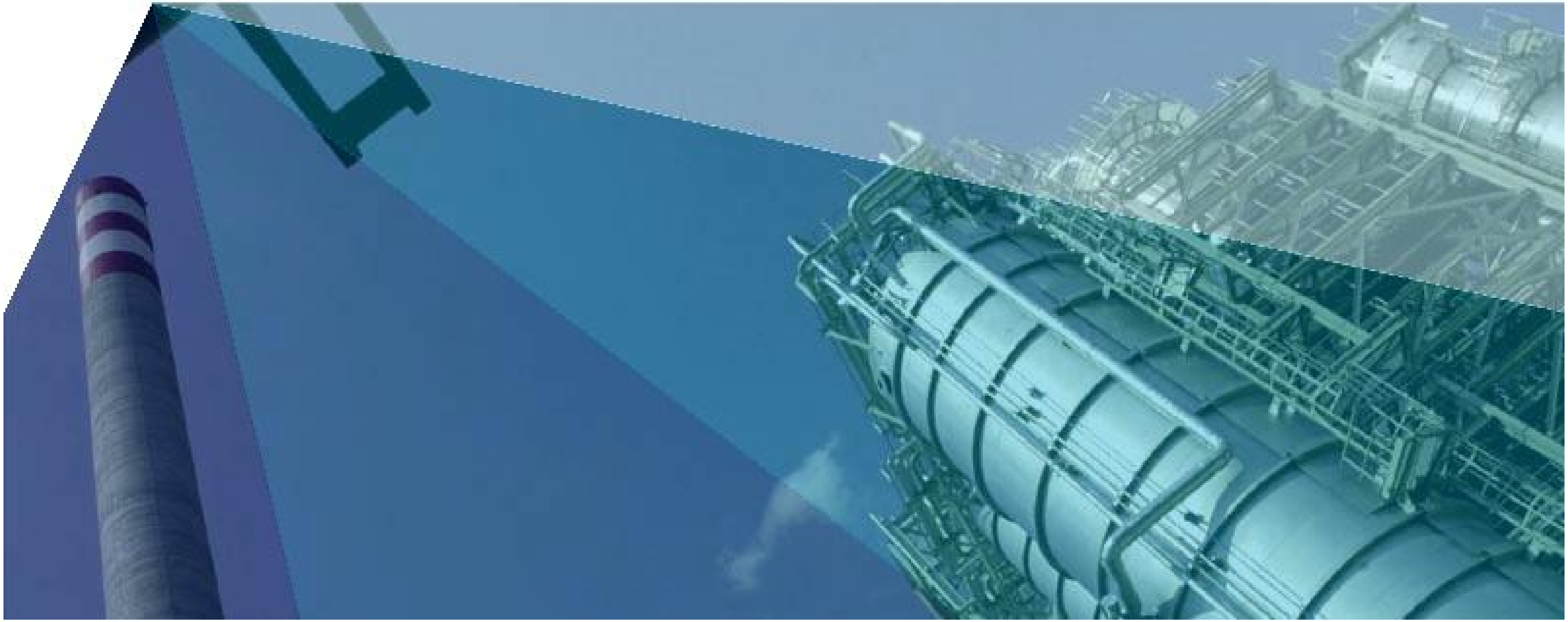
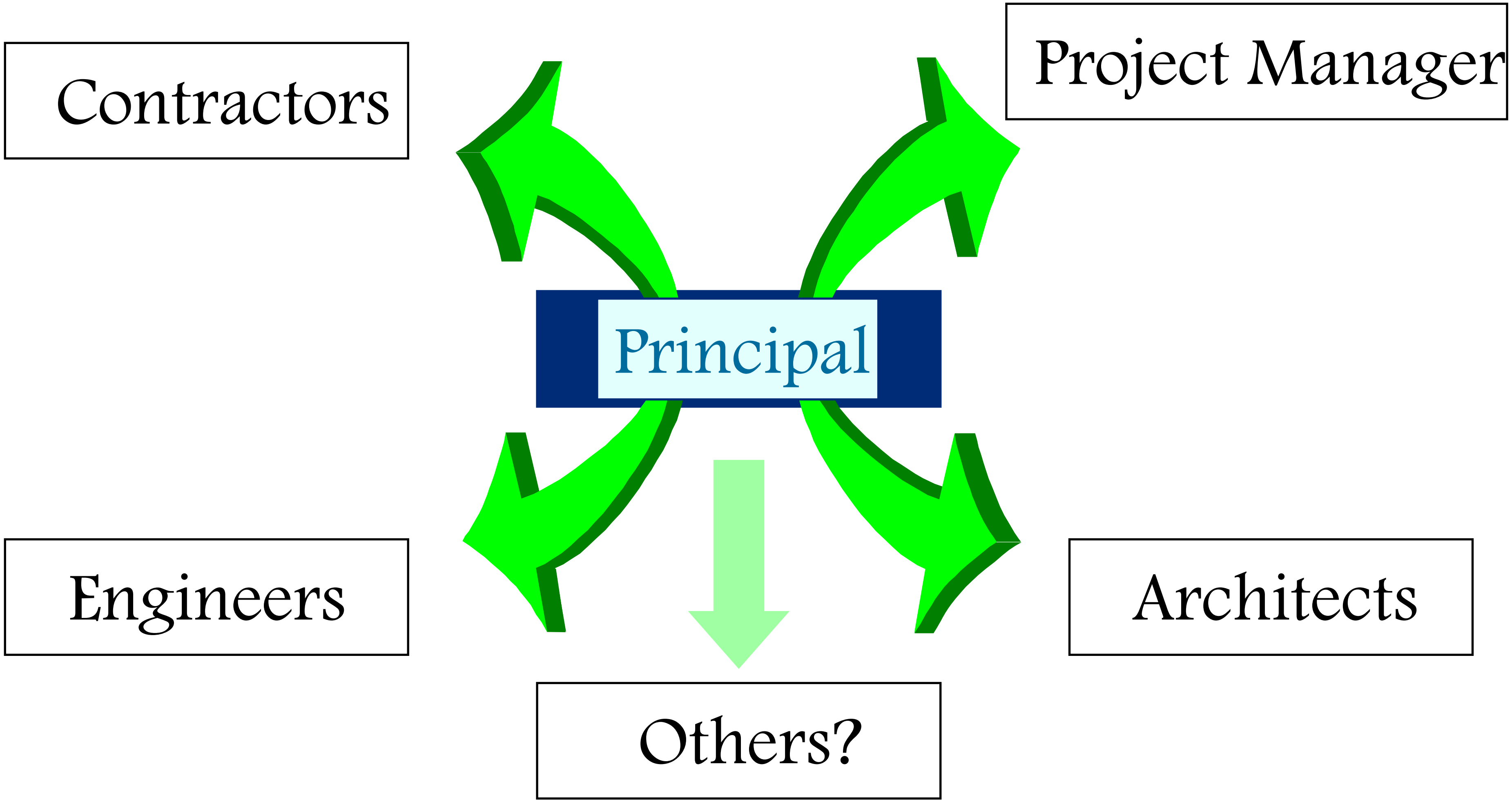
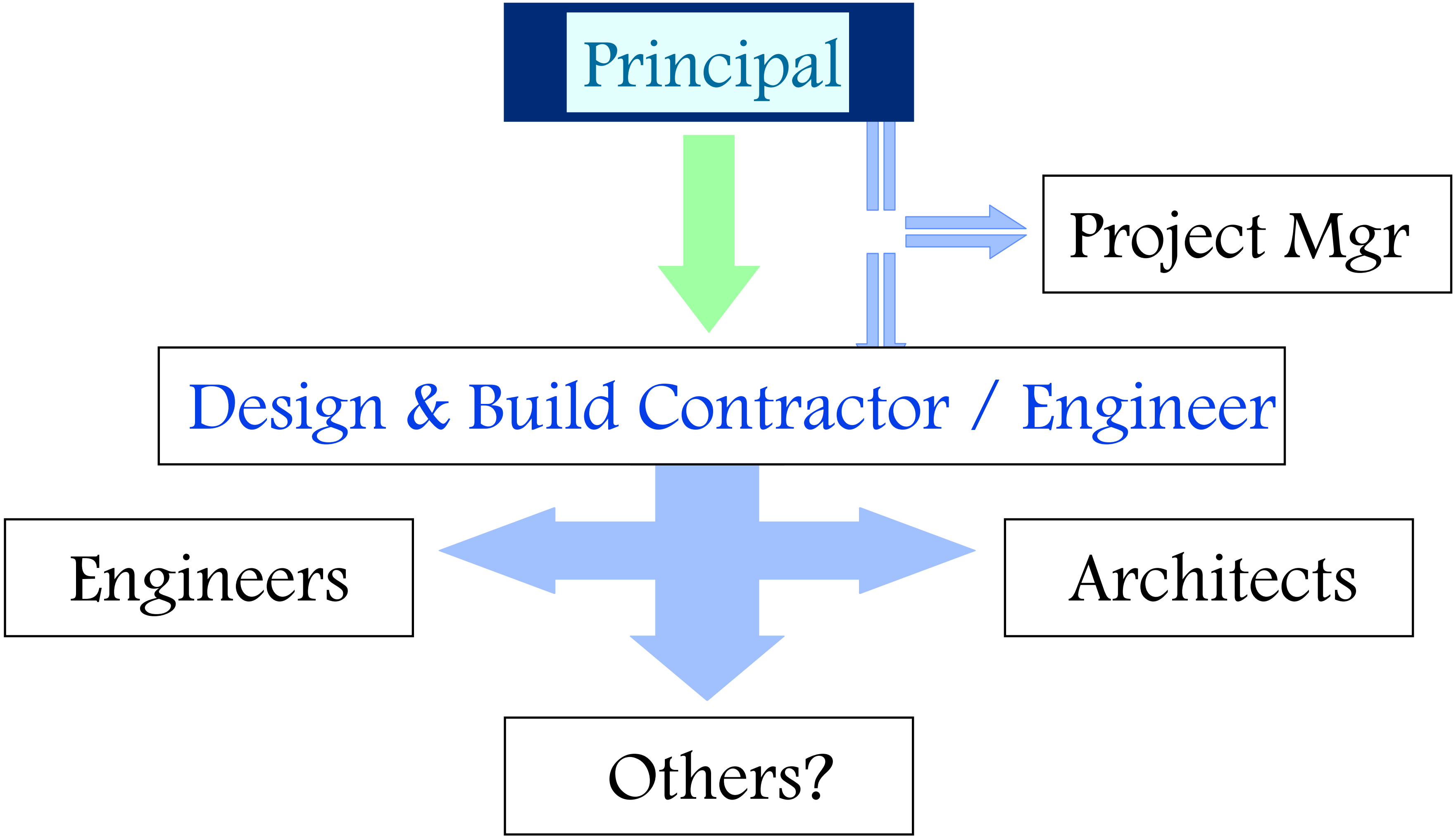
Connecting the dots….



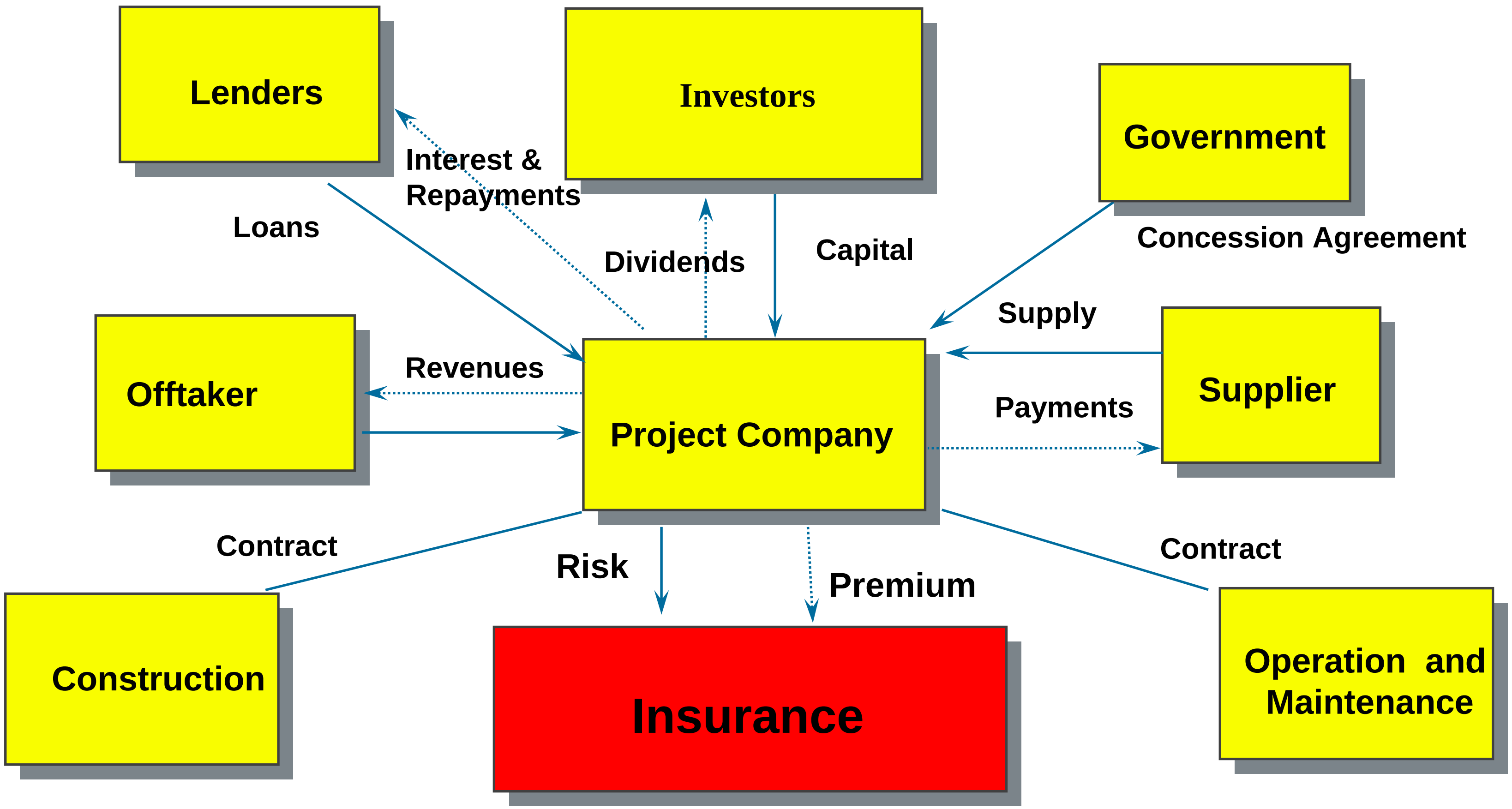
Traditional Contract Structure



The Design & Build Contract Structure



BOT Contractual Structure

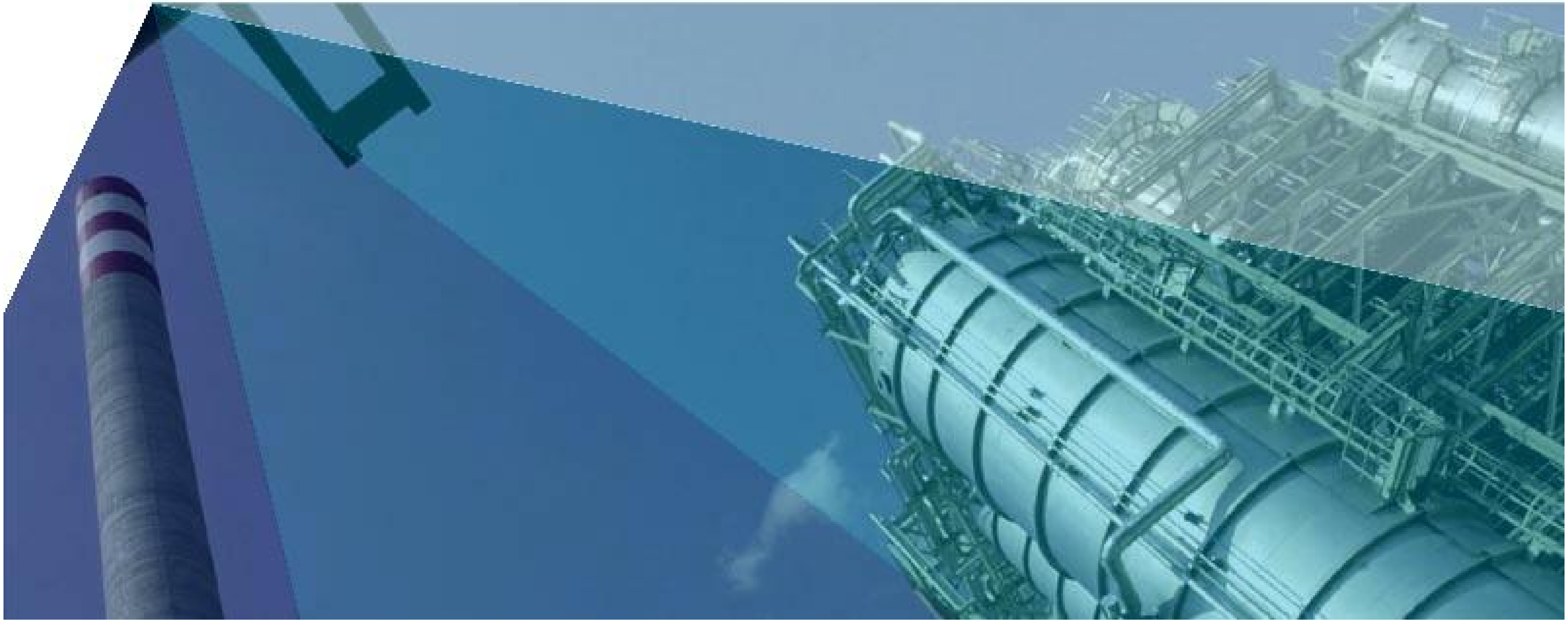


Contract - Indemnity and Insurance Clauses…connecting the dots

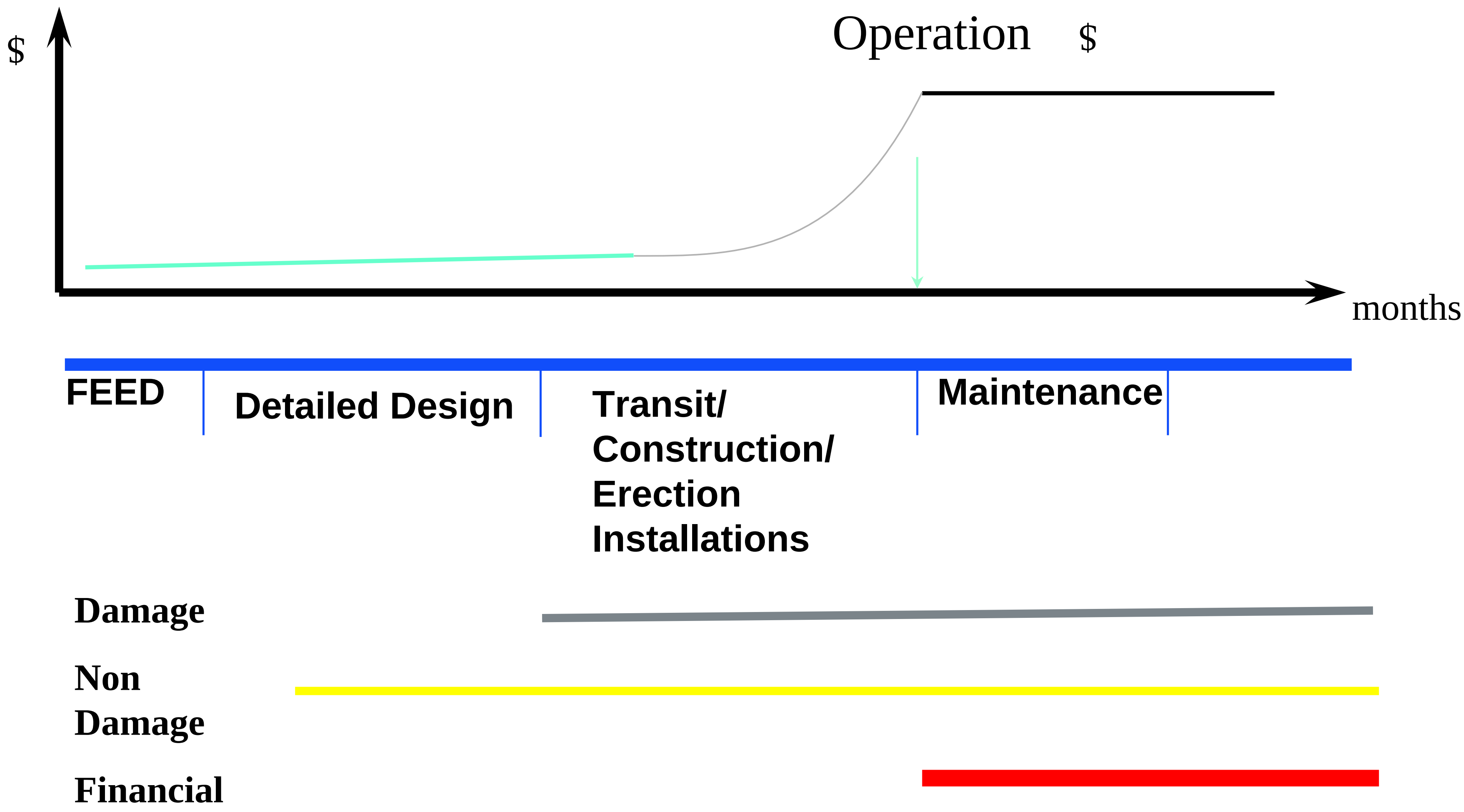
- An Indemnity Clause is quite separate from an Insurance Clause.
- The Indemnity Clause is a contractual risk transfer in the form of an agreement between the Indemnitee (usually the principal) and the Indemnitor (usually the Contractor, licence holder, lease holder etc).
- It details the extent of liability securing the Indemnitee against loss or damage.
- A contract wording usually also carries Insurance Clauses which set out the minimum level of coverage required to be effected by the Indemnitor and special provisions that are to apply to each coverage

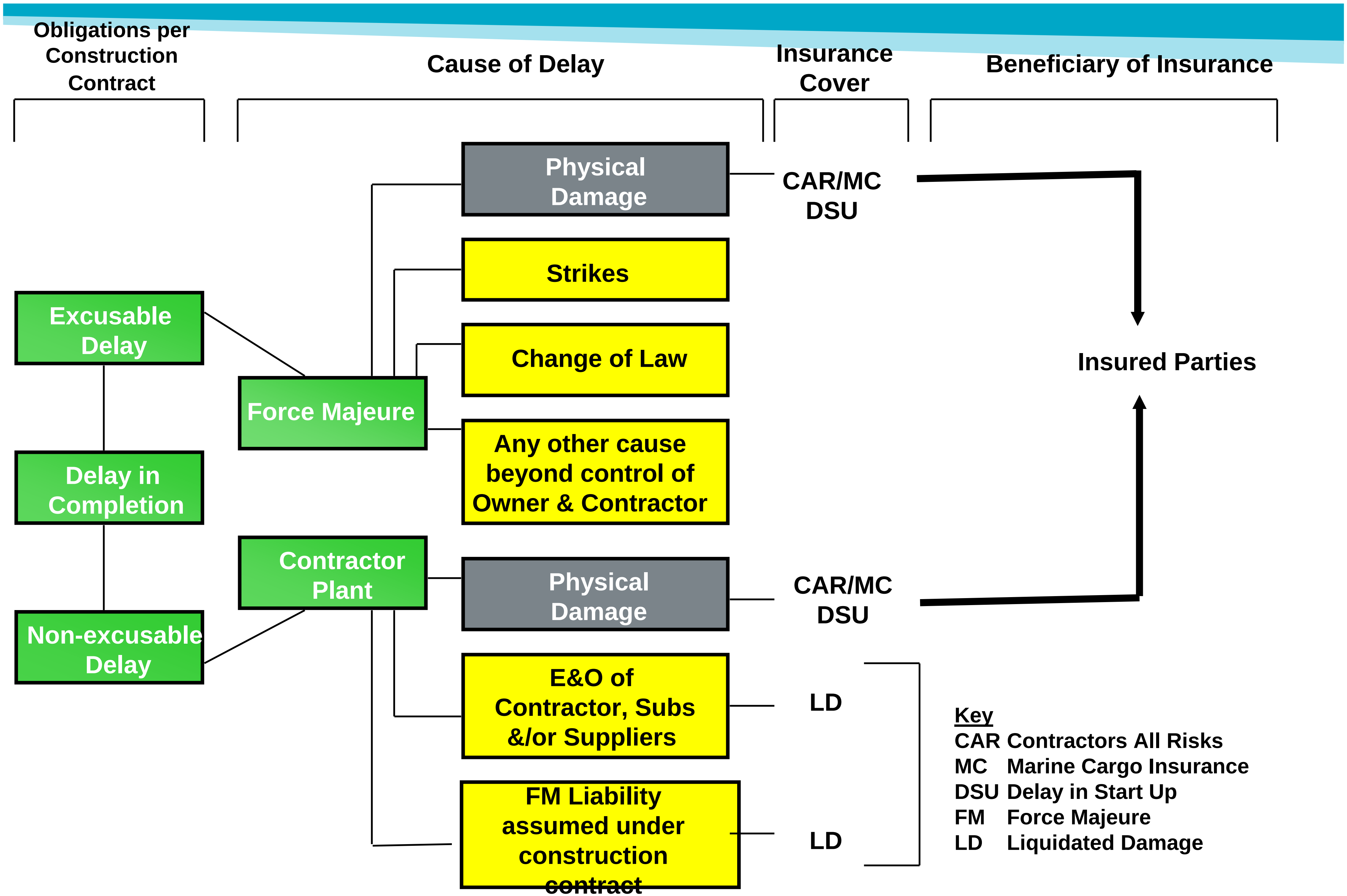
Whilst indemnity principles may be well understood, insurance provisions are seldom reviewed in detail till the end. There needs to be a recognition that insurance needs to be looked at from blue print stage by the specialists i.e. Lawyers, but also risk and insurance advisers; to ensure the dots remain connected.

Risk spectrum

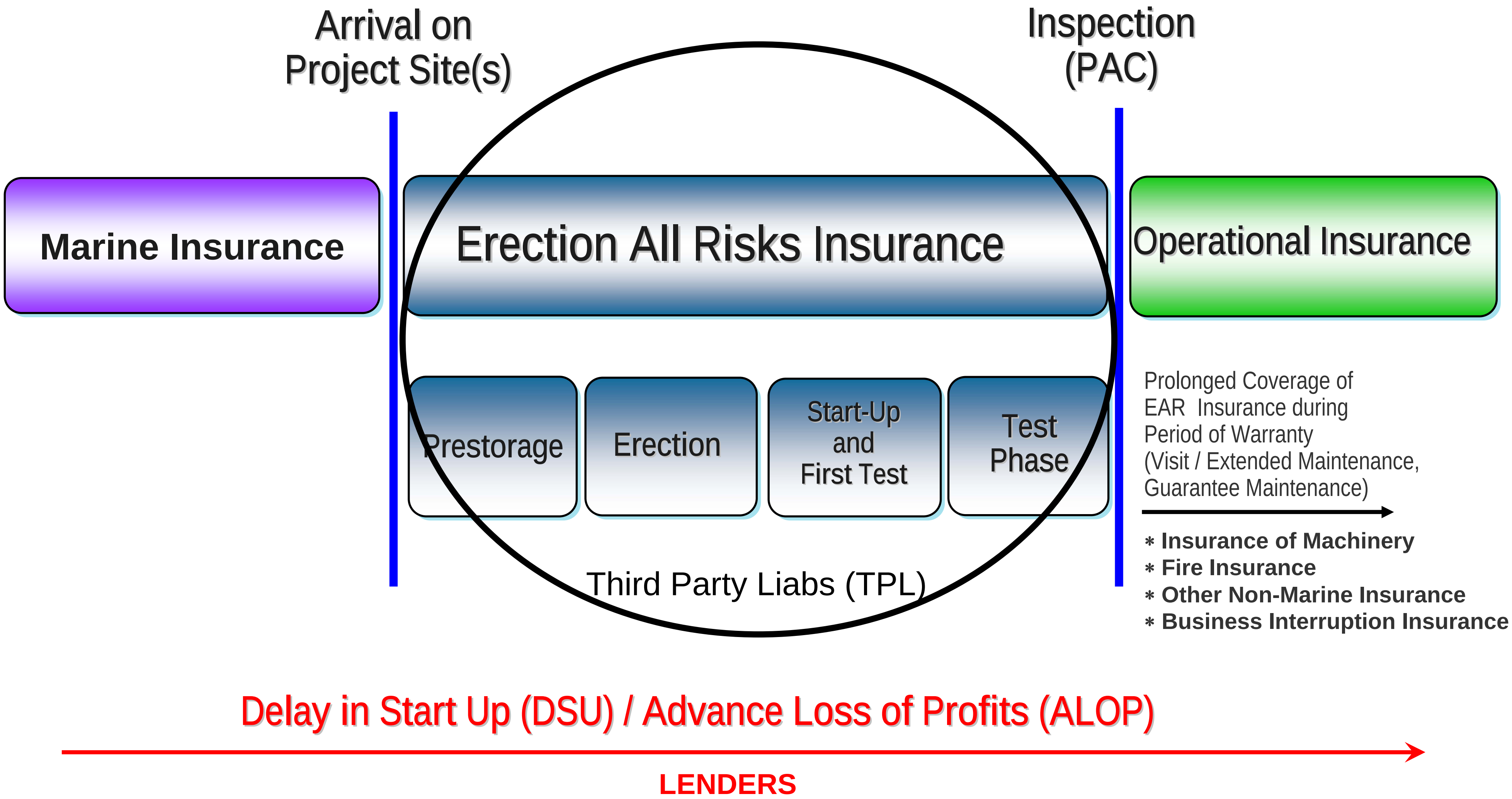


Risk Build – up / Time




Obligations per Construction Contract
Cause of Delay
Insurance Cover
Beneficiary of Insurance
Physical Damage
Strikes
Change of Law
Any other cause beyond control of Owner & Contractor
Excusable Delay
Force Majeure
Delay in Completion
Contractor Plant
Non-excusable Delay
Physical Damage
E&O of Contractor, Subs &/or Suppliers
FM Liability assumed under construction contract
CAR/MC DSU
CAR/MC DSU
LD
LD
Insured Parties
Key
CAR Contractors All Risks
MC Marine Cargo Insurance
DSU Delay in Start Up
FM Force Majeure
LD Liquidated Damage

Project Risk Exposure



Insurance Perspective - Viewed by Project Phases

Construction

Risks Mostly Familiar

Issues:

Defective Design Coverage Limitations on ‘New’ Technology Elements

Scale up issues

Design Criteria

Clarity on Revenue Model (DSU Cover)

Testing Commissioning

Risks Mostly Familiar

Issues:

Satisfaction of T&C clause criteria not always possible

Design or workmanship issues

Lack of feedstock

Most risky period in project life cycle

Operational

Risks Mostly Familiar

Issues:

72 hour Reliability

Damage post PAC where root cause pre-existing

Clarity on Revenue Model (BI Cover)

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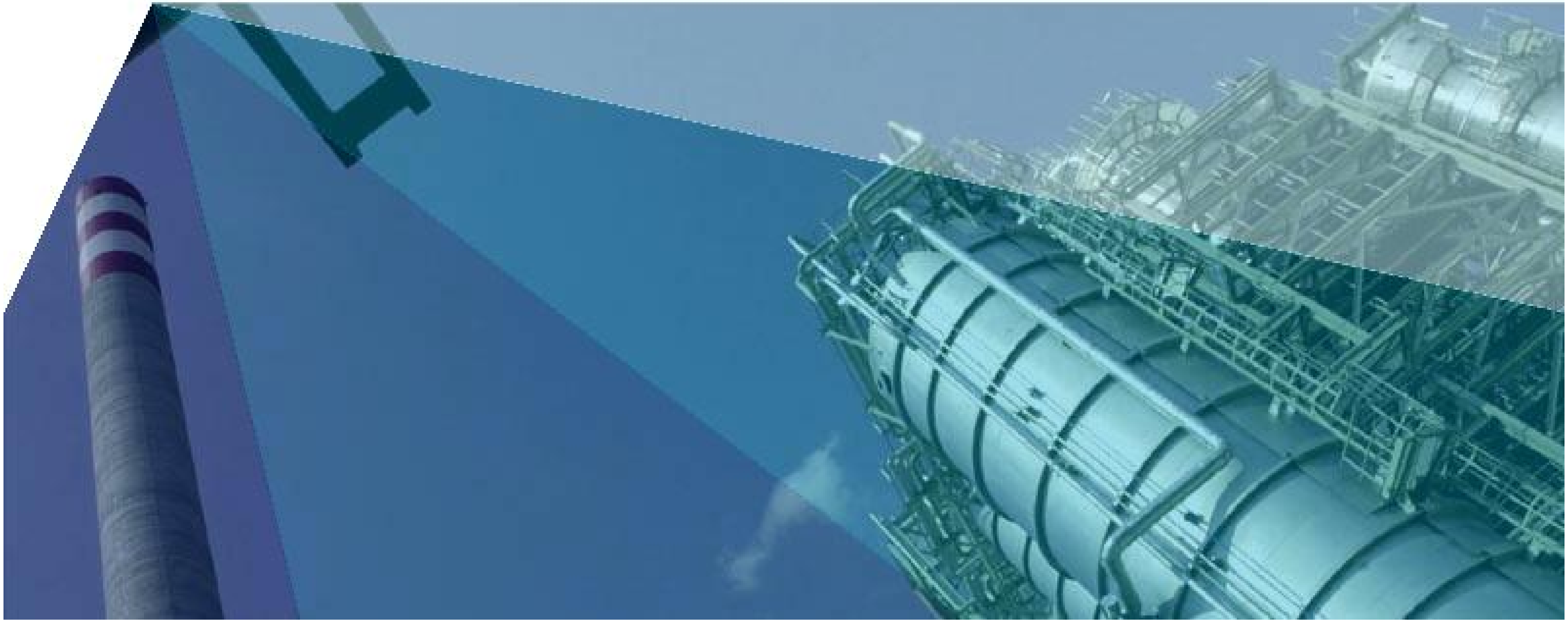
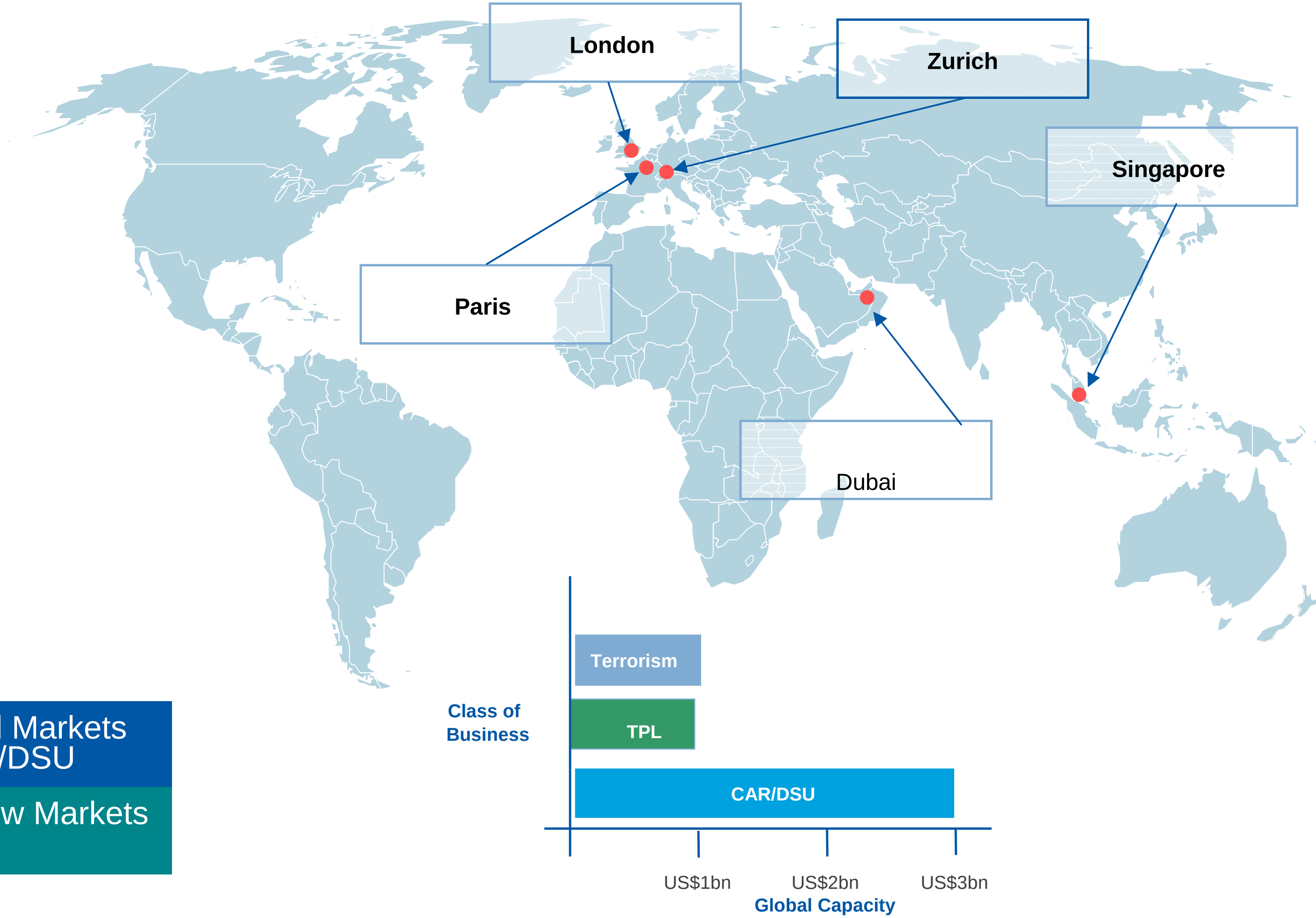
Construction insurance market – current ‘state of play’



Global Markets "Access Point" – Crucial Decision



Lead Markets EAR/DSU

Follow Markets

Evolving Regional Markets

Carrier	Rating (S&P)	Capacity (USD MILLION)
ACE	A+	50
ADNIC	A	75
Allianz	AA-	200
Asia Capital Re	A- AM BEST)	50
AXA CS	AA-	175
Chartis	A+	150
Gulf Re (Arch)	A- (AM BEST)	50
Hannover Re Bahrain	AA-	25
Hardy ARIG (Lloyd's)	A+	25
IGI	A- (AM BEST)	50
Liberty	A-	50
Oman Insurance Co	A (AM BEST)	50
Q Re	A	50
QBE	A	75
RSA	A+	150
Samsung F&M	A+	200
Swiss Re CS	A+	300
Talbot (Lloyd's)	A+	50
Trust Re	A- (AM BEST)	30
Zurich	AA-	140
TOTAL		**Circa 1,950**

Lots of reinsurers are jumping on the
Construction band wagon

Construction – Insurance Market Overview

- “Boutique” sector of the insurance market
- Capacity remains at an all time high
  +USD 3,000,000,000,000 PML
- Lead market competition remains fierce
- Market decentralised and is truly global
- Technical market which produces better results for interactive clients
- Markets remain soft but the question is “For how long?”
- Markets are in a state of transition
- NAT CAT costs in this region less of an issue, but Oman has some challenges associated with flood and cyclone

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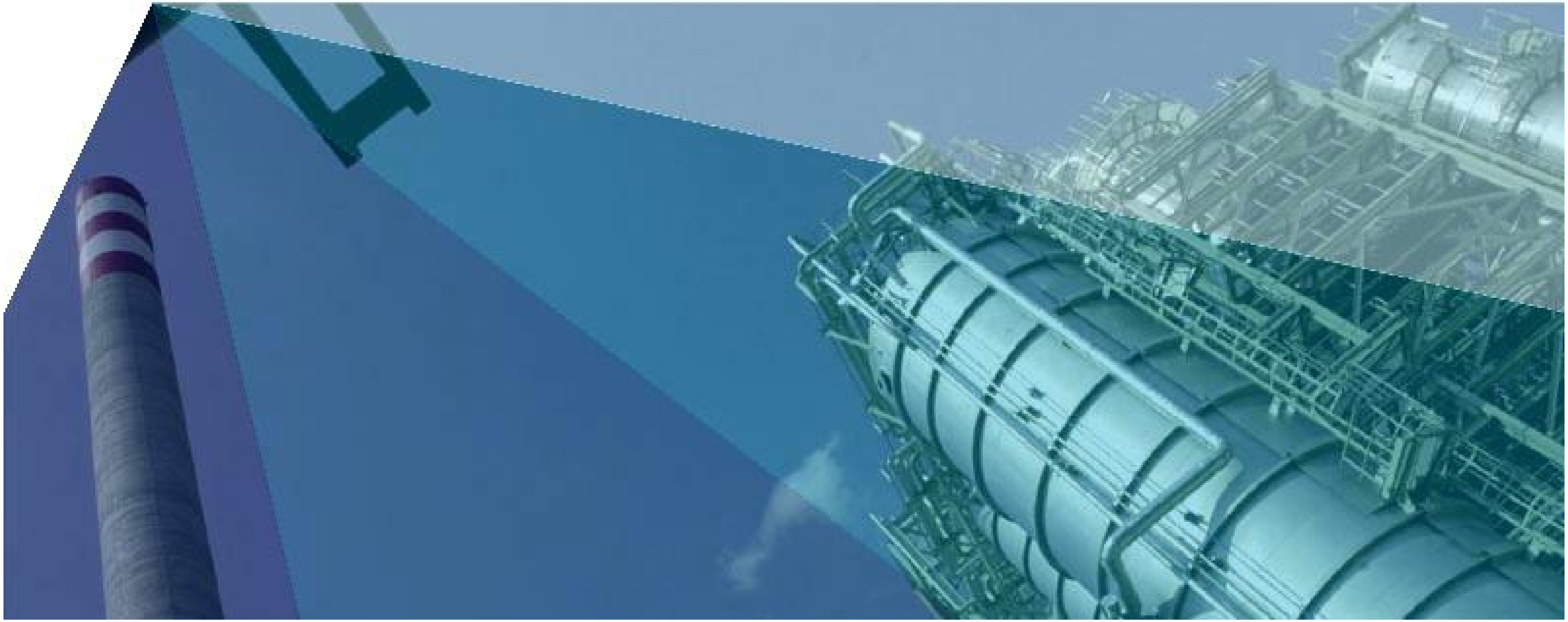
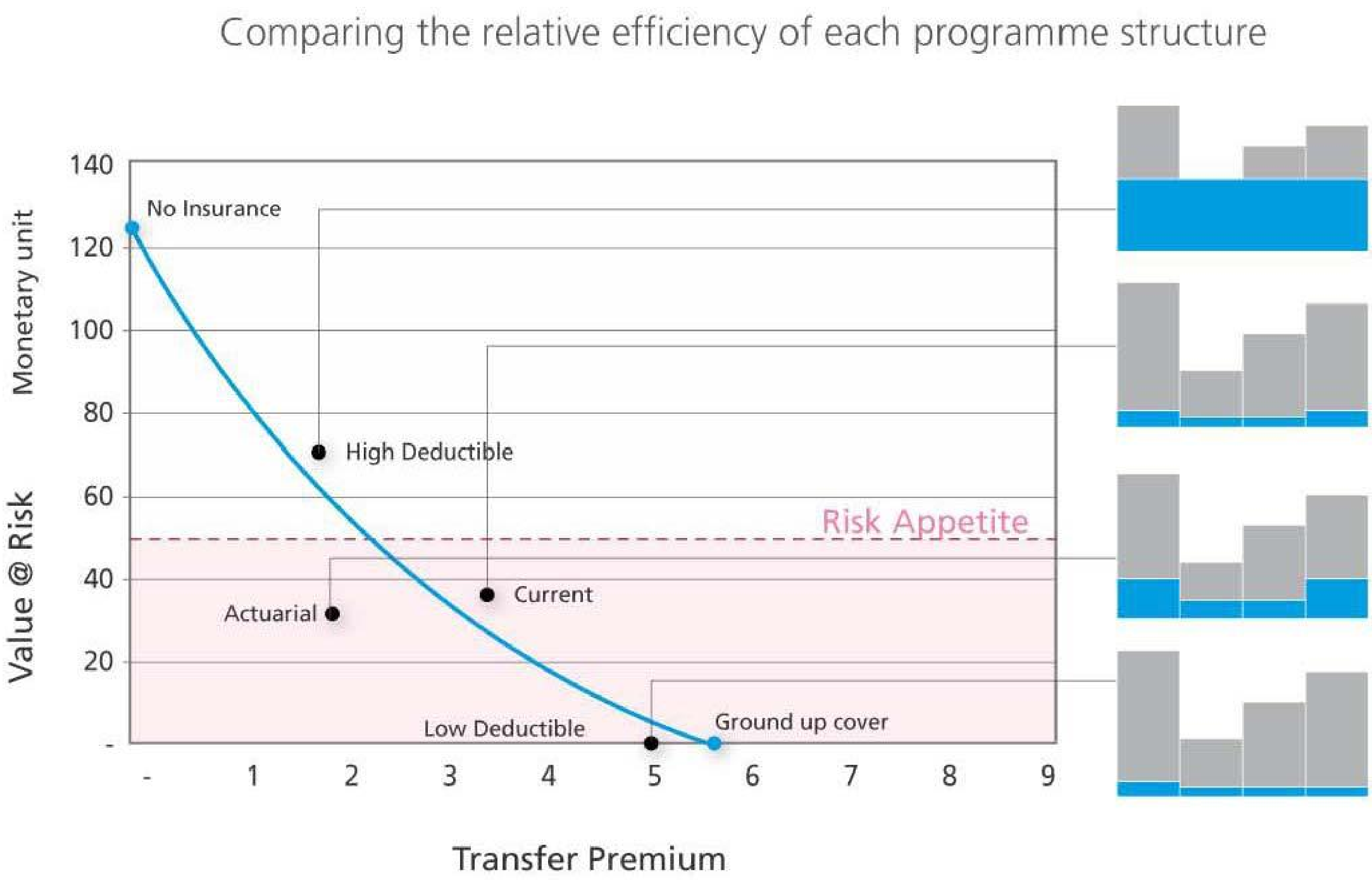
Procurement strategies



Risk Finance Optimisation

Through the insurance efficiency curve as shown below we can understand if your current programme design is aligned with your risk appetite



Owner Controlled Insurance Program

Class of Insurance	Project Participant	
	Owner / Principal	Contractor / Sub Contractor
Construction All Risks	✓	
Construction Delay in Start Up	✓	
Marine Cargo / Transits	✓	
Marine Cargo Delay in Start Up	✓	
Third Party Liability	✓	
Professional Indemnity		✓
Workmen's Compensation		✓
Contractors' Plant & Equipment		✓
Auto Liability		✓
Employers Liability		✓

Contractor Controlled Insurance Program

Class of Insurance	Project Participant	
	Owner / Principal	Contractor / Sub Contractor
Construction All Risks		✓
Construction Delay in Start Up	X	
Marine Cargo / Transits		✓
Marine Cargo Delay in Start Up	X	
Third Party Liability		✓
Professional Indemnity		✓
Workmen’s Compensation		✓
Contractors’ Plant & Equipment		✓
Auto Liability		✓
Employers Liability		✓

MARSH

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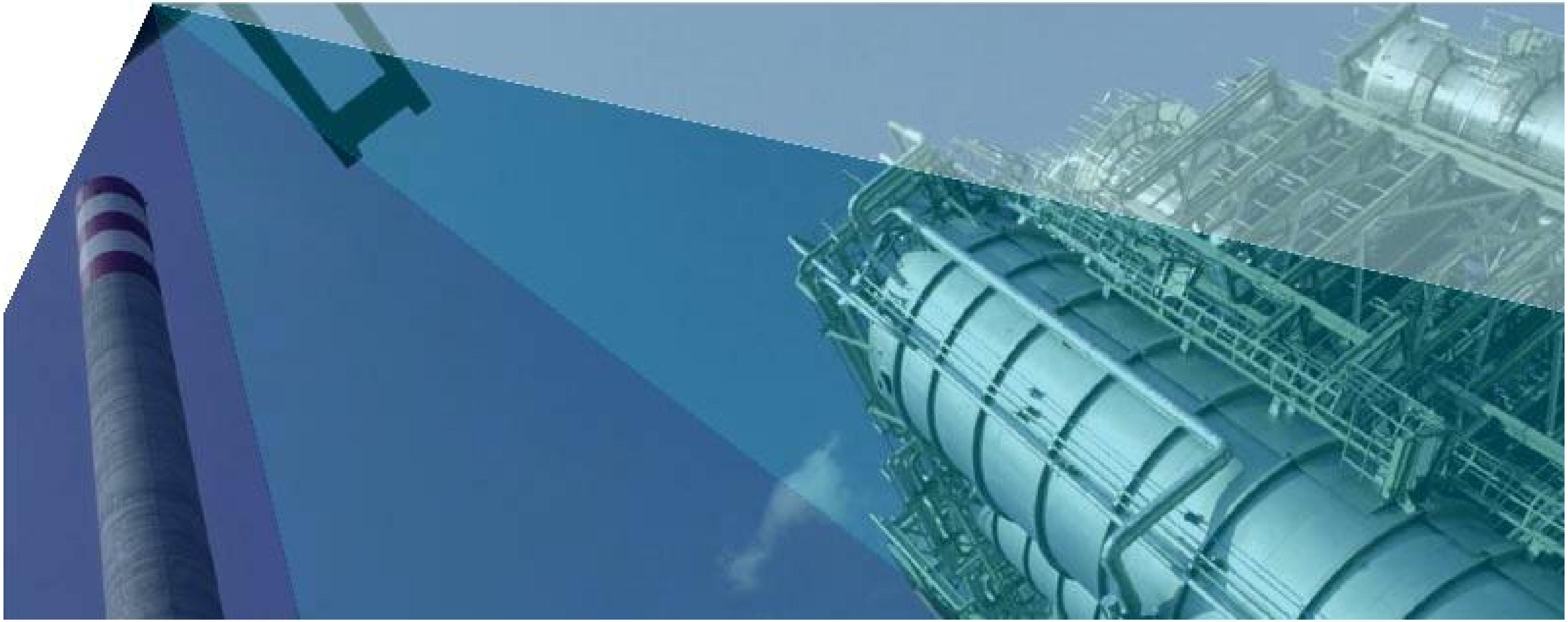
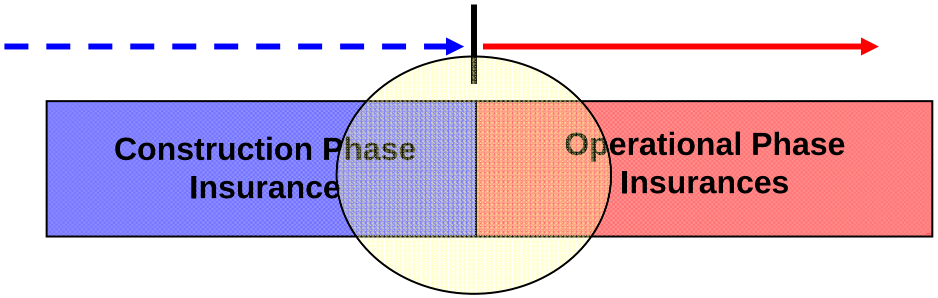
Further thoughts on post construction issues



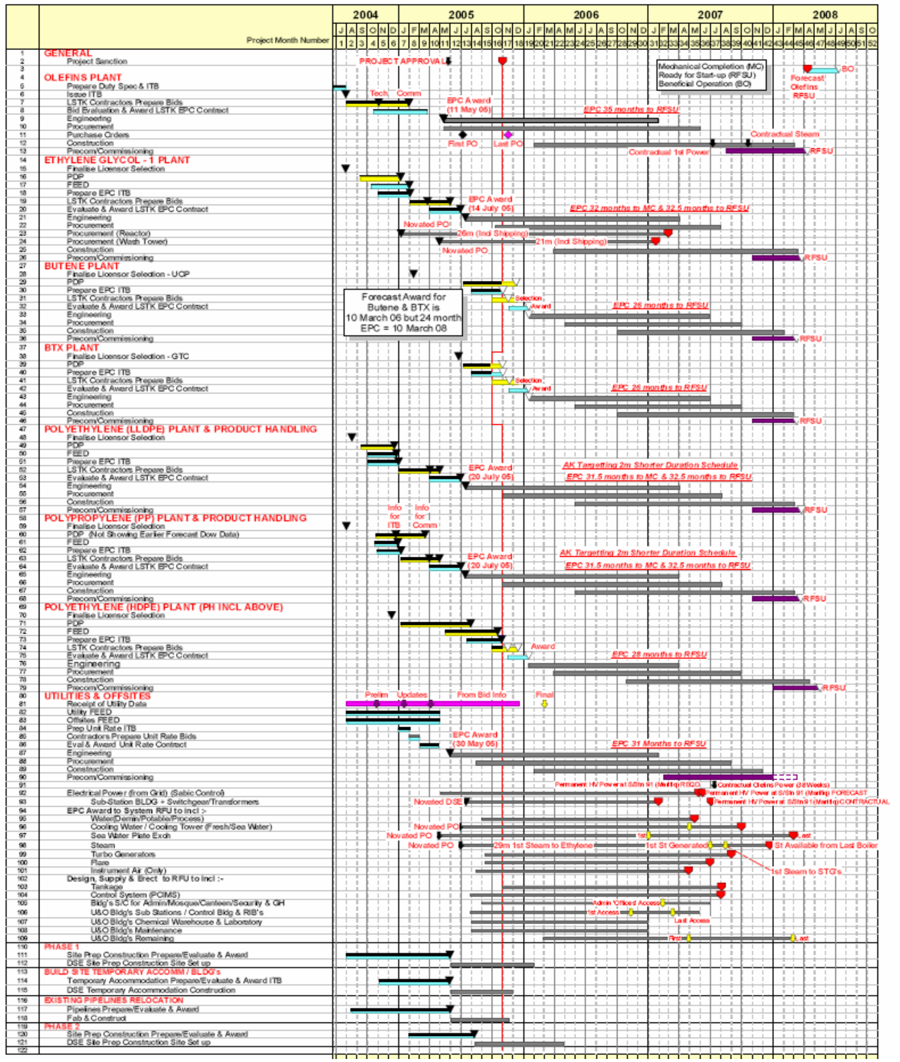
Transfer from Construction to Operational Insurance

.... Seamless/Simple/Dovetail ....

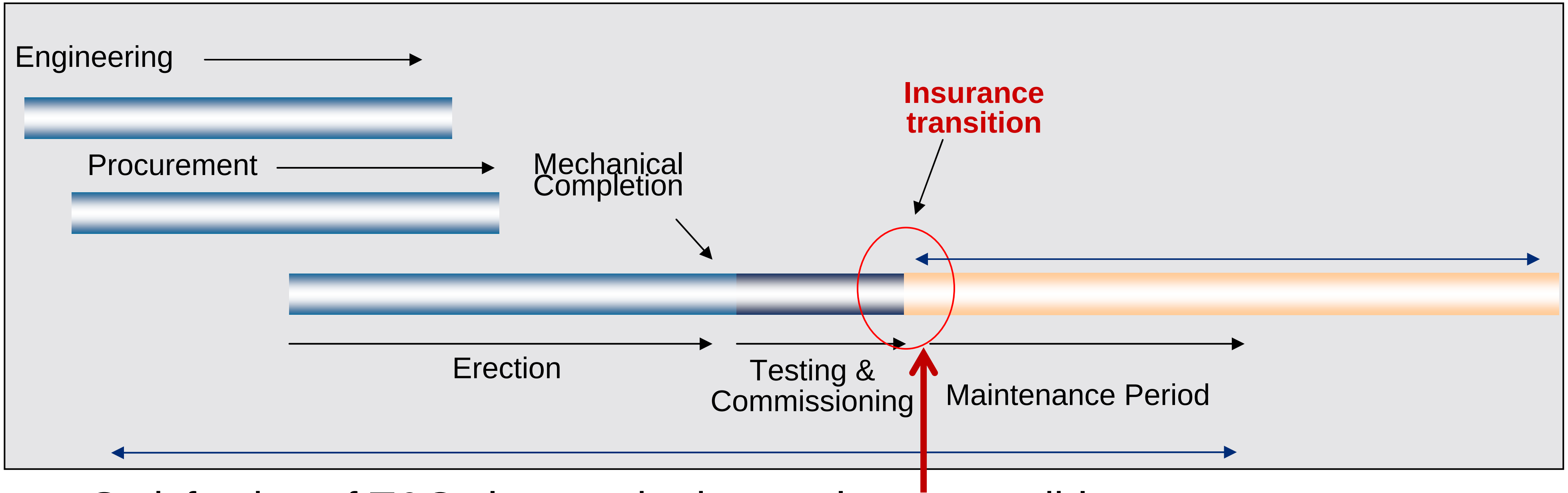


- Mechanical Completion
- Testing & Commissioning
- Performance testing 72 hours continuous at 100% design criteria
- Official acceptance
- No equipment faults or punch list items affecting operational integrity of the plant are outstanding
- No temporary structures and no modifications remain

.... Reality.........



Construction to operation: how seamless is the transition? testing & commissioning clause



- Satisfaction of T&C clause criteria not always possible
  - Design or workmanship issues
  - Lack of feedstock
- Options
  - Extend Construction All Risks Policy until satisfaction of T&C clause
  - “Early” transition to operational insurances BUT this may impose onerous conditions by operational markets

Thank you

Any questions?

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Risk Identification and Allocation during the Procurement Process

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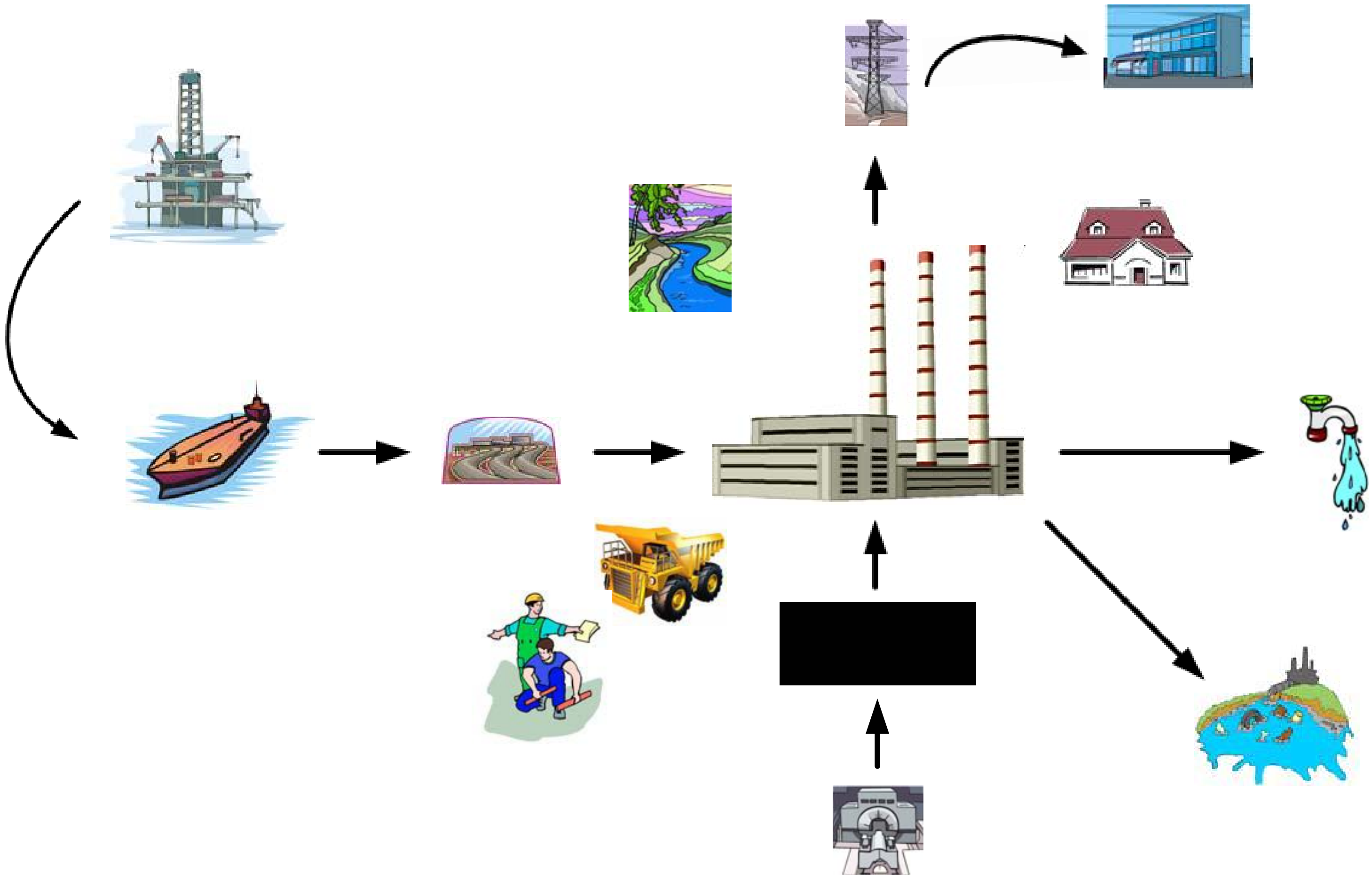
"No construction project is risk free. Risk can be managed, minimized, shared, transferred or accepted. It cannot be ignored!“

Sir Michael Latham
Latham Report (UK) - 1994

Major Projects can be Complex Creatures!



Topics to be Covered:

- Risk assessment
- Project delivery systems and contract structures
- Risk analysis and allocation in practice
- Key risk allocation provisions in the construction contract – their negotiation and insurability

Risk Assessment

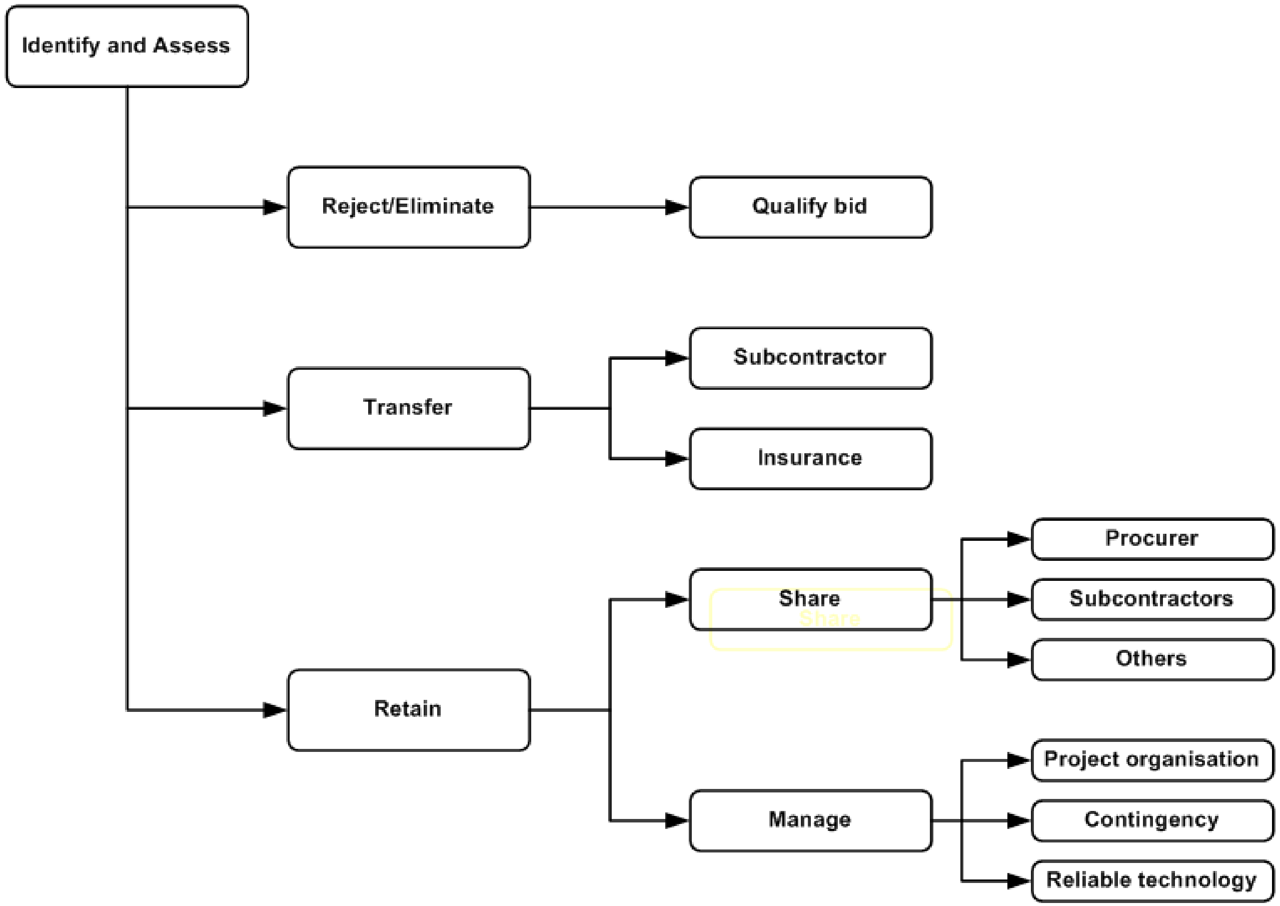
The Risk Assessment Exercise

- A <u>systematic</u> and <u>auditable</u> process is central to the task of undertaking risk assessment
- All project participants need to perform their own risk assessments
- Assessment must be <u>realistic</u> and <u>honest</u>

The Risk Assessment Exercise *(continued)*

- Categorize - analyze – allocate
  - Understand the project and what it involves at every tier
  - Consider the range of risks that each element of a project presents
  - Analyze and assess the likelihood of a risk arising, including the surrounding legal environment from which the risk is derived
  - Consider the effect that the risk is likely to have on the project and its participants
  - Determine who, <u>practically</u>, <u>legally</u> and <u>economically</u>, is best placed to assume the risk
  - Allocate risk to appropriate project participants. This may involve
    - Rejecting a risk
    - Accepting and transferring a risk
    - Accepting and sharing a risk

Responding to Risk as a Developer/Contractor



Typical Project Risk Categories to be Considered in the Risk Assessment

- Design and construction
- Site and climatic conditions
- Approvals and consents
- Change in law/regulation
- “Force Majeure” events
- Operation & maintenance
- Revenue stability and control
- Taxation
- Technology and obsolescence

A Developer's Risk Matrix – How it Might Look

Ref	Risk	Description	Authority	Project Company	Shared	Risk Allocation	Risk Factor	Notes
1.	**Design Risks**							
1.1	Failure to design to brief	Failure to translate the requirements of the Authority into the design, misinterpretation of design or failure to build to specification during construction may lead to additional design and construction costs.		(✓)		Construction Contractor		This risk can be mitigated by developing design and clarifying design ambiguities/interpretations with the Authority prior to financial close.
1.2	Continuing development of design	The detail of the design should be developed within an agreed framework and timetable. A failure to do so may lead to additional design and construction costs.		(✓)		Construction Contractor		A mechanism for developing design post financial close will be required in the Project Agreement.
1.3	Change in requirements of the Authority	The Authority may require changes to the design, leading to additional design and construction costs.	(✓)					Such a scenario can be envisaged where additional space needs to be made to accommodate extra prisoners.
1.4	Etc ...							
2.	**Construction and Development Risks**							
2.1	Incorrect cost estimates	The estimated cost of construction may be incorrect.		(✓)		Construction Contractor		
2.2	Incorrect time estimate	The time taken to complete the construction phase may be different from the estimated time.		(✓)		Construction Contractor		
2.3	Unforeseen ground/site conditions	Unforeseen ground/site conditions may lead to variations in the estimated cost.		(✓)		Construction Contractor		Subject to ability to carry out site investigations on site.
2.4	Etc ...							

Risk Assessment *(continued)*

Your Risk Analysis is Complete. So What Next?

Project Delivery Systems and Contract Structures

Selecting a Project Delivery System and Contract Structure

- The procurer must develop a project delivery system (e.g. conventional procurement, PPP, etc) and contract structure around its preferred risk allocation model
- Is there a contract structure or procurement methodology that best reflects the procurer's objectives and preferred risk allocation?
  - Adopting a tried and tested contracting model can be quicker, cheaper and more predictable <u>BUT</u> have regard to "lessons learnt" from past projects
  - Unusual projects may justify a "blue sky" approach to procurement
  - Beware of the "one size fits all" standard form which is generally an industry compromise

Commonly Used Contracting Structures

- Design-Build and Engineering Procurement Construction (EPC) Contract
  - Allocates most design and construction risks to the contractor on a "turnkey" basis
  - E.g. FIDIC Silver Book
- Construction Contract (engineer's design)
  - Design risk retained by procurer; contractor constructs the works in accordance with procurer's engineer's design
  - E.g. FIDIC Red Book

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Commonly Used Contracting Structures *(continued)*

- Cost Plus Contract
  - Suited to fast track projects or projects with significant uncertainties (undeveloped design; uncertain working conditions; novel technologies)
  - Contractor may be incentivized through target cost (“pain/gain” sharing) mechanisms
  - E.g. NEC 3 variants
- Construction Management Contract
  - Advisor/administrator/planner rather than general contractor
  - Procurer has greater choice of specialist contractors <u>BUT</u> directly exposed to multiple contracts – significant risk retained
  - Generally drafted as bespoke contracts

Commonly Used Contracting Structures *(continued)*

- Public Private Partnership (PPP) style contract
  - Complex interaction between multiple project participants
  - Greater consideration given to analysis and allocation of risk between procurer and private sector
  - Critical role of lenders in PPPs – “bankability” concerns need to be addressed
  - E.g. SOPC 4 variants (UK) and Abu Dhabi I(W)PP Agreements (UAE) together with their “back-to-back” construction and O&M subcontracts
- Bespoke Contracts
  - Highly amended standard forms significantly changing risk allocation or one-off project-specific contracts

Response from Bidders

- Procurers should be open to the possibility that the risk allocation model may need to change during the procurement process
  - feedback from bidders
  - emerging regulatory issues
  - funding gaps

Risk Analysis and Allocation in Practice

Risk Analysis and Allocation in Practice …

…the Site and its Surrounds

The Site and its Surrounds

- A project site presents procurers, developers and contractors with a variety of risks, both legal and technical
  - Title/ownership/permitted use restrictions
  - Environmental conditions
  - Ground and climatic conditions
  - Access restrictions
  - Effect of site works on neighbouring properties
  - Site security (against unlawful entry)

The Site and its Surrounds *(continued)*

- Natural risk allocation
  - Title/ownership/permitted use restrictions - the party with legal title (freehold or leasehold)
  - Environmental conditions/ground and climatic conditions/access restrictions/site security - the party undertaking design and construction works <u>BUT</u> potentially with some risk sharing (e.g. existing hazardous contamination or undiscovered artefacts)
  - Effect of works on neighbouring properties
    - Avoidable impact – the party causing the impact
    - Unavoidable impact – the party with legal title

The Site and its Surrounds *(continued)*

- Approaches to site risks taken under different contract models
  - FIDIC Silver Book position – substantially all site risks allocated to contractor. Site access risks and unavoidable risk to neighbouring properties retained by procurer
  - Cost Plus contract – extra cost generally reimbursed
  - PPP style contract – substantially all site/site access risks allocated to the private sector developer. Developer will seek to pass risks to the contractors to satisfy “bankability” requirements
  - Middle East power project – in general, as for PPP style contracts <u>BUT</u> greater potential to negotiate exceptions for hazards associated with “brownfield” sites
- Is insurance available to cover certain site risks (e.g. contamination, title defects, claims by neighbouring property owners)

Key Risk Allocation Provisions in the Construction Contract – Their Negotiation and Insurability Issues

Key Contract Provisions – The Lawyer's View

- Guarantees and Turnkey Provisions
- Indemnity Provisions
- Limitations on Liability and Consequential Damages
- Scheduling and Delay/Disruption Damages
- Payment Provisions
- Changes to the Work
- Termination and Suspension
- Dispute Resolution

Guarantees and Turnkey Provisions

- Parent company guarantees
- Performance guarantees
- EPC turnkey language
- Owners seeking to aggressively pass through all risks to the contractor must consider the risk premium ramifications
- Design builders accepting broad risks must remember that not all risks are insurable
- A/E's accepting warranty liability or responsibility above and beyond their standard of care may be accepting uninsured risks

Indemnity Provisions

- Contractors/A/E/Design Builders acceptance of indemnity risks may or may not be insurable depending on the type of coverage and exclusions.
- Negotiation points include:
  - Who is to be indemnified?
  - Who is responsible for losses caused by related or non-parties to the indemnity agreement?
  - Are indemnified claims limited to bodily injury and property damage or do they include economic loss?
  - Indemnification for a party’s own negligence?

Indemnity Provisions *(continued)*

- Does the indemnified party retain choice of counsel, claims handling and settlement rights?
- Who pays the attorneys' fees and expert fees on an indemnified claim?
- Is indemnity language for environmental, intellectual property and other risks which often appears in separate provisions coordinated with language in the main indemnity provision?

Liability Limitations and Consequential Damages

- Will there be liability caps in the contract?
- Will the parties agree to disclaim all consequential damages?
  - Note – recovery of consequential damages generally not permitted under UAE law
- Parties negotiating retrofit, upgrade, divided, or adjacent property projects should consider what consequential damages may occur to the base or adjoining plant.
- What consequential damages risks are insurable under CGL, professional liability and builders risk policies?

Liability Limitations and Consequential Damages *(continued)*

- Negotiation points:
  - Where will the caps be set? Some percentage of the contract price?
  - Are the types of consequential damages to be excluded clearly defined?
  - When is a mutual consequential damage waiver ever favorable to an owner?
  - Limit consequential damages to the extent of insurance coverage?

Scheduling and Delay/Disruption Damages Provisions

- What particular schedules, milestones, and schedule update requirements are incorporated into the contract?
- What notice requirements and other conditions are placed on requests for extensions of time,
  - are they reasonable and are they consistent with notice requirements in the extra work or changes clauses?
- Awareness of ‘no damage for delay’ clauses.
- Effect of ‘concurrent delay’ clauses

Scheduling and Delay/Disruption Damages Provisions *(continued)*

- Negotiation points
  - Note that under UAE law a judge can vary the amount of recovery of consequential damages so as to make the compensation equal to the loss.
  - Does the consequential damages clause negate what was negotiated in the liquidated damages clause?
  - What critical path analysis, cause and effect logic, and documentation are required by contract to support delay/disruption claims?

Payment Provisions

- Timely payment provisions
- Rights on default of payment
  - Suspension of work
  - Termination of the contract
- Retainage provisions
- Letters of credit
- Currency and inflation risk

Payment Provisions *(continued)*

- Negotiation points:
  - Right to file ‘Mechanic’s’ or ‘Builder’s’ liens?
    - In UAE, see Article 1527 of the Civil Code for contractors and architects
    - No liens permitted on government contracts
  - Does local law allow liens to be removed through bonding and what security must be posted?
  - Does the contract require the contractor to work during disputes and thus finance the project?
  - Is any GMP pricing arrangement realistic and well-defined?

Changes

- The ‘no oral change order’ clause – enforceable?
- Need for contemporaneous documentation of oral requests for changes and their specific time and material impacts.
- Can cost overruns ever be insured risks under project policies, CGL policies or professional liability policies?

Changes *(continued)*

- Negotiation points:
  - Are the definitions, procedures, time deadlines and pricing requirements for changes clearly set forth?
  - What rights does the contractor have to request changes (e.g. to overcome construction difficulties)?
  - What rights does the contractor have to stop work or resolve disputes if a change request is denied?

Termination and Suspension

- Does the contract clearly state each party's right to terminate?
  - Under what conditions may the contractor terminate?
- Will termination for convenience by the owner be permitted?
- What about the owner's right to suspend the work?
  - Are the suspension rights separate but coordinated provisions?
- Contractors faced with owner termination for convenience rights must address specific compensation formulas.

Termination and Suspension *(continued)*

- Negotiation points:
  - What is the compensation for termination for convenience? Should it include any element of lost profit?
  - Are de-mobilization, re-mobilization, extended supervision, or overhead recoverable for suspensions?

Dispute Resolution Clauses

- Choosing the law applicable to the contract is critical.
- Choosing arbitration vs. litigation and the proper forum can have substantial practical effect.
- If arbitrating, good practice is to minimize the risk of inconsistent awards and judgments by coordinating downstream dispute resolution clauses.
- Do dispute resolution clauses impact insurance underwriting or premiums?

Dispute Resolution Clauses *(continued)*

- Negotiation points for arbitration clauses:
  - panel make-up and seat for the arbitration.
  - administering body, applicable rules and language of the proceedings.
  - expense sharing?
  - form of award if arbitration is chosen?
  - fees and costs awarded to the prevailing party?

Risk Identification and Allocation during the Procurement Process

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www.klgates.com

Qatar Foundation

Managing Risk in The Gulf
The QF Perspective

September 2012

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Qatar Foundation
www.qf.org.qa

لإطلاق قدرات الإنسان.
Unlocking human potential.

Agenda

- Background to QF
- Our Risk Journey
- Challenges
- Lessons Learned
- Looking Forward
- Risk Issues in the Gulf…our view

Background to QF

Qatar Foundation
for Education, Science and Community Development

An independent, chartered, nonprofit organization committed to the development of Qatar and its people.

Founded in 1995 by HH the Emir Sheikh Hamad bin Khalifa Al-Thani

Chairperson: HH Sheikha Mozah bint Nasser

Qatar Foundation

Qatar Foundation is guided by the principle that a nation’s true wealth is its people. Our goal is to develop that human potential by:

•bringing world-class education, work experience and career opportunities to Qatar’s young people;

•building Qatar's innovation and technology capacity by developing and commercializing solutions through key sciences.

•fostering a progressive society, enhancing cultural life and protecting Qatar’s heritage whilst addressing immediate social needs in the community.

All these things will help create a forward-looking knowledge economy for Qatar.

Alignment with Qatar National Vision 2030

Risk Management

QF's **Risk Management team** assists QF entities in establishing risk management capabilities.

Qatar Foundation

"…QF strives to perform to the highest standards of quality and to make a **significant contribution** aligned with the Qatar National Vision"… The first of seven enabling strategies is **"Efficient Governance",** of which Risk Management is a key component.

Qatar National Vision

"…Qatar's economic strategy must be **alert to a range of risks** that could potentially limit the achievement of its ambitions…"

"**Assessing** the **severity of risks** and dealing with anticipated changes will require mobilizing capacities and coordinating efforts to tackle problems that arise."

Our Risk Journey

Timeline

- Initial focus on development and refinement of Insurance Program.
- Introduced the concept of Risk Management.

- Prepared and issued a Risk Policy and a Risk Procedure, setting out the proposed Risk Governance and Framework to effectively implement Risk Management.
- Some loss of momentum, mainly attributable to resource stretch.

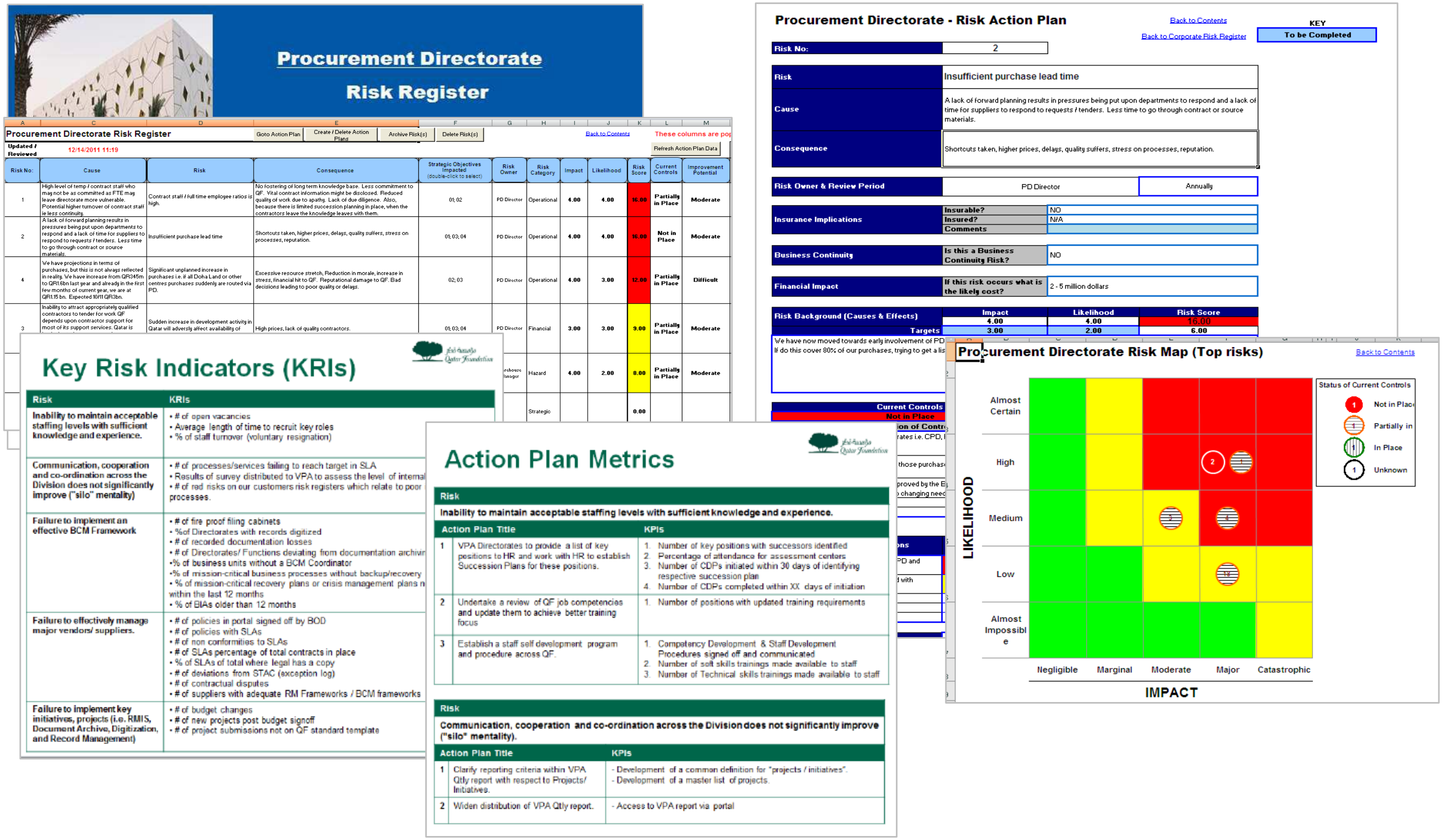
- Continued roll out of ERM across QF
- Knowledge Transfer through Risk Training.
- Risk Management Information System (RMIS) study.
- Developed VPA Forum and Risk Reporting.
- Qatar wide Risk Survey

2007/08 **2008/09** **2009/10** **2010/11** **2011/12** **201X**

- Undertook Strategic Risk Assessment exercise (Phase 1):
  - 110 questionnaires issued (74% response rate).
  - 42 interviews and 8 Workshops held.
  - 43 Entity specific Risk Registers distributed to each entity.
  - Introduced concept of risk maturity
- Enabled a basic level of risk management to be undertaken across QF.

- Continue working towards embedding Risk Policy and Procedure.
- Further Development of the Risk Framework.

Tools



Procurement Directorate
Risk Register
Procurement Directorate Risk Register
Procurement Directorate - Risk Action Plan
Back to Contents
Back to Corporate Risk Register
KEY
To be Completed
Risk No:
2
Risk
Insufficient purchase lead time
Cause
Consequence
Shortcuts taken, higher prices, delays, quality suffers, stress on processes, reputation.
Risk Owner & Review Period
PD Director
Annually
Insurance Implications
Business Continuity
Financial Impact
2 - 5 million dollars
Key Risk Indicators (KRIs)
Risk
KRIs
Inability to maintain acceptable staffing levels with sufficient knowledge and experience
• # of open vacancies
• Average length of time to recruit key roles
• % of staff turnover (voluntary resignation)
Communication, cooperation and co-ordination across the Division does not significantly improve ("silo" mentality)
Failure to implement an effective BCM Framework
Failure to effectively manage major vendors/ suppliers.
Failure to implement key initiatives, projects (i.e. RMIS, Document Archive, Digitization, and Record Management)
Action Plan Metrics
Risk
Inability to maintain acceptable staffing levels with sufficient knowledge and experience.
Action Plan Title
KPIs
Communication, cooperation and co-ordination across the Division does not significantly improve ("silo" mentality).
Procurement Directorate Risk Map (Top risks)
Status of Current Controls
Not in Place
Partially in
In Place
Unknown
Almost Certain
High
Medium
Low
Almost Impossible
LIKELIHOOD
Negligible
Marginal
Moderate
Major
Catastrophic
IMPACT

Risk Management Information System

- Allows us to manage 50+ customers more efficiently
- Effective resource use: central risk function manages **risk management** as opposed to one-to-one chasing
- Allows automated reporting to Senior Management
- Solves version control issues and reduce cycle time
- Moves forward in alignment with Finance Strategic Objectives and QF Maturity Model
- Helps embed Risk Management at Directorate level

Added Value

Risk Maturity

Level	Stage and description	QF status
5	**Optimised** Self-improving and governing backed by single IT platform and knowledge management system	
4	**Embedded** Integrated within organisational processes and strong visibility of risk data	Target
3	**Established** Considerable compliance and consistency with group standards, well staffed and qualified resource	
2	**Formalised** Some inconsistencies but basic compliance with a group standard	Current State
1	**Undeveloped** Basic non-compliance / audit failure with all entities administering their own arrangements	Start

Challenges

Key Challenges

Board Committee	• Establishing a "Risk Committee" or an "Audit and Risk Committee".
Reporting Line	• Aligning risk team reporting lines with leading practices.
Resource Challenge	• Manpower / Recruiting Challenges.
Buy-in	• Continued buy in – not once off. • Building this through awareness, initiatives and trainings
Momentum	• Have to keep it on the agenda (e.g. through regular updates, communications, publications, training sessions, etc.)

7 Deadly Sins

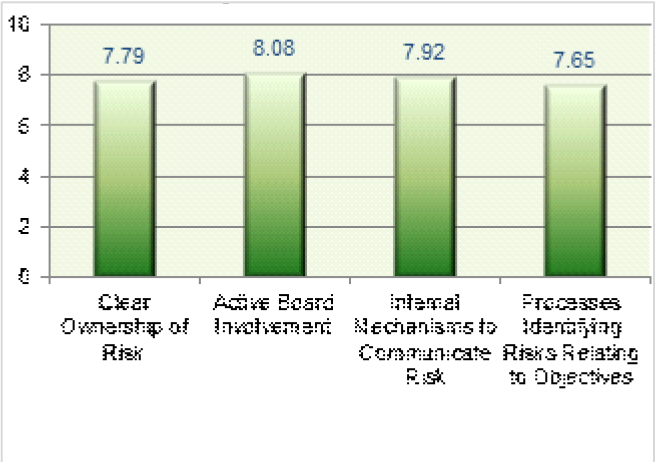
- Lack of Clear Vision
- Building Unnecessary Function or Process
- Overly Complex Risk Assessment
- Lack of Support from Leaders
- Risk Confusion
- Making ERM the endgame
- Bottom Up Approach

Lessons Learned

Lessons Learned

- Patience, be realistic, not going to happen overnight
- Get the scope right, start as small as is meaningful
- Keep it simple and be prepared for lots of handholding
- Risk registers need to be well understood. If not, it will be time wasted.
- Success is as much about soft skills, not just technical skills
- Get out there!

Relative Importance of Risk Success Factors



Source: Qatar Risk Management Survey (2011) Qatar Foundation and Ernest & Young

Looking Forward

Whats next?

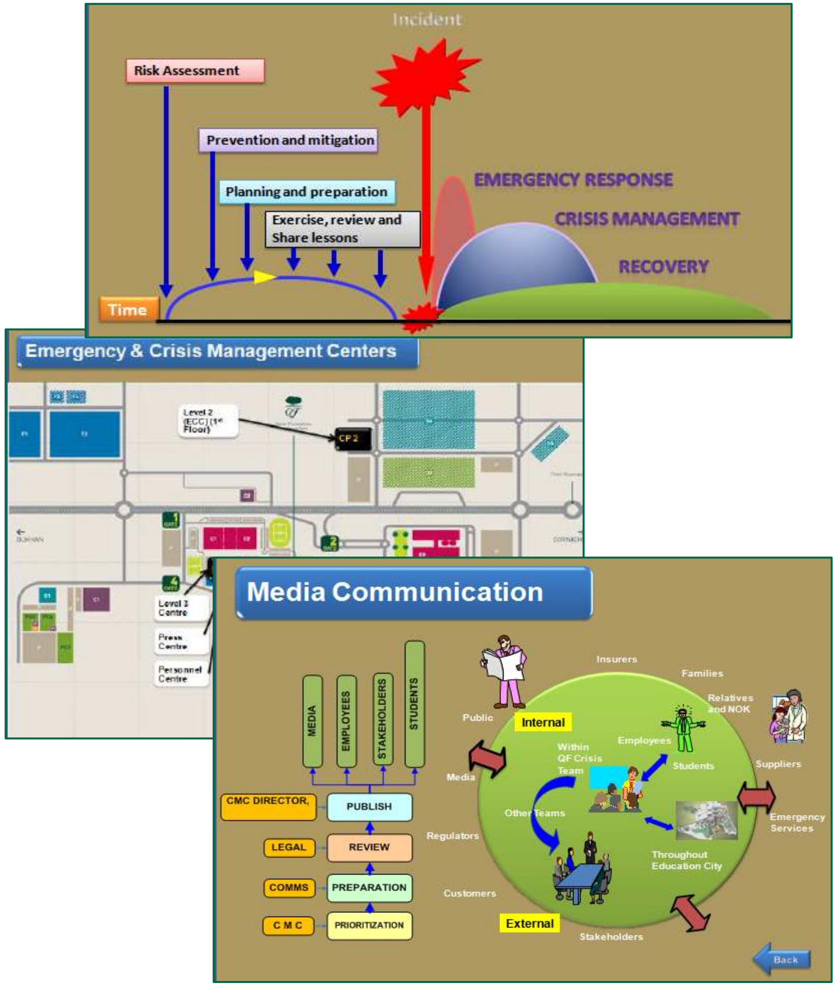
Key steps include:

- Continue to embed Risk Management across QF
- Keep driving **Risk Maturity** forward
- Invest in training and **Risk Team resource**
- Implement and customize the **Risk Management Information System** (RMIS)
- Progress Business Continuity Management (BCM) initiative
- Continue to raise level of **awareness and engagement** at Senior Management Level

Risk Issues in the Gulf…our view

Business Continuity Management (BCM)

- Initial Risk Assessment identified Business Continuity Management (BCM) as a gap.
- Project Team set up and Charter drafted. Ownership will lie with the VPA group.
- Current BCM initiatives include IT Disaster Recovery, Crisis Communication and Emergency Response Plans. However no overarching policy.
- This project will be a cross functional, multi year (2-3 year) project requiring dedicated resource.
- Met with other Qatari companies who are working on BCM and leveraging their experience.
- While certification is not the end game, we plan to align with BS25999.
- Recognition that outside assistance and additional budget will be required.



Workers Rights Initiatives

Significant attention from Human Rights and Labour Movements

News reports indicate that Qatar is working towards establishing an elected and independent worker's union

Lack of sufficient transparency with respect to worker's rights

Recent Exposes and Reports

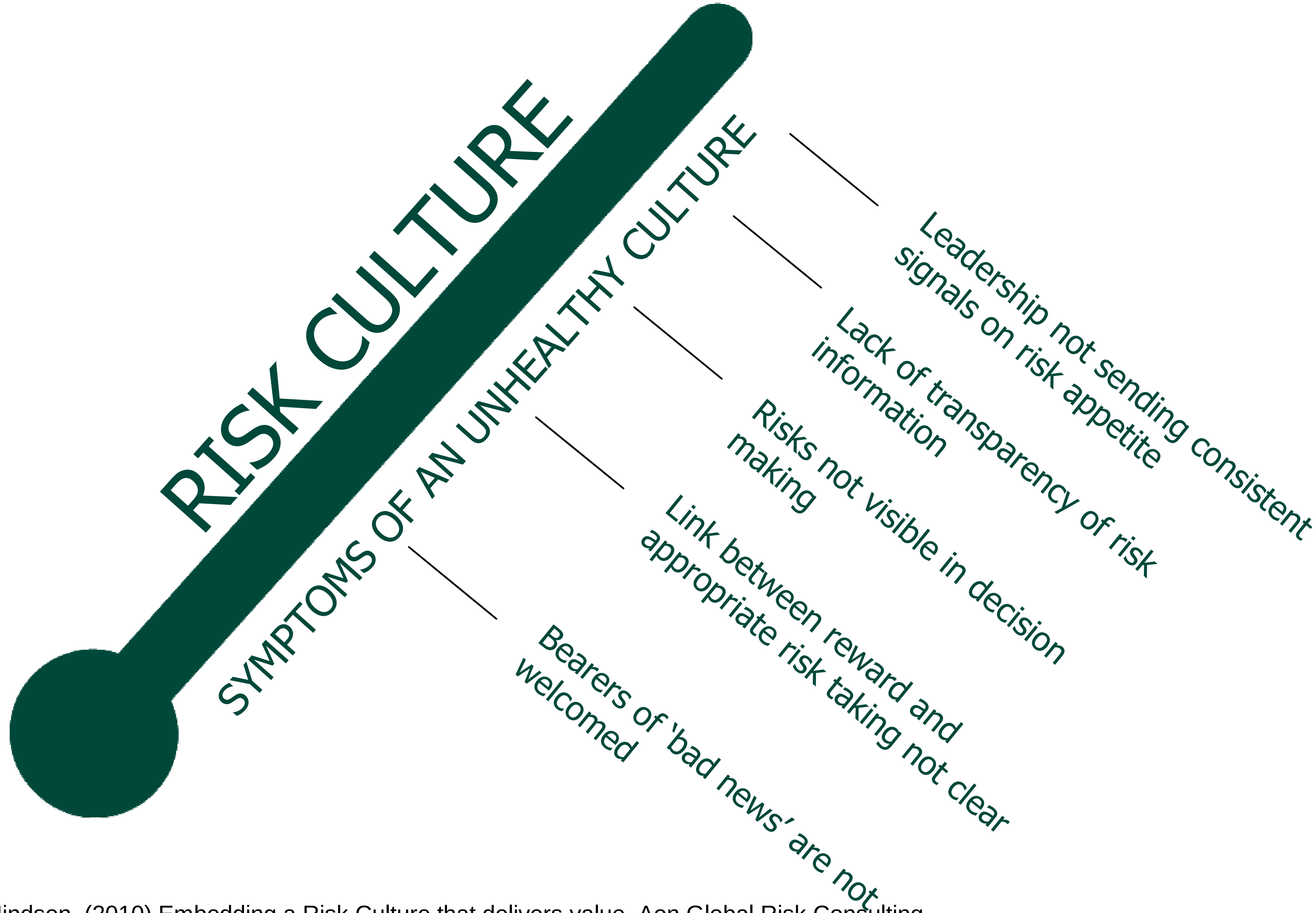
Sources: "The Future of Qatar's Labour", M. Sheshtawy (July 2012) Gulf News,; Building a Better World Cup, Protecting Migrant Workers in Qatar Ahead of FIFA 2022 (June 2012), Human Rights Watch

Education City Master Plan

Construction to Operations…building handover

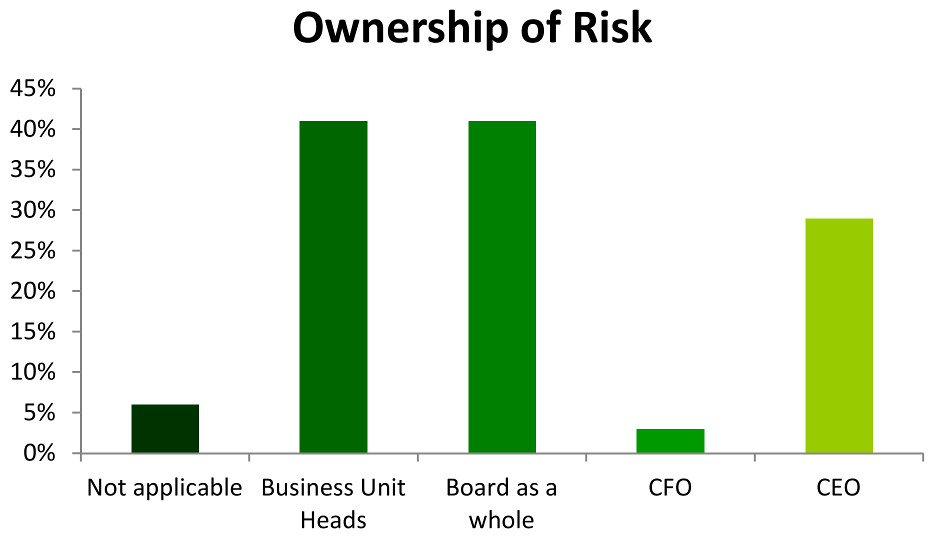
- Turnkey Basis
- Risk Profile
- Pressure
- Compliance with local regulation
- Implications – reputational, insurance..

Risk Culture



Source: A Hindson, (2010) Embedding a Risk Culture that delivers value, Aon Global Risk Consulting.

Governance



Source: Qatar Risk Management Survey (2011) Qatar Foundation and Ernest & Young

- Only **40%** of the respondents report to the Board, while approximately 30% report to the CEO and the remaining to Business Unit Heads / CFOs.
- This demonstrates the challenge that organization's face in:
  - achieving “face time” with the Board on risk management issues and
  - ensuring Risk Management remains a Board Agenda item.

Thank You

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Qatar Foundation
www.qf.org.qa

لإطلاق قدرات الإنسان.
Unlocking human potential.

Scott Saunders
Head of Risk & Compliance, Qatar Foundation

After reading law at Strathclyde University in Glasgow, Scott started his career with Price Waterhouse, qualifying as a Chartered Accountant in 1994. Scott has 15 years work experience in the Insurance and Financial Services sectors and has worked with American International Group, Scottish Power and with Resolution plc, as well as a number of smaller commercial start-ups. Joining Qatar Foundation in Doha 5 years ago, Scott has been responsible for developing and managing the growing Risk, Insurance and Compliance programs.

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HANDLING INSURANCE CLAIMS – WHAT YOU NEED TO KNOW ?

26th September 2012

Ian Peters

Marsh Risk Consulting Practice Leader – Middle East

MARSH

Agenda

- Policy requirements for submitting insurance claims
- Difficult claims area; how to manage your way through the process
- Recent trends and current hot topics in the claims field

Things go wrong

Buncefield Oil Depot, UK (Dec 2005)

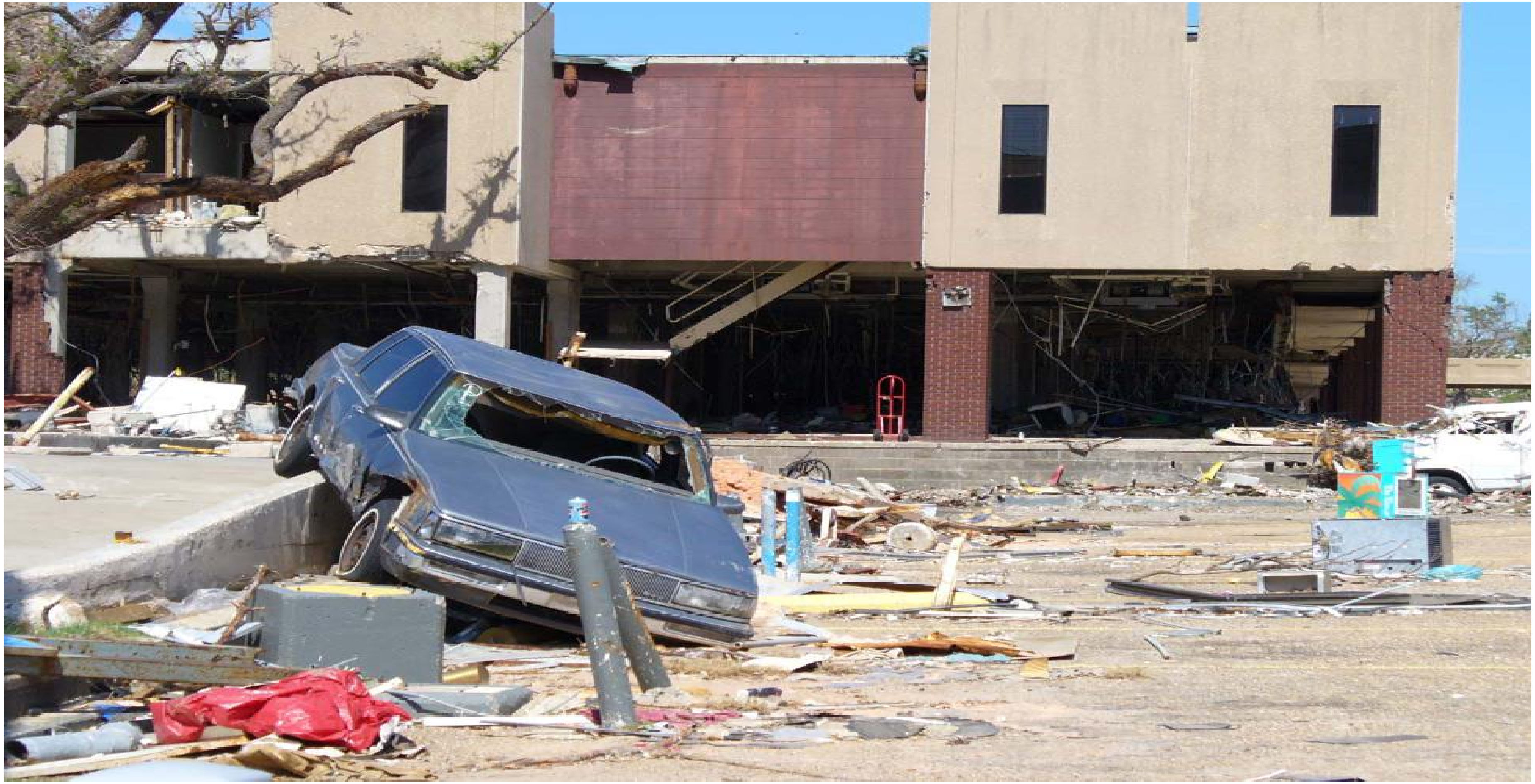
Things go wrong

Manufacturing unit , UAE (2012)

Things go wrong

Storage Warehouse , UAE (2008)

Weather events



Hurricane Katrina, US (Aug 2005)

Weather events in the Middle East?

Cyclone Gonu, Muscat (June 2007)

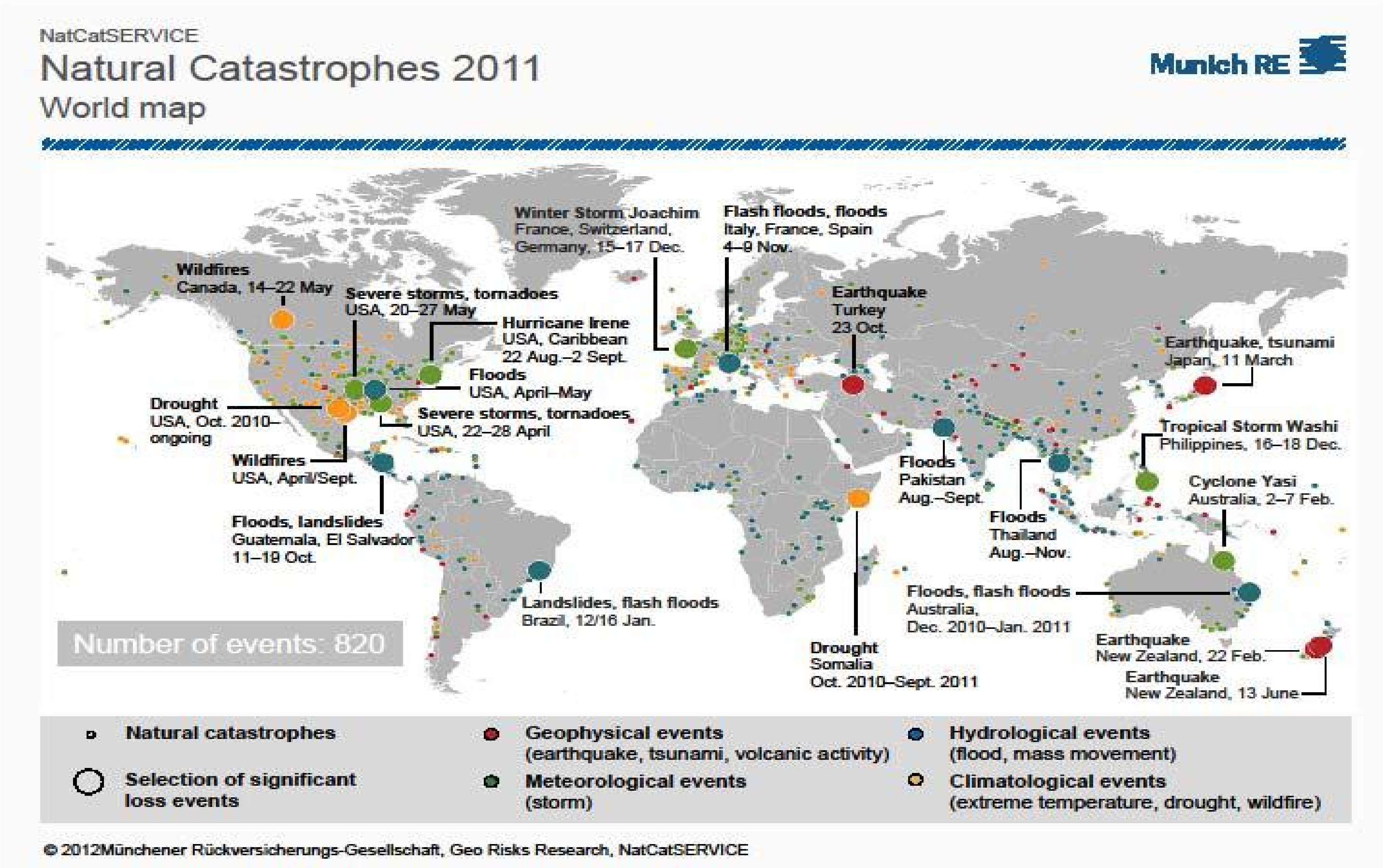
Weather events in the Middle East?

Cyclone Phet, Muscat (June 2010)

Weather events do affect our region

Jeddah, KSA (2011)

World Natural Catastrophe Losses in 2011



Munich Re NatCatSERVICE

Ranking by insured losses

Date	Country/Region	Event	Fatalities	Overall losses US$ m	Insured losses US$ m
11.3.2011	Japan	Earthquake, tsunami	15,840	210,000	35,000-40,000
22.2.2011	New Zealand	Earthquake	181	16,000	13,000
1.8-15.11.2011	Thailand	Floods, landslides	813	40,000	10,000
22-28.4.2011	USA	Severe storms/ tornadoes	350	15,000	7,300
22.8-2.9.2011	USA, Caribbean	Hurricane Irene	55	15,000	7,000

Ranking by number of fatalities

Date	Country/Region	Event	Fatalities
11.3.2011	Japan	Earthquake, tsunami	15,840
12/16.1.2011	Brazil	Landslides/flash floods	1,348
16-18.12.2011	Philippines	Tropical Storm Washi	1,257
1.8-15.11.2011	Thailand	Floods, landslides	813
23.10.2011	Turkey	Earthquake	604

Policy requirements for making insurance claims

Typical Claims Condition

“ In the event of the damage the insured shall:

- *Notify the insurer i**mmediately***
- *Notify the Police authority **immediately** it becomes evident that any damage has been caused by malicious persons*
- *Carry out and permit to be taken **any action** which may be reasonably practical to **prevent further damage***
- *Deliver to the insurer, at the **insured's expense***

*- Full information **in writing** of the property lost or damaged and the amount of damage*

*- Details of any **other insurances** on any property hereby insured*

within 30 days** after such damage or such further time as the **insurer may allow

*- **All such proofs** and information relating to the claim as may be reasonably required.*

*- If demanded a **statutory declaration of the truth** of the claim and any matters connected with it”*

Roles and duties of the parties involved in a claim

The insured:

- Notify the existence of loss as soon as possible
- Allow the loss adjusters cooperation in terms of
  - Identifying the cause
  - Determining the extent of damage
  - Measuring the cost of repair
- Can proceed with repairs but must be with adjusters knowledge and approval
- Deliver a proof of loss as soon as practicable
- to fully cooperate at the point of a claim and assist the insurer with their reasonable enquires
- Not abandon salvage
- to cooperate with insurers should there be an opportunity to ‘counter-claim’ (subrogation) against another party

Roles and Duties of the parties involved in a claim

The Loss Adjuster

- Agent of the insurer/reinsurer
- Their job is to:
  - Investigate the circumstances of the event to determine if the policy should pay or not and report the facts (cause, exclusions)
  - Confirm how much the policy should pay if cover attaches
  - Update insurer/reinsurer by regular reports
  - Act fairly – not biased towards insurers
  - Get agreement of the insured

The Insurer/Reinsurers

- Will leave day-to-day handling to loss adjuster
- Can get involved if adjuster unable to agree
- Ultimately they say what the policy will pay, not the adjuster

Difficult claims areas

Exclusions to an All Risks Policy

- **Onus of proof shift from Perils policy**
- **Design exclusions – know what you are buying!**
- **Wear and Tear, Gradual Deterioration –**
- **Need for serious technical analysis when big $’s are at stake (an RCA can take many months!)**

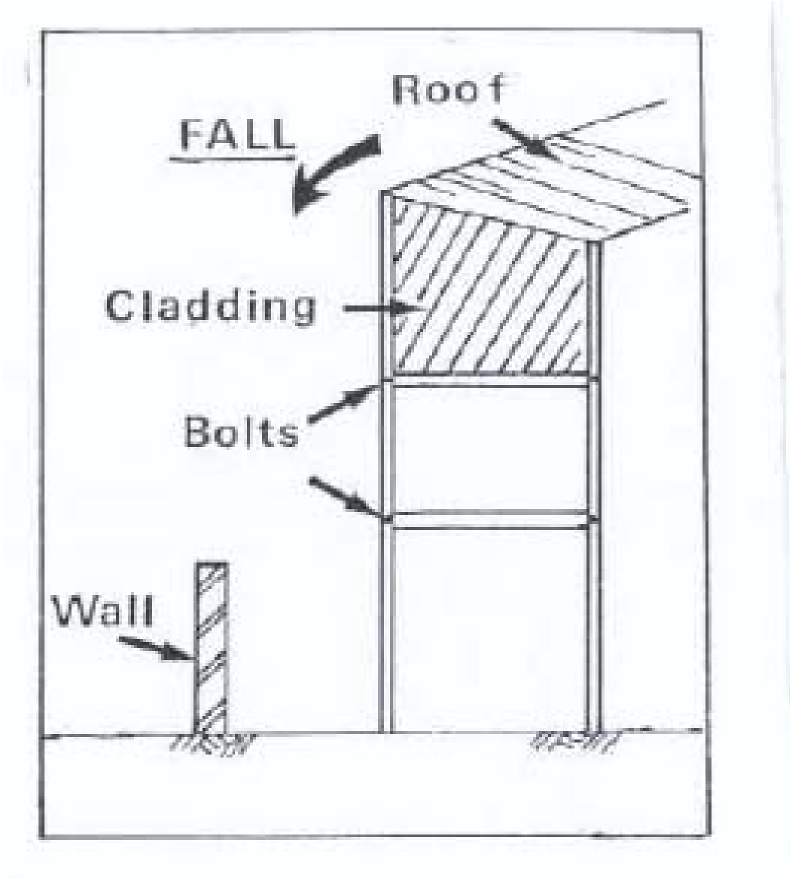
Conditions

- Strict compliance is a must, not optional
- ‘Fire Precautions on Construction Sites’ condition is a prime example

Overheads, Profit, Prolongation

- Often inconsistency, lack of clarity
- Best to make the sum insured crystal clear, transparent

Design defects and policy exclusions – an example



Design exclusions

DE 1 (LEG 1) – will not cover damage to the buildings or wall or anything damaged in consequence

DE 2 - excludes the cost of everything which rely for their support on the defective part (will only cover the wall)

DE 3 (LEG 2) – cover for the “remainder of the property insured” (will cover the walls, cladding and roof, but not the steel frame and bolts)

DE 4 – will cover everything except the defective bolts

DE 5 (LEG 3) – will cover making good all damage to “the works”, with exception of re-design costs

Difficult claims areas

Exclusions to an All Risks Policy

- Onus of proof shift from Perils policy
- Design exclusions – know what you are buying!
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Overheads, Profit, Prolongation

- Often inconsistency, lack of clarity
- Best to make the sum insured crystal clear, transparent

Difficult claims areas

Special conditions concerning fire-fighting facilities and fire safety on construction sites:

It is agreed and understood that …. the Insurers shall only indemnify the Insured for loss or damage directly or indirectly caused by or resulting from fire or explosion, provided always that:

- *With regard to the progress of work adequate fire-fighting equipment and sufficient extinguishing agents are available and operative at all times.*
- *Fully operative wet riser hydrants are installed up to one level below the highest current work level and are sealed by temporary end caps;*
- *The cabinets containing hose reels and portable fire extinguishers are inspected at regular intervals but at least twice a week;*
- *Fire compartments as required by local regulations are installed as soon as possible after the removal of formwork.*
- *Openings for lift shafts, service ducts and other voids are provisionally closed as soon as possible but not later than at the commencement of fit-out work;*
- *Waste material is removed regularly. All floors undergoing fit-out are cleared of combustible waste at the end of each working day;*
- *A "permit to work" system is implemented for all contractors engaged in "hot work" of any kind*

Difficult claims areas

Exclusions to an All Risks Policy

- Onus of proof shift from Perils policy
- Design exclusions – know what you are buying!
- Wear and Tear, Gradual Deterioration –
- Need for serious technical analysis when big $’s are at stake (an RCA can take many months!)

Conditions

- Strict compliance is a must, not optional
- ‘Fire Precautions on Construction Sites’ condition is a prime example

Overheads & Profit

- **Often inconsistency, lack of clarity as to what is reasonable, intended etc**
- **Best to make the sum insured crystal clear, transparent**

Difficult claims areas

Extensions to policy cover

- Removal of Debris limits often woefully inadequate
- Expediting expenses – significant assistance to an insured
- Increased costs for Completing Unbuilt Portions
- Public Authorities Clause

Delay in Start Up (DSU) or Advance Loss Of Profits

- Essentially Business Interruption where an operational start date is delayed by late delivery of the project
- Lenders requirement – power projects
- Expensive but can be a business saver!

Transfer from a Construction Phase/insurance to an Operational Phase/Insurance

- Need absolute clarity to avoid gaps
- This needs to be carefully implemented and signed off

How to manage your way through the claims process

Some top tips:

- Have a proper plan – programmes, timetables and milestones (set them, review them, update them)
- Engender trust – insurers will need to feel that there is transparency, no surprises
- Calculate an Order of Magnitude early on – manage expectations on all sides
- An effective, tested, business continuity plan makes a difference
- Good quality documentation is key – make the adjusters life easy
- Be proactive throughout – insurers rarely are….
- Request payments on account in advance – ease your cash flow
- Be prepared to compromise – all issues are rarely black and white

Recent trends and current hot topics

Drive on Insurers to deliver underwriting profits

- Continuing pressure to keep all claims costs down
- Higher scrutiny than ever, getting tougher
- Lawyers rather than claims professionals driving the claim bus

Pressure on loss adjusters

- Dwindling number of good, qualified adjusters
- Those that are good are often too busy

Contract certainty and contract clarity

- Policy’s are often a work in progress at inception
- Clear understanding on what’s being insured (e.g. Design defects example)

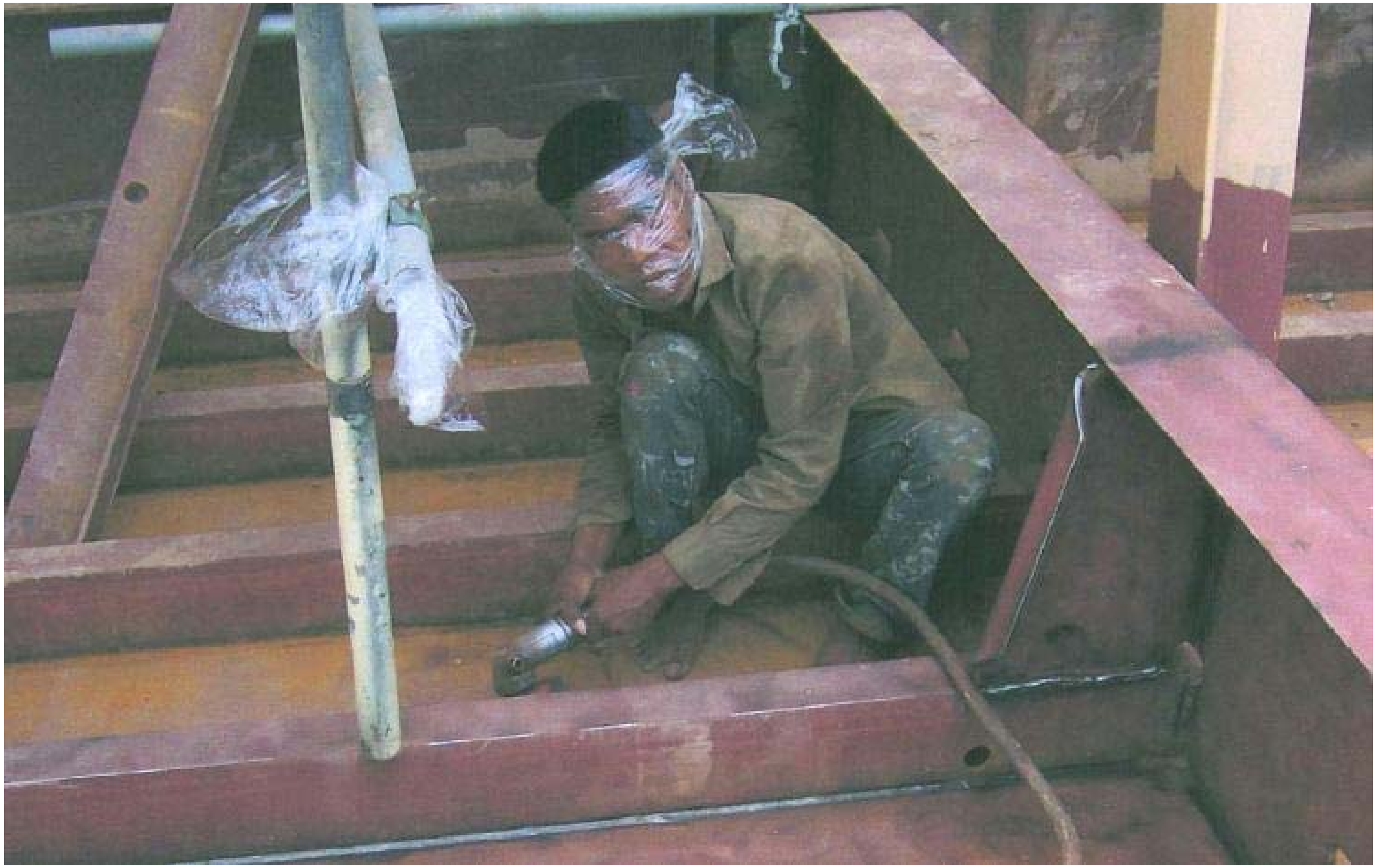
Re-insurers are increasingly at the table – often late in the day

- Challenges on coverage from behind the scenes
- Challenges on whether Cedents are following ‘their’ rules

Clients are increasingly focussed on risk – risk committees and head offices demand urgent action from local management

Last word on risk part I

Last word on risk part II



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Aligning enterprise risk with major projects
Dubai Conference

26 Sept 2012


Eddie McLaughlin
Managing Director, EMEIA
Marsh Risk Consulting

Outline

- The project risk management approach
  - Key elements
- Developing a risk maturity approach
  - International standards and best practice
- The people factor
  - Importance of risk perception and risk culture
  - MRC survey results on risk culture
- Summary and conclusions

Testing the keypads
Who will win the 2012/13 English Premier League?

Vote

1. Man Utd

2. Man City

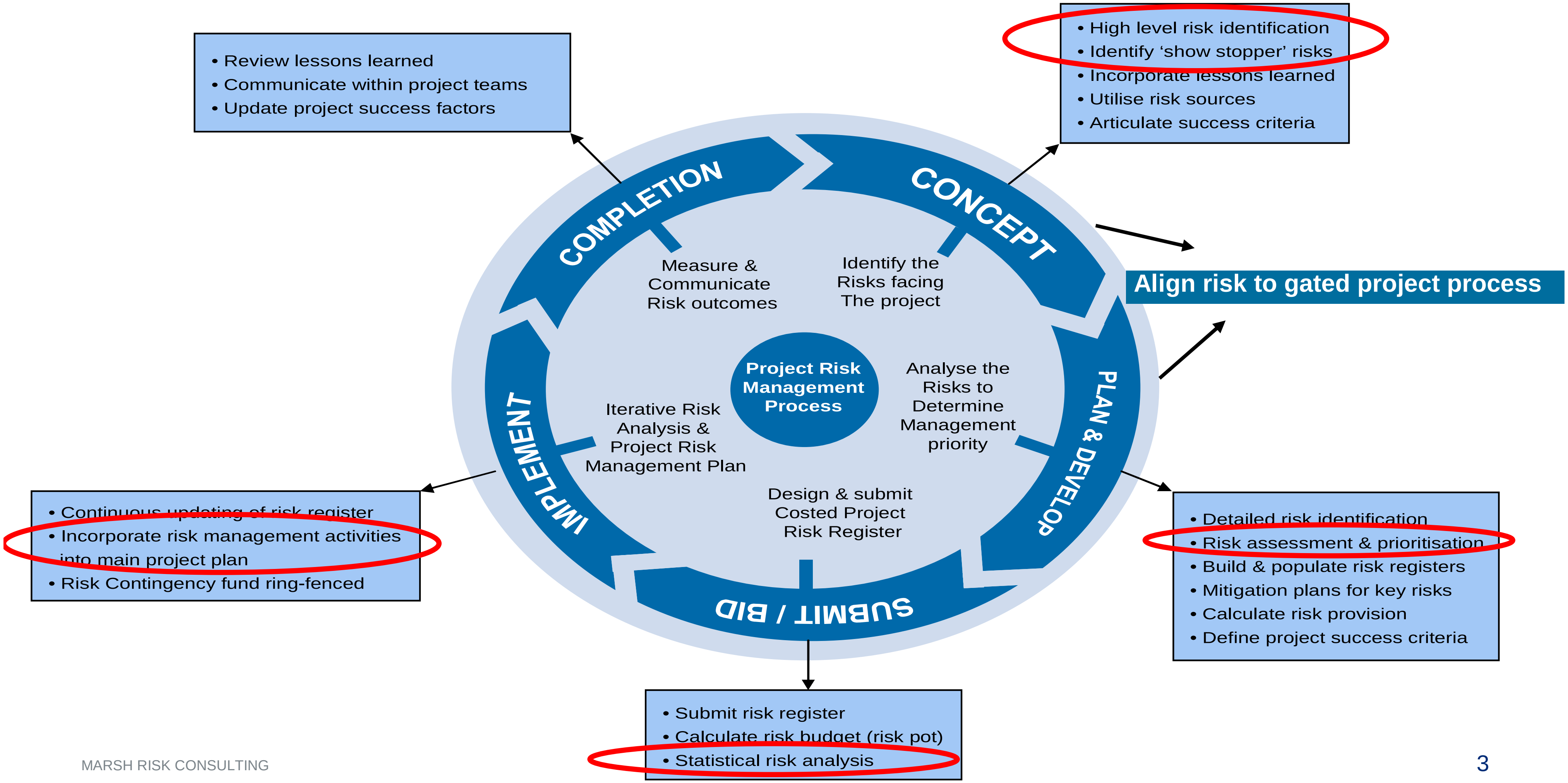
3. Arsenal

4. Chelsea

5. Don't care- Scottish, American, hate football etc!

Project Risk Management process

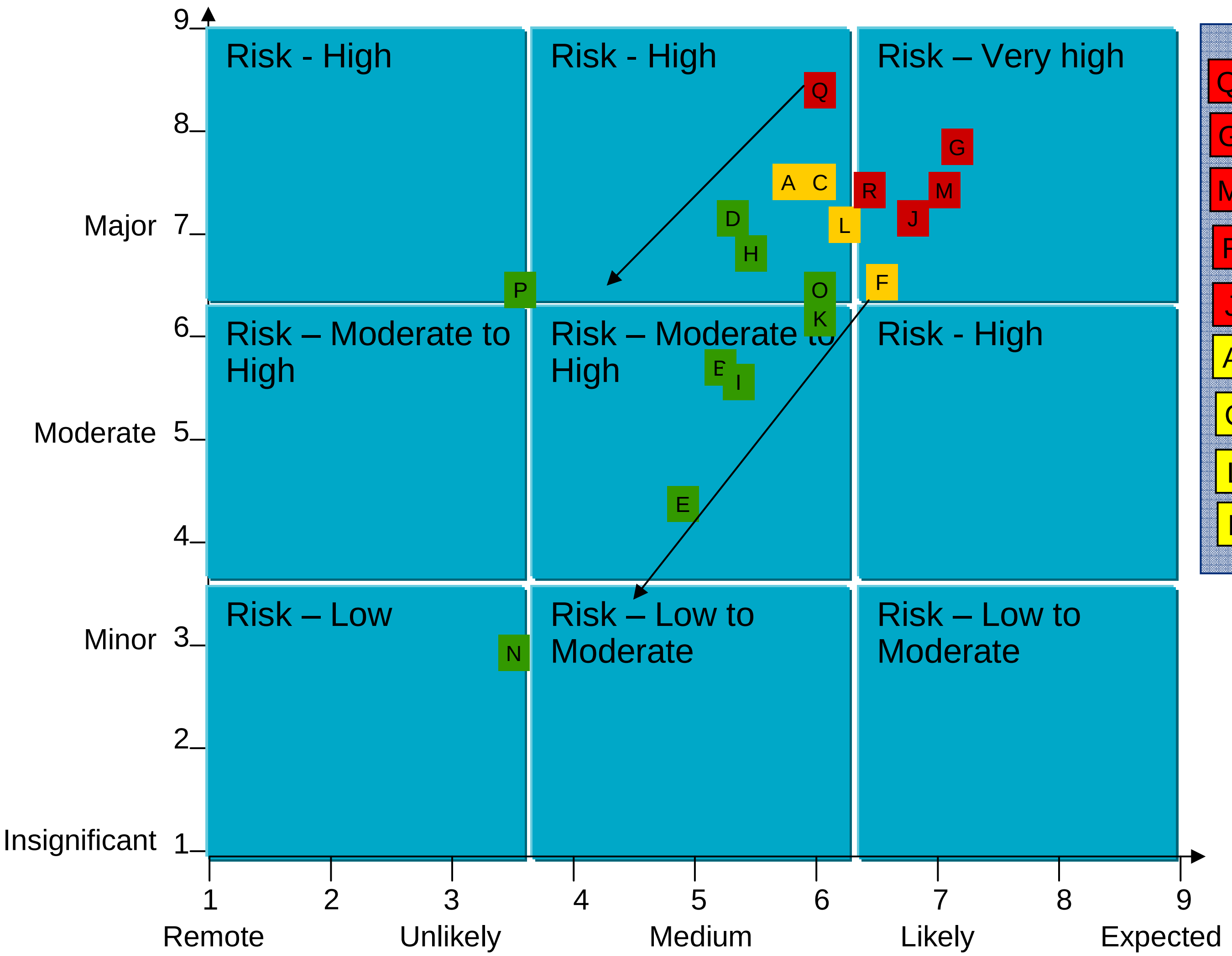
- Applies risk management techniques to a project lifecycle recognising accepted standards (such as APM PRAM, CMMI, ANSI, BS 6079 suite) in addition to wider business risk management standards (ISO 31K etc).



Key elements - Risk identification, assessment and analysis

Example output: Construction Project Risk Map

EXAMPLE



Q	Failure to obtain the correct licences
G	Delay of key equipment
M	Inflation
R	Increased costs due to increasing commodity prices
J	Increased costs due to increasing commodity prices
A	Failure to deliver project to time and budget
C	Shortage of key materials
L	Insufficient human resources to work on project
F	Failure to attract specialist sub-contractors

Key elements - Project Risk Assessment Methodology
Alignment of project risk appetite to cost of capital

Risk Appetite Scale	1 Averse	2 Avoid	3 Minimise	4 Accept	5 Seek
	Risk avoidance is key to determining courses of action. For practical purposes there must be no risk or uncertainty. Probability of success 100%	Prefer proven courses of action and predictable outcomes. Loss residual risk is more important than potential for upside Probability of success 90%	Prefer courses of action with broadly predictable outcomes. Trade upside potential for lower residual risk Probability of success 80%	Prefer courses of action with attractive potential upside, even assuming a material residual risk Probability of success 65%	Prefer courses of action which will maximise potential upside, even if residual risk may approach the extremes of tolerance Probability of success 50%
Complexity	- A highly common project scope - Well known and pervasive contracting partner pool - Operations in very low risk countries - <10% probability of failure	- A project type / technology that has been trialled already in Sovcomflot - Limited governance challenges and discrete contracting partner pool - Operations in low risk countries - 10% - 25% probability of failure	- A project type / technology new to Sovcomflot but employed by peers - Minor governance challenges including JV partners and multiple contracting partners - Operations in moderate risk countries - 25% - 50% probability of failure	- A new project type / technology that builds on existing technologies - Probable governance challenges including management of JV and contracting partners - Operations in high risk countries - 50% - 75% probability of failure	- A game changing project / technology - Significant governance challenges including multiple JV and contracting partners - Operations in very high risk countries - > 75% probability of failure
Implementation Blockers	- No resistance to implementation - Very minor risk of regulatory challenge - Significant internal expertise on the technology - Excellent long term relationship with partners	- Minor resistance to implementation externally - Minor risk of regulatory challenge - Internal expertise on the technology - Good relationship with partners	- Moderate resistance to implementation externally - Risk of regulatory challenge - Limited internal expertise on the technology - Reasonable relationship with partners	- Significant resistance to implementation externally - Risk of serious regulatory challenge - Limited internal or external expertise on the technology	- Significant resistance to implementation both internally and externally - High risk of serious regulatory challenge - Limited internal or external expertise on the technology
Magnitude	- Total Project Investment <5% of annual Pre-tax earnings - Phase 1 ULE around average	- Total Project Investment 5% - 10% of annual Pre-tax earnings - Phase 1 ULE < 10% above average	- Total Project Investment 10% - 20% of annual Pre-tax earnings - Phase 1 ULE 10% - 30% above average	- Total Project Investment 20% - 25% of annual Pre-tax earnings - Phase 1 ULE 30% - 50% above average	- Total Project Investment greater than 25% of annual Pre-tax earnings - Phase 1 ULE 50%+ above average

Complexity 3

Implementation Blockers 5

Magnitude 4

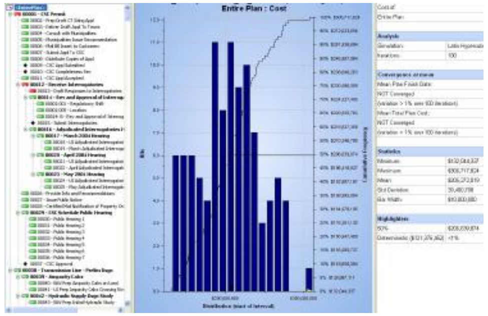
Qualitative Risk Score = 3 + 5 + 4 = 12 (IRR adjustment – project risk premium)

Qualitative Risk Score	Risk Banding	Qualitative Risk Premium
3 - 6	Low	0.50%
7 - 11	Medium	1.00%
12 - 15	High	1.50%

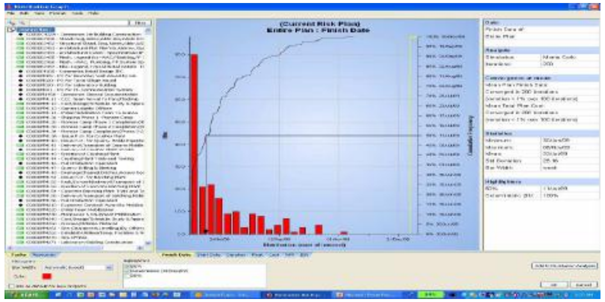
ILTING

Key elements - Project Risk Assessment Methodology
Risk quantification

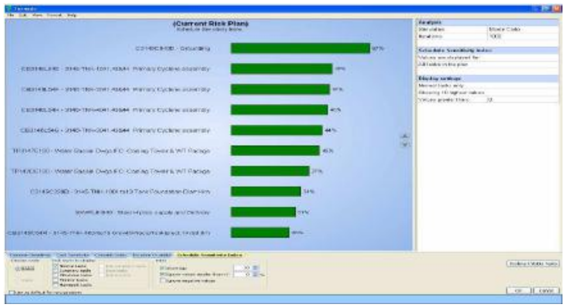
- Risk loaded project cost analysis



- Project completion forecasts by duration (risk loaded)

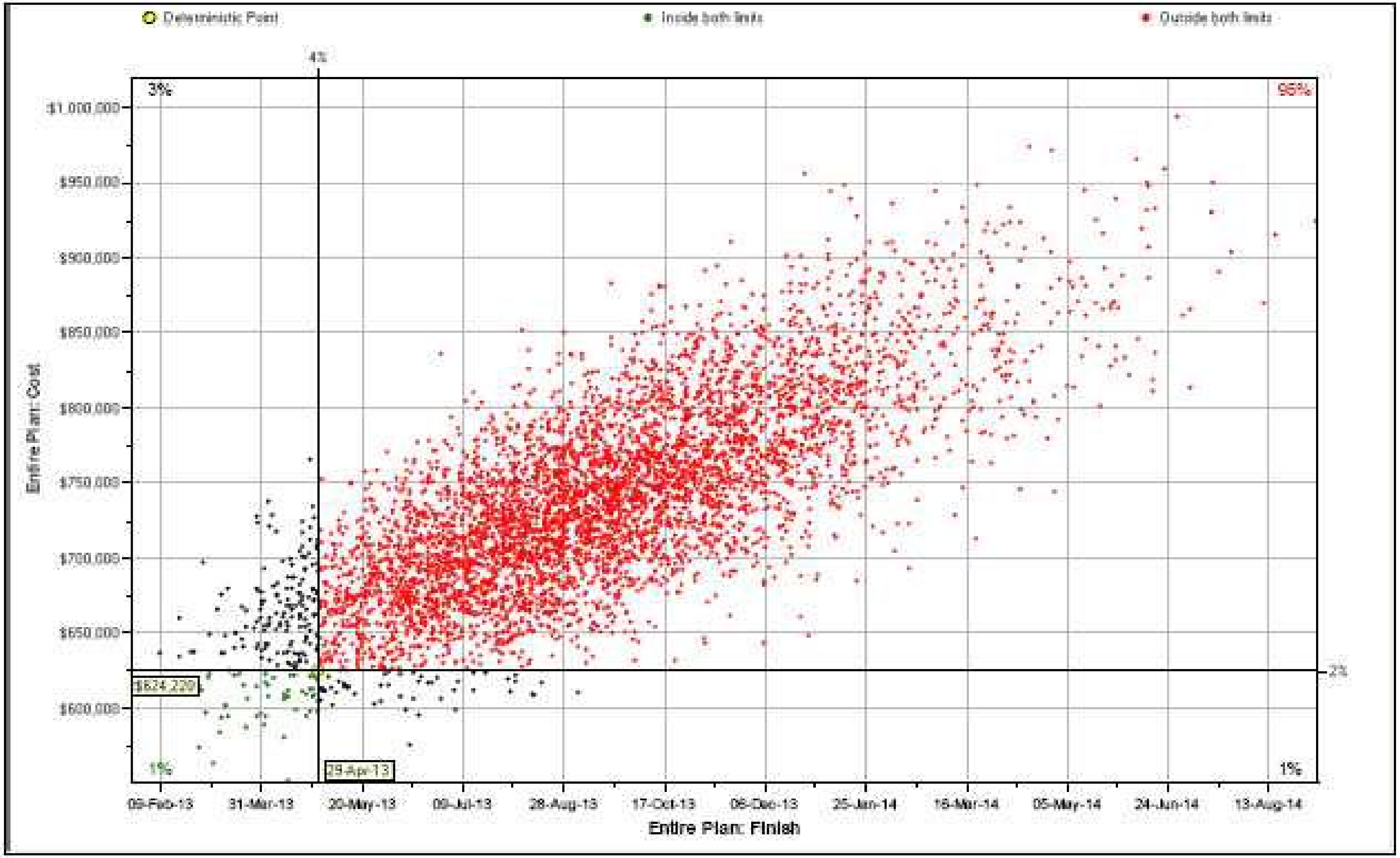


- Schedule sensitivity identifying and ranking the tasks most likely to influence the project duration/finish

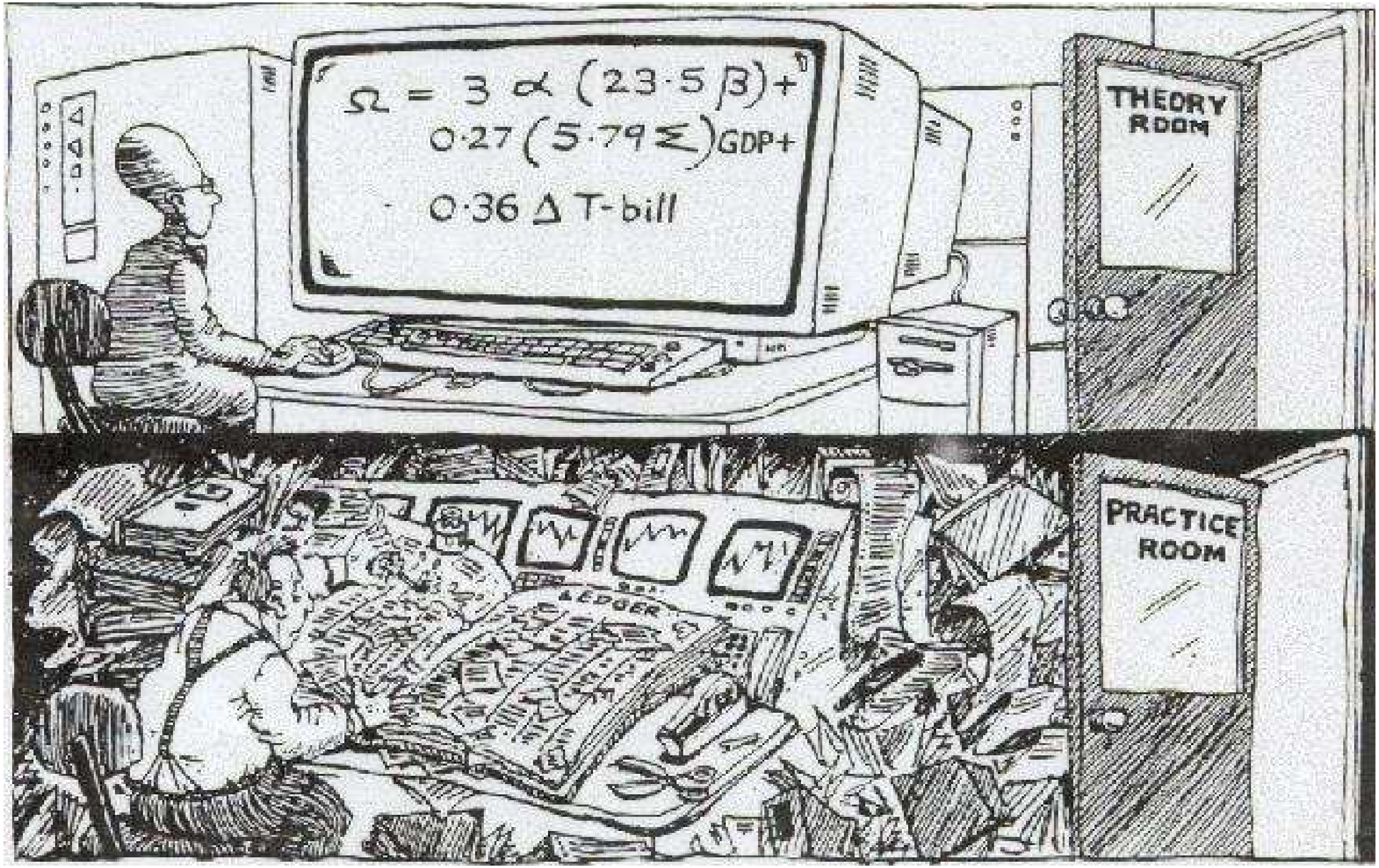


Key elements - Project Risk Assessment Methodology
Risk quantification - alignment of risk to overall project goals

Time-Cost scatter diagram



Not always easy in practice!



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Developing a risk maturity approach

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Does your organisation use a risk maturity approach?

Vote

1. Yes

2. No

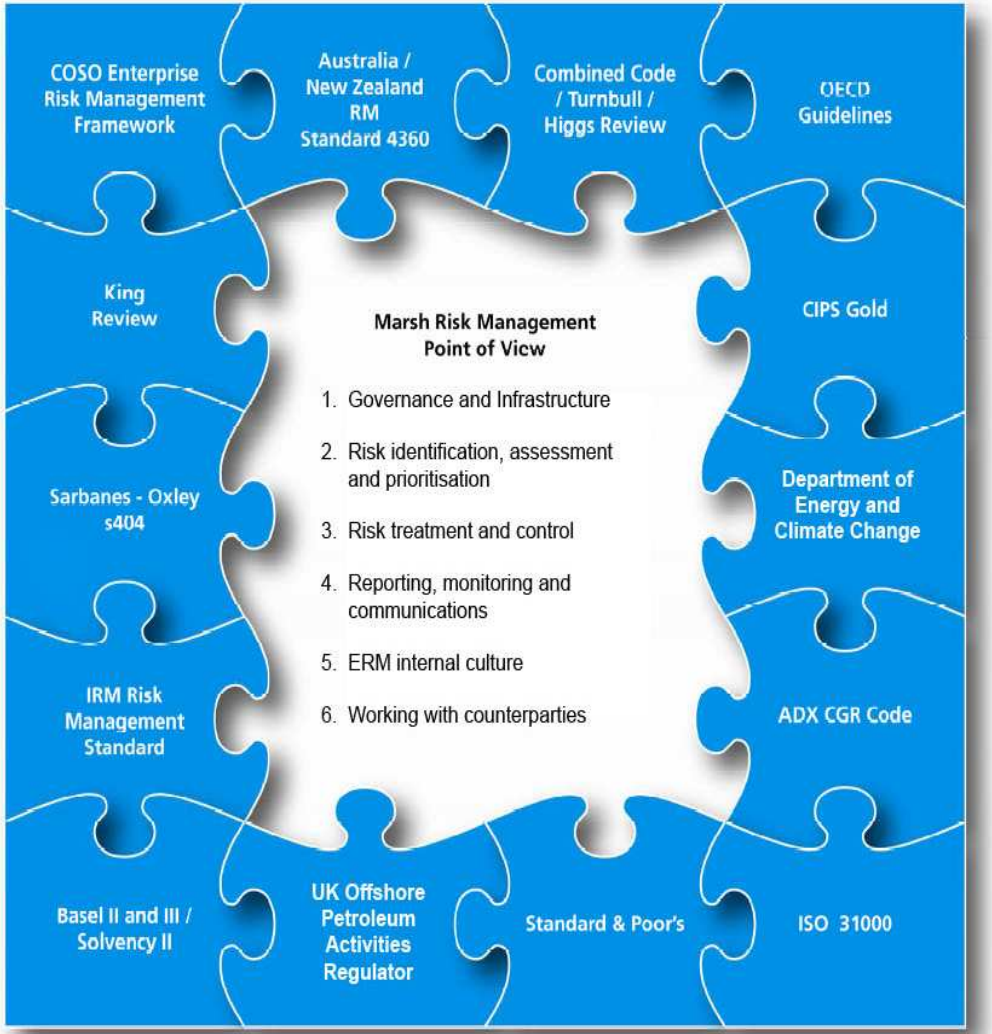
3. Don't know - what is risk maturity?

Enterprise Risk Management
Risk Blueprint

1. Board sponsorship
   Resourcing and accountability for risk management
   Risk management embedded in core decision making
   Continuous improvement
   Documented ERM framework
   Alignment to other assurance activities
   Consolidated view of risk

2. Identification at operational and strategic levels
   Consistency in approach
   Management of interdependencies
   Risk identification and assessment is a continuous process
   Emerging risks are identified
   Qualitative and quantitative techniques
   Risk is both positive and negative

3. Group wide, consistent risk treatment
   SMART action plans
   Interdependencies accounted for to exploit efficiencies
   Cost-benefit analysis applied
   Net risk and target risk categorisations
   Financial provisioning for contingencies

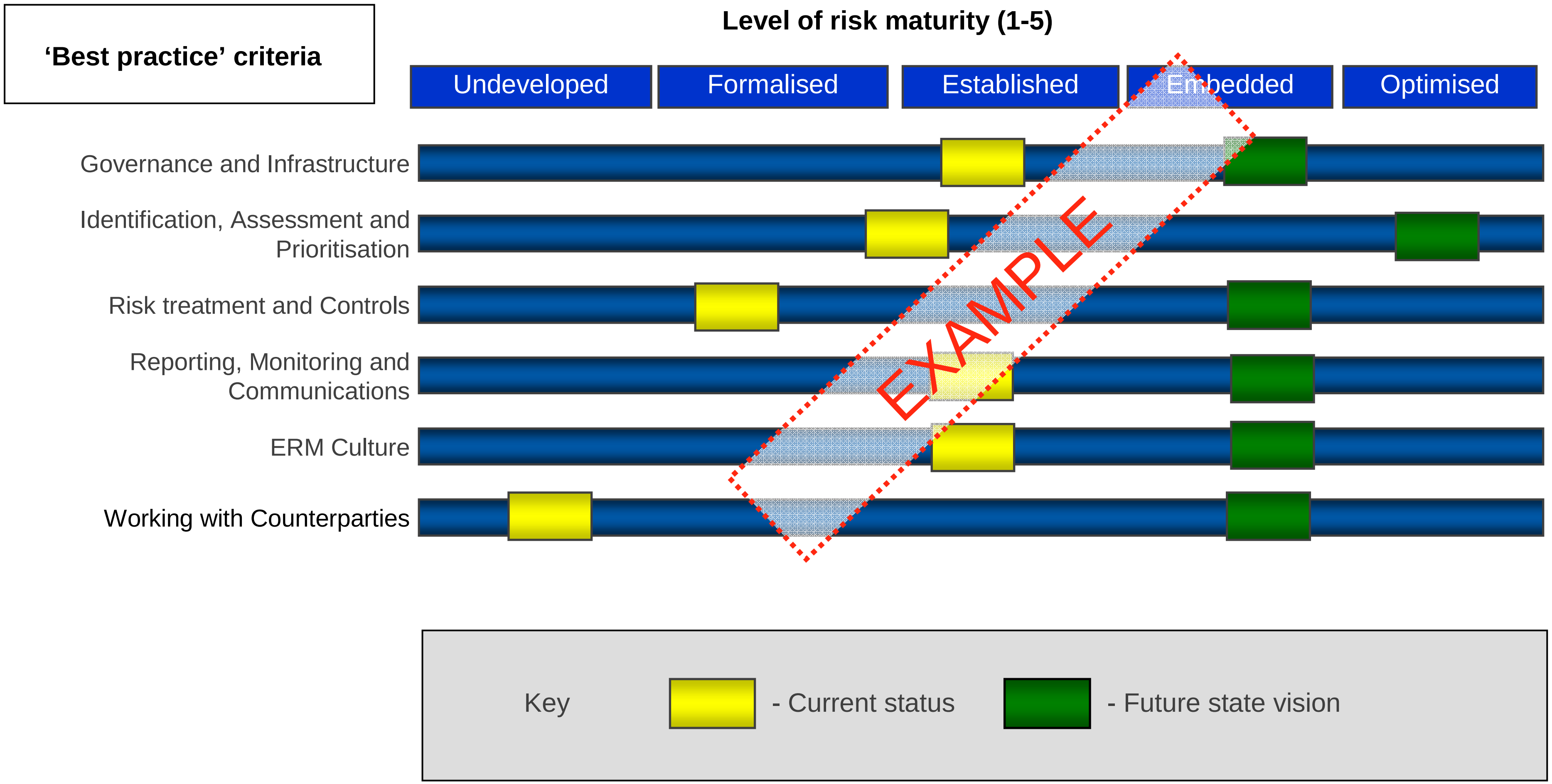


4. Regular reporting on risks, controls and mitigation
   Cross business information flow
   An "early warning" system for emerging risks
   Learning from Incidents (LFI) culture
   User friendly and relevant reporting to support decision making
   Alignment of ERM and Internal Audit

5. Incentivisation at a busines and personal level
   ERM training
   An effective internal and external network to exchange risk management best practice

6. A strong due diligence process to manage risk in joint working
   Reliable and regular information available to monitor risk of partner organisations
   Consistent management of partner relationships
   Management of the aggregate partner portolfio risk
   Joined up treatment plans

Best practice standards relative to risk maturity



What is your organisations existing risk maturity level?

Vote

1. L1 – undeveloped

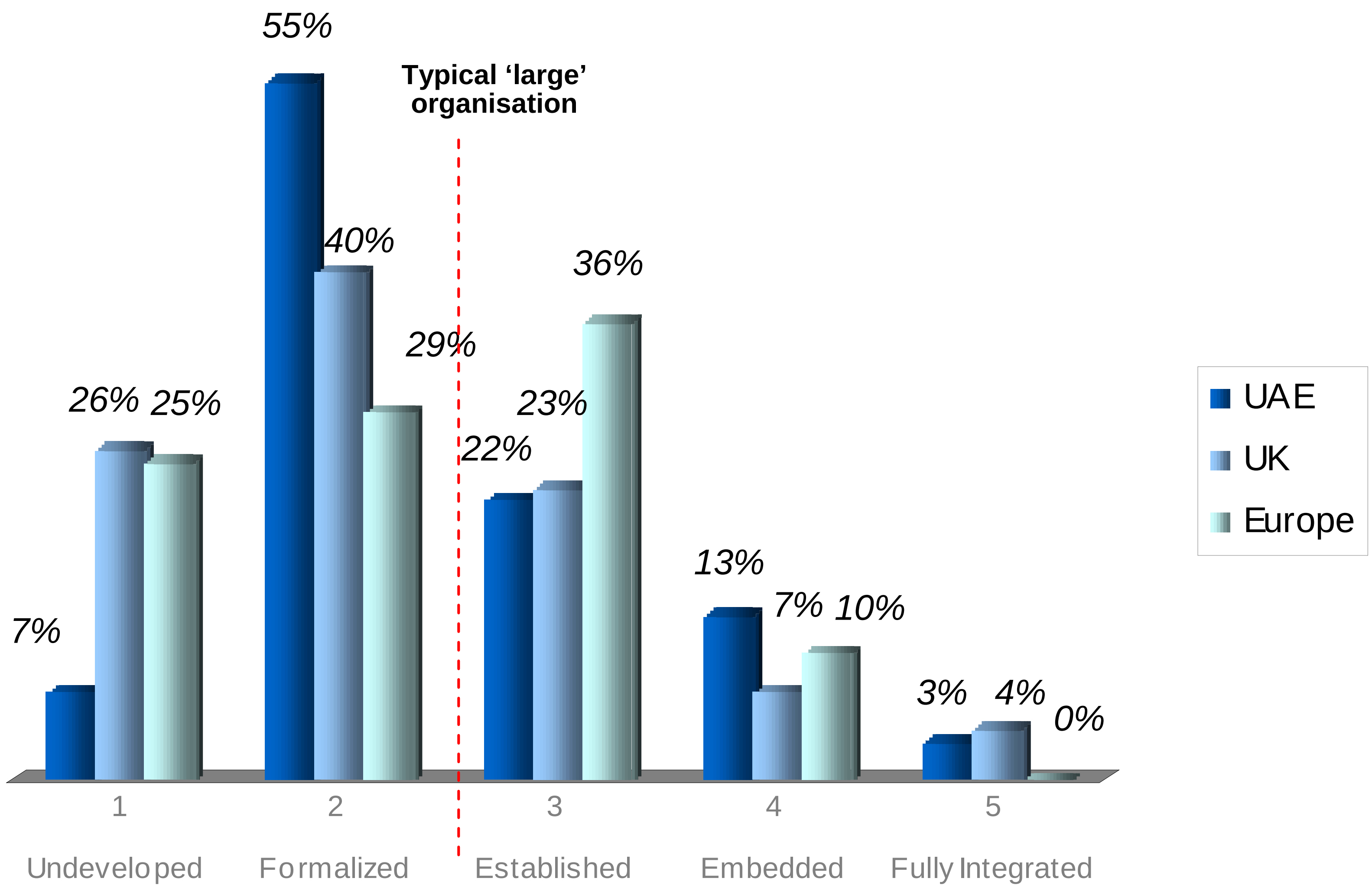
2. L2 – formalised

3. L3 – established

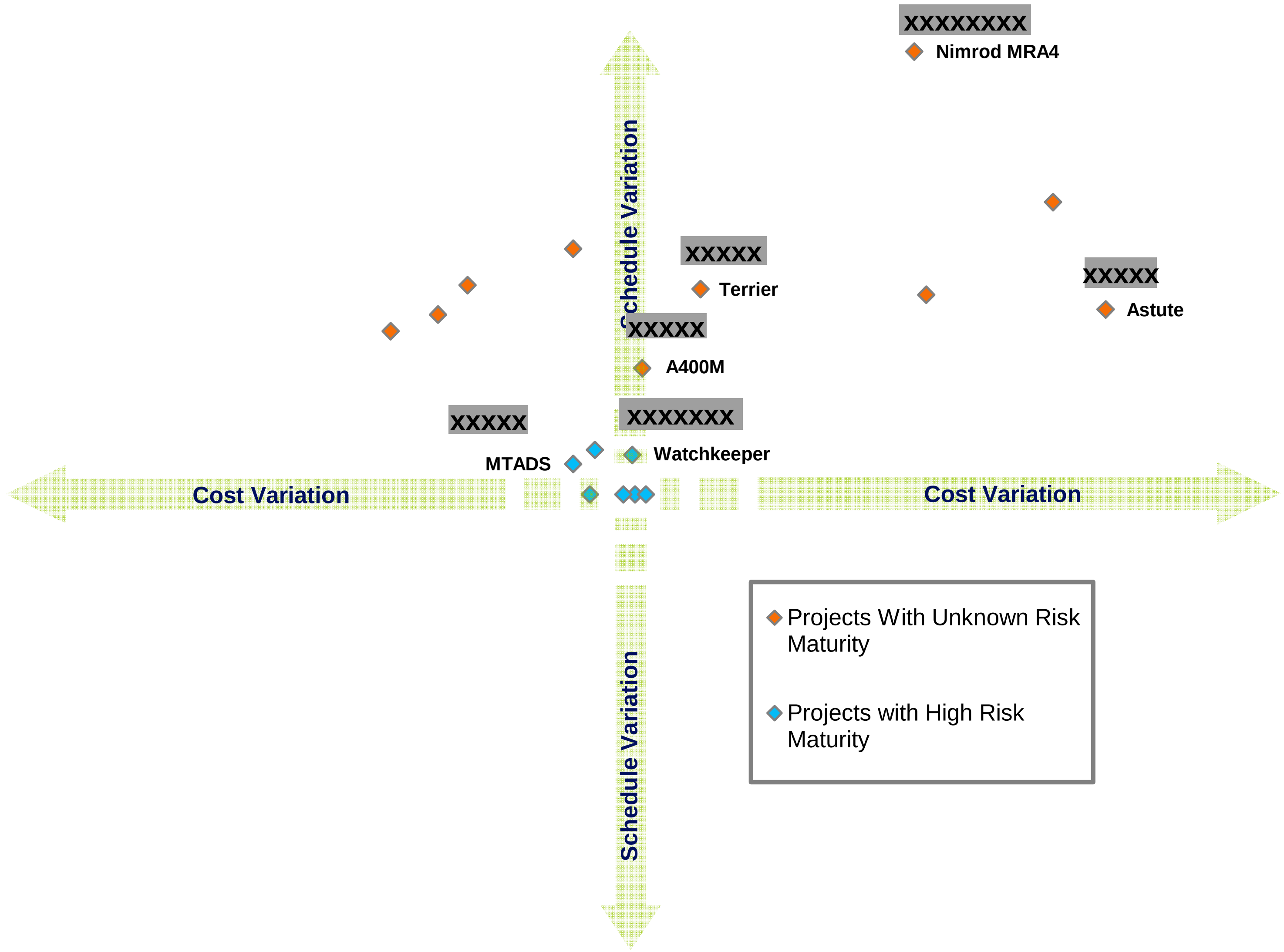
4. L4 – embedded

5. L5 - optimised

Level of Risk Maturity based on Marsh Risk Consulting model (Level 1 – 5)



The importance of risk maturity
Example – UK major defence projects



Warren Buffett major project rules – risk alignment

- **Rule #1: Preserve your capital**
- **Rule #2: See Rule #1**

Stakeholders will reward organisations who do not squander capital on poorly managed risks

RISK. DISPUTES. STRATEGY.

The people factor – risk culture

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Strong Culture/Weak Culture - characteristics

Our culture is strong because:

Staff respond to stimulus because of their alignment to organisational values. Our culture helps us operate like a well-oiled machine, cruising along with outstanding execution and perhaps minor tweaking of existing procedures here and there.

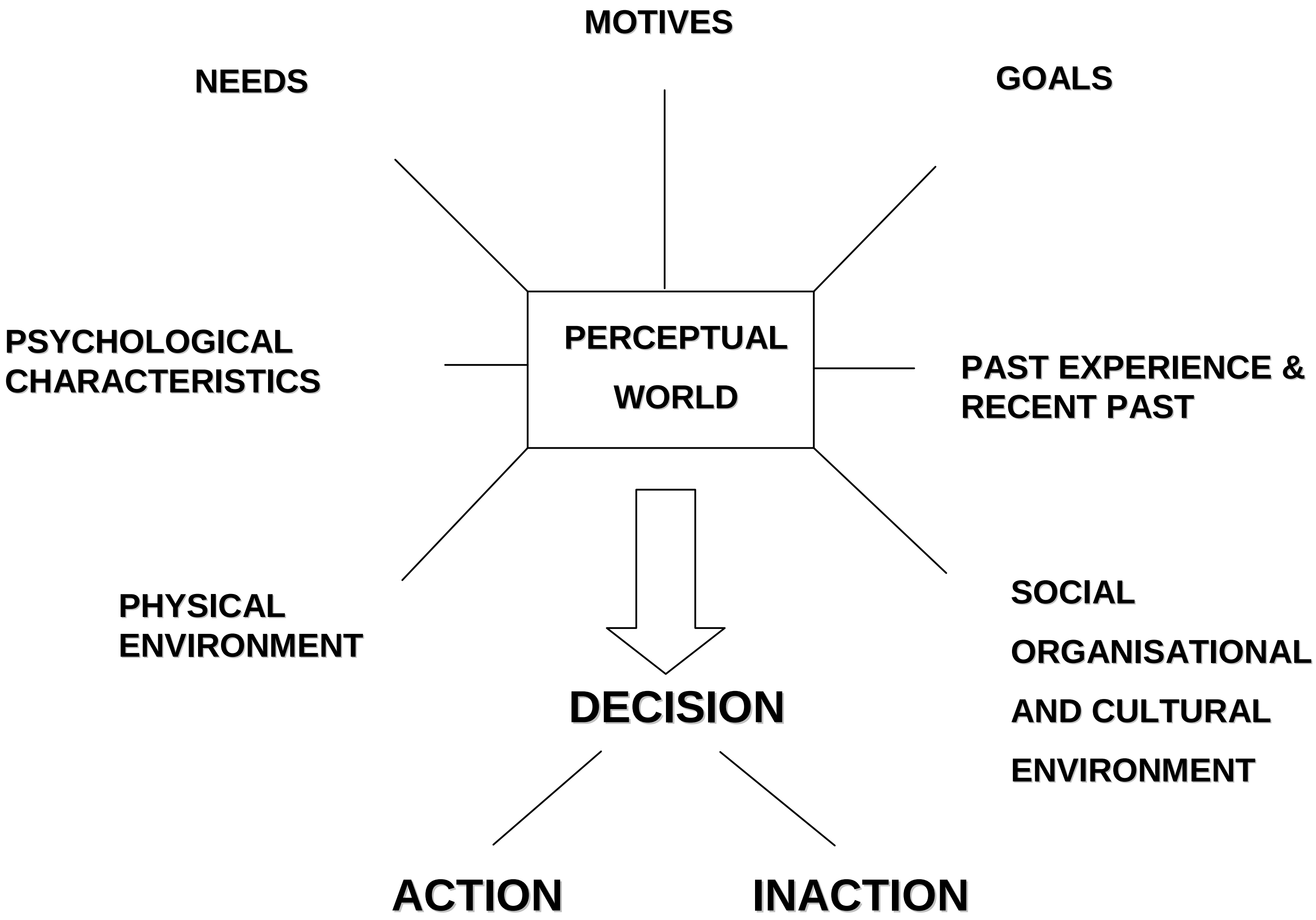
Our culture is weak because:

There is little alignment with organizational values and control must be exercised through extensive procedures and bureaucracy.

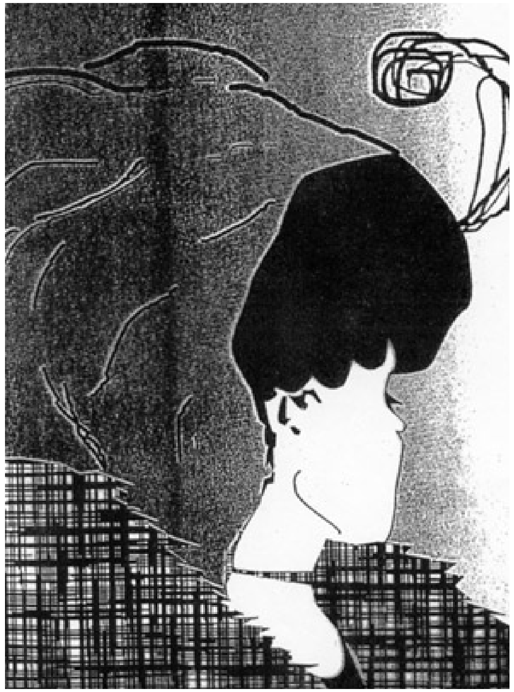
Risk Culture – The system of organisational values, goals, beliefs and behaviours that govern risk decisions.

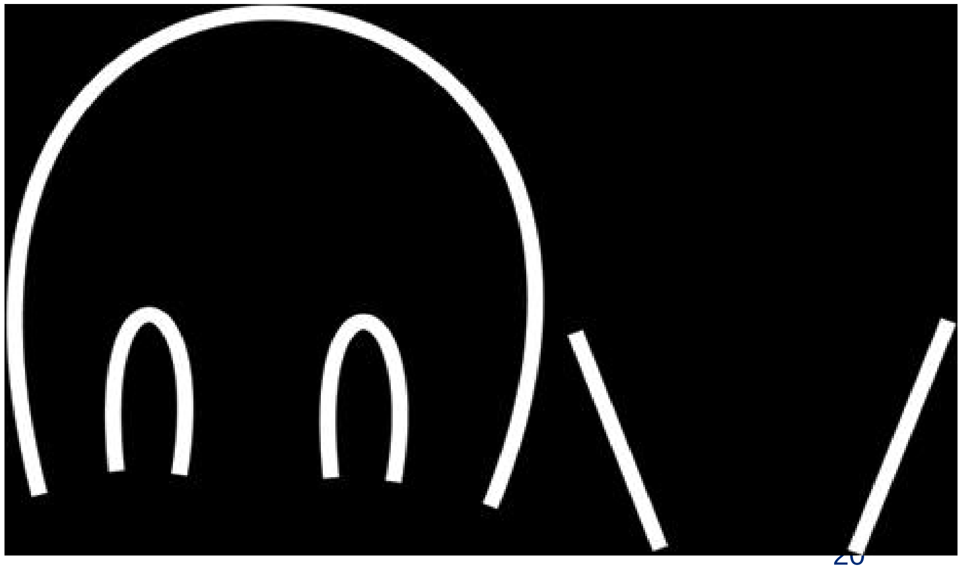
Your organisations culture type? e.g. Networked, Communal, Mercenary, Fragmented etc. (Double 'S' - Goffee & Jones)

What influences individual's perception and hence the organisational culture?



Risk perception examples – influences





How is RM Perceived in your Organisation?

Vote

1. Adds real value / supports decisions

2. Some value

3. Compliance driven process

4. Too bureaucratic - limited value

How is RM Perceived in your Organisation?

- Adds real value, supports decision making and is embedded across the organisation – **20%**
- Adds some value, providing structure and responsibilities for the management of risk – **40%**
- Considered to be compliance driven process / tool to communicate we manage risk responsibly – **31%**
- Considered bureaucratic, adding limited value – **9%**

Base – 280, UK IRM Conference 2012

To what extent is a risk culture embedded in your organisation?

Vote

1. Completely embedded

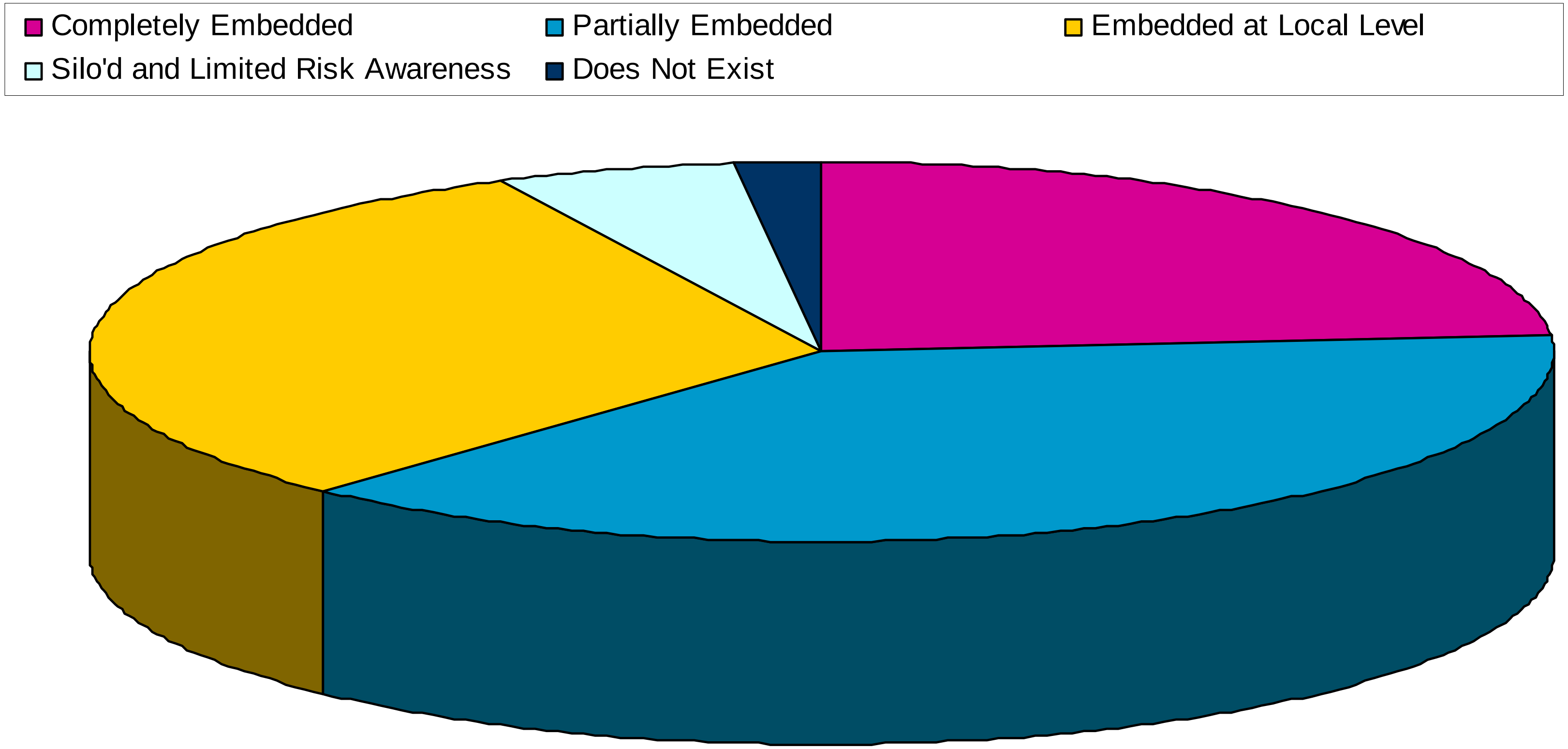
2. Partially embedded

3. Embedded at local level

4. Risk is siloed

5. Not embedded / does not exist

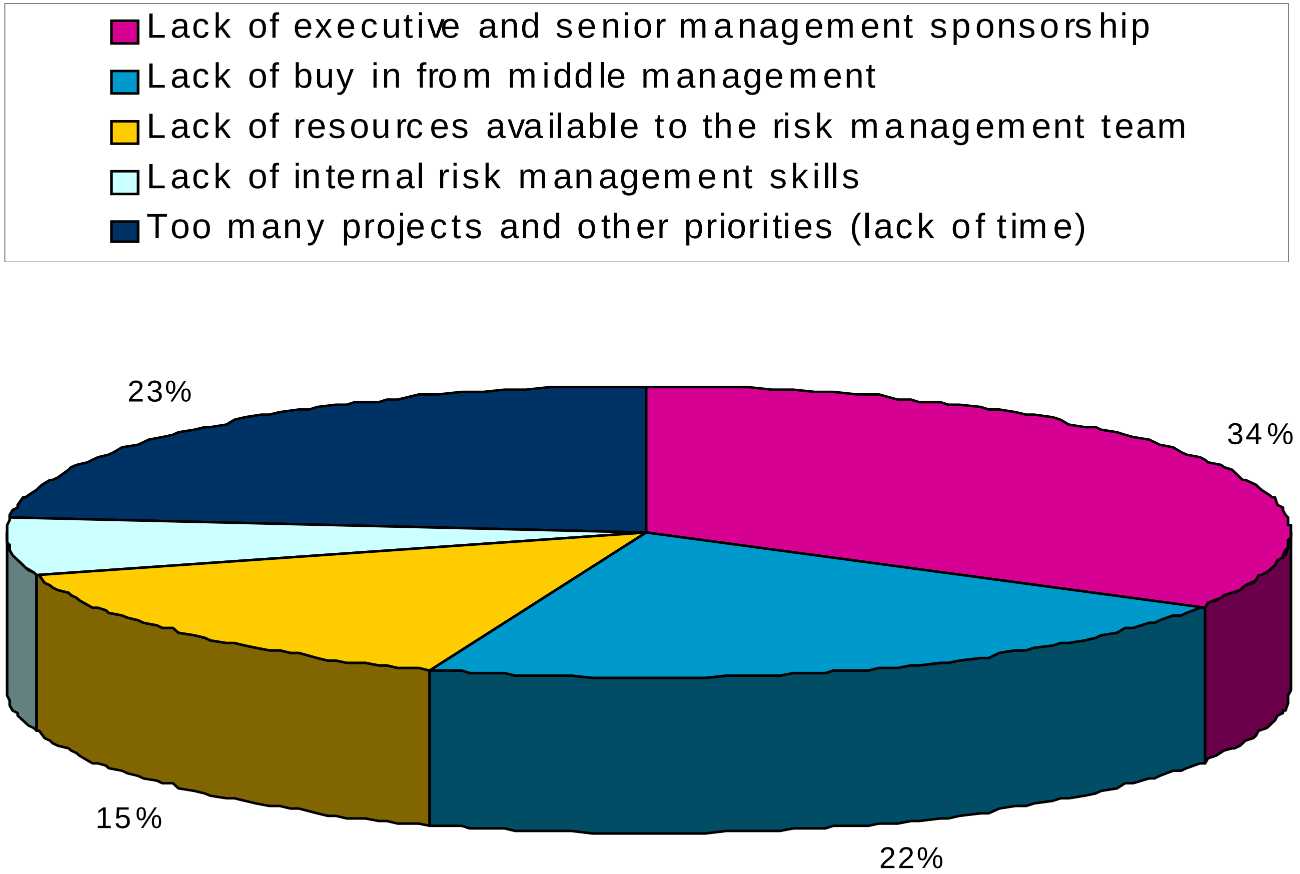
Level of Embededness of Risk Culture



- 60% either fully or partially embedded
- Only 2% have no risk culture
- 68% of respondents claim risk culture ‘significantly’ improved over last 24 months

Base – 280, UK IRM Conference 2012

Key Obstacles to Implementing a Successful Risk Culture



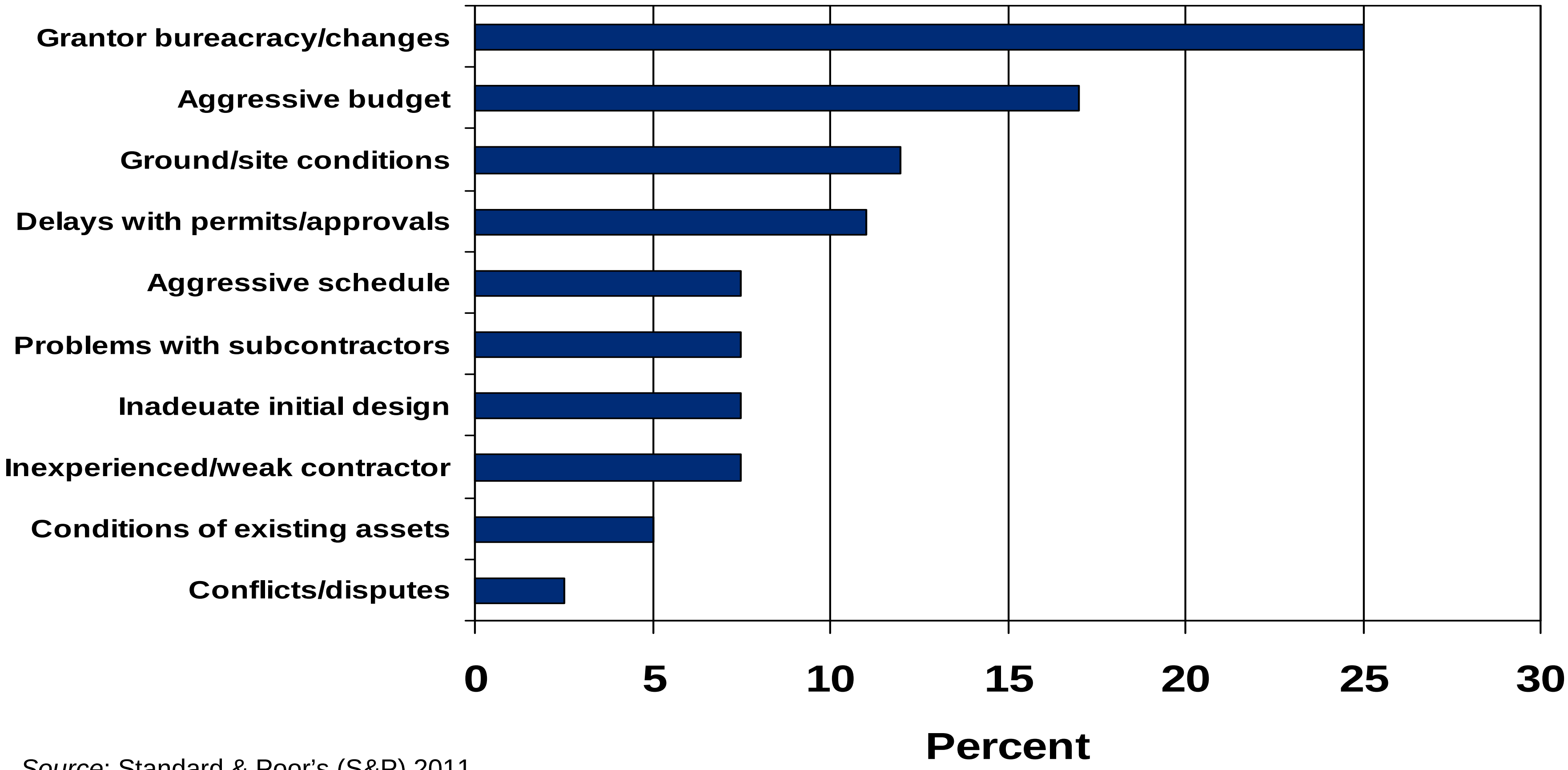
- 55% related to some form of 'management buy-in'
- Argue that the other obstacles may be a subset of 'management buy-in'?

Base – 280, UK IRM Conference 2012

Summary and conclusions


Aspirations
More Resources
Project Risk Management: a constant battle between aspirations and resources

Reasons for construction budget/schedule problems



Source: Standard & Poor's (S&P) 2011

Conclusions – Embedding a successful risk process and culture

1. Get the basics right – project risk registers, risk ownership, risk quants, risk adjusted project scheduling
2. Risk management training and induction process (varied by risk champion, senior executives and general staff awareness)
3. Secure and maintain support and buy-in from senior management (culture **AND** endorsement)
4. Simple and consistent PRM process – visible input into decision making (link risk to gated project review process)
5. Ensure there are clear descriptions of risk management roles, responsibilities, processes and terminology. A common language and infrastructure.
6. Integrate risk into performance management process – appraisals, balanced scorecards.
7. Review current risk culture (the theory) **&** risk maturity level and determine a target – a vision. There are many risk standards – apply wisely. Fit for purpose?, GIGO?
8. Demonstrate the value of RM – lessons learned, risks mitigated, opportunities etc
9. Be patient this will not change overnight

Thank you.

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Increased Risk = Higher Capital requirement =

Lower ROE = Lower valuation relative to sector = Time / cost overruns on projects

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RISK. DISPUTES. STRATEGY.

Supporting slides

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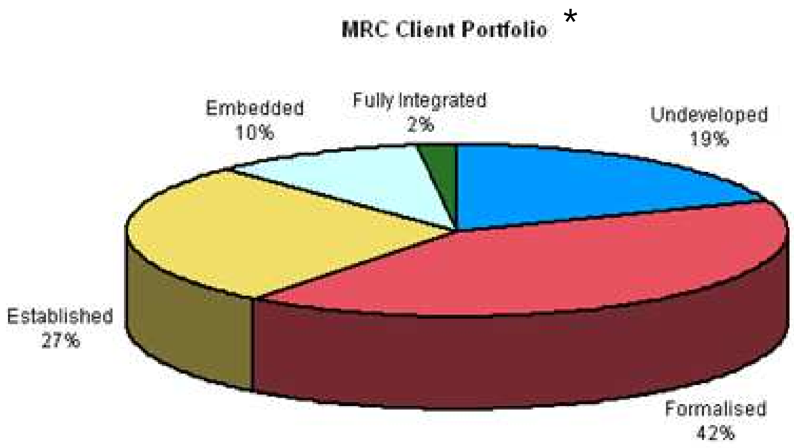
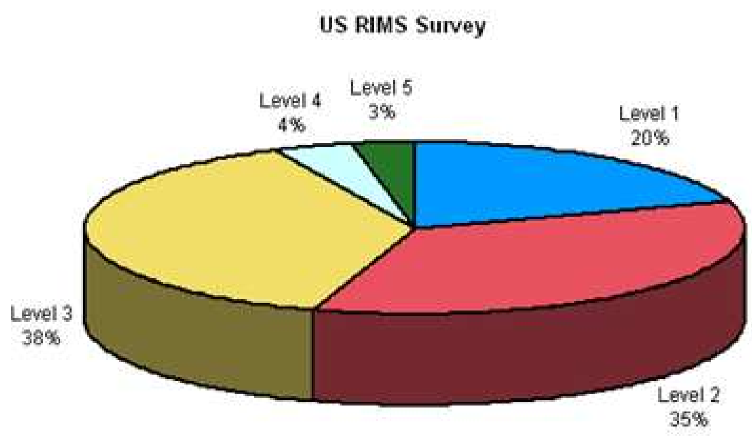
Enterprise Risk Management Review
Industry Risk Maturity Benchmarking





Only 12% of assessed clients and 7% of US organisations surveyed by RIMS have a risk maturity of Level 4 or above (Embedded or Fully Integrated)

* ~2,000 UK, European and Middle Eastern clients surveyed

K&L GATES

Construction Risk Management for Major Projects

Neal Brendel
Matthew Smith

www.klgates.com

Types of Coverage on Major Projects

Liability Insurance	Property / Material Damage	Other
Professional Indemnity / E&O Employers' Liability / Workmen's Compensation Public Liability / CGL Product Liability	Contract Works (CAR / EAR) Transit / marine cargo insurance Contractor's Plant & Equipment Insurance	Delay in Start-Up (DSU) Decennial Insurance

Contract Works Insurance

- A ‘no fault’ policy that covers the risk of physical loss or damage to the works during construction
- In the joint names of the Employer and the Contractor
- Full cover generally ceases on completion or takeover

Contractors' 'All Risks' – not what it says on the tin

Typical insuring clause in a CAR policy:

> *"the insurers will indemnify the Insured in respect of physical loss or damage to the Insured Property described in the Schedule arising from any cause except as hereinafter provided…"*

What is excluded from a contract works policy?

- Typical exclusions:
  - War, hostilities, civil commotion, riot or strike
  - Terrorism
  - Radioactive contamination etc
  - Wilful, intentional, careless, fraudulent, actions or omissions of the insured or their representatives

What is excluded from a contract works policy (cont'd.)

- Defects in design, plans or specification
- Defects in workmanship
- Liquidated damages, penalties and consequential financial loss
- Wear, tear, corrosion or other gradual deterioration

Common Coverage Issue No.1: Latent Defect or Physical Damage?

Pilkington UK v CGU Insurance [2004] All ER 272

- Glass panels in the canopy at Eurostar International terminal which were prone to fracture because of an impurity in the glass
- Insured's claim in relation to the panels failed
- Held: *"damage requires some altered state, the relevant alteration being harmful in the commercial context"*

Latent Defect or Physical Damage?

Seele Austria GnbH & Co v Tokio Marine Europe Insurance Ltd [2007] BLR 337

Field J:

> *"damage means here not a defect in the works but an adverse physical affect on the state of the physical state of the works as a result of the defect… there is no damaging within the insuring clause and therefore no cover under an unbespoke Contractor's All Risks policy for the cost of rectification where a defect is discovered which has not yet physically affected the insured property but will do so unless it is rectified"*

Latent Defect or Physical Damage?

Quorum v Schramm [2002] 2 All ER Comm

- Sub-molecular damage

Common Coverage Issue No.2: Issues with "Other Assureds"

- Typically CAR policies will identify the principal assured by name and list "Other Assureds" by category – e.g. "subcontractors of any tier"
- The conventional position is that a joint assured is not liable to another assured or, by way of subrogation, to the insurers
- However, under English law, Other Assureds may only have the benefit of the insurance to the extent made available in the underlying contract

Issues with Other Assureds

- *National Oilwell (UK) Ltd v Davy Offshore Ltd [1993] 2 Lloyd's Rep 582*
  - Davy's obligation was to *"insure on an All Risks basis the work and materials in the course of manufacture until the time of delivery"*
  - National Oilwell (the subcontractor) was held not to be insured in respect of matters arising after delivery
  - No insurable interest beyond delivery
  - Waiver of contribution clause similarly limited

Issues with Other Assureds

Hopewell Project Management Ltd v Ewbank Preece [1998] Lloyd's Rep 448

- Power station in the Philippines
- During commissioning, damage occurred to two gas turbines
- Alleged to have been caused by the negligence of Ewbank Preece who were the engineers

Issues with Other Assureds

- Ewbank Preece argued:
  - they were an “Other Assured” under the category of “subcontractor” and
  - the claim (which was a subrogated claim brought by CAR Insurers) could not be brought against them

- Held:
  - EP were a “subconsultant” not a “subcontractor” and therefore were not insured under the CAR policy

Issues with Other Assureds (cont'd)

- These cases underline the need to check
  - the underlying contract and
  - the CAR policy
  - to verify the extent to which the contractor, subcontractors and subconsultants are afforded the benefit of the CAR policy and are therefore protected from subrogated claims

Common Coverage Issue No.3: Issues with deductibles

- Typically, the CAR policy will stipulate that there is a deductible for each "occurrence" of physical loss or damage
- This can lead to disputes over what constituted the "occurrence" and insurers typically seek to argue that there are multiple occurrences in order to apply multiple deductibles

Issues with Deductibles

Mitsubishi Electric v Royal London Insurance [1994] 2 Lloyds Rep. 249

- 94 identical toilet modules attached to a cementitious board which was defective, causing damage to the tiles in each of the modules

Issues with Deductibles (cont'd)

- Deductible under the CAR policy was *"the first £250,000 of each and every loss in respect of any component part which is defective in design, materials or workmanship"*
- Insurers attempted to argue that the defective component was the module and 94 deductibles applied
- Court of Appeal rejected this argument and held that the defective component was the cementitious board; therefore only one deductible applied

Other types of coverage

- Transit and Marine Cargo Insurance
- Delay in Start-Up (DSU):
  - Covers the ‘soft cost’ of the CAR insurance caused by delays
  - Often triggered by a claim under the CAR policy
  - Parties with an insurable interest in the project revenue stream will be named as insured
  - The claim can often only be considered on completion, once the impact of the event can be properly assessed
- Contractor’s Plant and Equipment Insurance

Professional Indemnity cover for Consultants and Design and Building / EPC Contractors

Typical insuring clause:

“The insurers will indemnify the insured in respect of any legal liability to a third party incurred in the course of professional services carried on by the insured”

- In this example the trigger is ‘legal liability’ rather than ‘a negligent act, error or omission’
- Limit of indemnity may be ‘each and every claim’ or ‘in the aggregate’

Contractor's PI policies

- Mitigating costs cover
- Subcontractors with design responsibilities
- A Contractor's PI policy will usually include a detailed list of the activities covered – e.g. feasibility studies, surveying, procurement, design or specification, project or construction management, supervision or inspection (by an architect, engineer, etc employed by the Contractor)
- Can be a 'grey area' as to what amounts to a 'professional activity' by a contractor

Typical exclusions common to all PI policies

- Fitness for purpose obligations
- Dishonest, malicious or fraudulent acts
- Liability outside geographical limits
- Pollution and contamination
- Liability arising out of an agreement to pay liquidated damages “except to the extent that such liability would have attached in the absence of such an agreement”

Professional Indemnity

- Bear in mind that notification provisions will be interpreted strictly as conditions precedent to cover
- Typically, the insured is required to notify “circumstances likely to give rise to a claim”
- “Likely to give rise” has been held to mean “a better than even chance of a claim”
- Do not assume that one notification will be sufficient

Single Project PI Insurance

- Taken out by the Employer or owner for a specific project
- Covers all professional duties performed by any insured over a fixed period including a ‘run-off’ period of up to 12 years post-completion
- Will usually cover any consultants, contractors, subcontractors and suppliers on a project
- Insurers waive rights of subrogation against any insured

Single Project PI

- Advantages:
  - Continuity of cover
  - Increased control
  - Increased limits of indemnity
- Main disadvantage is cost
- May only be cost-effective on major projects
- Owners Protective Professional Indemnity Insured ("OPPI") is a variant of Single Project PI
- OPPI is a form of excess liability insurance which 'sits above' all of the design team's annual insurance programmes and is triggered if any of these policy limits are inadequate

Decennial Liability in the UAE

- Articles 880-883 of the Civil Code impose upon the contractor and architect strict liability for structural defects and instability for a ten year period from the date of delivery
- It is not possible to contract out of this liability

Decennial Liability in the UAE – Insurance Issues

- A number of PI policies have a ‘legal liability’ trigger rather than a ‘negligent errors and omissions’ trigger
- Potentially affords coverage against Decennial Liability
- A PI policy with a negligence trigger may not respond to a Decennial Liability claim because there is no requirement for a finding of negligence under Article 880 for liability to arise
- Check the exclusions in your PI policy – is any form of ‘strict liability’ excluded or simply ‘fitness for purpose’?

Decennial Insurance

- Can be taken out by the Employer, developer or funder on a material damage ‘first party’ basis
- Applies for a ten year period from completion
- Covers damage caused by an inherent defect in design, materials or workmanship
- Disadvantages:
  - The cost of procuring such insurance is significant and it is not widely available
  - It will usually only cover the Employer for the costs of rectifying the damage, rather than the consequential financial costs!

Practical Tips and Pitfalls in Managing Risk on Major Projects

- Know what coverage you are taking out
- Make sure your insurance programme is aligned with your contractual arrangements
- Discuss with your broker how to negotiate your policy
- Be aware of potential decennial liability risks under the Civil Code and try to mitigate these risks
- Avoid over insurance
- Consider establishing claims protocols on major projects
- Carry out regular checks to ensure that the required levels of insurance are being maintained
- Seek advice – prevention is always better than cure

Construction Risk Management for Major Projects

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Matthew Smith

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Performance Bonds

Nazanin Aleyaseen, K&L Gates LLP

Securing Performance of Construction Contracts

It is a common requirement within the construction industry, whether in the UAE or abroad, for contractors to provide some form of performance security to the owner/developer in relation to their contractual obligations.

The purpose of this security is to protect the owner/developer from financial exposure that it will inevitably face as a result of a contractor's non-performance.

Performance Bond

A Performance Bond is the most common form of performance security provided by contractors in the UAE. It is an irrevocable commitment to effect payment in the event the contractor fails to comply with the contractual terms. Provided that the terms of the bond are met, the owner, referred to as the beneficiary, can “call” the bond and receive payment for the value of the bond.

A Performance Bond can either be issued by a bank in the form of a guarantee or issued by an insurance company in the form of a surety bond. Performance Bonds are generally issued by the former within the UAE.

Contents of a Performance Bonds

Bonds in the UAE must contain the following information:

- The names of the contractor, beneficiary and issuing bank;
- A description of the construction contract to which the bond relates;
- The value of the bond;
- The governing law;
- Its duration; and
- The basis on which it is issued (i.e, whether ‘on demand’ or ‘conditional’)

Contents of a Performance Bonds

A Performance Bond may also contain:

- A provision that notice must be given to the contractor prior to a demand being made; and
- A provision that the demand to the issuing bank must be accompanied by a certificate that confirms that the person signing the demand are duly authorized on behalf of the owner/beneficiary.

If there is a notice requirement, a copy of the notice issued to the contractor must be attached to the demand letter to the issuing bank upon the calling of the bond.

Types of Performance Bond

The basis on which a Performance Bond is issued signifies its class. There are two classes of Performance Bonds, “on-demand” and “conditional”.

On-Demand Bonds

- An on-demand bond is one that allows an owner/beneficiary to write a demand to the bank indicating that the contractor has failed to perform its obligations under the main contract and demand that the payment of the bond value be made. No evidence of the alleged breach is required for payment to be made by the issuing bank.

Classes of Performance Bonds

<u>Conditional Bonds:</u>

- A conditional bond, on the other hand, is a class of bond where payment by the issuing bank is dependant upon proof that the contractor has failed to meet its obligations. For example, a conditional bond will often require production of a court judgment or arbitral award.
- Since obtaining a court judgment or arbitral award is itself a time consuming and costly process, the effect of a performance bond as a form of performance security is greatly diminished and is very rarely used.
- Often contractors confuse bonds that have notice requirements with conditional bonds. A notice requirement to the contractor does not make a bond conditional. An on-demand bond may also require the owner/beneficiary to provide notice to the contractor.

Calling a Performance Bond

The following steps should be followed for a proper “call”:

1. Read the Performance Bond carefully:
    - Ascertain whether it is a conditional or on-demand bond;
    - Ascertain whether the duration of the bond has expired;
    - Ascertain the legal beneficiary under the bond (very important for companies with several affiliates/ subsidiaries and companies that have since the issuance of the bond changed their names or assigned the rights under the construction contract to an affiliate);

Calling a Performance Bond

2. If notice is required to the contractor, ensure that it is provided at the latest available opportunity.

- Advance notice of the call will provide the contractor with an opportunity to make an application to the court which will delay the payment under the Performance Bond even if the bond is an on-demand.

Calling a Performance Bond

3. Prepare all documents which are required to be attached to the demand letter to the bank in advance such as notices to the contractor and/or certificates evidencing authorization.

- The Court of Cassation (Cassation Petition 148 of 1990) ruled that *"if documents are incomplete or do not comply with the terms of the guarantee, the bank should give notice to both the beneficiary and the* [contractor] *about such a deficiency…"* and that the bank will only be obliged to make payment *"if the* [contractor] *accepts the documents notwithstanding such defects…"*

Wrongful Calls

There have been many instances within the UAE, post-global credit crunch, where developers have attempted or threatened to call bonds for reasons not associated with the contractor's breach, including:

- Obtain liquidity;
- Prevent a contractor's lawful suspension of works as a result of non-payment by the developer; and
- Obtain a discount on the contract price and/or negotiate more favourable terms with the contractor.

Challanging Wrongful Calls (or the threat thereof)

The most effective and efficient method to prevent a wrongful call is through the local courts.

A contractor is able to stop payment under a Performance Bond by way of a provisional attachment order over the funds via the local courts. This application can be made irrespective of whether the contract contains a valid arbitration clause.

The UAE courts have jurisdiction to grant provisional attachment orders even if the courts do not have jurisdiction to entertain the substantive action. This principle is codified and routinely upheld by the courts. The Court of Cassation (Case 195/1995) ruled that *"…Article 22 of the Code of Civil Procedure stipulates that the State's Courts have jurisdiction to pass summary and provisional orders, which are enforceable in the State, even if they do not have jurisdiction to entertain the substantive suits."*

Provisional Attachment Orders

In respect to the specific authority on applications stopping the payment of guarantees by banks, the Court of Cassation (Petition 109 of 2001) provided as follows:

"An applicant's request for a provisional attachment order over the guarantee amount is possible when the applicant has serious and definitive grounds. The court may only deprive the beneficiary from cashing the guarantee after ascertaining that there are strong grounds necessitating such an order."

Grounds for Provisional Attachment Order

Contracts within the UAE are governed and construed pursuant to the UAE Civil Code. The Civil Code is a mixture of Egyptian law, French and Islamic Shari’ah law which is based on the principles of equity and fairness. These principles in interpreting and enforcing obligations under a contract are found in Article 246:

Article 246(1) The contract must be performed in accordance with its contents, and in a manner consistent with the requirement of good faith.

(2) The contract shall not be restricted to an obligation upon the contracting party to do that which is expressly contained in it, but shall also embrace that which is its purpose by virtue of the law, custom, and the nature of the transaction.

Grounds for Provisional Attachment Order

Similarly, Article 106 provides:

(1) A person shall be held liable for an unlawful exercise of his rights.

(2) The exercise of a right shall be unlawful:

- *(a) If there is an intentional infringement of another’s right;*
- *(b) If the interests which such exercise of right is designed to bring about are contrary to the rules of the Islamic Shari’ah, the law, public order, or morals;*
- *(c) If the interest desired are disproportionate to the harm that will be suffered by the other contracting party; or*
- *(d) If it exceeds the bounds of usage and custom.*

Case Law – Bona Fide Legal Grounds for the Call

A recent example of a contractor successfully challenging a bond call governed by UAE law is in the matter of *Bin Belaila Baytur General Contracting LLC v Nakheel PJSC and Standard Chartered Bank* (Claim No: DWT/APP25/003/2010).

Background Facts:

Nakheel, the developer and the beneficiary under two performance bonds, was concerned about the slow progress of works of its contractor.

The contractor, however, had slowed its works as a result of delayed payments by Nakheel and Nakheel's refusal to satisfy payment certificates.

Case Law – Bona Fide Legal Grounds for the Call

Both parties purported to terminate the contract. Nakheel then made a call on the performance bonds for the full amount, AED 67,000,000. The contractor applied to the Dubai World Special Tribunal for a provisional order restraining Nakheel from doing receiving payment by Standard Charter Bank.

The panel of three judges taking into account UAE law, framed the legal issue as:

Did Nakheel have bona fide legal grounds to justify its demand for payment of the full amount under the performance bonds?

Case Law – Bona Fide Legal Grounds for the Call

The panel unanimously agreed that Nakheel did not have bona fide legal grounds.

In coming to this conclusion, the panel looked the terms of the construction contracts; the correspondence between the parties and the reasons for the contractor's delay/non-performance.

The panel, in reviewing the evidence, determined that (i) Nakheel was in breach of its obligations by not satisfying its payment obligations to the contractor by 15 months; and (ii) Nakheel was not entitled to call the bond as it did not provide the requisite notice to the contractor as required. Based on these determinations, the panel found that Nakheel did not have bona fide grounds to call the bonds.

Conclusion - Strategic Considerations

Therefore, based on the reasoning in the *Nakheel* case, it is recommended when considering to challenge a bond call to consider the following:

(1) Is the default by the contractor related to or occasioned by the default of the owner/developer?

(2) Does the developer's default disentitle it to call the bond under the contract or the UAE Civil Procedure Code?

(3) Has the default by the developer been properly documented by the contractor? Were proper notices issued to the project engineer and/or developer?

(4) Can fair negotiations with the developer continue when there is a threat of a bond call?

Legal Perspectives on Claims Handling and Dispute Resolution

Neal R. Brendel, K&L Gates LLP

Overview

Goal: Managing claims to maximize recovery.

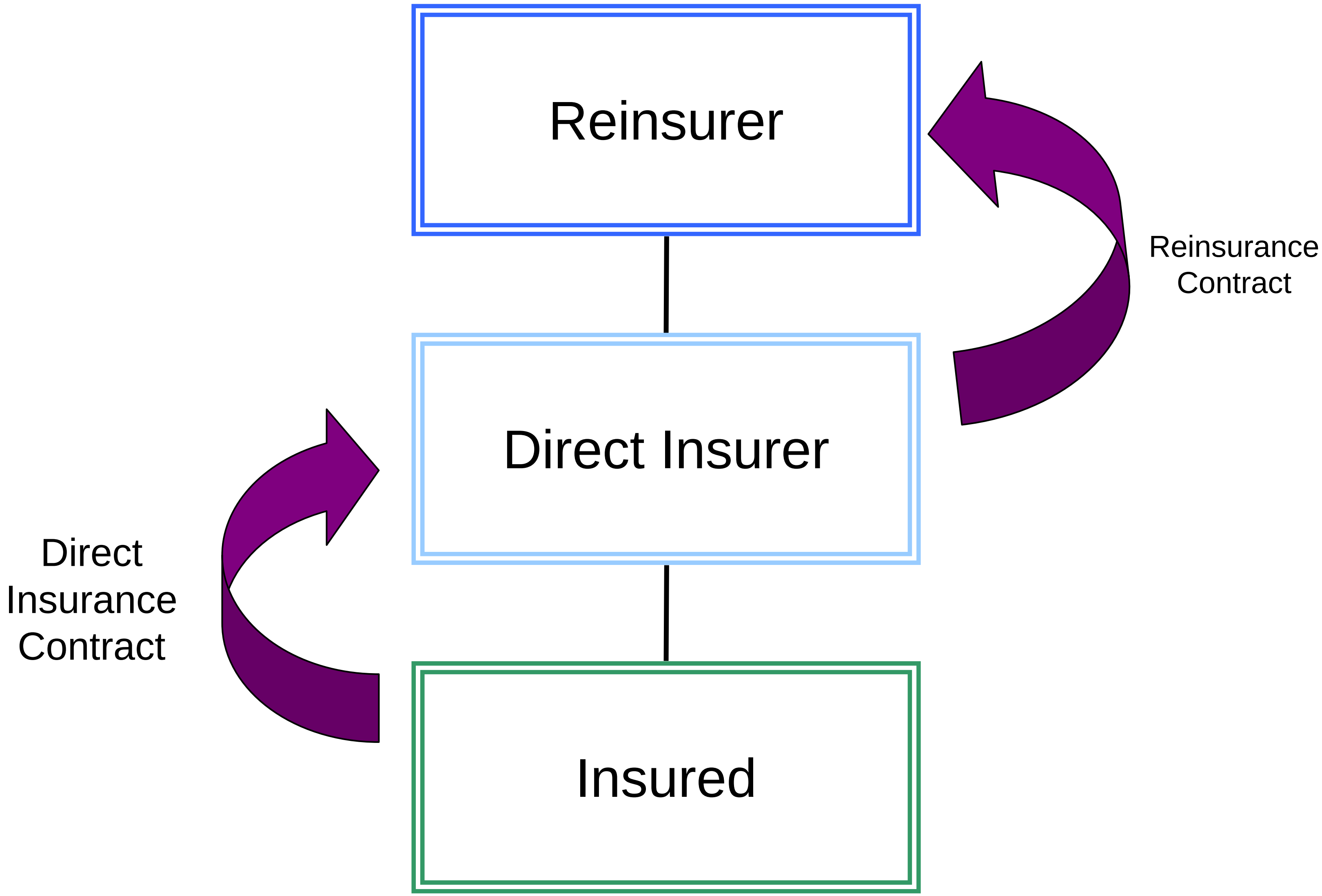
Coverage disputes: How are they resolved?

- Negotiation
- Litigation/Arbitration

The impact of the local regulatory requirements and market conditions on enforcement

- Critical role of reinsurers
- Effectively transferring risk vs. satisfying regulatory/contractual requirements

Traditional Model



Traditional Model: Considerations

- Federal Law No. 6 of 2007
  - **Requires that all direct insurance must be secured through a local insurer ("admitted insurance" requirement)**
  - Reinsurers must only be licensed in their home jurisdiction
  - No mandatory minimums for project/liability insurance
  - Similar requirements throughout the region
- No direct relationship between reinsurer and insured
- No control over selection of the reinsurer(s)
- Risk of asymmetry between the scope of coverage/dispute resolution under the direct and reinsurance policy
  - May result in inconsistent outcomes and coverage avoidance

Traditional Model: UAE-Specific Considerations

Local Insurance Market

- Uncertainty regarding rights in the case of insolvency
- Limitations of local insurers
  - Limited capacity
  - Limited experience insuring large-scale projects
  - Lower credit ratings
- “Fronting” Arrangements

Traditional Model: UAE-Specific Considerations (continued)

Governing Law & Jurisdiction

- Although not statutorily mandated, UAE policies often:
  - Require UAE forum; and
  - Are governed by UAE law.

UAE Forum -- Courts

- Perceived limitations of the UAE Court System (non-DIFC)
  - Civil law system with no binding precedent
  - No specialized courts or judges
  - All business conducted in Arabic
  - Restrictions on rights of audience
- Federal Law No. 16 of 2011: Expands jurisdiction of DIFC Courts
- Benefits of selecting the DIFC Courts
  - Expediency, transparency, and accessibility
  - Common Law system with binding precedent
  - English language
  - Quality and experience of judges
  - Rights of appearance
  - Fee shifting available

Traditional Model: UAE-Specific Considerations (continued)

__UAE Forum -- Arbitration__

- Governed by Article 1028(1)(d) of the UAE Civil Code & Article 7(2)(a) of the Insurance Authority's Code of Conduct (Insurance Authority Directive 3 of 2010).
- Requirement: Arbitration agreement must be <u>separate</u> agreement attached to the policy.
- Court guidance:
  - **<u>Federal Cassation Court judgment 249/15J</u>**: Refusing to uphold arbitration clause in insurance policy.
  - **<u>Federal Cassation Decision 278/155</u>**: Upholding appointment of arbitrator despite lack of separate arbitration agreement.
- Practical considerations:
  - Best practice is to use a separate arbitration agreement attached to the policy.
- UAE requirements of specific authority

Traditional Model: UAE-Specific Considerations (continued)

Enforceability of UAE Forum and Law Clauses

- UK and US courts will respect the parties’ forum selection and choice of law clauses.
    - ***Aizkir Navigation Inc v Al Wathba National Insurance Company, [2011] EWCA 3940 (Comm)***
    - Similarly, most US jurisdictions will respect the parties’ choice of forum and choice of law provisions absent some compelling reason to disregard them.

Impact of Admitted Insurer Requirement

Traditional Model

- All insured parties are subject to the default model, regardless of its benefits or pitfalls

Impact of Traditional Model on Claims Handling

- The "real insurer" is not at the table
- No direct enforcement option
- Insolvency Concerns

Solution: "Workarounds"

- Purpose of the workaround models:
  - Avoid local insurer insolvency/capacity issues
  - Direct access to reinsurer
  - Control over the reinsurance process
  - Liquidate claims in non-UAE jurisdictions under non-UAE law

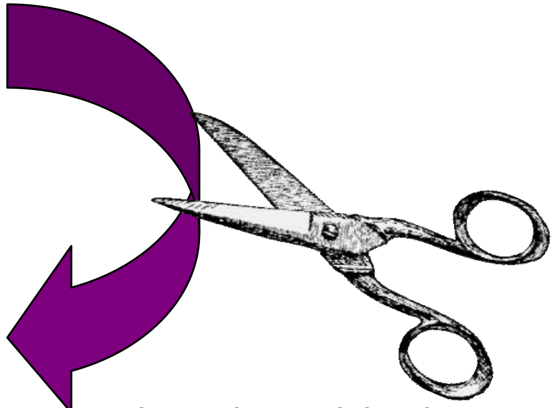
Workaround: “Cut Through” Clauses

Reinsurer

Direct Insurer

Insured

Eliminate ceding insurer and gain direct access to reinsurer



Cut through provision in reinsurance contract

TRIGGERS:

- **Default by ceding insurer**
- **Insolvency of ceding insurer**

“Cut Through” Clauses: Contractual Requirements

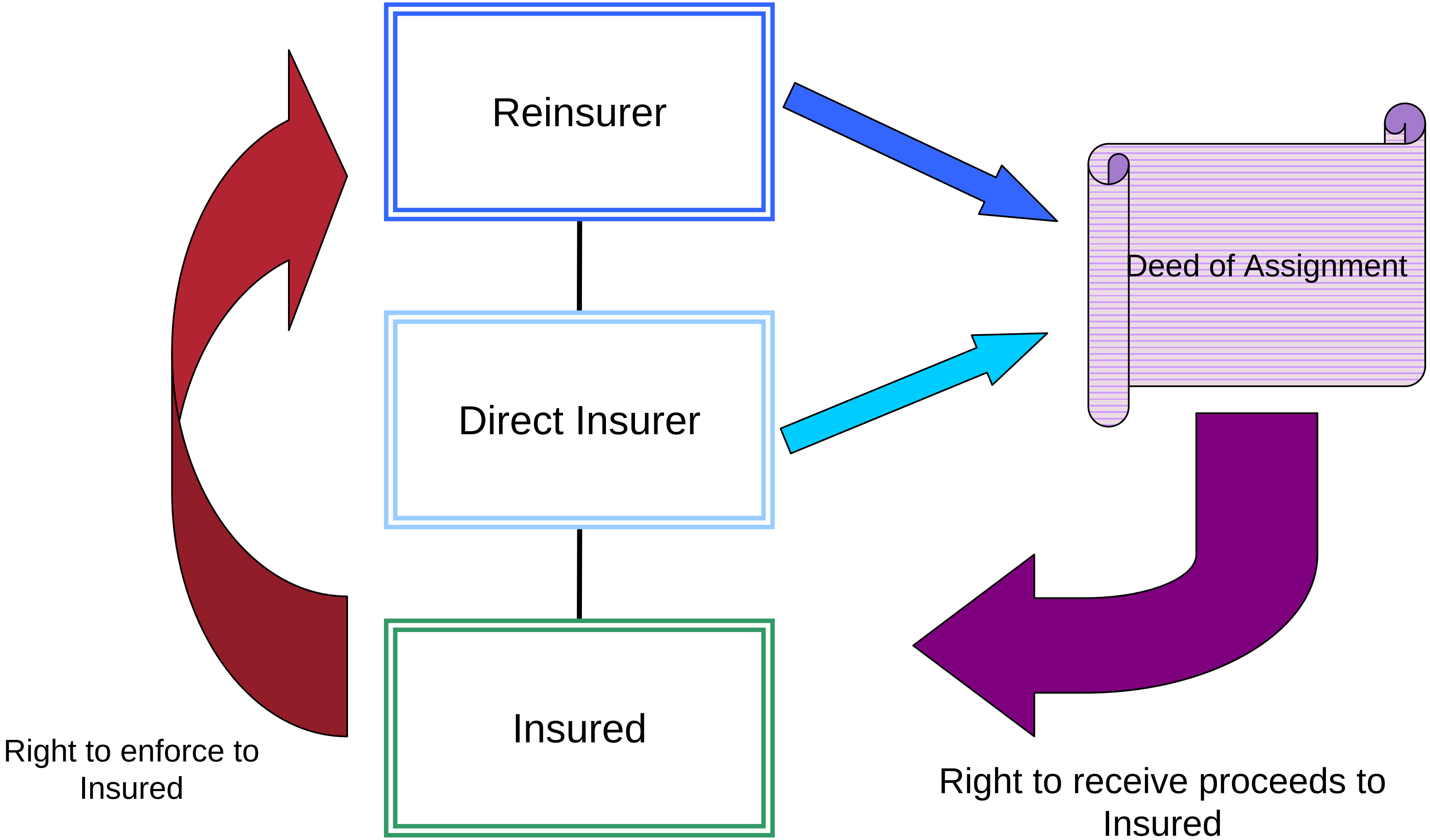
- Clear statement of insured’s right of direct payment
- Clear statement of insured’s right to enforce payment against the reinsurer
- The effect of payment by reinsurer on its obligations to direct insurer
- What is the reinsurer entitled to assert against the insured:
  - Defenses of the insurer?
  - Rights of set-off that the reinsurer has against the insurer?

“Cut Through” Clauses: Enforceability

<u>Jurisdictions</u>

- New York
  - Generally accepted as enforceable
    - <u>In re Bennett Funding Group, Inc. Securities Litigation</u>, 270 B.R. 126, 131 (S.D. N.Y. 2001)
  - In New York, may be written to apply in the absence of insolvency
    - <u>Mercantile & General Reinsurance Co. v. Spanno Corp.</u>, 573 N.Y.S.2d 102 (N.Y. Sup. Ct. 1991)
  - New York expressly permits cut-through clauses in the insolvency context (N.Y. Ins. Law 1308(a)(2)(B)(i))
  - Untested in UK courts
  - Contracts (Rights of Third Parties Act) of 1999 will allow insured to claim against reinsurer unless the Act has been excluded in the policy
  - Questions of validity when allowed to bypass statutory insolvency requirements
- UAE (Local law may apply to determine whether cut-through is valid)
  - Third party rights likely enforceable where reinsurance contract has been drafted in accordance with Article 254 of the Civil Code
  - Whether cut-through clauses will allow insured parties to bypass insurance liquidation rules (Art. 95 of Insurance Law) remains untested

Workaround: Assignments



Assignments: Enforcement

- Courts are more likely to enforce reinsurance assignments in the absence of insolvency issues
- Procedure in the event of direct insurer insolvency
  - Insured agrees to assign its right to collect to reinsurer
  - Reinsurer agrees in return to pay claims directly to insured

Assignment: Advantages

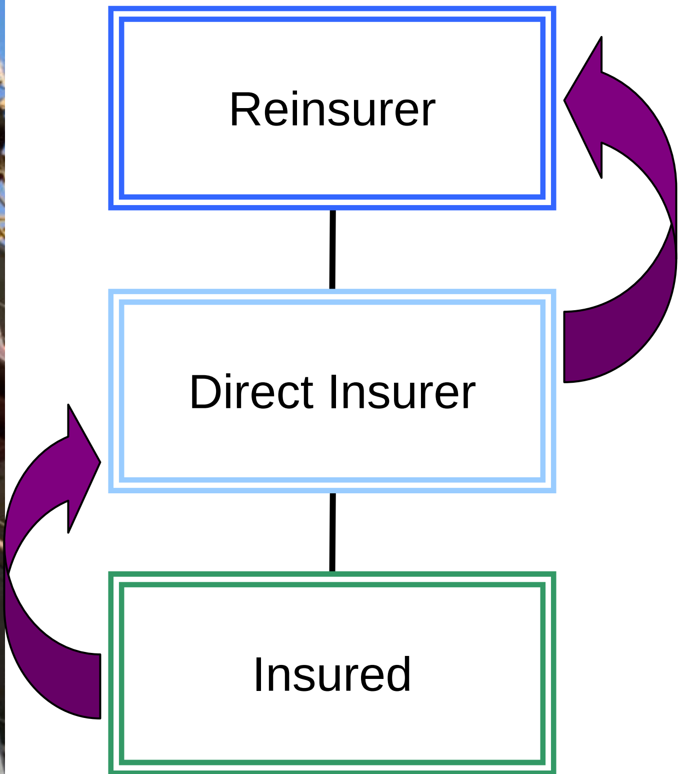
- Greater certainty regarding enforcement
  - Improve odds of avoiding the insolvency trap
- Prosecution of the claim
  - Draft assignment to give insured right to make claim directly against reinsurer

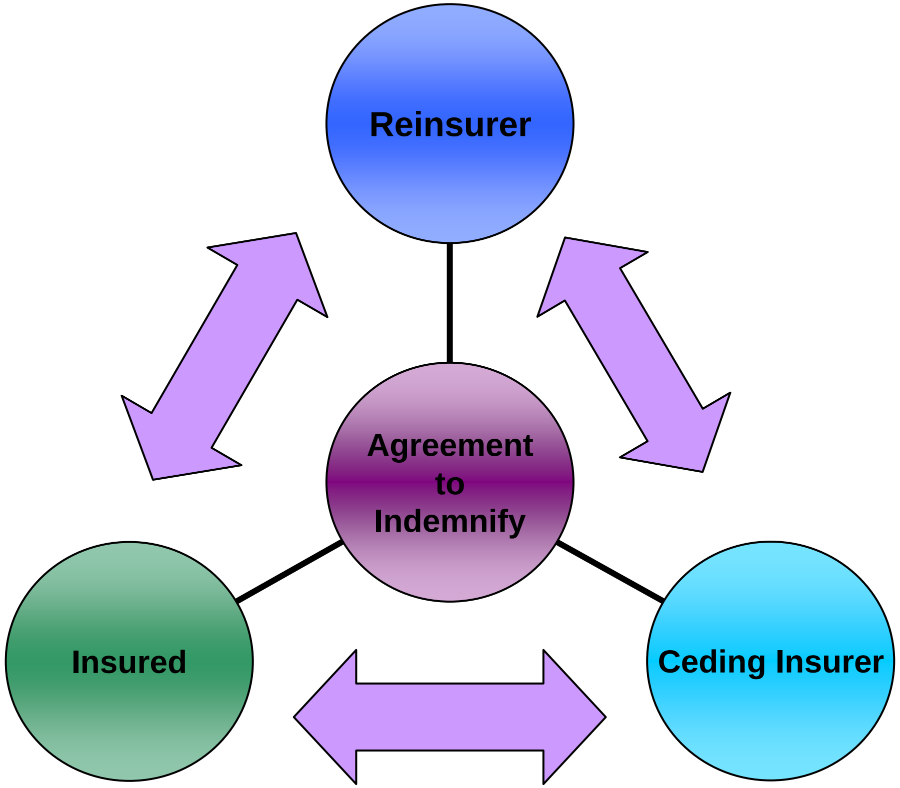
Workaround: Multi-Party Indemnification Agreements

Traditional Model

PLUS

Side Agreement





Workaround: Multi-party Indemnification Agreements

- Reciprocal indemnification obligations
- One agreement governs the ability of the insured to pursue multiple claim avenues
  - Claim against direct insurer
  - Claim against reinsurer
  - No pursuit of both
- These agreements remain untested
- Enforceability
  - Like an assignment, as a distinct agreement this would appear to be enforceable, though untested in the context of insolvency

Workaround: Common Law ("Assumption Reinsurance")

- Where the reinsurer acts as de facto direct insurer, some jurisdictions may allow an insured to bring claims directly
  - Canal Ins. Co. v. Montello, Inc., 826 F. Supp. 2d 1264, 1268 (N.D. Okla. 2011) (New York law) (even absent cut-through provision, insured may have rights against reinsurer where insured deals only with reinsurer)
- Key considerations
  - Does the reinsurer interact directly with the insured?
    - Who handles claims
  - Is the direct insurance contract merely a fronting arrangement?
  - Did reinsurer assume *all* liabilities?
  - Existence of negation clause

Workarounds: Further Considerations

- All workarounds remain relatively untested.
- Potential application of UAE law in the event of UAE insolvency
- "Successful" workaround: allows insured to bypass local insurer, UAE courts, and UAE law.
  - Consider: World Omni Financial Corp. v. Ace Capital Re, Inc., 2003 WL 21024610 (2d Cir. May 2, 2003) (arbitration clause in contract between reinsurer and fronting company may apply because insured seeks to rely on reinsurance contract)
  - In the event a workaround is successful, consider what law to apply to the reinsurance policy.
- Retain a sophisticated broker

Choice of Law Considerations: UAE Law

- Choice of law may have direct impact on insurance recovery
- UAE Civil Code
  - Time for bringing a claim: 3 years (Article 1036)
  - Duty of good faith by all contracting parties (Article 246)
  - Insured's obligations:
    - No concealment (Article 1033)
    - Ongoing disclosure requirement (Article 1032)
  - Certain clauses void in insurance policies (Article 1028):
    - Exclusionary clause not shown "conspicuously"
    - Arbitrary clauses, where breach of such a clause has no relation to the occurrence of the event insured against
    - Any provision providing that the insured's rights lapse upon a breach of law, excepting felonies or deliberate misdemeanors
    - Provisions where insured's rights lapse for failure to give timely notice where there is "reasonable excuse" for delay
    - Any arbitration clause not set out in separate agreement

Choice of Law Considerations: UK/NY Law

- Voiding the contract
  - Duty of utmost good faith/duty to disclose material facts; in the UK, the aggrieved party may avoid the contract
  - “Basis of the contract” claims
- Notice
  - New York puts the burden on the insurer to show prejudice if noticed within two years; burden shifts to the insured to show no prejudice after two years
  - UK courts consider notice clauses to be “conditions precedent” to triggering insurer liability; no prejudice requirement
- Warranties
  - In New York, breach of a warranty (by the insured) will <u>not</u> automatically cancel the contract (N.Y. Ins. Law § 3106)
  - UK: Penalty for breach of warranty is severe; no prejudice required
- Damages
  - New York: Consequential damages may be recovered by insured
  - UK: No consequential damages

Claims handling tips

- Insurance is a corporate asset that requires careful management
- Obtain copies of the policies that cover you or are supposed to cover you
- Make a timely claim
  - As soon as reasonably practicable
  - Lawsuit or arbitration demand is not necessarily required to trigger notice obligation
- Put all the carriers on notice
  - Do not characterize the claim too early
  - Defect might be GL or Builders Risk or Professional
- Privilege issues: Attorneys and brokers
- Duty to defend v. duty to indemnify
  - A little bit of duty goes a long way
- Duty to cooperate
- Preservation of subrogation claims
- Don’t accept the first no
  - Some would say to expect it

Successful Risk Transfer

Swiftly resolving the underlying liability with as little of your money as possible—and preferably none!

Major Projects - Risk Management and Insurance Strategies

September 26, 2012 – Dubai

THANK YOU FOR ATTENDING

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MARSH