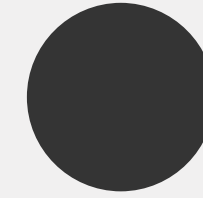




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# Practical Tips & Must-Have Records for Employers to Succeed in CIPAA

Belden Premaraj  
CIPAA Adjudicator  
AIAC Arbitrator  
FCI Arb, FMI Arb

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CIPAA Adjudicator  
AIAC Arbitrator  
FCI Arb, RICS Evaluative Mediator

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A vertical graphic element consisting of a dark grey rectangle at the top, a black circle, and a light grey-to-white gradient bar that runs down the center of the page. The word "Roadmap" is centered on the white portion of this bar.

# Roadmap

1

Works done

2

Variations

3

Loss and expense

4

Final Accounting

5

Jurisdiction

6

Set-Offs & Counterclaims

7

Time at Large

8

Cross-contract set-offs



Purpose



"By failing to prepare, you are preparing to fail."

- Benjamin Franklin

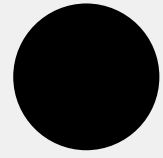
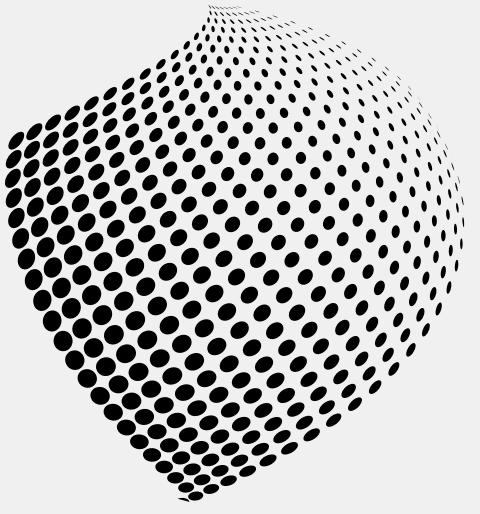
- The when, what and how to being prepared for potential adjudications as Employer.
- The best preparation for what may occur tomorrow is the preparation you do today!

# Appreciating



Success in adjudication is a creature of the strength of documentary evidence and clarity.

Adjudication process favours the Claimant but make it difficult for the Adjudicator to do so and make it easier to dismiss the claims.



# Mind map

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Defences to  
Claims



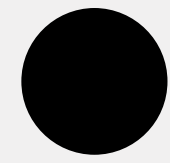
Jurisdictional  
challenges: Are there  
any and raising it



Set-Offs: Raising it,  
quantifying it &  
complying with  
contract requirements



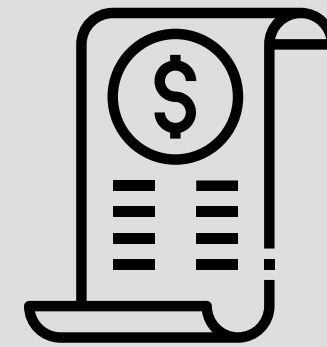
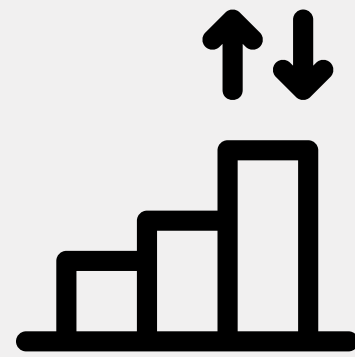
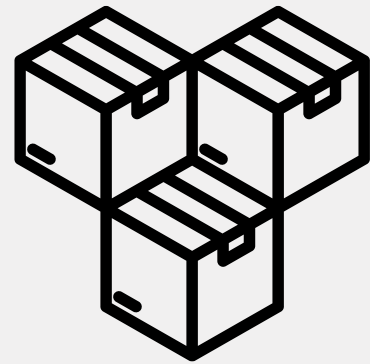
Can counterclaims  
be raised?



# Mind Map on Defences

Defences for the following claims:

-

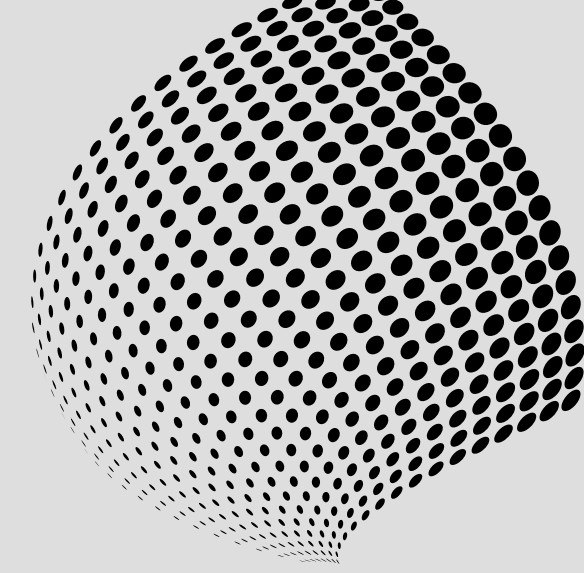


• Value of Works Done

• Variations

• Loss & Expense

• Final Accounting



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# Works Done & Variations

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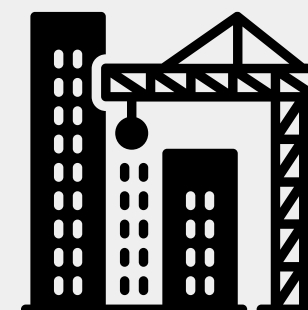
When preparing Tender and Contract Documents (COC/Preambles/Prelims Bill)

- Preliminaries
  - division between initial, recurring and final payment %
  - recurring on pro-rate or percentage of works done
- Lump sums
  - take-off % - construction drawings / approved shop drawings
  - effect of BQ used for Lump Sum Contract
- Re-measured
  - joint measurements or alternative methods
- Defects discovered
  - No value at all or if previously valued and certified, reversible



# Works Done & Variations

When preparing tender and Contract documents



## Variations

- definition of what can be a variation
- existing rates (same or similar), market or reasonable rates or schedule of rates etc
- ancillary or necessary non-particularised works - not variation



## Termination / Final Account

- Post-termination or final joint inspections and/or take-offs and/or measurements
- Effect of failure to attend - unilateral inspection and/or measurements

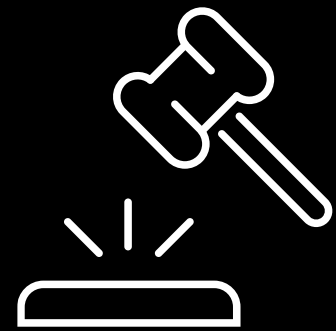






# Loss and expense

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## Is it claimable under CIPAA?

- Conflicting HC decisions
- If Final Account allowed, then why not Loss and expense?



## Time of tender and contract documents (COC)

- Condition precedent notice, submission requirements and No-Waiver provisions.
- Events of Delay that entitle loss and expense and no other.
- Entitlement to monitor loss and expense and mitigation.
- When is it claimable and payable.

Condition Precedent  
Notices & Claim for EOT

As-built data (weekly & monthly  
progress reports &  
daily site diaries)

EOT Claims

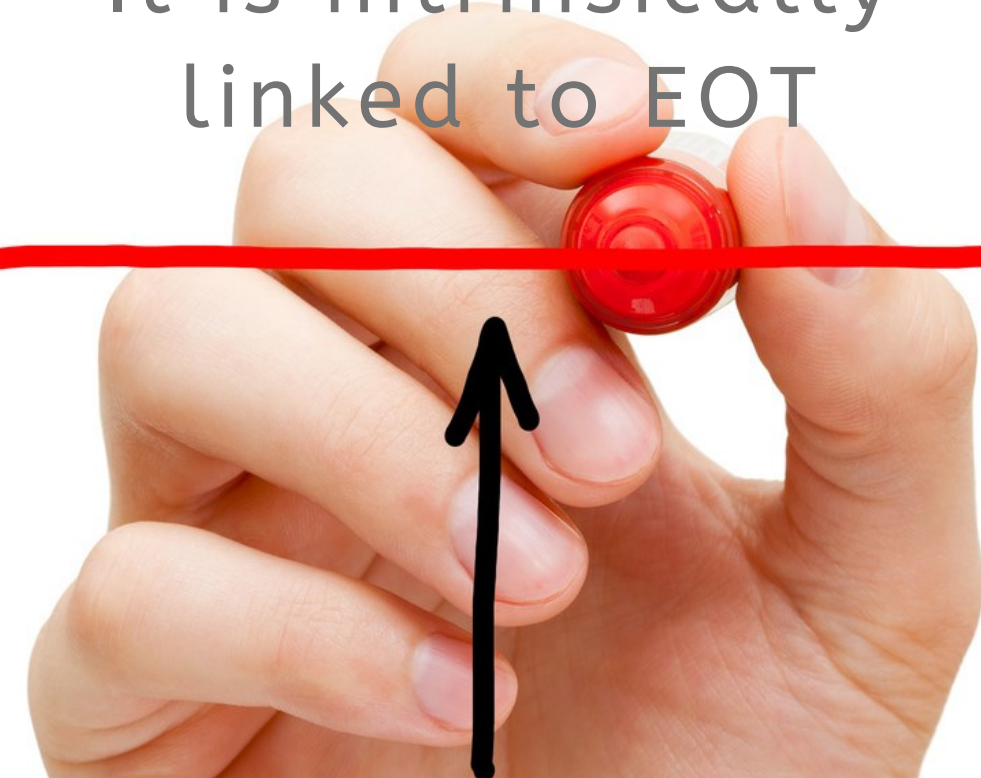
# Loss & Expense

It is intrinsically  
linked to EOT

Baseline,  
Updated with as-built info,  
Catch-up, Look-ahead programmes

Assessments of EOT  
by SO/PMC

Reasons and justification for  
rejection of EOTs claimed with  
contemporaneous documents



# Loss and expense

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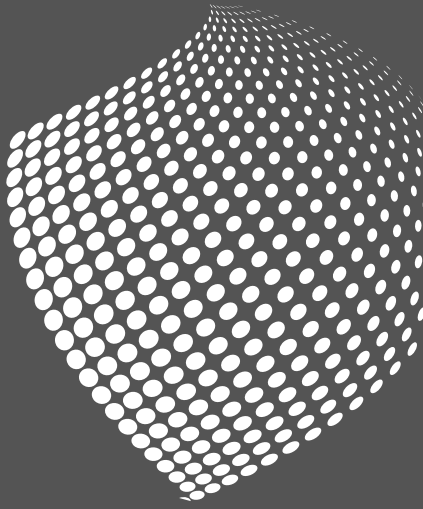
Time when claim is made: -

- Premature based on COC?
- Condition precedents fulfilled?
- Delay and disruptive events - Are they compensable loss and expense events?
- Audit on proof of actual costs and expense with findings.
- No theoretical claims using prelims
- Claimable heads of loss and expense.
- Impact period v end prolongation period?
- Claims limited to direct cost and expense for critical path delayed works and not other works (unless there was a pacing notice).
- Unabsorbed overheads - Not claimable?



# Final Accounting

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- When preparing Tender and Contract Documents
  - Final Accounting procedure clearly set out.
  - Strict process and deemed admitted if not challenged (PAM procedure)
  - Timing and when payable.

- When Final Claim made

- QS/PMC - report on reasoning for claims that were reduced or rejected
- Contemporaneous documents on valuations.
- Final joint measurements / take-offs r unilateral measurements / take-offs.
- As-built drawings.

# Adjudication Stage

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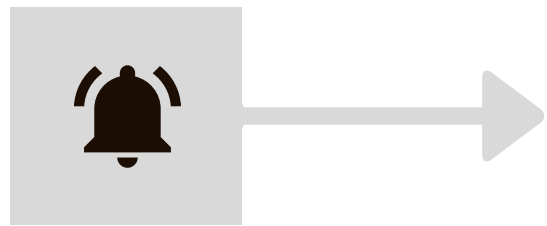


When Payment Claim / Notice of Adjudication has been issued

- Too late to establish any useful documentary trail.
- Too constrained a time-frame to ascertain justifications and find the relevant documents.
- Only additional new documents at this stage.
  - QS/PMC - statutory declarations.
  - Expert evidence on disputed or controversial methods of measurements or VO
  - Expert evidence on EOT rejections
  - Expert evidence on loss and expense claims.

# Need for complete and detailed project documents

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## 10 working days

Period from Adjudication  
Claim to Adjudication  
Response - severe time  
constraint



## Experts

No time to engage a  
quantum / delay expert  
at that stage

Experts don't have  
sufficient time to  
ascertain facts  
themselves



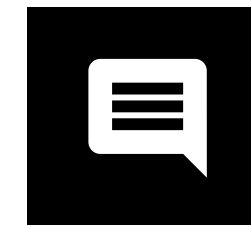
## Consultant assessments

Rely on consultants'  
assessments,  
reasoning and  
justifications



## Contemporaneity

Imperative for  
contemporaneous  
project documents  
supporting reasoning  
and justification to be  
organised.



## Admissions

Any admissions /  
waiver by  
Claimant/Contractor  
to be used and  
highlighted.

# Jurisdiction

01 Absolute lack of jurisdiction

Seldom -exists, i.e.,  
- Not a construction contract.  
- Not a claim for work done.

02 Competence Jurisdiction

More likely.  
- Defect in Payment Claim.  
- Claims not allowed under CIPAA.  
- Claim beyond that raised in Payment Claim.

03 Contingent Jurisdiction

More likely.  
- Premature claims since sums not due yet.

# Set-Offs

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When preparing Tender and Contract Documents

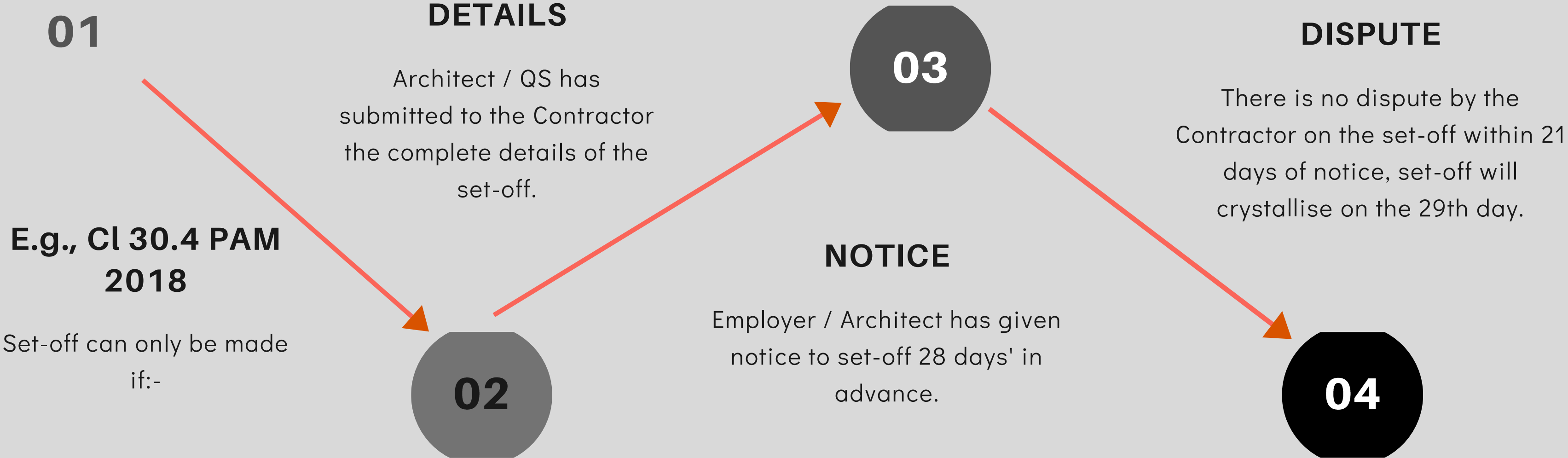
- Ensure comprehensive set-off rights or reservation of common law rights of set-off
- Procedure for set-off extensive or minimised to benefit Employer?
- Notice of Set-Off, is it a pre-requirement?
- PAM 2018, Clause 30.4 is a serious problem.





# Crystallisation of Set-Off

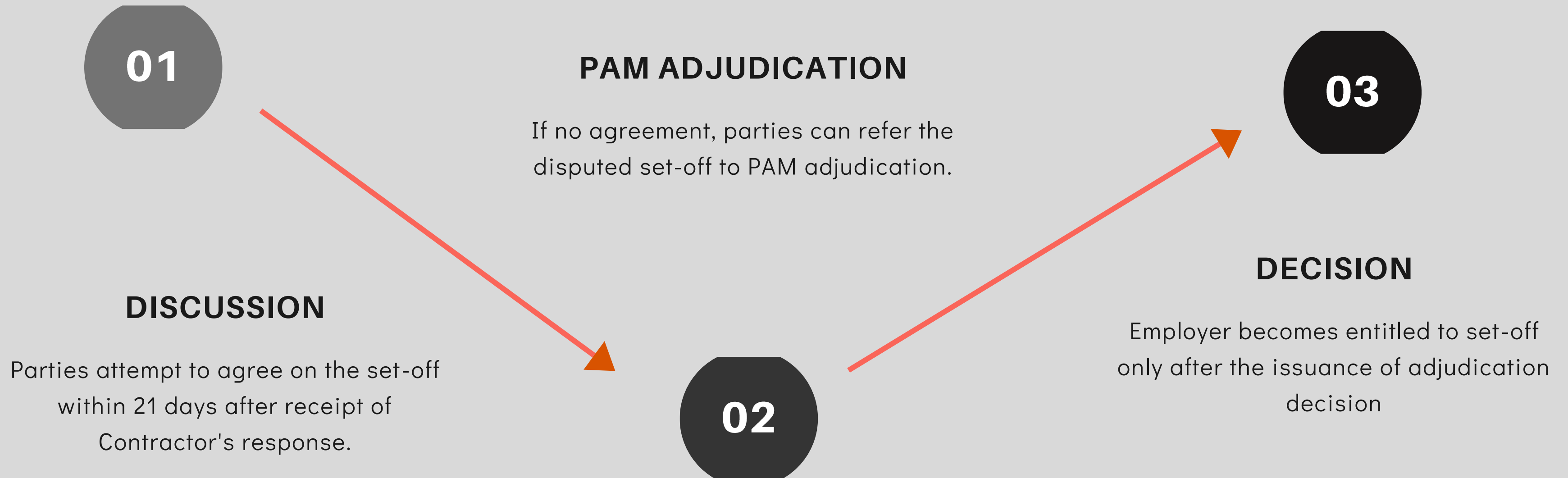
Employer needs to ensure that the contractual right to set-off has accrued:-

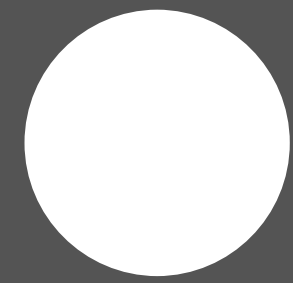


# Crystallisation of Set-Off

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If the Contractor disputes the set-off within 21 days of receipt of notice:-

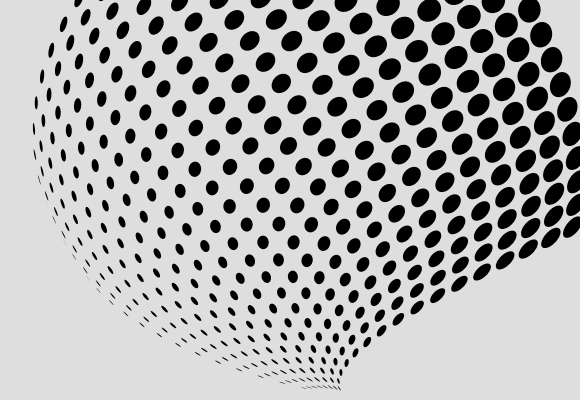




# Crystallisation of Set-Off

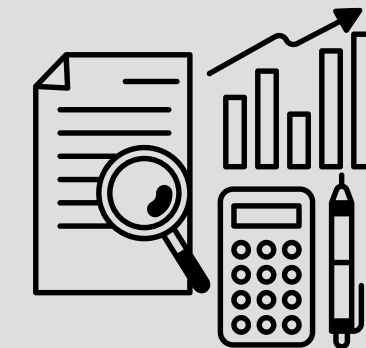
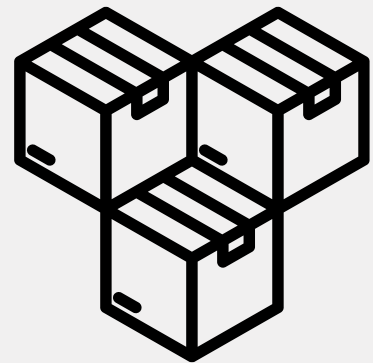
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- Employer needs to ensure compliance with the set-off mechanism to bring the set-off into CIPAA Adjudication.
- Given the extensive time required to crystallise the set-off, Employer/Architect must kick-start the contractual mechanism ASAP.
- Cannot afford to wait until Payment Claim is issued, since: -
  - Adjudicator may find that set-off must crystallise at the due date of payment; and
  - Set-off process would not be completed by the time of Notice of Adjudication.



## ● Set-Off / Counterclaims

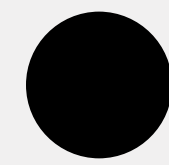
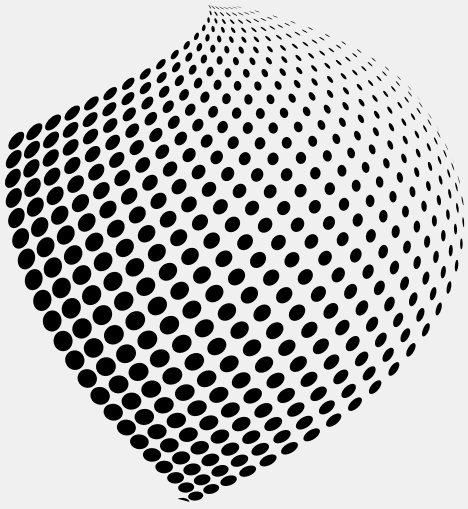
Set-off / Counterclaims are 'active' defences where deduction / cross-claims are put forth to extinguish the Contractor's claim



- Employer must ensure that set-off has crystallised at the due date of payment of the interim claim / certificate in CIPAA Adjudication

- Or latest, prior to the issuance of Notice of Adjudication
- [Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd [2018] 1 LNS 459]

- There are inconsistencies in the Court decision - safest approach is to crystallise the set-off by the due date for payment of the claim.



# Must-Have Documents for Set-Off

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Documents to prove crystallisation of set-off under the Contract.



Unless value is agreed, valuation report by the consultants to justify the value.



Even if there is a decision in favour of Employer in PAM Adjudication, it is advisable to also include the valuation report and justification of value.




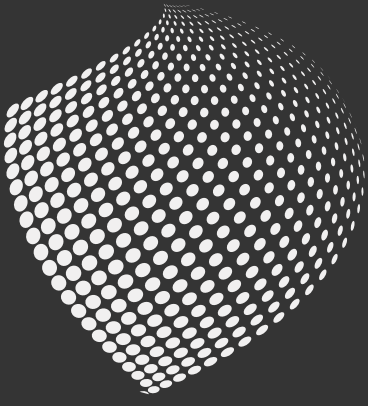
CIPAA Adjudicator may not be bound by PAM Adjudication Decision & res judicata may not apply. Binding effect of PAM Adjudication is only until CPC if the decision is disputed and referred to arbitration.

# Set-Off for LAD / Delay Damages

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- For set-off for LAD, Employer must ensure that the requirements of LAD clause are met.
    - e.g., for PAM Contract, issuance of CNC and a notice of deduction of LAD under Clause 22.1.
  - The Employer must ensure the determiner determines all EOT applications in strict compliance with terms of Contract, especially if there is a timeline for determination.
  - Otherwise, time is at large.
- 

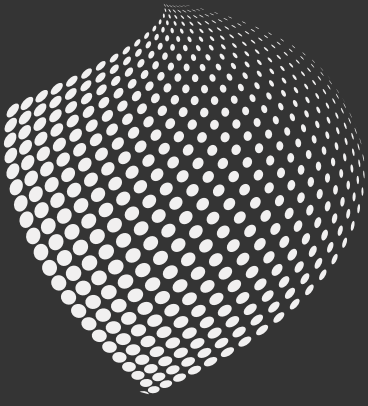


# ● Time at Large & Actual Damages

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- If there is a risk that time will be 'at large' due to the determiner's failure to assess, Employer must collate documents to prove actual delay damages as set-off.
- E.g., Financing costs - financing agreement and documents on payment of the loan.
- E.g., Rental income - rental agreement / valuation report on rental rate.
- E.g., Delay in occupation & use - Extended rental payment for existing premises.



# ● Cross Set-off From Other Contract

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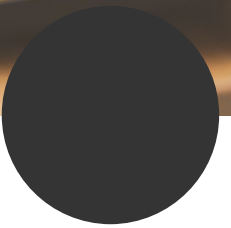

- Construction contract may allow Employer a right to cross-contract set-off.
- However, this contractual right is prohibited in CIPAA adjudication
  - Ireka Engineering v PWC Corp Sdn Bhd and other appeals [2020] 1 MLJ 311.
  - Section 5 CIPAA only allows for a single construction contract, the Employer is prohibited from relying on cross-contract set-off provisions.

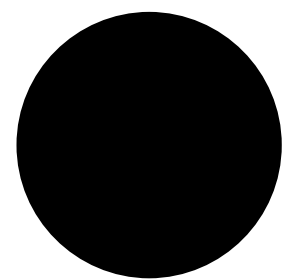


# Counterclaims

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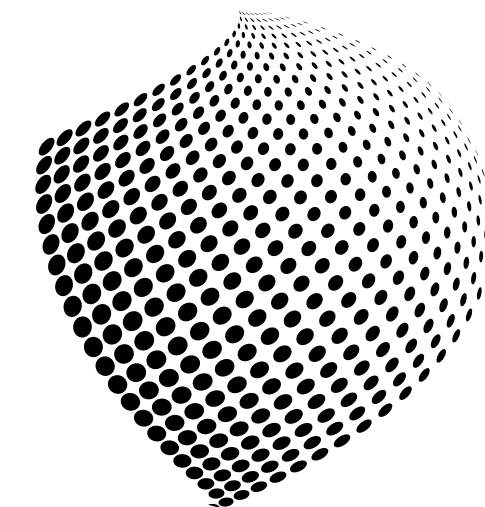


- If no right of set-off, can it be raised as a counterclaim?
  - Inconsistent views from HC.
  - Counterclaim is effectively a claim by a Respondent-Employer.
  - Not provided for within regime of s6 CIPAA?
- 
- 



*thank you*

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