driver trett
ANALYSIS ACTION RESOLUTION

THE DIGEST NEWSLETTER

Issue 1 | November 2012

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Welcome to the Driver Trett Digest

A very warm welcome to the first edition of the Driver Trett Digest, issued by the combined teams of Trett Consulting and Driver Group. I am delighted that the Digest, which is hugely popular amongst Trett's clients, contacts, and colleagues and draws a circulation of over 17,000, will not only continue, but extend further, featuring more articles and insight with a greater frequency than ever before.

Turn to page 2 to find out more.

Adjudication in Malaysia – a practical view

Until 2010, the 'Eye on Malaysia' was one of Kuala Lumpur's major attractions.

Cash flow is the lifeblood of the construction industry and it was thought necessary to introduce legislation to protect it.

By Alastair Farr – Managing Director Asia Pacific

Adjudication and payment legislation is imminent in Malaysia in the form of the Construction Industry Payment and Adjudication Act (CIPA). This article discusses ways in which statutory adjudication may work for you. What is it actually likely to mean to the users of adjudication, whether contractors, sub-contractors, owners, or legal representatives?

Adjudication was first introduced into law in the UK 14 years ago. Since then it has been introduced in various forms by other countries: Northern Ireland 1999, Isle of Man 2004, various territories of Australia (New South Wales 2000, Queensland 2004, Western Australia 2005), New Zealand 2003, and Singapore 2005.

The background to adjudication in all of these countries has been the desire to tackle the issue of delayed payment and non-payment in the construction industry. Cash flow is the lifeblood of the construction industry and it was thought necessary to introduce legislation to protect it.

Adjudication provides a quick and inexpensive means of resolving a dispute, certainly compared to arbitration or litigation. It allows the claimant to get a temporarily binding and enforceable decision. Although these can be opened up and retried by the high court or in arbitration, our experience in the UK is that in the vast majority of cases the parties accept the decision as binding and do not reopen them, even where there are large disputes. There have been a number of cases in the UK where the losing party has gone to court to try to resist the enforcement of a decision but in the majority of cases the court has upheld the adjudicator's decision and enforced it even where the

Continued on pages 3 & 4.

WELCOME TO THE DRIVER TRETT DIGEST CONTINUED

In May this year Trett became part of Driver Group, sharing numerous synergies as international consultancies, both providing specialist services to the engineering and construction industries.

The combination of our two firms means that we are now part of a much larger business employing over 285 staff, in 13 countries, with an annual turnover in excess of £37m. Our offices operate across Africa, Americas, Asia Pacific, Mainland Europe, the Middle East, and UK.

Driver Group now comprises of five complimentary business lines with commercial consultancy services provided by Driver Trett, project control services through Driver Project Services, financial monitoring and insolvency support through Driver Corporate Services, project financing and management through Driver Strategic Project Management, and expert witness support services through our new venture DIALES.

The Digest will be issued twice a year, featuring interesting and topical articles from staff and other leading industry and legal writers from around the world. The style of the Digest will remain informative whilst at the same time being lightly written and easy to absorb, and we will also continue to actively encourage readers to share their own views and experiences and welcome feedback and contributions.

Finally, I am delighted to introduce Dave Webster, CEO of Driver Group. Dave has kindly been interviewed for this first edition (see opposite), and so I'll not steal his thunder and instead allow him to introduce you to the Driver Group.

I hope you enjoy this edition of the Digest and continue on our future circulation. If you wish to receive further copies or have other colleagues you think may be interested in receiving Driver Trett Digest please do let us know.

With very best wishes

Alastair Farr
Managing Director Asia Pacific

Q&A: Dave Webster

DAVE WEBSTER, CHIEF EXECUTIVE OFFICER OF THE DRIVER GROUP, SHARES HIS THOUGHTS ON THE ACQUISITION OF TRETT CONSULTING AND THE FUTURE OF DRIVER TRETT

Could you give us an outline of Driver Trett's visions and missions?

Driver Trett provides the dispute and advisory service of Driver Group; its mission is to provide best in class consultants to our clients - working within our and their ethics to achieve the best commercial outcome for their projects and business. The vision is to be the leading provider of this service to the major construction and engineering companies across the world.

What has the acquisition of Trett Consulting brought to the Driver Group?

The acquisition of Trett Consulting has brought to Driver Group a well respected brand with a high quality client base, particularly in sectors targeted by Driver as those within which we ought to expand; oil & gas, industrial, energy, and marine. The Trett offices in Houston, Kuala Lumpur, Netherlands and Singapore now provide the group with the global offering we had planned to achieve and all of this is delivered by highly skilled and loyal staff. The UK and Middle East offices significantly strengthen our joint offering in these regions. As Driver Trett we are now the leading provider of dispute and advisory services across the globe.

How did the companies fit strategically?

The strategic fit is very complimentary. The capabilities of the staff are very similar and the culture of Driver is more akin to that in which the Trett staff have historically thrived. The client base of Trett fits the strategic development plan of Driver with little duplication across the client base. This means that there is no dilution across the joined business and every opportunity to leverage further growth through integration of Driver Project Services, Strategic Project Management and Corporate Services. Within Driver Group we can now offer to a broader range, and increased number of clients, a full compliment of quantity surveying, cost, commercial, planning and consultancy services from feasibility stage to final account settlement at the right pricing levels and appropriate skill set.

How has the acquisition benefitted Driver Trett's clients?

The acquisition has benefitted Driver Trett clients because we now have the capacity to serve them on a global basis with 285 staff working from offices across all regions of the world. Very importantly for our clients – who are predominantly significant companies in the construction and engineering industries, we have the critical mass to fulfil their needs on any project no matter what volume and skill of resource is required and whether this is short notice, short duration or long duration.

What is Driver Trett's position within the Driver Group?

Driver Group provides the following services:

- Expert witness and arbitration/ litigation support
- Dispute and advisory
- Project services
- Strategic project management
- Corporate services

The Driver Trett staff deliver the dispute and advisory and expert witness and arbitration/litigation support services. We have Driver Trett staff in each of our office locations around the world and the Driver Trett service currently accounts for 70% of the Driver Group offering.

What is Driver Trett's vision for the next 5 years?

Driver Trett's plans for the medium term are to double the size of its business through ensuring complete integration of knowledge, development and client care across all five regions of the world and leveraging the opportunities provided by the four other service offerings of the group.


Petronas Towers, Malaysia

ADJUDICATION IN MALAYSIA – A PRACTICAL VIEW CONTINUED

adjudicator has made a clear mistake. We would imagine that the same would be the case in Malaysia, with the courts seeking to uphold adjudicator's decisions. From a practical view point, companies are unlikely to wish to go through the cost and time of arbitration or litigation after they have been through adjudication. So a clear understanding of adjudication will be necessary.

Adjudication under CIPA will apply to every construction contract made in writing and relating to construction work carried out wholly or partly within the territory of Malaysia. It includes government contracts and also consultancy agreements. Unlike in the UK, CIPA also includes oil and gas contracts. The only exclusion will be residential construction under 4 storeys where the contract is entered into by a natural person intending to occupy the building.

Adjudication is fast. In the UK it takes 28 calendar days from referral (extendable to 42 days). In practice many adjudications go on longer by agreement of the parties. Under CIPA it's 90 working days so the parties have a little more time, and again it is extendable by agreement of the parties. It is still a very quick procedure, particularly if dealing with a large dispute. In practical terms, whether you are the claimant or respondent it will mean you diverting all your efforts to the case in this period, during the submission stages and during the period in which the adjudicator makes a decision. Adjudicators have extensive powers under CIPA (in fact greater than what UK adjudicators have), and can order disclosure, act inquisitorially if they wish, and can require a hearing. All of this will require the parties to be reactive during the process as it will be a pull on resources.

You must be alert to the ambush. Under CIPA, once a payment claim is made there are just 10 working days to respond. If you do not, it is taken that you dispute the whole amount, at which point you may receive the notice of adjudication. In the early days of adjudication in the UK, many parties would wait until the start of a public holiday to serve the adjudication notice, as the timetable would commence knowing that the responding party would be unable to react quickly. Watch out for the Notice just before Chinese New Year.

Adjudication is fast...You must be alert to the ambush.

In the UK any dispute can be referred, so it's common to see all types of contractual issues (payment, extensions of time, quality, practical completion, etc.) being referred, often in a single adjudication. CIPA only refers to payment disputes. However it is likely that many of these will involve wider issues. For example, the claimant seeks payment of prolongation costs as loss and expense under a contract. This will involve the adjudicator forming a view as to whether the claimant has been delayed. So by default, adjudicators are going to have to deal with wider issues anyway. The jurisdiction of the adjudicator under CIPA comes from issues set out in the payment claim and response and it's likely that there will be many reasons why payment is being claimed and denied. The payment claim might actually be the final account. This can lead to very complex adjudications. In the UK we have dealt with some adjudications up to £15m, with many complex interlinked issues. If you are the claimant then you are in the driving seat because you will have had time to prepare. If you are the respondent however you need to act quickly and have your project team and consultants in place very quickly to defend it. You have to be able to respond quickly

■ Continued on page 4.

ADJUDICATION IN MALAYSIA – A PRACTICAL VIEW CONTINUED

and decisively.

In the UK the hope was that adjudication would be used early during construction and to deal with issues quickly. The reality has been that adjudication is adversarial and that parties, not wishing to confront the other during the project, have left it until the end to refer, often after handover. Again this has led to large disputes being referred.

One of cases we dealt with concerned an £8milion dispute and involved a final account, extensions of time (EOT) on three sections of work, and a counterclaim for liquidated damages. The backup papers to the submission ran to 26 boxes of files. Many had not been opened by the adjudicator when the decision was made. However the case was convincing and we were able to present it succinctly and clearly allowing him to reach his decision. The claimant (client) was awarded £6million, full EOT on all three sections of work and the counterclaim dismissed. Our client had only expected £2million. The award was paid without enforcement being necessary and it was not re-opened in arbitration. The case demonstrates that complex decisions can be made in a short period of time, but much depends on it being presented clearly so that the adjudicator is convinced.

Be familiar with the Act, make sure you are fully prepared, and your team ready

In our experience in the UK there has been a presumption with adjudication in favour of the claimant. In other words, because he is claiming he must be entitled to something! This presumption is hard to rebut and it is rare for an adjudicator to decide that the claimant is not entitled to anything at all. Furthermore, as mentioned, the claimant will have had time to put its argument together. So as the responding party you need to have your case set out well and in advance of any likely adjudication, including any financial counterclaims you might have. These need to have been included in the payment response otherwise the adjudicator is unlikely to have jurisdiction to consider them.

One of the most important features of adjudication is the adjudicator's jurisdiction. I have already mentioned that under CIPA this is derived from the payment claim and response, which precede the notice of adjudication. In the UK we have seen a lot of case law develop as to whether the adjudicator had, or exceeded their, jurisdiction in deciding an issue. I imagine that the same will be true in Malaysia, because if you can demonstrate that an adjudicator has done so, his decision is unlikely to be enforced. What does this mean in practical terms? It means making sure the payment claim and response are carefully and thoroughly prepared, and the adjudication submissions likewise.

Tactically how can you improve your chances in adjudication?

1. Firstly, be familiar with the act itself and the procedures within.
2. Secondly, if you are referring make sure that your case is fully prepared, and if you are likely to be the respondent be aware of the likelihood that you will be drawn in to adjudication and be prepared to act quickly.
3. Thirdly, no matter which party you are be sure to have your project team, consultants and lawyers ready and on hand for the duration of the proceedings.

There are many differences between the CIPA and the Housing Grants Construction and Regeneration Act in the UK, some have been mentioned already. Much of what we learned and some of the problems we encountered after our Act came into force have been dealt with in CIPA. For example, the adjudicator can award party costs and this prevails over any other agreement by the parties prior to the adjudication. This effectively prevents what is known in the UK as the tolent clause where Party A could state in a contract that no matter whether Party B won or lost an adjudication against it, they would pay its costs and those of the adjudicator. The effect of such a clause was that Party B would never wish to bring proceedings.

This is just a flavour of what adjudication may entail and some of the practical issues that may be faced in Malaysia.

There are also some important payment clauses in CIPA. Firstly, conditional payment or 'pay when paid' and 'pay if paid' clauses will be void under the Act. Secondly, there is an important direct payment from principal clause which allows a party with an enforceable adjudication award to ask the principal of the party who does not pay the award to pay the amount. The principal must then pay and recover the amount from the party as a debt or by way of set off against the party who had the decision made against him. This mechanism can only be invoked if the principal owes money to that party at the time the request for payment is made. These are both useful and welcome provisions and will assist greatly in the flow of cash in a construction

ALASTAIR FARR ASIA PACIFIC

Alastair has a quantity surveying and contracting background and is also a barrister and mediator. He has experience of most forms of dispute resolution including ADR, adjudication, arbitration and litigation. He has also provided expert witness reports in quantum and delay.

Alastair has worked on projects in various sectors including oil and gas, nuclear and renewable energy, process, civil engineering, rail, water, building, and mechanical and electrical engineering. These projects have involved loss and expense, disputed variations, extensions of time, liquidated damages and defects. He has experience in providing commercial and contractual advice at all stages of the construction process from tender through to completion.

Alastair has experience of most forms of procurement including PPP, EPC, traditional, lump sum, reimbursable, target cost, etc. Specialist areas include risk management, commercial management, and insolvency.

Alastair is the managing director for Asia Pacific.

The Old Supreme Court of Singapore

Introducing Driver Trett Asia Pacific

Our Asia Pacific region covers the whole of South East and Central Asia and Australasia. We currently operate from six offices across the region including Australia, Hong Kong, India, Japan, Malaysia, and Singapore, with more offices due to open over the coming year.

The region is as diverse as it is vast; it possesses some of the largest and fastest growing economies, biggest financial and business centres, and some of the most rapidly developing countries in the world. It is also a region that is rich in natural resources with extensive oil and gas, metal, and mineral reserves.

Our services cover a wide range of engineering and construction sectors including building, energy, infrastructure, marine, mining, oil and gas, and petrochemicals. We deliver support and solutions to owners, developers, contractors, sub-contractors, and suppliers.

Our team is drawn from a wide range of backgrounds and is truly multi-disciplinary, this enables us to provide specialist high-quality commercial, programme, risk management, claims and dispute resolution services across the region. □

UK Autumn Seminars 2012

The UK Autumn seminar season is almost complete, with final events scheduled at the end of November. This season saw a case review of Walter Lilly v Mackay & Anor, offering an extensive summary of case law in the context of construction disputes. The case covered a whole range of issues that arise commonly in construction and engineering matters including defects, concurrent delays, and global claims.

Topics covered included:

- Record Keeping
- Standards and Specifications
- Dealing with Defects
- Legal Privilege
- Evaluating Delays and Concurrency
- Global Claims
- Expert Witness Evidence
- Claim and Case Management

For more details regarding this seminar, or any other Driver Trett seminars and training, contact: info@drivertrett.com

For the latest details of Driver Trett seminars visit our website: www.drivertrett.com/knowledge/seminars.html

Driver Trett UK team at the Bristol Seminar

You will also find further details of how Driver Trett can deliver a wide range of seminar and training topics directly to your team, through our regular seminars and focussed in-house training services. □

MARTIN WOODALL
AMERICAS

Martin is a quantity surveyor with over 25 years of experience in commercial management, specialising in the petrochemical, onshore and offshore oil and gas sectors. He has managed projects in Norway, France, South Africa, and throughout the UK.

He has represented a number of major engineering contractors at senior level and process owner operators, on both major capital projects and multi-million pound engineering maintenance contracts.

Martin is a skilled communicator, negotiator and facilitator who is knowledgeable in traditional and alternative contracting styles. His particular specialisations include: commercial and contractual advice and strategy; preparation and negotiation of disputed final accounts; alternative and performance linked contractual arrangements; contract administration and project controls; client focussed business and service development.

Martin is the managing director for Americas

Sufficient Information ...merely a question of fact!

By Leslie Harland – Director Driver Trett Singapore

The term "sufficient information" appears in two standard forms of building contract used in Singapore (PSSCOC[1] and SIA Standard Form of Contract[2]) and relates to particulars a contractor must provide to the contract administrator[3] in support of his extension of time application. Nothing wrong with that I hear you say, quite normal in fact and to be expected when trying to estimate how much extension to grant.

What constitutes "sufficient information" can be extremely subjective, the requirement is often met after numerous exchanges of correspondence between the contractor and contract administrator. This is very much a trial and error process with the contract administrator taking the usual position of not saying exactly what information he requires. To some, this may be viewed as an opportunity or license to procrastinate, particularly as both the PSSCOC and SIA Standard Form of Contract only obliges the contract administrator to determine extensions of time when he is in receipt of sufficient information.

Sadly, such discretionary powers may be used to defer the prospective award of extension of time until a convenient date in the future, or when the works are near or complete, at which time the full extent of the delay is apparent. In the case of the SIA Standard Form of Contract, the contract administrator can wait until the final certificate is issued.

This puts the contractor in the position of not knowing what extension to expect (if any). Does he speed-up work to avoid possible delay damages or continue in the belief that an extension of time will be granted?

So what must a contractor do?

Is there an industry test, or check list, that can be used to show how and what information is to be presented; or is it simply a question of cobbling together as much information as possible and submitting it to the contract administrator in the hope that he will do the rest?

Quite often it is the latter that seems to be the norm with little, or no, attempt being made by the contractor to establish the facts or circumstances surrounding the alleged delay event.

What amounts to "sufficient information" is, by and large, a question of fact; to be objectively answered in light of the contract administrator's knowledge of the delaying event. If we assume the contract administrator has very little knowledge of the event, which is sometimes conveniently the case, then as a minimum the information to support the contractor's extension of time application should typically include fact based narratives. These should explain the alleged cause of delay and how this affects progress and completion, and be illustrated by the appropriate method of delay analysis. This approach is generally in keeping with the requirements of clause 14 (3) (1) of the PSSCOC.

Documentary evidence comprising letters, method statements, instructions, progress reports, photographs, meeting minutes, and construction programmes are required to support the assertions made by the contractor. These are records which the contractor would be obliged to keep in any event and in keeping with the requirements of most standard forms of contract.

Whilst contractors and contract administrators may continue to have different views and ideas as to what constitutes "sufficient information", along with types of documentation to be provided; adopting the above basic principles will aid the timely assessment and award of extension of time with any further amplification required by the contract administrator being limited to any specific information only. □

> Documentary evidence is required to support the assertions made by the contractor

[1] Public Sector Standard Conditions of Contract (2005 Edition) Clause 14.3 (1) & 14.3 (3)
[2] SIA Standard Form of Contract (Sixth Edition) Clause 23 (4)
[3] Superintending Office or Architect

THE GREATER FORCE

Is Force Majeure an unforseen event or normal business risk?

By Mike Davis – Director
Driver Trett Houston

Force Majeure is a common contract clause, intended to provide relief or suspend contractual liability should an unforeseen event prevent fulfilment of contractual obligations. For force majeure to be applicable, these events must also be beyond the control of the party seeking relief.

Traditionally, relief has been in the form of schedule consideration only, subject to an obligation to overcome the effects of the force majeure event as quickly as possible. In recent years the inclusion of cost relief, in addition to schedule relief, has become more prevalent in the drafting of force majeure clauses in engineering and construction contracts in the USA.

Force Majeure should be included as a defined term within the contract.

The definition should also include a specific description or listing of force majeure events such as:

- unusually severe weather
- natural disasters
- change in law
- acts of government and regulatory authorities
- acts of war, riot or terrorism
- strike

More modern interpretations can include:

- computer hacking
- computer viruses
- data storage crashes
- medical pandemics

U.S. District Judge Jerry Buchmeyer once cited a force majeure clause in which "intergalactic confrontations" were included!

Often, such specific listings are supplemented with a 'catch all' phrase e.g. 'including but not limited to' or '...anything beyond the reasonable control of the parties.' These phrases will often be interpreted as 'anything beyond the reasonable control of the parties AND analogous to the preceding list of events.'

However, a closed list of events will always provide a more limited application of the clause. The party most likely to rely on force majeure will seek a broad definition of force majeure events while the party least likely to rely on it will wish to restrict the definition. It is also possible to include within the force majeure definition, a list of events that shall not constitute force majeure, such as:

- reasonably anticipated weather conditions for the area
- labour action specific only to the project and not affecting other projects in the area

Force majeure does not apply automatically - it has to be made explicit in a contract and force majeure clauses are generally drafted to apply equally to both contracting parties as a result of the same triggering event.

An example of a force majeure definition:
An event or condition that has an adverse effect on the ability of a contractor or owner to perform any of their obligations under this agreement or which delay such performance or compliance, in each case if such event or condition is beyond the reasonable control, and not the result of the wilful or negligent action or inaction of the non-performing Party.

■ Continued on page 8.

FORCE MAJEURE – THE GREATER FORCE CONTINUED

U.S. District Judge Jerry Buchmeyer once cited a force majeure clause in which "intergalactic confrontations" were included!

It is usually desirable under force majeure to provide for postponement or suspension of performance and the contract, so a clause may also include something like:

...The time for performance shall be extended for a reasonable time, having regard for the cause of the delay upon reasonable notice in writing to the other party. Should such delay persist for a period of over 28 continuous days either party may give notice to terminate this agreement on 7 days' notice in writing.

Considerations when assessing the impact of Force Majeure

Despite best efforts and intentions during contract negotiations, it is not unusual for parties experiencing delay during the execution of the work to try to find something that could be classified as force majeure in order to excuse such delay and subsequent exposure to damages, and also to recover cost or even cancel the contract. However, it is worth considering that the effects of a force majeure event may be more far reaching than immediately evident.

For example, the short term effects of hurricanes Katrina and Rita on the Gulf Coast region of the United States included:

- the immediate delays to progress and associated project prolongation costs
- the cost of repair and replacement
- the loss of labour availability as workers evacuated the areas and were slow to return
- the spike in fuel costs driven by the impact on upstream and downstream activities in the Gulf of Mexico
- The immediate increase in demand for materials and equipment for repair work drove rates up overnight
- transportation costs doubled as haulage companies brought supplies into the region but left empty due to halted production in the area.

The longer term effects included:

- wage rates spiralling upward as existing projects competed with emergency rebuild work, to attract a limited workforce
- reduced labour productivity as the market was flooded with less skilled workers attracted by the high wages on offer
- incentives, bonus and per diem payments made across the board to retain workers
- the cost of providing labour camps and other accommodation due to the lack of available hotels and rental properties, many of which were destroyed

The burden of proof is on the party seeking to invoke the force majeure clause. It is also essential that the party invoking a force majeure clause provide written notice to the other party in the specified manner and within the timeframe stipulated.

Force majeure is not intended to excuse negligence or misconduct, neither can it excuse insufficient resources or errors. Usual and predictable conditions that could and should be contemplated are not force majeure events but normal business risk. The purpose of force majeure is to save the defaulting party from the consequences of anything over which it has no control. A well drafted force majeure clause will allocate risk and allow the parties to expeditiously respond to a force majeure event. □

An example of a force majeure clause:

If a Party believes that a Force Majeure has occurred, such Party shall use reasonable efforts to mitigate the potential impact of such Force Majeure and give notice to the other Party of occurrence of the Force Majeure, describing the cause and nature thereof, within five (5) Business Days after the occurrence of the Force Majeure is known and advising of any anticipated delay and cost resulting there from.

JOHN MESSENGER AFRICA

John has over 30 years of international experience in the construction industry. His experience includes the management of projects through initial feasibility studies, scheme development, and the 'financial engineering' necessary to translate an opportunity into a viable business enterprise.

John is involved in the identification of procurement strategies and the procurement process necessary to secure the involvement of partners on realistic commercial and contractual terms. He has experience in working for owners seeking to develop projects, as well as for contractors seeking to develop involvement in the projects tender, negotiation and delivery stages.

John is the managing director for Africa and chairman of Driver Group Africa (Pty) Ltd.

MARK WHEELER EUROPE

Mark is a building services engineer with over 25 years of engineering experience within the construction industry, including major civil engineering, building and power projects.

He specialises in providing expert services support, quantum, and claim reports for support in construction dispute resolution. This is achieved by means of litigation, adjudication, arbitration, or mediation. He acts as an expert witness in both technical and quantum disputes, and has cross examination experience.

Mark also has experience in working with a wide range of contracts, including JCT, FIDIC and the NEC3 form. He regularly advises on the practical application and use of NEC3.

Mark is the managing director for Europe.

KEVIN MCPHILOMY MIDDLE EAST

Kevin has a quantity surveying background with over 40 years of experience in the engineering and construction industry. His extensive experience includes identification, development, negotiation and settlement of claims across the building, civil engineering, petrochemical, power, process and offshore industries.

Kevin has major project experience in cost control and contractual management systems, managing design and build contracts, value engineering and risk management. He has also acted as an expert witness in numerous disputes.

Kevin is based in Muscat, Oman and is the managing director for the Middle East.

Driver Corporate Services New Starters

DRIVER CORPORATE SERVICES ARE PLEASED TO ANNOUNCE THAT THERE HAVE BEEN TWO IMPORTANT APPOINTMENTS MADE TO THE TEAM IN RECENT MONTHS.


Phil Rylance


Hilary Robson

Phil Rylance has joined as an Associate, specialising in project monitoring. Phil is based in Driver's Haslingden office and is responsible for the development of the service line to main lenders, second tier funders and developers. Phil has some twenty years' experience working for main contractors, before joining a major private quantity surveying practice, where he honed his skills working for a variety of lenders dealing in the property market.

Hilary Robson has taken the position of Director in the London office. Hilary brings a wealth of experience in the financial sector and is tasked with continuing the progress made in the South East market over the last 12 months and developing our existing team in the region.

Hilary has enjoyed great success working at a senior level for regional and national quantity surveying practices, in addition to running her own company.

Chris Walsh, Head of the Corporate Services team said: "We are extremely pleased that Phil and Hilary have agreed to join us. Our clients rely on our professional abilities, which are respected throughout the sector. Bringing two individuals in to the group who are well known in the market and who will ensure the continued growth of business will benefit the group."

Driver Corporate Services provides services that include dealing with due diligence, corporate recovery, and insolvency cases. For more details please visit our website www.drivercorporateservices.com or contact Chris Walsh on +44 1706 223 999 or chris.walsh@driver-group.com

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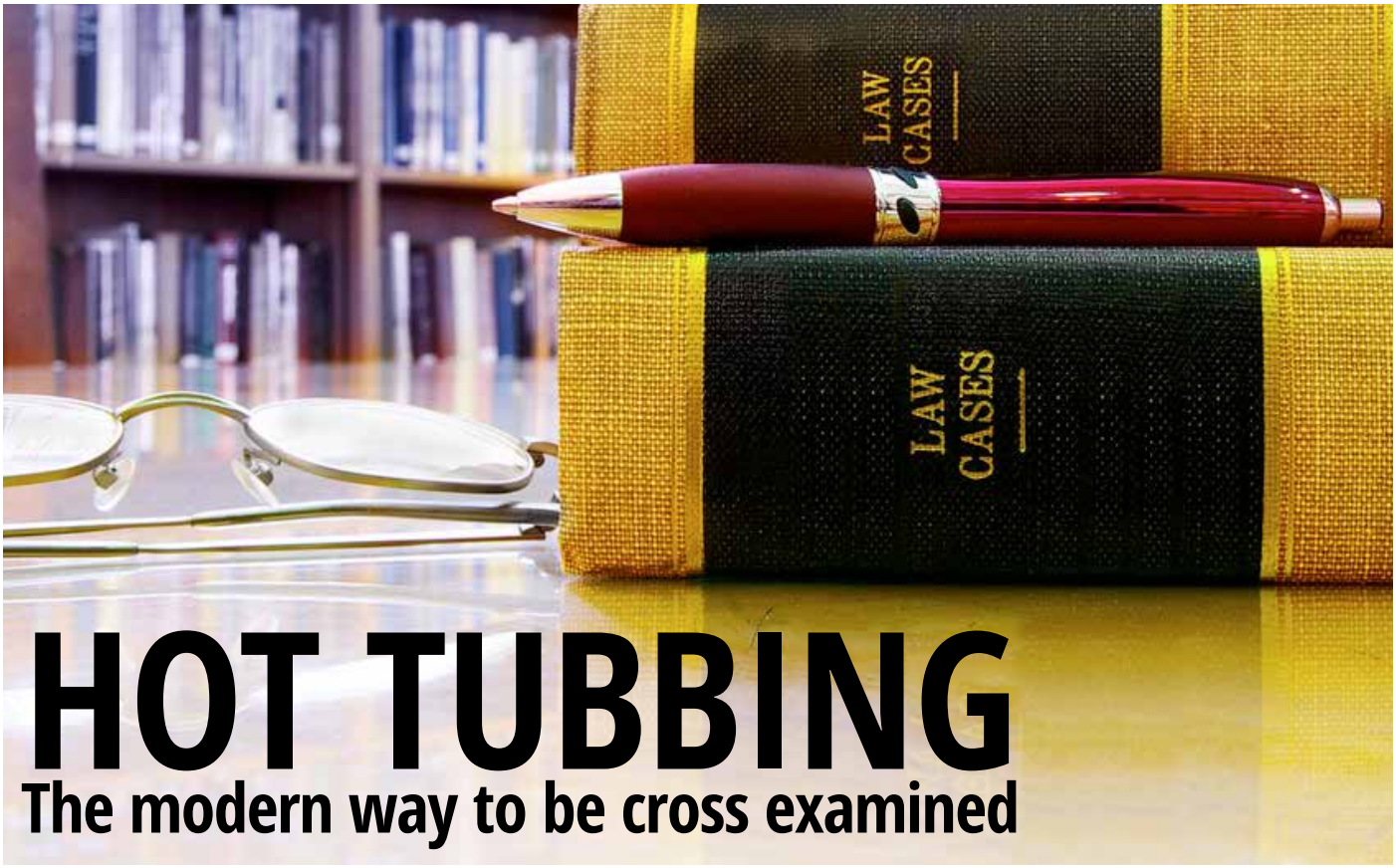

HOT TUBBING

The modern way to be cross examined

By John Mullen – DIALES Principal

Traditionally expert witnesses of like discipline give their evidence separately in turn, the first being examined and cross examined and the other expert following. Over recent years the practice of taking the evidence of experts concurrently has attracted increasing popularity under the descriptions "duelling experts", "concurrent evidence", "expert conferencing" or "hot tubbing". The practice has gained particular popularity in Australia and interest in Canada, the US and UK.

Possibly its first use in the UK Courts occurred in City Axis Limited - v - Daniel P Jackson (1998) 64 Con LR 84, where Driver Trett's Paul Battrick sat with his counterpart in front of HHJ Judge Toulmin to give their evidence concurrently. Since then Driver Trett's Peter Davison, Andy Smith, Mark Castell, Chris Foan and John Mullen have particular experience of it, John's including joining Roger Trett in the hot tub with the tribunal's own quantum expert also giving his evidence at the same time.

Hot tubbing is currently being piloted in the UK in the TCC and Mercantile Courts in Manchester and Bristol with the intention that the CPR might be amended to provide for its use in appropriate cases.

Supporters of the approach claim the following advantages:

- Experts should be more relaxed in the less adversarial and relaxed circumstances. They are likely to take a more constructive approach, to more confidently express their opinions and also make concessions where they feel it right.
- Experts will find that they are given a better opportunity to explain their opinions because they are not confined to answering questions from the parties' representatives.
- Experts also get a much better opportunity to respond to the opinions of their counterpart.
- The tribunal can more clearly see where the differences lie between the experts, following the debate first-hand.
- It helps the tribunal by focussing the experts on the search for the truth.
- The tribunal also gains a well ordered transcript because the evidence of opposing experts on the same items can be read together.
- The tribunal can ensure that the experts are working on the same assumptions as to legal or factual matters or those arising from the evidence of experts from other disciplines.
- If both experts need to express alternative positions based on alternative assumptions of law or fact then this can also be more readily identified and ensured.
- It saves costs by providing a quicker process, avoiding cross examination of both experts in turn and allowing the discussion to focus on the areas of disagreement.

Critics of the approach say that:

- The downside of a quicker process is that it may lead to the cutting of corners and reducing the quality of the resulting award or judgement.

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The IBA Rules have provided for concurrent evidence since the 1999 Edition at Article 3.(f) The TCC Guidelines of October 2010 also provide for it at 13.8.2(d). These suggest that the decision to take evidence concurrently should be taken at the case management conference considering:

- The number, nature and complexity of the issues.
- The importance of the issues to the outcome of the case.
- The number of experts.
- The areas of expertise.
- The experts' relative experience.
- The extent to which concurrent evidence is likely to assist in understanding or clarifying the expert issues.
- The extent to which concurrent evidence is likely to save time and/or costs.

HOT TUBBING CONTINUED

- There is a danger of losing a full opportunity to educate the tribunal on technical issues in the manner that examination-in-chief ensures.
- It may take away from the lawyers control over issues that they are concerned about or experts in whom they are not entirely confident.
- Counsel may also lose the opportunity to put points that they would like to put.
- Documents may be missed if counsel is not allowed the usual level of control in presenting their case.
- This is contrary to the cardinal principle of the adversarial system that the parties must be allowed to fully set out their case.
- It is also suggested by some that some counsel do not like the way in which it shifts the spotlight away from them and onto the tribunal.
- It is unlikely to be suitable where there is a serious issue as to one expert's credibility or independence, denying the chance to test and expose that with the full rigours of cross examination.
- It is to the advantage of the experienced, assertive, confident and persuasive expert.

In our experience, concurrent evidence can be a very efficient and effective way of presenting and scrutinising expert evidence.

The approach works best if all are properly prepared for it. This includes being clear: what issues the concurrent evidence should cover and the different opinions on them; how the process differs from the traditional approach; and that it is designed to inform and educate the tribunal rather than being a gladiatorial tussle.

It works well with a Scott Schedule and/or a joint statement in which experts have set out those issues on which they are not agreed and their reasons. Here, concurrent evidence may be seen as an extension of the process of meetings of experts and to agree and narrow the issues.

Experts need to be prepared for a process that is very different to the traditional adversarial process of cross examination. The relatively relaxed atmosphere may lead them to lose the focus that the adversarial environment brings such that they concede issues that, with more thought, they might properly not concede.

It is also suggested that there is a greater need for expert's assistants to attend the hearing to assist the legal team during what can be a very dynamic process.

Parties should consider whether their expert is experienced, confident and persuasive particularly in comparison with their counterpart. Alternatively, if the opposing party's expert is considered to lack credibility on an item it may be that lengthy and detailed cross examination in the traditional manner will better expose that. □

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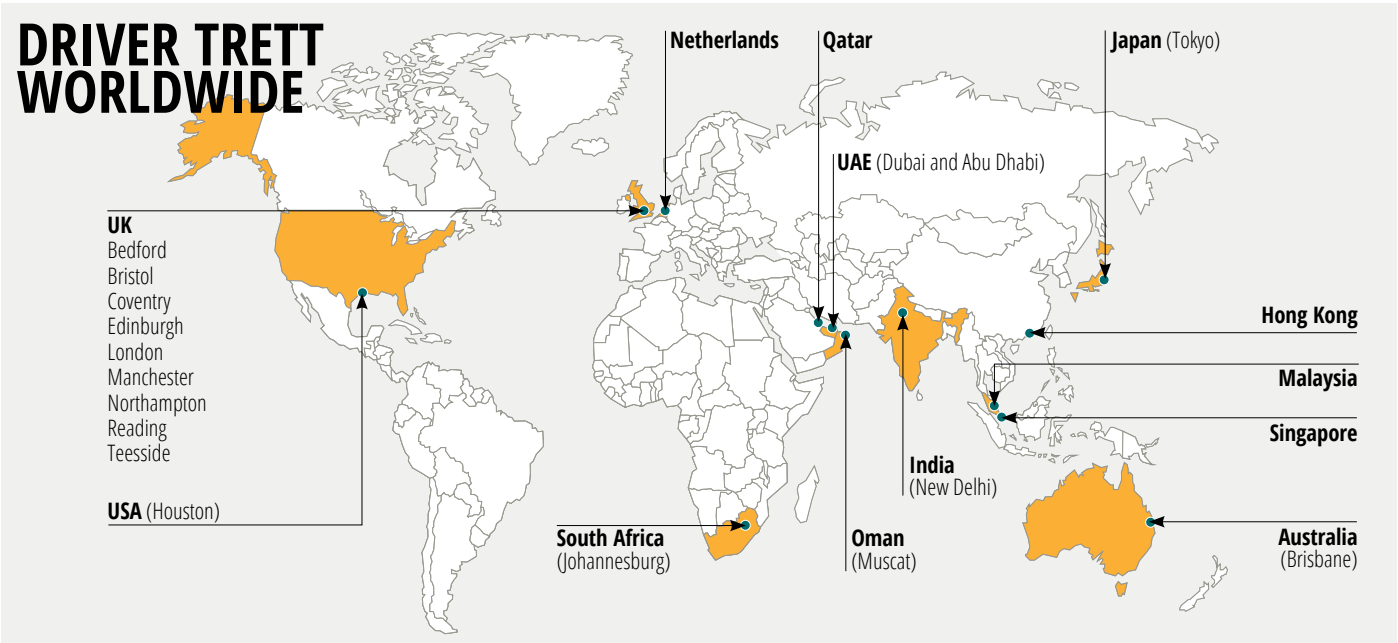
DRIVER TRETT WORLDWIDE

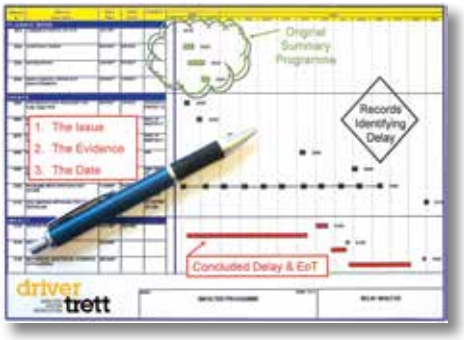


driver trett ANALYSIS ACTION RESOLUTION DIGEST NEWSLETTER

You're Getting Nowt*

How adverse weather conditions can change the goalposts on your NEC3 compensation event.

By David Wileman - Director of Planning, Driver Trett



As a Geordie who, in my formative years worked in the North East, I have heard this phrase regularly. To those of a more 'Queen's English' persuasion this means 'you have failed to show entitlement'.

Unfortunately, if you are a contractor working on an NEC3 project you will start to hear this with even greater regularity, especially when it comes to compensation events for adverse weather.

Adverse weather is treated as a 'compensation event' under the NEC3 form of Contract. A compensation event under 60.1(13) occurs when a weather measurement is recorded:

a) within a calendar month;
b) before the completion date for the whole of the works and at the place stated in the contract data;

Further, and most importantly

c) "the value of which, by comparison with the weather data, is shown to occur on average less frequently than once in ten years."

The important bit being that the weather data is contained within the contract data and as such removes subjectivity and makes assessment of 'adverse weather' an objective test.

What is relativity novel within the NEC3 is that the employer also holds the financial risk for such events rather than a more neutral position of the contractor being entitled to time but no associated costs.

The agreement of the weather data allows both parties to understand the weather risk profile, with the contractor accepting that any adverse weather which cannot pass the test i.e. is shown to occur on average less frequently than once in ten years - is at its own risk. This objective test provides employers with a datum at which to test the adverse weather.

As those who had set their hearts, this year, on a summer holiday in the UK know all too well, this risk profile has changed dramatically.

Horrendous weather has, to use a topical Olympic term, raised the bar. In 2012 the UK has encountered significant rainfall levels and extended periods of flooding across the country. Any assessment of adverse weather which exceeds once in ten years will mean that chaps called Noah will be knocking out little wooden boats.

> One way a contractor can protect itself is by careful use of the provisions of Clause 31.2 of the NEC3

As a consequence of the weather recently encountered the risk profile has significantly shifted with the contractor now bearing a far greater proportion of the risk.

The question is 'what can a contractor do?' to protect itself from the risks of adverse weather.

The Programme

There are not many contractors out there who want, at a tender stage, to discuss with the employer lowering the test by discounting 'freak' weather conditions, previously encountered in the last 10 years.

As with all compensation events adverse weather needs to be addressed by reference to the programme. It is the programme which provides time protection to a contractor.

Now as a consequence of the extreme weather recently encountered, the contractor is at a far greater level of risk of adverse weather not reaching the level of becoming a compensation event. Therefore, one way a contractor can protect itself is by careful use of the provisions of Clause 31.2 of the NEC3.

Clause 31.2 provides that the contractor shows: on each programme which he submits for acceptance; amongst other things, time risk allowances and float.

Under the NEC3 float and time risk allowances are owned by the contractor as part of his realistic planning to cover his risks.

It is therefore crucial to a successful project, especially one which starts at or under ground level, that the programme float and time risk allowances protect the contractor from the now near impossible summit of adverse weather that "is shown to occur on average less frequently than once in ten years." □

*In colloquial Northern English, 'nowt' can be used as a substitute for the word 'nothing'

FIDIC RAINBOW SUITE SEMINAR

The Omani Society of Engineers together with Driver Consult (Oman) LLC and Trowers & Hamlins jointly organised a seminar on FIDIC contract forms (the "Rainbow Suite") that took place at the City Season Hotel in Muscat on October 8th 2012. The speakers concentrated on standard contracts, the key issues and market factors affecting projects under FIDIC and the Oman Standard Documents. The seminar was opened by Khamis Al Souli, Local Partner Driver Consult (Oman) LLC welcoming nearly 60 guests from the construction and engineering industry. Kevin McPhilomy Regional Managing Director Driver gave a short overview of the Rainbow Suite and its key elements. Further key presentations were held by Jamie Kellick and Cheryl Cairns, Trowers & Hamlins and Andrew Smith, Driver Consult (Oman) LLC followed by in-depth discussions. **For further articles and information regarding the FIDIC Rainbow suite visit www.drivertrett.com/knowledge/articles.html** □

Driver Consult (Oman) LLC host FIDIC Rainbow Suite Seminar – Muscat, 8th October 2012

It's a Risky Business

By Paul Blackburn - Director
Driver Trett UK

The NEC3 Engineering and Construction Contract (ECC) and the Professional Services Contract (PSC) concentrate the minds of parties on the word "risk". The clauses contained within these contracts have the word "risk" liberally spread throughout both the ECC and the PSC.

Who carries the risk?

These contracts are very clear on this subject, as clause 81.1 states:

'From the starting date until the Defects Certificate has been issued, the risks which are not carried by the employer are carried by the contractor'.

The risks that are carried by the employer are defined in 'section 8 – risks and insurance' and 'section 6 – compensation events'. In addition, 'contract data part one' can cater for additional employer's risks.

The contractor has to include in the price and programme for those risks which are not an employer's risk. The inclusion in the price for the contractor's risk is not visible unless the activity schedule identifies an item for such risks, assuming they are measured in compliance with a particular method of measurement, does not separately measure or itemise risk.

Thus we are left with the programme and the risk register that the contract, irrespective of which ECC option is used (and that includes the NEC PSC), requires that risk is identified.

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IT'S A RISKY BUSINESS CONTINUED

What about the programme

The contract is not specific about what a time risk allowance (TRA) is or what it should contain but the 'notes for guidance' give a very clear definition of what should be included on the programme in respect of time risk allowance.

The definition recommends that time risk allowance should be the duration of each activity or the duration of parts of the works. In addition they should be clearly identified in the programme or included in the time periods allocated to specific activities.

The simplest and most effective way of dealing with TRA is to show it in a separate column titled TRA on the programme adjacent to the activity period, i.e. that is it is included in the duration of the activity. This is preferable because the contractor does not know precisely when the risk is going to occur. If the TRA was to be shown as a separate programme activity then this would have the effect of potentially doubling the size of the programme.

TRA is applied to the relevant programme activities, or indeed the programme could have a separate activity for known particular risks. Another form of TRA is the time difference between planned completion and completion, this is known as terminal time risk allowance (TTRA). Both TRA and TTRA are owned by the contractor for those risks that he is liable for. This is clearly recognised by the contract in that, should an event occur that is a compensation event and it delays planned completion, then the completion date is also delayed by the same amount (Clause 63.3).

Where does it actually state in the contract that the contractor owns the TRA associated with individual programme activities?

The notes for guidance make it clear that the TRA belongs to the contractor. This would appear to be a sensible approach as the contract does distinguish between float and TRA. We have to rely on the notes for guidance for the definition of float:

'Float is any spare time within the programme after the time risk allowances have been included. It is normally available to accommodate the time effects of a compensation event in order to mitigate or avoid any delay to planned completion'.

The word 'normally' puts it into context that it may not be normally used to mitigate the effects of compensation events. This would suggest that float is owned by whoever gets there first i.e. the float belongs to the project (see example 1).

Example 1 assumes that the last activity on the critical path results in the planned completion. Thus the effect of the above is that the contractor will retain his TRA (assuming the programme activity is on the critical path), even if he does not use the allowance by virtue of a risk not occurring or being less than anticipated. That is, planned completion will become earlier and the TTRA will increase.

Should planned completion be brought forward or should it remain in position and float be created?

This would create float for the mitigation of the effects of a compensation event. It is equitable that should the contractor not use the TRA then he should retain that allowance because he may have equally underestimated other risks and their allowance within other critical programme activities. To this end, should he require more allowance for these risks, it will be available for him in the increased TTRA. That said, as the risk has effectively passed, the unused allowance should become project float.

Example 1

The contractor owning the TRA and its effect on the programme and planned completion, the following could be relevant:

Contained within the critical path of a programme is an activity that has a TRA of 2 weeks.

During the currency of the works the contractor submits a revised programme. The revised programme has recorded the actual progress and one of the activities against which actual progress is recorded is the critical activity that contains the 2 weeks of TRA.

The TRA for the risk that the contractor has ownership has not been used because the risk did not occur or was less of a risk than first thought.

The effect on the timing of the remaining work is to reduce the duration of the critical path and thus planned completion is revised to an earlier date.

Control of TRA

The contractor does not have complete control over the amount of TRA he includes within his programme. The project manager could envoke Clause 31.3 if it is felt that the amount of TRA is unrealistic. Project managers should think twice before this course of action as this could lead to them taking the responsibility for determining the TRA which is based on the contractor's assessment of risk to enable delivery on a completion date.

Risk Register

TRA and TTRA are allowances contained within the programme for those risks that are owned by the contractor. The contract requires the completion of a risk register that identifies the risk, and is then used to enable management of the risk. The risk register does not allocate ownership of

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that risk. This is left to the contract in that all options define the contractor's risk as being everything, other than those covered by an employer's risk.

What relationship does the risk register have with the programme TRA and TTRA?

The answer is that there is no relationship. The contract would appear to imply that the TRA and TTRA would cover those risks contained within the risk register.

This begs the question, 'how does the project manager determine whether the allowance contained in the TRA and TTRA are sufficient to cover the contractor's risks if the risk register and the programme are not aligned?'

We can conclude that the project manager could not reject the contractor's programme if he thought the contractor's plans were unrealistic because the TRA or TTRA were incorrect.

It would be a simple matter to make the risk register align with the programme and the TRA and the TTRA in so far as the risks identified in the risk register were catered for in the TRA and the TTRA. This would allow the project manager to make an informed decision as to whether or not he could accept the contractor's programme. In accepting a programme whose TRA and TTRA have possibly been drawn from the risk register, it does not mean that the project manager is changing liability for the ownership of risk should one of the items on the risk register have an incorrect allocation of risk. There can be no change to the contract unless the conditions of contract provides for it. Who owns what risk and the definition of a risk register does not include the allocation of liability for a risk.

Compensation events and risk

Clause 63.6 states that contained within the assessment of the effect of a compensation event are risk allowances for cost and time for matters which have a significant chance of occurring and are at the contractor's risk under this contract.

To put this in context, if the contractor retains the risk of a weather measurement i.e. should a weather measurement occur he will not receive compensation, and a compensation event delays an item of work from a summer period into a winter period of work. The contractor should make an assessment of the effect of the moving of the work from a summer period to a winter period of working, this includes the effect on time and cost.

Having decided in principle that the contractor should include in his assessment of a compensation event an allowance for the contractor's risks that have a cost and time effect and have a significant chance of occurring how should the contractor go about making his assessment? One thing is certain, that you will at some point require the accepted programme to analyse and demonstrate the forecast effects of risk.

What better way of demonstrating this than with the accepted programme that contains TRA which reflects some of the contractor's risk allowance.

The project manager will have the comfort of knowing what TRA the contractor had included in the accepted programme and he can base his acceptance of the contractor's quote on an analysis of that TRA. Or if the project manager makes his own assessment he at least has a reference document that he has accepted the programme.

This could only work if the project manager understood what was included in the TRA. It would be preferable if the risk register was aligned to the accepted programme whereby the risks were quantified and allocated to relevant programme activities. Better still if the accepted programme has some form of resource allocation from which can be determined the effect of risk on the resource levels. Having achieved some form of demonstration of the effects of the compensation event the NEC then instructs that some form of mitigation should take place.

The ultimate recommendation is that project managers should be aware of the changes in the accepted programme.

Should the contractor change the accepted programme, what are reasonable defined costs, and what is a reasonable amount of time to be incurred?

Project managers should be aware of what the contractor is doing in relation to changing the accepted programme to mitigate the effects of a compensation event. Any change to the accepted programme brought about by mitigating the effects of a compensation event could impose shorter timescales on the periods to the commencement of an employer's liability. This does not mean a shorter period than that contained within the works information, as that can only be changed by an instruction from the project manager. The act of mitigation can introduce additional risks particularly if it involves making sequential programme activities become concurrent and thus introducing additional resource which may not be as productive.

The ultimate recommendation is that project managers should be aware of the changes in the accepted programme that mitigates the effect of compensation events, and be aware of the additional risks it may bring. □

In the next issue

The next issue of the Driver Trett Digest will have a UK focus, with other Driver Group regions covered as we move through the issues.

The Digest will always aim to be topical, and respond to requests and questions from our readers through the articles and briefings we publish. If you would like to submit a question or article request to the Digest team please email info@drivertrett.com with DIGEST in the email subject line. We are always pleased to receive feedback from our readers, and welcome the opportunity to develop the Driver Trett Digest into a valuable read for those involved in the global engineering and construction industry.

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