driver trett
ANALYSIS ACTION RESOLUTION

THE DIGEST NEWSLETTER

Issue 3 | June 2013

New National Director for Australia

Driver Trett is pleased to announce the appointment of David Hardiman to head its operations in Australia. David has over 30 years' experience in construction, specialising in claims and dispute resolution, and is a leading expert witness having testified in arbitration and litigation in a number of jurisdictions. In his career, he has advised on major construction and engineering projects in Europe, South East Asia, Middle East, India, Africa, and Australia.

David will be based in our Brisbane office and will spearhead the growth of Driver's operations and brands nationally including Driver Trett (contracts, advisory, and dispute resolution) and DIALES (expert witness services). □

In this issue...

Welcome to the Driver Trett Digest

Alastair Farr
Asia Pacific issue – Technical Editor

I am delighted to welcome you to the third edition of the Driver Trett Digest, where we turn our focus once more to the Asia Pacific region with articles from our staff in Singapore, Malaysia, and Australia offices. We also feature the recent opening of our Driver Trett office in Brisbane, our third new office in six months; and the appointment of our new national director for Australia, David Hardiman.

Rest assured, for those outside of the APAC region, there is plenty of interesting content to satisfy your other regional interests.

Keeping pace with worldwide changes is an important part of our business, in this issue we look at the use of BIM in dispute resolution, the newly launched CIOB contract for complex projects, and the new adjudication legislation 'CIPAA', which will soon come into force in Malaysia.

Methods of preventing or resolving disputes are many and varied; we examine the use of early neutral evaluation as an effective means of preventing disputes. Separately, we consider whether arbitration might be a preferred dispute resolution option in Asia.

The Society of Construction Law's Delay and Disruption Protocol, which originated in the UK, is commonly cited by those dealing retrospectively with the often thorny issue of delay. Now with the protocol in its 11th year, Stephen Lowsley considers how delay analysis techniques in practice have moved on and whether the protocol is still valid against this backdrop. Is it time for an update I wonder? Any views on this would be welcomed.

And whilst on the subject of delay analysis, expert delay analyst Clive Holloway, in our Singapore office, looks at the effectiveness of baseline programmes and provides two case studies for the preparation of delay, prolongation, and disruption claims.

Guest writers are always welcome and this edition is no exception. We're pleased to include articles from Barrister Charles Pimlott on global claims and Architect Katerina Hoey on expert witness immunity. Both are very topical subjects at the moment worldwide. I should mention that If you have an article you wish to contribute or any feedback you'd like to give on articles you've read, please do write to us at **info@drivertrett.com**.

It's often said that variety is the spice of life and this issue is no exception. I hope you enjoy reading it. □

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Concurrent delay in Australia: The road to apportionment?

JOHN LEWIS – ASSOCIATE DIRECTOR, DRIVER TRETT AUSTRALIA EXPLORES THE DEVELOPING APPLICATION OF APPORTIONMENT UNDER AUSTRALIAN LAW.

Australian common law has a long tradition of following English legal precedent. In 1986, The Australia Act (the Act) abolished the Privy Council which, prior to that point, had been the highest court in Australia. Until 1986, the State Courts of Australia could appeal to the Privy Council yet, with the passing of the Act, powers transferred to the Australian High Court. This article examines whether the Australian Courts have since followed pivotal English case law on causation, how they have dealt with the issue of concurrent delay and delay costs, and considers what may be a move towards apportionment.

Since the passing of the Act, the commonality of approach in relation to causation has led to equally similar findings involving concurrency of delay. Indeed the analogy provided by Giles J. (see below) in, Thiess Watkins White Construction Ltd. v Commonwealth, bears more than a passing similarity to the dicta Dyson J in the leading English case of Henry Boot v- Malmaisson:

"To take a simple example, if an owner-caused delay of 5 days commencing on day 15 means that a contractor which would have completed the work on day 20 still has 5 days to work to do, and there is a neutral delay on day 23, I see no difficulty in concluding that the time based costs incurred on day 23 were caused by the original delay[1]".

However, more recently in Australia there seems to have been a divergence from English case law in which the courts have preferred the approach of establishing dominant and driving delay.

In The Supreme Court of Queensland case; McGrath Corporation Ltd (MCPL) v Global Construction Management (Global)[2], the delay element of the case involved defective works in the two lift shafts of a twin tower unit. The formwork contractor had installed a defective product which required additional time to correct. The owner (MCPL) claimed the delay amounted to 155 days (the total period of project overrun). MCPL brought an action against the management contractor (Global) who rejected their assertion, stating their delay accounted for only 55 days of the overall project over-run.

The opposing delay experts could not reach a consensus and neither expert proclaimed to be able to precisely allocate delays during the period of concurrency. Evidence produced at trial cast doubt on the correctness of the 155 day claim made by MCPL. Daubery J. stated the overall position as follows:

"It was, at the end of the day, uncontroversial that the ITF defective works had caused a 55 day delay to the whole building program. It was for MCPL, however, to establish on the evidence, and not merely by assertion, that delay to the project beyond that 55 days was at least substantially caused by the ITF defective works. The evidence, however, discloses that there were multiple causes for the rest of the delay. The ITF defective works might have made some contribution to that further delay, but that is really a matter of speculation[3]."

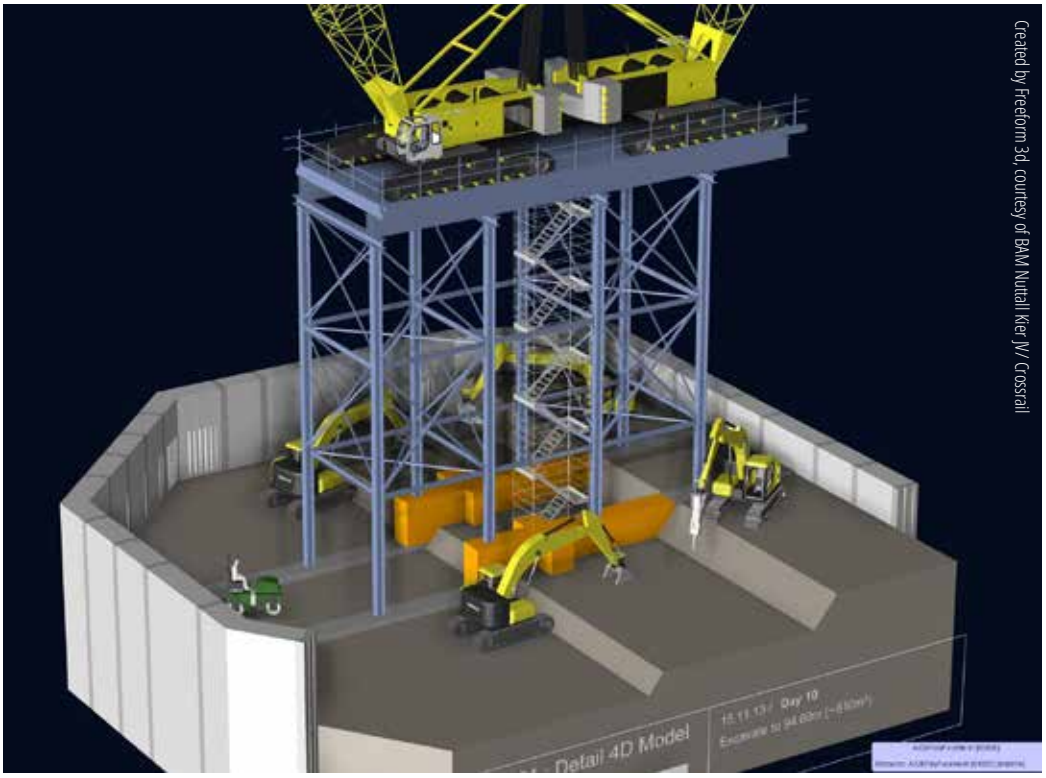
Preceding that, Daubery J. had cited the obiter of Lord MacLean in the Scottish case of Laing Management (Scotland) v John Doyle Construction Ltd[3] which specifically required the, "apportionment of loss between the causes". Daubery J. awarded MCPL 55 days of the delay costs.

At no point was it stated that the exercise conducted by Daubery J. represented apportionment; however, it appears clear from the evidence that MCPL had not established their claim such that the intertwined concurrent delaying events had been unravelled. The author suggests that taking the 'least uncontroversial' duration does not represent a discharge of MCPL's burden of proof. It is suggested that the judgement in MCPL –v- Global represents an approach more akin to that of Canada, where apportionment of concurrent delays is more common place. If the above case finds further judicial assent it would appear Australia is embarking on the road to apportionment in cases of concurrent delay. □

[1] *Thiess Watkins White Construction Ltd v Commonwealth*, Giles J NSW Supreme Court, 23 April 1992 unreported cited in Doyles Construction Lawyers "Concurrent Delays in Contract"

[2] *McGrath Corporation Ltd (MCPL) v Global Construction Management (Global)* [2011] QSC 178 Ibid at 164

[3] *Laing Management (Scotland) Ltd v John Doyle Construction Ltd [2004]* BLR 295.



A picture paints a thousand words – the use of BIM in dispute resolution

ALASDAIR SNADDEN – CONSULTANT, DRIVER TRETT SINGAPORE EXPLORES THE VALUE OF BIM IN DISPUTE RESOLUTION.

The growing phenomena of BIM; can it help?

Building information modelling (BIM) and its evolution is gaining an ever growing audience. In Singapore, the Building and Construction Authority (BCA) implemented the BIM roadmap in 2010 with the aim that 80% of the construction industry will use BIM by 2015. The United Kingdom's Government Construction Strategy has a mandate making BIM compulsory on all public sector projects by 2016. Consequentially, it seems critical we ask; how can this help speed up the dispute resolution process?

In his 2009 report into UK civil litigation costs, Judge Jackson identified that a key difficulty often faced when resolving disputes is handling, understanding, and interpreting exhaustible amounts of documents and information. Indeed in Hunte v Bottomley 2007, Lord Justice Arden identified how many cases are often prepared in a way that it makes it very difficult for the courts to follow and understand.

Can BIM help overcome this obstacle? If so, what will its challenge be? This article looks at BIM generally and how it can be used by parties in the dispute resolution process.

Getting a clearer picture?

With BIM pushing forward in conceptualising projects digitally it will, on the face of it, offer great opportunity to dispute resolution.

> The United Kingdom's Government Construction Strategy has a mandate making BIM compulsory on all public sector projects by 2016.

Resolving disputes on engineering and construction projects can mean dealing with complex issues often difficult to comprehend. The use of a BIM model, and the chance to visually present to an uninformed audience what is being described, can only lead to a better and faster understanding of the issues.

For example, on a project in Malaysia, BIM was used to show the difficulties encountered by the contractor constructing a cable stay bridge. A major difficulty faced was having access to construct approach roads at either side of the bridge. For this to occur in the sequence shown on the agreed programme, it required the relocation of the residents. What actually happened was completely opposite to what was envisaged.

The stakeholders involved in the project struggled to comprehend how such an issue had the effect it did. It became apparent that words alone could not convey what actually took place.

By conceptualising the project into a 4D model, it gave visual aid to compare how the project had originally been planned, with how it was actually built. The effect of the late relocating of residents became very apparent to the audience. This helped the parties reach an amicable conclusion to an otherwise lengthy and tortuous process.

Putting BIM into perspective; the quandary causation poses!

The example above is encouraging, giving insight into the impact BIM can have in dispute resolution. Certainly, this visual support will be replicable in disputes looking at different issues. For example changes in design, construction methods, and quantum can all benefit from their

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WHAT IS BIM?

In order to try and find an answer to how BIM can assist in the dispute resolution process, a quick understanding of what BIM is will be helpful.

At its core, BIM uses software to produce an integrated model of a project. The model should have the ability to represent functional and physical characteristics of a project, reacting to change when new knowledge and requirements need adopting. This means it needs to be supported and involve the collaboration of all parties required for this process to exist i.e. the client, design team, contractor(s), subcontractors, etc.

This foundation is now being expanded and explored further. For some users BIM has a multi-dimensional capacity, including help with the construction sequencing and programming (4D), cost management (5D), and facilities management (6D). Therefore, BIM is still on a continuum of discovery into its own capabilities.

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changes being conceptualised and shown by a BIM model.

However, some perspective must be put on this assistance so BIM is not taken out of context.

It must be remembered, disputes often crystallise when parties involved do not or cannot agree on matters. In other words, they have differing positions on the events that occurred. That being the case, the issue of causation is critical.

Currently, explaining via BIM technology the reason something has happened and the effects thereof will be limited. The reasoning for this can be found in writings as far back as David Hume, a scholar of the 18th Century Enlightenment, into the problems of causation. Hume explained how causation, i.e. the reason something occurred, is a mental act of induction. In other words, causation cannot be seen but is instead inferred through explanation of the events that led up to when something happened.

A simple illustration of this is a game of pool. A player hits the pack of balls two separate times. The player believes he played the exact same shot both times yet the balls split differently. Explaining why this happened could only be achieved by identifying the differing activities which occurred before the shot was made and deducing why it is believed this was a cause of the balls splitting differently.

Undeniably, engineering and construction projects are more complex than a game of pool. They involve the interconnectedness of many different characters, parties, and organisations on a variety of levels at differing stages of its life cycle. This means, when disputes occur, understanding and explaining what occurred, why it occurred, and its relations to the agreements made is of paramount importance and often not simple to achieve.

Without doubt, having a BIM model can make causation appear more obvious. For example, on a case relating to a delay and disruption claim for a cladding contractor, the model showed the slow progress on the concrete frame. This made it a matter of common sense that the cladding could not be completed on time when the preceding works were nowhere near ready.

Notwithstanding this, it has to be remembered that BIM, as it currently stands, won't itself make these deductions, no matter how evident they may appear. Furthermore, it cannot detail what time and/or costs should be granted or allocated because of this and why. This has to be identified, explained, and decided separately.

The use of a BIM model, and the chance to visually present to an uninformed audience what is being described, can only lead to a better and faster understanding of the issues.

The challenge for BIM: making sure the picture is clear!

The discussion above shows how BIM might assist dispute resolution as a tool, albeit potentially a very powerful one, aiding explanation rather than providing it.

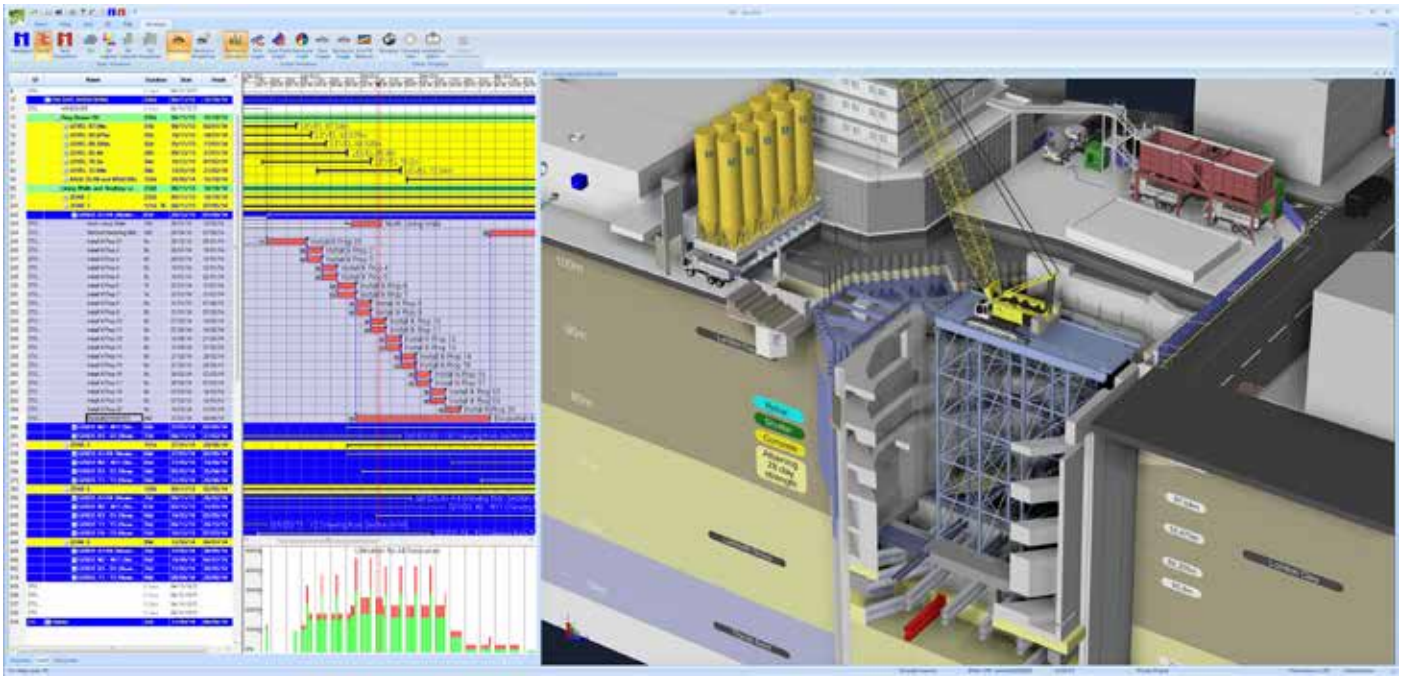
However, if BIM is to be of great magnitude in this way it will face a key challenge of making sure it is seen as an accepted and admissible form of evidence.

This should not be underestimated. In dispute resolution, the accuracy of records and data is often brought into question. Furthermore, as a BIM model is an artificial replication of the project, suspicion may arise that the information used in its creation is either incorrect or indeed manipulated to show what a party wants, not necessarily the full or correct circumstances.

A recent example of this happening with BIM, which nearly ended in court, was in the United States of America (US). Whilst constructing a new university building, the components of a plumbing system fitted perfectly in the BIM model. Yet the model failed to show the very specific construction method required for this to occur. Ultimately, it meant it would not fit due to buildability issues.

Parties using BIM need to make sure they overcome such problems, or distrust, and ensure BIM is an appropriate representation of the project. Using contemporaneous records and back-up information as support is always advisable in such circumstances. However, perhaps the more distinct advantage could be the fact BIM should have the involvement of all parties on a project and ought to be developed throughout a project's life cycle. Therefore BIM models, unlike many other forms of visualisation, are not done independently or in isolation away from the project and the parties involved.

If energy is put behind this collaborative approach which provides BIM models with reliable information, then dispute resolution will have an effective mechanism to call upon. □



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Nipping it in the bud

ALISTAIR CULL – DIRECTOR, DRIVER TRETT UK EXPLORES THE LITTLE CHAMPIONED METHOD OF DISPUTE RESOLUTION THAT IS EARLY NEUTRAL EVALUATION.

Early Neutral Evaluation (ENE) has been around for almost a decade but for some reason it has not been a method of dispute resolution which is often talked about, proposed, or used.

So what is ENE? It is an early process whereby a third party neutral evaluator considers the parties' submissions, hears the evidence, and provides his or her evaluation of the dispute.

However, evaluators do not need to be limited to simply reviewing and hearing the submissions made. They can go much further and dig into the real causes of the disputes, subject to the terms of appointment; and ask the parties for their submissions on other aspects of the project which may have become overlooked as the parties point the 'finger of blame'. This ability to investigate issues that may not have been highlighted by the parties is a key difference of ENE when compared to adjudication. In adjudication, the powers of the adjudicator are derived by the Law (statue and in common law in the UK). The notice determines the scope of the adjudication and the adjudicator's jurisdiction. If these are exceeded then the parties may cry foul.

The aims of ENE can be summarised as follows:

- Provide the parties with a quick, confidential, and impartial assessment of the dispute.
- Encourage the parties to consider the strengths and weaknesses of their case – 'reality check'.
- Early presentation and consideration of key documentation.
- Early identification of core issues.
- Encourages early dialogue and settlement.

One of the most significant benefits of ENE is the providing of a 'reality check'. All too often, parties become blind to the potential weaknesses in their arguments, especially if specific individual's personalities have become involved. The use of the evaluator to test the veracity of each party's case can be extremely useful and may prevent the expenditure of substantial costs in taking the matter forward to adjudication, arbitration, or litigation.

ENE has also been referred to by one commentator as 'Mediation Plus'. The plus being that, unlike mediation where the mediator is there to facilitate negotiations between the parties, the ENE evaluator will provide an assessment of the value of the dispute without his opinion being binding.

The use of the evaluator to test the veracity of each party's case can be extremely useful and may prevent the expenditure of substantial costs in taking the matter forward to adjudication, arbitration, or litigation.

So what is the process? Well there are no hard and fast rules governing how the process should take place but it will typically be along the following lines:

- Evaluator is agreed between the parties or is appointed via an appropriate body.
- Initial meeting held and timetable agreed.
- Parties make submissions.
- ENE hearing held. Evaluator asks questions of the parties and their representatives.
- Evaluator prepares and issues his opinion.
- After the opinion has been issued, the parties may request a further meeting with the evaluator to discuss their findings.

Rather than a definitive figure, the evaluator will generally provide a range in which it is considered the dispute would ultimately be determined at by some future dispute resolution process.

ENE may be started at any time in the process but it is suggested that it is undertaken at an earlier rather than a later stage. However, there is no point in starting the process until all the facts have been assembled, otherwise the opinion provided by the evaluator could be fundamentally flawed.

ENE can be extremely useful where there is a need to maintain the commercial relationship between the parties, which would only diminish further if one of the more adversarial methods of dispute resolution were adopted eg. where there is a 'winner' and 'loser'. ENE can also provide an effective means of resolution where there is a particular point of principle, be that legal or technical, which is effectively preventing sensible discussions from taking place. Other possible advantages include:

- The process is confidential.
- The process is quick.
- It may reduce litigation costs in any future proceedings and is particularly well suited to complex disputes or disputes which comprise multiple issues, which would be extremely expensive and time consuming to play out in front of a judge or arbitration panel.
- It allows the parties to understand the real issues between them.
- It is a controlled and impartial process.

On the flip side the disadvantages are relatively limited:

- It requires the parties to be honest. There is a risk of the process being abused whereby a party has a preview into the other's case.
- It could be perceived as adding another step in the dispute resolution process with possible duplication of costs.

Once the parties are in possession of the evaluator's opinion they can choose to either use it as the basis of further negotiations and hopefully settlement or ignore it and continue on the dispute resolution road. If the parties continue along this road there is an interesting strategic tactical consideration. If one party to the ENE process was considering making a UK Civil Procedure Rule (CPR Part 36) offer, which is a without prejudice offer save as to costs made during litigation proceedings, should it base its offer on the opinion of the evaluator? On the basis that the evaluator has had sight of various written submissions and has had the opportunity to question the parties and their representatives, an offer within his range of figures could put considerable pressure on the other party to accept rather than risk paying all the legal costs[1].

A further consideration is whether ENE satisfies the pre-action protocol for construction and engineering disputes. Technology and Construction Court Guide 2010 states "The purpose of the Protocol is to encourage the frank and early exchange of information about the prospective claim and any defence to it; to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and to support the efficient management of proceedings where litigation cannot be avoided". It is hard to see how it could not be considered, when consideration is given to the overriding principles set out at Section 1.3 of the Protocol. That said, to the best of my knowledge, this issue has not yet been tested in the Technology and Construction Court (TCC) and therefore a degree of caution must be exercised.

The reasons as to why ENE is not a more widely used method of dispute resolution are unclear; perhaps it is because it is not formally written into building contracts or because there is a general lack of awareness within the industry. However, I believe that the benefits that ENE can bring to the table are considerable given its speed, merit based evaluation, and its ability to maintain long term relationships. All of which can only be an aid in resolving dispute. □

[1] From the date that the Offer could have been accepted provided the Offer is not beaten.

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Baseline planned programme faults

CLIVE HOLLOWAY – DIRECTOR, DRIVER TRETT SINGAPORE HIGHLIGHTS THE ISSUES OF RELIABILITY AND CREDIBILITY OF BASELINE PROGRAMMES.

Baseline Planned Programme Flaws

In the retrospective analysis of delay on projects, it is frequent for commentators to declare that the baseline planned programme is flawed and so deemed unreliable unless the omissions, faults, and errors are corrected.

Often, these defective and deficient baseline planned programmes are approved (albeit regularly 'with comments') and are subsequently used to monitor and report progress, and to measure performance throughout the project.

It is a concern that more often than not relevant events are impacted against these imperfect baseline planned programmes to develop delay claims and establish extension of time (EOT) entitlements.

Also, without a realistic and reliable baseline planned programme the outcome of any 'what if' scenarios cannot be accurately predicted and the consequential effect established.

Typically, baseline planned programmes:

- Have no detail of how the activity durations were built-up and established.
- Do not provide any indication of resource levels required to achieve the programme.
- Have no quantities or values attached or assigned to the activities.
- Have some activities missing or incorrectly sequenced.
- Have some logic linkages missing and so the network is incomplete.
- Do not provide a method statement to complement the basic concept of how it is intended to carry out the works to accord with the planned programme intent.
- Request information earlier than is necessarily needed (built-in float or buffer periods).
- Lack build-up of lead-in procurement periods from receipt of design to delivery to site.
- Do not have structured release of information to meet the demands of the plan.
- Have some sequences of work that might be preferential (i.e. resource driven) and are open to other equally viable permutations.
- Have activities that include certain elements of work that are deficient in the description.
- Do not define in detail the essential elements of the design information that is required to enable works to progress efficiently.
- Do not properly correlate with the tender bid and price with respect to method, resources, quantities, output rates, plant, equipment, calendar, working hours, subcontracts, etc.
- Do not reveal periods of available float on non-critical activities or are defined.
- Do not indicate any learning curve allowance on certain activities and progress is predicted as constant from start to finish.
- Group together elements of the works for certain activities without any consideration of the complexity of the coordinated sequence of the operations (eg. MEP works).
- Have certain activities of similar work content, are inconsistent, and have longer durations.

In fact, so many aspects of the programme will merely be indicative of what the planner drafting the programme felt was appropriate at the time based on their experience and knowledge.

Also, the subcontractors and suppliers might not be identified. Therefore as and when orders are placed, the design, procure, and installation strings might differ and so the plan will inevitably alter.

Reliability

A reliable baseline programme would need to address the above list of typical faults as far as possible, and so requires the work activities, dependencies, and critical path to correctly reflect the true and strict criteria for the sequencing of the works.

However, in reality there is always so much uncertainty on a project with so many different influential factors, making it impossible to develop a perfect model programme, such as one that will accurately generate the real consequential effects of progress and any delays or failings.

It is impossible to predict the future with any accuracy for more than a brief period. The expectations of what a fully logic linked network planned programme provides is all so often too great. After all, a programme is only the best forecast of what can be expected to happen in the future, based on current circumstances, what is known about at the time, and the amount of detail and information available.

Of course, as the quality of the information improves, the situation alters, different ways of working are realised, more detailed information is received, changes are made, etc. and so the programme of future intent will inevitably require adjustment i.e. adaptive planning.

It is common knowledge that the criticality of the works evolves and changes as the project progresses, and the efforts of all parties, to ensure that the concentration of effort is correctly administered and managed, requires teamwork to achieve tactical goals.

However, it is the original planned intent that often carries with it the contractual basis of entitlement, and so the baseline planned programme needs to be credible.

Baseline Planned Programme Credibility

We all comprehend that programmes should:

- Be developed very early on, incorporating all the elements of design.
- Afford adequate lead-in procurement times and coordinate the various trade interfaces.
- Utilise proven output rates.
- Be logically sequenced.
- Be a sensibly structured work breakdown structure (WBS).
- Create appropriate working calendars.
- Make allowance for any influential factors, and temporary works as necessary.
- Establish methods of execution.
- Allocate adequate labour resources and ascertain the materials required.
- Determine plant and equipment required.
- Identify the critical aspects of work.
- Be costed to generate cash flow curves, and above all reflect the best solution for the project.

So, why can't this be achieved? Well it can, at least, be greatly improved, if the information is available and more certainty is visible, such as a complete design, a material take off, an accurate thorough ground condition survey, a reliable and consistent labour force, predictable weather patterns, tried and tested output rates, etc.

When preparing a programme, a planning engineer will approximate the dura-

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tion of activities, then roughly sequence the activity bars in order, with appropriate overlaps, within the time constraints of the project and then input the logic linkages.

However, the planner will be reluctant to enter logic links to the programme network unless almost certain the link is correct, in other words, strict engineering logic or hard logic. The trouble is, the planner will end up with very few logic linkages that they can defend and provide good reason to insert.

Resource type links are then entered and other links where justification for insertion is less certain.

The planner will still be short of links to complete the programme network, and so the remainders end up being put in for the sake of it (often due to the lack of information and certainty), because the software demands that the network is complete, even if one is not certain.

The upshot of this typical process in the preparation of a fully logic linked network, is that the planner who prepared the programme, deep down will know the inherent deficiencies of the plan and accept that it will not withstand any scrutiny.

It seems that if a planner, when drafting a programme, used a formula to calculate the duration of activities from the quantity of work, the expected output rates, and the number of men assigned to the task; then this would enforce the need for more accurate project related information. Therefore, the planned programme would be supported with back-up and build-up data to clarify the planned intent.

Also, if the planner defines whether logic links are hard, soft, resource based, or whatever to indicate any flexibility, then this would assist in understanding the basis of the plan.

The problem is, planned programmes that are produced subsequent to the tender and contract baseline of intent, tend to be more accurate and reliable, but will rarely have any contractual status for entitlements.

Tribunals recently are in favour of the factual analysis of delay, as opposed to theoretical analysis based on these unreliable defective planned programmes, which can easily be deconstructed and criticised. □

The new CIOB Contract for use with Complex Projects

STEPHEN LOWSLEY – DIALES EXPERT EXPLORES THE NUANCES OF THE RECENTLY LAUNCHED CIOB CPC 2013.

On 25th April 2013 I attended the official launch of the new CIOB Contract for use with Complex Projects (CPC 2013).

At the launch presentation it was explained that following an earlier survey undertaken in 2008 it had been found that in many instances complex projects suffered delay to completion. Following this survey the first step was for the CIOB to produce the 'Guide to Good Practice in the Management of Time in Complex Projects'. CPC 2013 relies on this publication; referring to it as the CIOB Guide.

CPC 2013 is a relatively lengthy contract comprising of four sections, agreement, conditions, appendices, and user notes. At this early time, and without some feedback of its use, it is difficult to provide comment. However, the following represents some initial, brief observations relating to the planning and time related requirements.

The contract uniquely requires the employment of a project time manager, who is required to be named at Contract Appendix B. The contract user notes describe the project time manager as the contract administrator's adviser on project time related matters, employed and paid by the employer with a duty to act independently and fairly. The project time manager's role is to check and either approve or reject the contractor's time related information. This ensures that the contractor's time management processes are satisfactory and can be relied on for the purposes of decision making.

From experience, contract administrators often appear unclear as to their time related contract responsibilities and, although supposedly independent, often have difficulties when problems arise due to their own default; namely the common occurrence of the late and piecemeal release of information. As such, I can see some advantage in the CPC 2013 requirements for an independent project time manager; however such requirement introduces a further layer of costs. Furthermore without direct and open access to the contractor's subcontractors it may prove difficult to evaluate the contractor's time related submissions. True 'independence' may also prove difficult.

> The contract gives no consideration to the fact that it may not be appropriate in all circumstances and that other techniques are available.

CPC 2013 is highly prescriptive in respect of programme format and the maintenance of progress records. The format of the master programme, referred to as the working schedule, is covered at Contract Appendix D and requires the use of critical path analysis. The software used to prepare and maintain the working schedule is to be stated in the appendix; however the prescriptive requirements relating to work break down structure and activity coding seem to suggest the use of Primavera P6 or similar equivalent.

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Delay events under the contract, simply referred to as events, are provided at Contract Appendix F, which also identifies whether each of the events represents an employer's time and/or cost risk.

Procedures for the calculation of the effect of an event on time are given at clause 38 of the contract conditions. The guide states that the working schedule is to be impacted by the effect of events that can be foreseen and/or have occurred saying that such calculation is based upon what is referred to as time impact or modelled/additive/multiple base analysis. These analyses are cross referenced to the Society of Construction Law Delay and Disruption Protocol (2002), 'Keith Pickavance, Delay and Disruption in Construction Contracts (4th ed. 2010) and the American Association of Cost Engineers, International Recommended Practice No. 29.

Following receipt from the contractor of the relevant information relating to delay, the project time manager has ten business days to advise the contract administrator of the impact described, as well as the instructions that may be given in order to reduce the delay.

Following receipt of this information the contract administrator has five business days in which to award an extension of time. Any extension of time awarded can be based on an accurate record of the resources, durations, and sequences arising, or on a reasonable estimate of the quantity of work, activities and resources, productivity, durations, and sequences likely to flow directly from an event. Therefore extension of time can be based on the actual events or the likely events.

Where the event is based on an estimate of the quantity of work as well as the likely delaying impact of an event, clause 40.4.1.1 allows the contract administrator to certify an earlier completion date. This is on the basis that the estimate of likely delay is revised by the accurate record of the activities and the actual resources, durations, and sequences, or the non-working period that actually occurred (the actual timings of the event are less than the predicted likely timings). This is subject to the likely delay not being previously agreed by the employer and contractor.

Subject to the nature of the delaying event, any such setting of an earlier completion could occur some considerable time after the extension of time was initially awarded. The certifying of an earlier completion date by the contract administrator is likely, for obvious reasons, to prove a very contentious issue.

In respect of extension of time the Contract Guidance Notes state:

"There are no provisions in the Contract for a subjective assessment by the Contract Administrator of a 'fair and reasonable' extension of time or an 'equitable adjustment'. The Contractor is only entitled to the time it can prove by calculation that it should actually need. Since the Working Schedule is a fully linked critical path network complying with the standards of the CIOB Guide, it operates as a predictive tool, which is intended to be used contemporaneously to calculate the consequences of any Event impacted upon it."

In the case of John Barker Construction Ltd v London Portman Hotel Ltd (1996) the judge was highly critical of the architect for carrying out an impressionistic, rather than a calculated, assessment of time.

In the later Scottish case, City Inn v Shepherd Construction [2007] the judge appears to have a differing opinion saying that the architect:

"is not expected to use a coldly logical approach in assessing the relative significance of contractor's risk events and non-contractor's risk events; instead, as the wording of both clause 25.3.1 and clause 25.3.3.1 makes clear, the architect is to fix such new completion date as he considers to be 'fair and reasonable'. That wording indicates that the architect must look at the various events that have contributed to the delay and determine the relative significance of the contractor's and non-contractor's risk events, using a fairly broad brush approach. Judgment is involved."

The above relates to the JCT form and CPC 2013 attempts to provide a method of calculating delay rather than relying on judgement. Such an approach seems logical and the avoidance of highly impressionistic awards by architects will be beneficial. My own view is that all of the elements required to necessitate such calculation will be complex, require judgement and agreement, and will represent a source of dispute between the parties. A seemingly calculated quantification will still therefore rely on subjective elements.

In the assessment of any delay I consider that to some extent intuitive assessment based on experience of the construction process and common sense are invaluable.

> CPC 2013 is highly prescriptive in respect of programme format and the maintenance of progress records.

The guidance notes state that the contract takes the view that differences of opinion as to liability should be dealt with immediately. A notice of an issue referral can be given, and within five business days both the employer's representative and contractor's representative are to meet in order to agree the issue.

If within a further five business days of this meeting the issue is not resolved then it is automatically referred to the principle expert for determination.

The principal expert can consult with other experts, request further information and meetings, and has a period of 20 business days to make a determination. This determination is binding on the parties unless either party issues a notice of adjudication or arbitration within 20 business days. The aim of this process is to resolve issues in an expedient manner and within 30 business days.

The above is only a very brief overview of the time related elements of CPC 2013. My main initial concern is the highly prescriptive nature of the planning and time related requirements.

From experience, the management of time in construction projects, as well as such issues as record keeping, is considerably lacking. However, I am a little concerned that good practice should form a prescriptive contractual requirement.

It would be wrong to suggest that critical path analysis should not be used as it is a powerful and invaluable tool, however the contract gives no consideration to the fact that it may not be appropriate in all circumstances and that other techniques are available. CPC 2013 appears to assume that all projects can be time managed in much the same way, 'one size fits all' and as such in my opinion is a little blinkered.

CPC 2013 adopts a very analytical and scientific approach to the management of time as well as to the calculation of extensions of time. In my opinion planning and project management are not a cold scientific process and require an element of an intuitive approach based on knowledge and experience.

CPC 2013 appears to be attempting to define certainty whereas good management is about considering possibilities. □

Q&A: Alastair Farr

How would you describe your role within Driver Group?
I look after the Asia Pacific region of Driver, which covers a vast area from India, through to South East Asia, Hong Kong, China, Japan, and down to Oceania. I'm one of five regional managing directors in the Group, reporting through to our CEO, Dave Webster.

What are your aims for the business in the region?
In one word our aim is 'GROWTH'! But I must emphasise, it's not growth just for the sake of being bigger. Our aim is to do 'what we do best', but with greater coverage across the region. At the moment we're focussed on growing our Driver Trett (contract, advisory, and dispute resolution services) and DIALES (expert witness) brands across the region. However, we're working to a medium term plan which ultimately will also see the introduction of Driver Project Services and Driver Project Management brands in targeted niche markets, specific to country. The first stage of strategy has been investment, particularly in recruitment. People are the lifeblood of our company, so having the right people with corresponding skill sets and abilities is very important to us and our clients. My aim is to build on our hard won reputation for providing sound, robust practical advice, and high quality professional services.

What services do you provide in the region?
At the moment it's mainly contract advisory, claims, and dispute resolution services, together with expert witness services. However, we're also providing bid support, and long term commercial and contract management to a number of clients, and these services are more aligned to our Driver Project Services and Driver Project Management brands. Over the next few years we will be expanding this side of our business.

So, big plans for expansion.
You bet! We've just established ourselves in Australia (in Brisbane) under the leadership of our newly appointed national director David Hardiman, and we're looking to grow our business there nationally, with further offices in the pipeline. Our specific focus is on oil and gas, mining, and infrastructure and we've already been amazed by the demand for our services. We're also looking to develop our existing business in Hong Kong which has seen a resurgence in construction in recent years including ten mega projects which are either underway or in the pipeline. We're also focussed on developing South Korea, Japan, and Indonesia. Asia Pacific has not been as badly affected by the global financial crisis (GFC) as other parts of the world and the region is experiencing a reasonable amount of growth which means there are demands in construction and engineering terms in all of these locations.

Are you recruiting for any key roles?
Well, consistent with the plans for expansion I've mentioned above, I'm looking for national managers for these locations. What I'm looking for is 'best in class' with tried and tested abilities. Additionally, I'm looking for renowned expert witnesses, people that want to concentrate on delivering reports and giving testimony rather than running a business. As a colleague of mine once explained 'grey hair and brains!'. Although no hair's okay too, obviously! Beyond that, I'm looking for all levels of staff, wanting to join a progressive business. If anyone reading this is interested, please do get in touch at **alastair.farr@drivertrett.com**. Thanks for the free advert by the way!

> Having the right people with corresponding skill sets and abilities is very important to us and our clients

You're welcome! So what can clients expect from Driver that they don't currently get in the market place?
In terms of Driver Trett, I think what it boils down to is providing pragmatic, robust advice, and actually caring about the outcome. All too often, clients come to us because they have employed others in the first instance, and they have simply repeated back the facts to the client, without actually advising.

With DIALES, we provide experts that instil confidence in lawyers and clients, knowing they will not let them down professionally, will provide their opinion without trying to advocate a case, and if they are called to give evidence they will perform well under cross-examination. That's why our DIALES experts must have a minimum 15 years' industry experience and have either been cross-examined or have been trained to do so. Finally, in terms of Driver Project Services and Driver Project Management, we differentiate from others because we are able to provide consistently strong individuals and teams which between them have many years' experience of providing project advice and successful project delivery. One other important difference is that our staff comprises employees, and we're not a 'body shop' or agency as are some of our competitors.

Finally, are there any particular sectors you will be focusing on in the next few years?
Given Asia's growth there is a huge demand for energy, and with oil becoming harder to find and exploit, there is and will be a growing reliance on gas, and the production and export of LNG in particular. We're already actively involved in this market and we are seeing an increasing demand for our services at all stages of an LNG project whether it be onshore or offshore gas. In addition, many countries in Asia Pacific are looking to develop, extend, and improve their infrastructure, and in particular rail and light rail systems, and so we're seeing a growing requirement for our services in this sector. When all's said and done, I think the future is bright for Asia Pacific as a region, and for Driver too. □

Going, going, **gone!**

Expert immunity after *Jones v Kaney*

KATRINA HOEY – CONSULTANT ARCHITECT, UK ASKS WHAT DOES THE FUTURE HOLD FOR EXPERT WITNESSES IN THE CONSTRUCTION FIELD?

Believe one who has proved it. Believe an expert. *(Virgil)*

The principle of witness immunity is said to date back more than 400 years, before either the development of the modern law of negligence or the practice of paying expert witnesses to give their opinions in civil and criminal cases. In respect of expert witnesses, this immunity was seemingly swept away in 2011 by a 5:2 majority judgment in the Supreme Court in the case of Jones v Kaney [2011] UKSC 13.

The case involved a psychologist (Kaney) instructed as an expert witness in a personal injury claim, who was said to have negligently signed a joint statement, in which she made a number of concessions that weakened the claim considerably. As a result, the injured claimant (Jones) had to settle the claim for much less than he believed he would otherwise have obtained.

How was the judgment received at the time? Could the results of loss of immunity be predicted? What have we learnt two years on?

Immunity abolished! At last...

This development was eagerly received by many in the industry, following the removal a decade earlier of advocates' immunity in Hall v Simons [2000] UKHL 38. The expert witness, paid handsomely for his or her services, was finally being taken to task when he behaved negligently, as befits a professional of his status; industry journals and newsletters were quick to report the momentous news with punchy headlines: "Is it open season on experts after Jones v Kaney?" "Expert witness didn't come up trumps? Sue, sue, sue!" "Expert witnesses: now liable for inexpert evidence".

After all, professionals normally owe their clients a contractual and/or tortious duty to exercise reasonable care in carrying out their duties; why shouldn't a professional be held responsible for his or her work as an expert, when he is responsible for it outside of court?

Immunity abolished! What next?

For many expert witnesses, the decision in Jones will make little immediate difference to their professional lives. Experts in the construction field, as conscientious professionals, may feel themselves unlikely to be at risk of having to deal with a claim of negligence, and will in any case carry adequate professional indemnity insurance. Perhaps they will start to incorporate a limitation of liability clause within their client agreements, just to be on the safe side. They may even view the established risks of professional disciplinary action or judicial criticism as a greater concern.

How likely is it that there will be a flood of claims? What can we hope to predict if we look at advocates? How difficult will it be for a party to sue his expert and what might his chances of success be?

"I've changed my mind."

The tension between an expert's duties owed to the court and to his client is summarised in the statement below, which sets out the circumstances for what has been described as the 'divided loyalty' argument:

"In my view, the public interest in facilitating full and frank discussion between experts before trial does require that each should be free to make proper concessions without fear that any departure from advice previously given to the party who has retained him will be seen as evidence of negligence. That, as it seems to me, is an area in which public policy justifies immunity." *Landall v Dennis Faulkner & Alsop [1994] 5 Med LR 268*

An expert's duties to his client have not altered as a result of Jones, merely the consequences of any breach.

So, post-Jones, what will happen if an expert changes his mind? Is it going to be sufficient for the expert to say simply "I've changed my mind and am complying with my overriding duty to the court by reporting this" as suggested by Lord Kerr?

The facts in Jones make it clear that should Dr Kaney's negligence be eventually established in future litigation, the negligent act would have occurred at the point at which she signed the joint expert statement. There is therefore a difference between an expert changing their mind and taking on board certain aspects of the opposing expert's point of view and an expert carelessly or mistakenly agreeing to an amended position. Experts may therefore need to take additional care in giving their initial opinion, for this is where I believe potential liability to predominantly lie. In addition, experts must ensure they limit themselves to giving opinion based absolutely on the evidence they have been asked to consider. It is highly unlikely that the courts will establish as negligent the mere act of conceding issues within

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the context of a joint expert's meeting. This would effectively condemn such meetings to an early grave, and with them, the significant savings in time and cost that can result.

A return to the hired gun?

An expert must also ensure that he does not confuse any duty owed to the party, with behaving in the interests of the party; any attempt to act as an advocate for the party will not be consistent with his duty to the court, and may result in accusations of acting as hired gun. It is important to remember that an expert's duties to his client have not altered as a result of Jones, merely the consequences of any breach.

Claims in negligence

Assuming that litigation against a negligent expert witness does materialise in some form, what will a claimant need to establish in order to succeed?

i. Establishment of a duty of care;
ii. Breach of that duty (in which a claimant will need to establish a failure by the expert to comply with a contractual obligation; or a failure to exercise reasonable skill and care in breach of section 13 of the Supply of Goods and Services Act 1982 (assuming there is a contract); or a breach of a duty of care in tort by reason of common law negligence); and
iii. Causation and loss (in which a claimant must be able to prove that the expert's negligence caused the loss, or at least that it made a material contribution in causing such a loss; the expert's conduct would be assessed 'on the balance of probabilities').

The quantum of the loss may represent an increase in the settlement sum (ref: Jones), damages that might have been obtained otherwise (loss of a chance), consequential losses (the expense of a substitute expert), and/or costs (a claim was not settled when it should have been, resulting in wasted costs).

Meanwhile, a distinction should be made between the position of:

i. An expert brought in to assist with the establishment of negligence; and
ii. An expert brought in to assist with quantum issues.

Evidence provided by an expert brought in to assist with the establishment of negligence goes to the very heart of the case in question. If negligence is not established, there is no case and no quantum to be determined. If proceedings are subsequently brought against a negligent expert on the basis that his evidence failed to establish negligence, when in fact it could or should have done, then re-litigation of the original issue is possible. This is less likely to be the case if the expert evidence relates to quantum issues. There would therefore appear to be more at stake for both the party and the expert in the establishment of negligence and this distinction may well provide fertile ground for judicial activity in the future.

PARALLELS WITH ADVOCATES

It is over ten years since advocates' immunity was removed by the House of Lords in Hall v Simons; since then, the predicted flood of vexatious litigation does not appear to have materialised. This is undoubtedly as a result of difficulty in proving negligence and establishing causation. There are a number of examples of the courts applying Hall in striking out claims on the basis that there is no reasonable prospect of success, including Pretty v Carter [2001] Lloyd's Ref PN 832 where alleged criticism of the advocate's style of cross-examination was described by the judge as "doomed to failure".

Whilst a comparison with advocates post-Hall may appear useful, it is not without its limitations. Expert witnesses and advocates are sufficiently distinct creatures as to lead one to wonder whether more claims may be brought against experts than against advocates in the future:

i. An expert's evidence is often critical to the outcome or settlement, whereas the advocate merely presents the case, it is more difficult to trace a connection between his error and any subsequent loss.
ii. Judicial criticism has been more common with expert witnesses than with advocates.
iii. An optimistic opinion of an expert, in the form of preliminary reports, may be more likely to come back to haunt them than the advocate.

Experts who already hold PI insurance should check the terms of their policy to ensure that their expert work is fully covered.

Insurance

Many of the initial industry reactions to the Jones judgment related to insurance, the heightened need for it, and the assumption that premiums would increase substantially as a result, although there is no evidence of such as yet. There are some obvious implications for experts and their PI insurers.

The current ongoing recession has resulted in increased claims against all professionals, with the collapse in the housing market in particular affecting construction professionals across the board. Any experts who are currently operating without PI insurance should certainly ensure that they have adequate PI insurance to meet any claims that might arise out of their expert work; those who already hold PI insurance should check the terms of their policy to ensure that their expert work is fully covered.

Limitation of liability

An expert would be well advised to insert exemption or limitation clauses in their terms of engagement; it is worth noting however, that efforts to limit liability are generally more favourably viewed in the courts than any attempt to exclude liability completely. In any case, questions of reasonableness and fairness will arise under Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, but where they exist, such clauses will remain an obstacle to any claim.

Further protection may be sought by an expert in setting contractual limits to what they can be expected to do, or by insisting on performance obligations on the part of the client and instructing solicitors. Conversely, clients and instructing solicitors may also wish to stipulate performance obligations for the expert.

Meanwhile, there is a real risk to those experts who may have not dealt with limitation of liability in their contracts of engagement signed prior to Jones, who may now be exposed to the risk of a claim in the future.

Conclusion

"Expert... witnesses are a crucial resource. Without them, we could not do our job". *Butler-Sloss and Hall, Expert witnesses, courts and the law (2002), Journal of the Royal Society of Medicine, vol. 95, no 9, p 433.*

The effects of Jones are potentially far reaching across the legal spectrum, though perhaps less so within the construction industry. A resultant 'sharpened awareness' of the risks surrounding inaccurate expert evidence may result in a 'flush out' of experts from the market, whilst ensuring that those remaining take care not to be overly robust in their initial opinions. To date there is little evidence to support the fear of a flood of negligence claims against experts from disgruntled clients. Regarding the 'divided loyalty' issue and concerns that Jones may herald a return to the hired gun, take note of Lord Kerr's high hopes for the conscientiousness of the average expert faced with difficult decisions to make. Those experts who comply with CPR Part 35 and maintain adequate PI insurance should have little to fear. □

CASE STUDY

Airport works

PREPARATION OF A DELAY AND DISRUPTION CLAIM AND COSTS FOR A MEDIATION HEARING

THE CLIENT

A large multi-national JV main contracting organisation.

THE PROJECT

The construction of airport works at a new international airport. The works included the main runway, taxiways, and apron areas, complete with all underground drains and services. The Airport Authority awarded the contract to the JV main contractor.

THE DELAY

The project suffered initial delays due to problems with the enabling works that were supposed to have been carried out by the preceding contractors. Also, the JV main contractor claimed delay due to many global issues, and so created numerous heads of claim. However, the JV main contractor had not noticed how significant these early problems were or how much disruption this had caused. Essentially, the JV completed the works on time overall, however interim completion dates had been missed. Hence the JV were not looking for an extension of time (EOT), but needed to recover costs which had more than doubled due to the disruptive nature of how the works were actually executed when compared to what was expected.

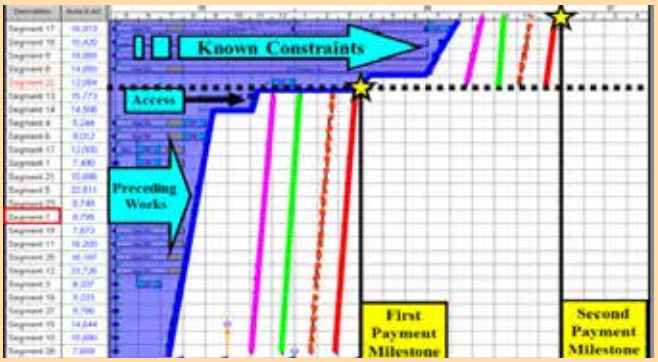
THE BRIEF

To analyse, assess, and evaluate the works, and demonstrate the extent of the disruptive working that was experienced on the project from start to finish, as outlined in the JV's claim. The direct effects of delays had been paid for in most cases via the variation account; however the consequential effect had not been recovered. It was necessary to demonstrate that the works could have been completed more efficiently, but for the employer's events, and so a type of measured mile technique was used to illustrate this.

THE ANALYSIS

An accurate as-built programme was quickly developed from progress data and site photographs, which was then compared with the planned programmes. Productivity curves were produced from the contemporaneous site records for the key elements of the work, to identify where the project suffered. It was clear that the works could not be executed in accordance with the plan due to circumstances for which the JV was not responsible. The consequential effect caused major disruption to the works, and motorway type aggregate laying machines were ineffective and inappropriate when the long lengths of work expected were chopped up into small segments.

The as-built programme of the segments of the runway and taxiways hard-core (pink and green) and tarmac (dotted and solid red) layers



The planned programme of the segments of the runway and taxiways hard-core (pink and green) and tarmac (dotted and solid red) layers

THE RESULT

The dispute went all the way through a mediation hearing at which evidence was presented on behalf of the JV. This was so successful the mediator thoroughly understood the disruption analysis to the point where he had to explain it himself to the opposing programming expert. The mediation was settled and there is no doubt that the settlement was a lot higher due to the planning expert analysis and demonstration of disruption. □

Aerial caption of the taxiway layers (segment nr 7) affected by underground service installations

WHEN WILL GLOBAL CLAIMS SUCCEED?

CHARLES PIMLOTT – BARRISTER, CROWN OFFICE CHAMBERS, LONDON

EXAMINES HOW THE ATTITUDE OF COURTS AND TRIBUNALS TO GLOBAL CLAIMS HAS BECOME MORE LIBERAL, AND SUGGESTS THAT (WHILST GLOBAL CLAIMS SHOULD NOT BE ENCOURAGED) THERE IS NO REASON WHY A GLOBAL CLAIM CANNOT SUCCEED IF IT IS PRESENTED IN THE RIGHT WAY.

Introduction

'Global', 'composite', or 'total cost' claims are a common feature of construction disputes, particularly those disputes arising out of complicated projects involving contractor's claims for an extension of time and/or loss and expense. This article examines how the attitude of courts and tribunals to global claims has become more liberal and suggests that, following the TCC case Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC), defendant employers are likely to think more carefully before arguing that a contractor's claim must fail simply because it is advanced on a global basis.

What are 'Global' Claims?

Broadly speaking, a global claim may be defined as one which provides an inadequate explanation of the causal links between the breaches of contract or relevant events relied upon and the relief claimed. In the context of construction disputes, it has been stated that a global claim most commonly refers to 'a contractor's claim which identifies numerous potential or actual causes of delay and/or disruption, a total cost on the job, a net payment from the employer and a claim for the balance between costs and payment which is attributed without more and by inference to the causes of delay and disruption relied upon[1]'. The definition is important, since in many cases what the contractor produces will not, on analysis, fall readily into the category of a 'global' claim[2].

What is the problem with 'Global' Claims?

A global claim faces a number of problems. First, it may not make it sufficiently clear to the defendant what case he is being asked to meet. Secondly, it relies on a number of assumptions: one, in particular, being that the difference between actual and anticipated costs results entirely from matters for which the defendant is responsible. Thirdly, it falls foul of the rule that the loss or delay attributable to each cause relied upon by a contractor should be specifically stated, particularised, and proved.

In grappling with these problems, the courts have tried to strike a balance between, on the one hand, ensuring that the defendant has a fair opportunity of meeting the claim against it and, on the other, reflecting the fact that the task faced by a claimant contractor in proving the many items of loss in a claim for delay and/or disruption can be both time-consuming and difficult.

In the example at (7) overleaf there is no difficulty, because in that situation, save for the unpriced £50,000 in the contractor's tender, the global loss can be said to be solely the employer's responsibility. But what happens where it is not possible to separate out the effects of the matters for which the employer is not responsible? There is Scottish authority to the effect that, in such circumstances (i) the claim will succeed if it can be shown that the matters for which the employer is responsible are the 'dominant' cause of the loss and (ii) even if it cannot be shown that the events for which the employer is responsible are the 'dominant' cause of the loss, it may still be possible for the tribunal to make a 'rational apportionment' between the causes for which the employer is responsible and other causes[11].

In the Walter Lilly case, Akenhead J[12] did not make any reference to the 'dominant cause' or 'apportionment' approaches when summarising the relevant principles[13]. As far as the author is aware, there is no English authority in which either of these approaches has been applied to a global loss claim. It is suggested that the 'dominant cause' and 'apportionment' approaches are unlikely to be followed by the English courts in light of the facts that (a) in a recent case, the TCC confirmed that there is no general ability under English law to apportion damages between two parties[14] and (b) it is now well established

A global claim may be defined as one which provides an inadequate explanation of the causal links between the breaches of contract or relevant events relied upon and the relief claimed.

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The importance of adequate cost recording during the project cannot be understated.

in English law that a contractor will not normally be entitled to recover in respect of loss and expense caused by concurrent delay (thereby ruling out the possibility of an 'apportionment' in such circumstances)[15].

Concluding remarks

A contractor claiming in respect of delay or disruption related loss and expense will often be met with a challenge that the claim must fail because it is advanced on a 'global' basis. The authorities, culminating in the Walter Lilly case, should provide contractors faced with such a challenge with both guidance and reassurance. But that is not to say that global claims should be encouraged[16]. The importance of adequate cost recording during the project cannot be understated. Where a contemporaneous allocation of costs is unrealistic (for example, allocating preliminaries which are being deployed across two or three projects at once), an adequate cost record system will enable such costs to be allocated after the event (an approach which the court endorsed in the Walter Lilly case[17]). This will make it easier to identify specific additional or extended resources and to link them to the events which are said to have caused them. If this is done effectively, there is less chance of a court or tribunal finding that the claim is, on a proper analysis, a 'global' claim. Where such a claim is truly 'global' in nature, the claim is less likely to fail if the contractor has kept adequate records as there will be sufficient information from which the tribunal can identify and separate out those matters for which the employer is not responsible, thereby allowing the tribunal to make an award in respect of the remainder as a composite whole. □

[1] Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC) Akenhead J at [484]

[2] Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773, at [491]

[3] Mid Glamorgan County Council v J Devonald Williams (1991) 8 Const LJ 61 and see, for example, JCT 2011 clause 4.23

[4] GMTC Tools v Yasa Warwick Machinery (1994) 73 BLR 102, CA, Leggatt LJ and Walter Lilly, at [486 c]

[5] Bernhards Rugby Landscapes Limited v Stockley Park Construction Limited [1977] 82 BLR 39, HHJ Humphrey Lloyd QC at [76]

[6] See: London Borough of Merton v Stanley Leach Ltd (1985) 32 BLR 68; Wharf Properties Ltd v Eric Cumine Associates (1991) 52 BLR 1; Walter Lilly, at [486 d]

[7] See: Walter Lilly, at [486 f]

[8] See: Walter Lilly, at [486 g]

[9] See: Walter Lilly, at [486 d]

[10] See: Walter Lilly, at [486 e]

[11] See: John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2002] BLR 393 (Outer House, Lord Macfadyen, paragraphs [35] to [38]) and [2004] BLR 295 (Inner House, Extra Division, Lord Maclean paragraphs [14] to [18])

[12] See: Walter Lilly, paragraph [479]

[13] Although he did cite Outer House decision in John Doyle v Laing (see paragraph [479])

[14] See: Hi Lite Electrical Limited v Wolseley UK Limited [2011] EWHC 2153 (TCC), Ramsey J at paragraph 238

[15] De Beers v Atos Origin IT Services UK Ltd [2011] BLR 274, Edwards-Stuart J at paragraph [177]

[16] Core Principle 19 the SCL Delay and Disruption Protocol expressly discourage the making of global claims

[17] See paragraph [488] of the judgment

THE APPROACH OF THE COURTS

The following general principles can be drawn from the authorities:

(1) Where specific events are relied upon as giving rise to a claim for moneys under the contract then any pre-conditions which are made applicable to such claims by the terms of the relevant contract will have to be satisfied[3].

(2) Subject to any express contractual restrictions, it is open for a contractor to prove its claim in whichever way it chooses[4]. The degree of particularity that must be provided in support of the claim is 'a matter of fact and degree in each case[5]'.

(3) There is nothing in principle wrong with advancing a claim on a 'global' or 'total' cost basis[6].

(4) A claimant contractor will not be debarred from pursuing a global claim merely because another form of evaluation is readily available (although it may be that the court or tribunal will be more sceptical about the claim if a direct linkage approach is readily available but is not deployed[7]).

(5) Similarly, a claimant contractor will not necessarily be debarred from pursuing a global claim where he has himself created the impossibility of identifying what loss and expense each event has caused[8].

(6) Where a contractor chooses to advance a global or total cost claim, it will face added evidential difficulties. In particular, it will have to show that the loss (namely, the difference between the actual and anticipated costs) would not have been incurred in any event. Thus, it will have to demonstrate that there are no other events (unpleaded or which are the risk or fault of the claimant contractor) which caused or contributed to the global loss[9].

(7) The fact that such other events caused or contributed (or cannot be proved not to have caused or contributed) to the global loss does not necessarily mean that the claimant contractor can recover nothing[10]. In those circumstances, it is open to the court or tribunal to take out of the 'rolled up award' those elements for which the contractor cannot recover loss (in the Walter Lilly case Akenhead J gave an example of a contractor's global claim in the sum of £1 million where the contractor is able to prove that but for one overlooked and unpriced £50,000 item in its tender it would probably have made a net return. In those circumstances, the global loss claim would not fail simply because the tender was underpriced by £50,000; the consequence would simply be that the global loss is reduced by £50,000).

An overview of the Construction Industry Payment & Adjudication Act 2012

GARTH MCCOMB – DIRECTOR, DRIVER TRETT MALAYSIA REVIEWS THE LIKELY EFFECTS OF THE SOON TO BE IMPLEMENTED ADJUDICATION ACT ON MALAYSIAN DISPUTE RESOLUTION.

The Malaysian Construction Industry Payment & Adjudication Act 2012 (CIPAA) was gazetted in June 2012 and is expected to be implemented soon. (It may well have been implemented by the time you read this article).

While adjudication is by no means new to Malaysia, it has not been widely used in the past and was certainly not a statutory right, until now.

In this, the first of a series of articles related to adjudication, we provide some insight into who is likely to take advantage of the new legislation (as opposed to being taken advantage of) and some of the considerations that both potential claimants and respondents might want to consider once the legislation is enforced.

Who will be affected?

Clause 2 of CIPAA states that "This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government".

Clause 4 of the Act defines construction work as being "the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of:

(a) Any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
(b) Any road, harbour works, railway, cableway, canal or aerodrome;
(d) Any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or
(e) Any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work,"

I believe the Malaysian CIPAA has a wider coverage than any other statutory adjudication law in any other country.

> In many cases the adjudicator will not be a legal professional but may well be an architect, engineer, or other such professional.

In fact, the only confirmed non-application is contained in Clause 3 of the Act which states that "This act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation".

While CIPAA does not apply between the main contractor and an employer who is building their own home with less than four-storeys, it appears it could still apply to a contract signed between the main contractor and a subcontractor/supplier.

The only other possible exception would require an exemption to be granted by the minister for works under Clause 40 of CIPAA by way of an order published in the Gazette. By doing so the minister may

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exempt "(a) Any person or class of persons; or (b) Any contract, matter or transaction or any class thereof, from all or any of the provisions of this Act, subject to such terms and conditions as may be prescribed." It remains to be seen how difficult or easy obtaining such an exemption might be.

What are the main intentions of the Act?

A commonly quoted reason for the introduction of statutory adjudication is to help facilitate cash flow in the construction industry. It is intended to be used to help secure payment by an unpaid party of money that is rightfully due under a contract.

The Act is not intended as an avenue to try and correct pricing errors in a contract or to get a fair price when you have already signed and agreed on a contract sum which may be less than fair. It is simply intended to help a contractor, or other organisation, to secure their contractual right to payment of the amount they are entitled to under the terms and conditions stipulated in the contract (unless these are conditional payment terms as discussed below).

In any jurisdiction in which it has been introduced, another of the primary objectives of adjudication has been to outlaw, or at least overrule, the traditional 'pay when paid' or 'pay if paid' mentality that has been prevalent within the construction industry.

Mr Sceptic (not his real name), a member of a large main contracting organisation that I spoke to recently, said that he did not think CIPAA would have much of an impact in Malaysia "because it doesn't matter what the law says, a contractor will only pay his subcontractors after he has received payment himself".

This statement was made despite Mr Sceptic being aware that clause 35 (1) of CIPAA states that "Any conditional payment provision in a construction contract in relation to payment under the construction contract is void".

One wonders whether Mr Sceptic will be one of the first recipients of a payment claim referred under CIPAA.

To leave no one, except maybe Mr Sceptic and his like, in any doubt as to the intention of the Act, CIPAA clause 35(2) states that "For the purposes of this section, it is a conditional payment provision when: (a) The obligation to make payment is conditional upon that party having received payment from a third party; or (b) The obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party."

At the risk of overstressing the point, we would highlight that any conditional payment provisions in a contract, even one that both parties have negotiated, agreed, and signed, will be considered void in the eyes of an adjudicator.

Who is likely to make use of the Act?

While different jurisdictions have different payment regulations governed by statutory legislation, similar payment issues tend to arise throughout the world and it is expected that the trends seen in other countries that have introduced statutory adjudication, will be repeated in Malaysia.

Statutory adjudication was introduced in Singapore in 2005 under the Security of Payment Act. Recent statistics published by the Building Control Authority (summarised in figure 1 page 17) indicate that the vast majority of matters that have been referred for adjudication since 2005 have been payment disputes between subcontractors and main contractors.

A similar pattern can be seen in the UK where again more than half of all adjudication referrals are related to payment disputes between main contractors and subcontractors, and we expect that a similar pattern will be seen in Malaysia once the Act is implemented.

What type of issues can be expected to be referred for adjudication under CIPAA?

One of the main differences between the legislation in Singapore and under CIPAA is the time allowed for the adjudication process. The Singapore process would normally be concluded within 35 days and the result may even be known before the next payment certificate becomes due.

Under the Malaysian Act, given that the

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HOW TO PREPARE FOR LIFE UNDER CIPAA?

A good document management system and good system for compiling of contemporaneous documents and records will be of great benefit whether you are the party submitting or responding to a payment claim. Where possible, try to agree schedules of payment in the contract or at least prior to the commencement of work. The preparation and agreement of a cost loaded programme early in a project can help reduce the risk of payment disputes during the course of the works. When claiming for variations submit as much relevant detail and evidence as possible, including photographs of the work done where appropriate and supported explanations of how the variation has been priced. When assessing/certifying a payment which is less than the amount claimed, always be prepared with valid reasons why you are not paying the full amount claimed. Statements like 'contractors always claim double so I only certify half,' are unlikely to convince an adjudicator to accept your assessment. Credible evidence of current market prices and records of joint site measurement and valuation, for example, are likely to be much more persuasive.

HOW TO MINIMISE POTENTIAL EXPOSURE UNDER THE ACT?

Follow the payment terms stipulated in the contract. It would obviously be preferable to have clear (valid) payment terms stipulated in the contract to minimise disputes. If no such payment terms are specified however, it is likely that the 'default provisions in the absence of terms of payment' under the act will apply.

CIPAA Clause 36 (3) states: "The frequency of progress payment is:

(a) Monthly for construction work and construction consultancy services; and

(b) Upon the delivery of supply, for the supply of construction materials, equipment or workers in connection with a construction contract".

Note the potential for disputes even if the default provisions apply. For example, a labour only subcontractor might contend that he is entitled to payment as soon as he has supplied workmen to a site. The contractor is likely to only agree to make payment once those workmen have worked for a specific period.

Try to keep the pricing of contracts as clear and consistent as possible.

Some tips to consider when pricing include:

1) For measurement contracts, price the works as described but be sure to include any related works required by the specifications and/or drawings that may not be readily apparent in the descriptions.
2) For lump sum contracts, identify significant cost items which are not readily apparent in the contract sum analysis by inserting separate descriptions and sums rather than just 'lumping' the cost into an existing item.
3) As far as possible price supply only items separately from other works.
4) For expensive equipment always separate mobilisation, monthly and demobilisation rates/prices.
5) Identify whether major equipment is a) rented or b) owned/purchased by the contractor.
6) Ensure that as far as possible, subcontract payment terms to follow the main contract payment terms (bearing in mind that conditional payment terms will be void).
7) Keep preliminary costs separate rather than making allowance for them in the rates for the work.

I believe the Malaysian CIPAA has a wider coverage than any other statutory adjudication law in any other country.

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process can take more than three months, two or three subsequent payment certificates may have been made following the disputed payment and the matter may have been resolved even before the adjudication decision is issued (for example the matter may have been resolved by way of a joint site measurement before the adjudication can be concluded).

It seems likely, therefore, that adjudication in Malaysia will more often be initiated where the dispute is one of principle rather than quantum. Unpaid parties are unlikely to risk damaging the working relationship of the project team and possibility of incurring additional unnecessary costs when the dispute may well be resolved in the next payment certificate anyway. Referrals under CIPAA are more likely to relate to 'in principle' payment disputes that may even be debated for several months before the unpaid party considers making a referral.

Secondly, the Singapore legislation is not intended for use in the case of repeat claims. If a claim for payment has been rejected once and the matter is not referred to adjudication within the time limit stated in the Act, the unpaid party will likely lose the right to refer the matter to adjudication. If he claims the same payment again in a subsequent payment claim, and again the payment is rejected he may already be time barred from bringing a claim under the Security of Payment Act. This also means that the Singapore Act is unlikely to be of any help at the final account stage.

In the UK on the other hand, where there is no restriction on referring final accounts for adjudication, final account referrals make up almost a quarter of all matters referred for adjudication. The other most popular issues in the UK are failure to comply with payment provisions, valuation of interim payments, and valuation of variations.

In Malaysia, there would seem to be no restriction on repeat claims and it would appear that both interim and final account claims can be brought under the Act. This may result in a slightly different set of statistics for Malaysia than those seen in Singapore and one might expect a greater number of claims between main contractors and developers/employers, however one would still expect adjudications between main contractors and subcontractors to constitute the highest number of referrals, particularly in the first few years after the legislation is introduced.

Kuala Lumpar skyline – future construction will be subject to the Act.

Under the Malaysian Act the process can take more than three months.

Who will the adjudicators be and how will they operate?

In many cases the adjudicator will not be a legal professional but may well be an architect, engineer, or other such professional.

Irrespective of their background, any adjudicator appointed to decide an adjudication dispute between two parties will refer, first and foremost, to the contract between the parties.

Fortunately, it is likely that the KLRCA will take the nature of the dispute into consideration when appointing an adjudicator to a particular dispute and you can be sure that any adjudicator so appointed will be suitably qualified and experienced to make the appropriate findings.

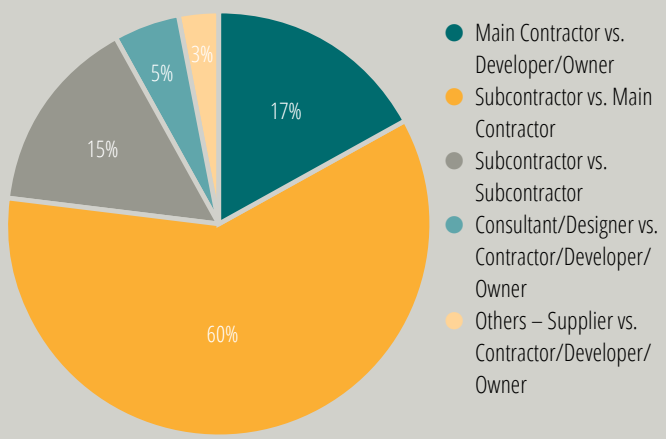
And finally...

Based on our experience in other jurisdictions where statutory adjudication has been introduced, the first few years following enactment will see a large number of legal issues being raised pertaining to the interpretation of the Act itself.

No matter how well it is drafted, there will always be avenues for legal experts to interpret the wording to gain an advantage that may not have been anticipated by the authors of the Act. It is also likely that in the beginning, unless the nature of the dispute clearly dictates otherwise, the adjudicator will also be an experienced and qualified legal professional.

While not specifically required under the Act, I would recommend, particularly in the early years of the legislation, that anyone making or defending a claim under the act engage the services of an experienced lawyer and, at the risk of being somewhat self-serving again, an experienced claims consultant. □

Figure 1: Adjudication cases in Singapore



Source: extracted from statistics published on the Building and Construction Authority (Singapore) website.

Ten years of the SCL delay and disruption protocol

STEPHEN LOWSLEY – DIALES EXPERT REVIEWS THE APPLICATION OF SCL PROTOCOL IN ASSESSING RETROSPECTIVE DELAY ANALYSIS OVER THE PAST DECADE.

A little over ten years ago, in October 2002 the Society of Construction Law (SCL) published their Delay and Disruption Protocol. Publication of the protocol brought discussion in respect of the difficulties faced when undertaking delay analysis to the fore, however over the years the protocol has faced much criticism.

In time related disputes the protocol is often referred to, however, in my own experience such reliance has related only to 'cherry picking' limited elements that best suit the issues under consideration. Since its introduction, I have had my own various concerns particularly in respect of its guidance relating to the retrospective quantification of extension of time (EOT).

During the course of the works and prior to overall completion, extensions of time can only be ascertained on an anticipated likely basis. Once the works have been completed, the facts will be known.

The protocol, quite rightly in my opinion, advocates that extensions of time should be awarded at the time that a delaying event occurs rather than adopting a 'wait and see' approach. This will allow the contractor to re-plan the works in accordance with the amended completion date and will eliminate any claims from the contractor of constructive acceleration. Notwithstanding this, the contractor often fails to submit the contractually required notifications and/or the contractor administrator (CA) often fails to award extensions of time so disputes arise after completion of the works.

The protocol at Guidance Section 4 provides "Guidelines on dealing with disputed extension of time issues after completion of the project – retrospective delay analysis." Within this section, the protocol provides guidance on such issues as the delay analysis techniques and the factual material available.

> Although the protocol provides guidelines in respect of the approach to concurrent delay it is very difficult if not impossible to address concurrent delay on a prospective basis.

Guidance section 4 concludes with the following guidance provided in bold text:

"The Protocol recommends that in deciding entitlement to EOT, the adjudicator, judge or arbitrator should as far as is practicable put himself/herself in the position of the CA at the time the Employer Risk Event occurred."

In undertaking the above, the protocol acknowledges that the results may not match the as-built programme. Based on the above, the protocol therefore recommends that when reviewing extensions of time retrospectively a theoretical prospective approach should be adopted.

I have never understood the logic in providing such guidance. As an expert, I review and rely on the facts and I would not relish being cross-examined in respect of my opinion of what the CA may theoretically have done at the time, when the facts of what actually occurred are clearly available.

At the time that the protocol was produced, the most widely used building contract form, by far, was the JCT form and although I have no firm data I would suggest that it is probably still the most popular.

Under the main JCT forms, during the course of the works, the architect has a contractual obligation to consider likely delay to completion and extensions of time, following notification being provided by the contractor.

Once the works are complete and practical completion has been certified the architect has a 12 week period in which to consider all delay, whether notified or not, and to amend the completion date accordingly. The architect cannot

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reduce any extension of time awarded except under very limited circumstances.

The contract is silent in respect of how the architect should undertake such review, however in order to be fair and reasonable the architect will surely use their knowledge of the project and of what actually occurred. Common sense dictates that the architect would not put themself back at the time of the event and theorise what he or she should have done at the time.

In the recent case of 'Lilly and Mackay' [2012] EWHC 1773 (TCC) Justice Akenhead comments on these requirements of the JCT contract saying:

"The extension granted within 12 weeks after Practical Completion (Clause 25.3.3) is to involve the fixing of a Completion Date which is fair and reasonable having regard to any of the Relevant Events."

Justice Akenhead then comments:

"If at the later stage [the 12 week post Practical Completion review] it is clear that the Relevant Event in question has actually delayed the Works by, say, 10 weeks, it would be an extraordinary state of affairs if the extension of time then granted as fair and reasonable was anything other than 10 weeks."

This is, in my own opinion, a matter of common sense and, as stated above, it is very difficult to understand why the protocol makes the recommendation that it does.

Furthermore, if the recommendations of the protocol are followed and extension of time and delay are quantified on a prospective and 'likely' basis, actual delay will still require quantification in order to address potential loss and expense.

Although the protocol provides guidelines in respect of the approach to concurrent delay it is very difficult if not impossible to address concurrent delay on a prospective basis. Although the impact of say an employer variation can be quantified on a likely and prospective basis it would be unreasonable to address contractor's culpable delay in the same manner. For instance, it can be ascertained retrospectively as a matter of fact that the contractor caused actual delay by having, for example, insufficient labour. It would, however, be a little unreasonable to say that the contractor is likely to cause delay in the future for the same reasons.

Concurrent delay must therefore be based on what actually occurred and be a matter of fact.

Similarly, dependent on the circumstances global claims have some merit, however such claims can also only be evaluated on a retrospective basis.

The SCL recently held a ten year anniversary event at King's College in London. The above point in respect of using a prospective approach to the retrospective evaluation of extension of time was raised and I think that it is reasonable to say that other general comments received from the audience were generally critical of the protocol.

The SCL confirmed that it had been decided that the protocol would not be amended or updated. Following a show of hands it was considered that the compilation of some form of guidelines relating to the available delay analysis techniques, as well as to relevant case law, may prove beneficial.

To conclude, based on the above the protocol's guidance relating to retrospective delay analysis is flawed. As stated above, the protocol's comments and guidance relating to the award of extension of time at the time that the delay event occurs rather than adopting a wait and see approach, together with other guidance such as that relating to record keeping, must be applauded.

Unfortunately, in my opinion the protocol is far too prescriptive. Delay in construction projects is very often complex and to some extent the circumstances and the facts will be unique. This being the case, the analysis of delay must be approached with an open mind and all options must be considered to ascertain what is appropriate to the circumstances in question. Delay analysis is not just a matter of cold logical calculation and it requires an element of intuition and judgement based on experience.

The protocol advocates that extensions of time should be awarded at the time that a delaying event occurs rather than adopting a 'wait and see' approach.

Since the time of the Protocol's introduction, the approach to the way that delay is assessed has, in my opinion, changed with a move away from a scientific computer modelled approach to a much more pragmatic one with reliance on what actually occurred and, above all, the facts.

As stated above, the introduction of the protocol brought about a realisation of the difficulties associated with delay analysis and has helped stimulate discussion and so, maybe indirectly, the protocol has helped bring about this welcome change. □

SPRING SEMINARS A SUCCESS

Driver Trett's latest round of informative and entertaining breakfast seminars has been a huge hit with our guests. Delivered in 11 locations throughout the United Kingdom, the two hour sessions explored the NEC3 form of contract through role play and discussion, followed by an opportunity to ask our knowledgeable speakers any further questions. Feedback from attendees was particularly positive, with one commenting 'very useful seminar, as always, covering a believable scenario in a detailed and understandable way.'

For information on future seminars please visit **http://www.drivertrett.com/** or follow the link to our enquiry form to keep updated. **http://www.drivertrett.com/about/enquiry_form**

CASE STUDY

LNG Facility

DELAY CLAIM FOR AN EXTENSION OF TIME (EOT) AND PROLONGATION COSTS

THE CLIENT

A large worldwide construction and engineering JV contracting consortium.

THE PROJECT

The construction of an LNG plant facility to convert gas to liquid, and the contract works included for the engineering, design, procurement, manufacture, fabrication, delivery to site, assembly, installation, construction, testing, and commissioning.

THE DELAY

The regular progress of the project works suffered from delay and disruption primarily stemming from an inadequate base design and the late finalisation and completion of approved for construction engineering design due to employer interference, affecting vendor data and as a consequence, the ability to commence manufacture of the long lead items of plant and equipment, and to prepare civil works details and base foundation drawings. Subsequent to this, the overall completion of the works suffered as a result of late utilities supplied by others to facilitate the testing and commissioning of the plant ready for startup. Also there were many other relevant delay events and numerous heads of claim, some global complaints and some interface issues, and so the JV consortium contractor was not only looking for an extension of time (EOT), but for all of his site costs for the delayed periods.

THE BRIEF

To review, analyse, identify, develop, and prepare an EOT delay claim submission, highlighting the employer relevant delay events and the problems encountered throughout the project. Also to show the impact upon the planned programme of works and the costs that flowed. The employer's agent specifically requested for the claim to be robust and credible.

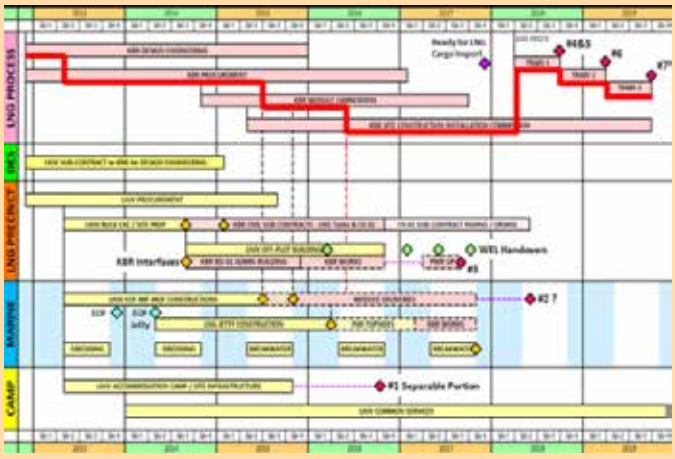
THE ANALYSIS

The direct effects of delays were easily identifiable in most cases, however the consequential effect upon the overall completion of the project was more difficult, with the many competing critical path routes through the 35,000 activity network programme, related to the many long lead items. The employer was clearly at fault by incorporating late design change via design development workshop meetings, and so change was not as such instructed, or easily identifiable. There was some evidence of contractor default, however it was felt that this was secondary to the more dominant employer relevant delay events. Although it had to be acknowledged and so accounted for that in any event the works would not have been completed any earlier but for the employer's own delays, and so a pacing argument was used. It was demonstrated that the consortium contractor was due an EOT due to the impact of the employer relevant events, however this did not automatically entitle prolongation costs which would require a factual analysis, and so the claim had to relate to the quantum. This was addressed and was achieved with a full review of the direct (non-core) and indirect (core) costs with respect to the planned and actual programme work activities.

THE RESULT

The employer's agent was satisfied with the format of the claim and was able to put forward a recommendation to the employer based on the time and money submission. The settlement in terms of time provided a full extension of time to the revised completion date requested in the claim. However the financial settlement was adjusted and apportioned to account for some contractor default issues and some culpability re late procurement and poor site performance. The contractor consortium accepted this and was satisfied with the result. □

> The employer's agent specifically requested for the claim to be robust and credible



International construction arbitration in Asia: The preferred option

SCOTT RAMSDEN – ASSOCIATE DIRECTOR, DRIVER TRETT SINGAPORE EXPLORES THE GROWTH AND IMPORTANCE OF THE ROLE OF ARBITRATION ACROSS THE ASIAN CONSTRUCTION INDUSTRY.

International business has grown rapidly due to developments in communication technology, business confidence, freer borders, and increased global competition which has led to significant growth in international commercial arbitration. As Asia begins to dominate the global economy, arbitration is seen as an essential part of the dispute resolution fabric. This article looks at the role of arbitration in Asia and its rise in popularity.

The appeal of arbitration

Arbitration has become an attractive method for resolving disputes in the international business arena. This is partly because of the often long drawn out process associated with litigation and the daunting task of enforcing national court judgments in other jurisdictions.

> Arbitration provides a solution to most of the inadequacies of resolving international disputes through the court system.

Perhaps its greatest advantage is that it allows parties, from different legal and cultural backgrounds, to resolve their disputes without the formalities of their respective legal systems.

Arbitration in construction

Arbitration is a system of justice, born of merchants. In one form or another, it has been in existence for thousands of years. Arbitration in construction disputes is not new. Almost 130 years ago, arbitration was introduced into standard-form construction agreements and since that time it has become an accepted method of resolving construction disputes.

The growth of construction arbitration in Asia

The last decade has seen a steady increase in the number of cross-border transactions and investments across Asia Pacific. This has inevitably led to cross-border disputes, involving multinational organisations from across the globe. Because of the ease of cross-border enforcement, parties to such transactions prefer arbitration as the dispute resolution mechanism. With commercial disputes on the rise, arbitration has sated the desire for an acceptable form of dispute resolution in Asia with locations such as Hong Kong and Singapore providing the perfect location for parties to resolve their disputes.

There are also a number of cultural drivers that have led to the growth of arbitration in Asia. A Chris Crowe article, published in the International Bar News in August 2010 described what he called "Asia's Arbitration Explosion[1]." Crowe points out that in 2004, the Hong Kong International Arbitration Centre (HKIAC) handled just 280 cases but that by 2009 this increased significantly to around 650 disputes. He also points out that growth in

> Arbitration has sated the desire for an acceptable form of dispute resolution in Asia.

Asia in relation to arbitration has been far more significant than that in Europe. The reason for this is that in Europe there are sophisticated transnational treaties which can be used to enforce international judgements[2].

Enforcement, neutrality, choice, and finality

One of the most important reasons for the development of arbitration in Asia is that enforcement under the New York Convention (NYC) crosses jurisdictional boundaries. In addition, there is now greater confidence in Asian arbitration centres.

The China International Economic and Trade Arbitration Commission (CIETAC), for example, is garnering the confidence of both domestic and foreign parties. China's arbitration law provides distinct sets of rules for foreign-related and domestic arbitration. The most important distinctions being related to the rules of enforcement, wherein foreign-related arbitral awards are only subject to procedural, not substantive, review[3].

China has also introduced a reporting-up process by which local courts are not allowed to review or set aside arbitral awards without referring the case up to the next level, with the ultimate stage being the Supreme People's Court. This has increased confidence in arbitration in China as a method of dispute resolution. In 2009, CIETAC handled 1,482 arbitration cases, the highest volume of disputes by any international arbitral institution glob-

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ARBITRATION IN ASIA

The development of arbitration in Asia has been nothing short of incredible over the last ten years. There are a number of reasons for this, not least because Asia's legal foundations seem to have developed into clear and sound legal systems. These systems demonstrate that the courts and the judiciary are generally very supportive of arbitration and this ultimately means that enforcement and recognition become less problematic. It is clear that jurisdictions where the judiciary is supportive of the arbitration regime tend to thrive as centres of international arbitration, as the courts are not prepared, save for particular circumstances, to interfere with the decisions that have been made by the arbitrator.

China, Singapore, and Hong Kong's arbitration centres are thriving and amongst the most advanced and popular in the region. In addition, there are growing arbitration centres in Malaysia (KLRCA) and Indonesia (BANI). This is set against the decline of international arbitration in Europe, caused mainly by the increase in treaties and agreements that exist between member states both within and outside of Europe. It is beyond doubt that the growth, and the importance of Asian arbitration, is as a direct result of the growth of the economies of Asia.

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ally. This demonstrates quite clearly the growing significance of international arbitration within Asia[4].

Hong Kong has long been a mainstay of the Asian arbitration landscape. It has endeavoured to maintain its position as a recognised centre for international arbitration through legislation such as the Hong Kong Arbitration Ordinance which provided a more user friendly legal framework and adopted the United Nations Commission on International Trade Law (UNCITRAL) Model law when it came into effect on 1st June 2011. This new legislation, while making Hong Kong more attractive from a procedural perspective, is also supported by the enforceability of awards in over 140 countries, by virtue of both the New York Convention, and in mainland China under the 'Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region'.

Singapore's approach to arbitration

The Singapore International Arbitration Centre (SIAC) was created in the early 1990s. It was established as an autonomous non-profit administration, provided with support of both the Economic Development Board and the Trade Development Board within Singapore. In the late 1990s, the SIAC became independent of these two boards and now operates under arbitration rules contained within the UNCITRAL and The London Court of International Arbitration (LCIA). SIAC has recently undergone several momentous changes to its arbitral procedures. New rules came into effect in July 2010, and were proposed to provide enhanced effectiveness and elasticity[5].

International arbitration in Singapore is governed by the International Arbitration Act (IAA) of Singapore. The 2010 amendments to this Act have served to redefine what constitutes an arbitration agreement, the jurisdiction of the Singapore court in ordering interim measures, the authentication of Singapore awards to facilitate overseas enforcement, and to identify convention countries for the application of the NYC[6].

Further legislative changes were made through the International Arbitration (Amendment) Act 2012 and the Foreign Limitation Periods Act 2012, which have amended the writing requirements for a valid arbitration agreement, allowed the courts to review an arbitral tribunal's negative jurisdictional rulings, addressed the appointment of emergency arbitrators, and redefined the meaning of a Foreign Arbitral Award, amongst others.

SIAC has been successful for a number of reasons. The first of these is that Singapore has a vigorous and strong legal system and a judiciary that is considerate and supportive of arbitration.

Singapore is recognised as having a strong and well developed business infrastructure and an incredible resource of international lawyers who are experts in arbitration. In addition, Singapore has gained a reputation for neutrality and has ranked within the top five nations in the Corruption Perception Index for the past five years[7]. This highlights the importance of trust and confidence in the arbitration centres as being key to their success and development.

In conjunction with Singapore's perceived neutrality boosting its reputation, Hong Kong's appears to have been weakened, as indicated in the falling value of its Corruption Perception Index over the past five years. Perhaps this is due to its proximity and close ties with mainland China, and China's perceived lack of neutrality. Together with Hong Kong's falling figures, in terms of the total number of arbitrations handled by the HKIAC down from 620 in 2008 to just 275 in 2011[8], the decline in construction arbitrations - from 139 in 2008 to 39 in 2011[8], and government construction projects' increasing use of the New Engineering Contract 3 (NEC3), where the main dispute resolution method is adjudication, would seem to suggest that the number of construction arbitrations held at HKIAC may continue to decline.

By comparison the number of arbitrations, particularly those held at SIAC, has been increasing year on year, from 99 new cases in 2008, to 235 in 2012[9], an increase of over 230%.

Singapore, and Asia as a whole, has the potential to globally become the preferred option for international construction arbitration. □

> Singapore has a strong and well developed business infrastructure and an incredible resource of international lawyers who are also experts in arbitration work.

[1] C Crowe, 'Asia's Arbitration Explosion' International Bar News, August 2010

[2] C Crowe, 'Asia's Arbitration Explosion' International Bar News, August 2010

[3] Fei LanFang, 'Enforcement of Foreign-Related Awards in China: Judicial Attitudes', (2009) Arbitration 75(3) 382-389

[4] C Crowe, 'Asia's Arbitration Explosion' International Bar News, August 2010

[5] http://www.qmul.ac.uk/media/news/items/hss/38048.html

[6] G Smith, 'Commentary on the New Singapore International Arbitration Centre Rules', (2010) Arbitration 76(4) 727-738

[7] 200-205

[8] http://www.transparency.org/research/cpi/

[9] Source HKIAC Annual Reports 2008 to 2011

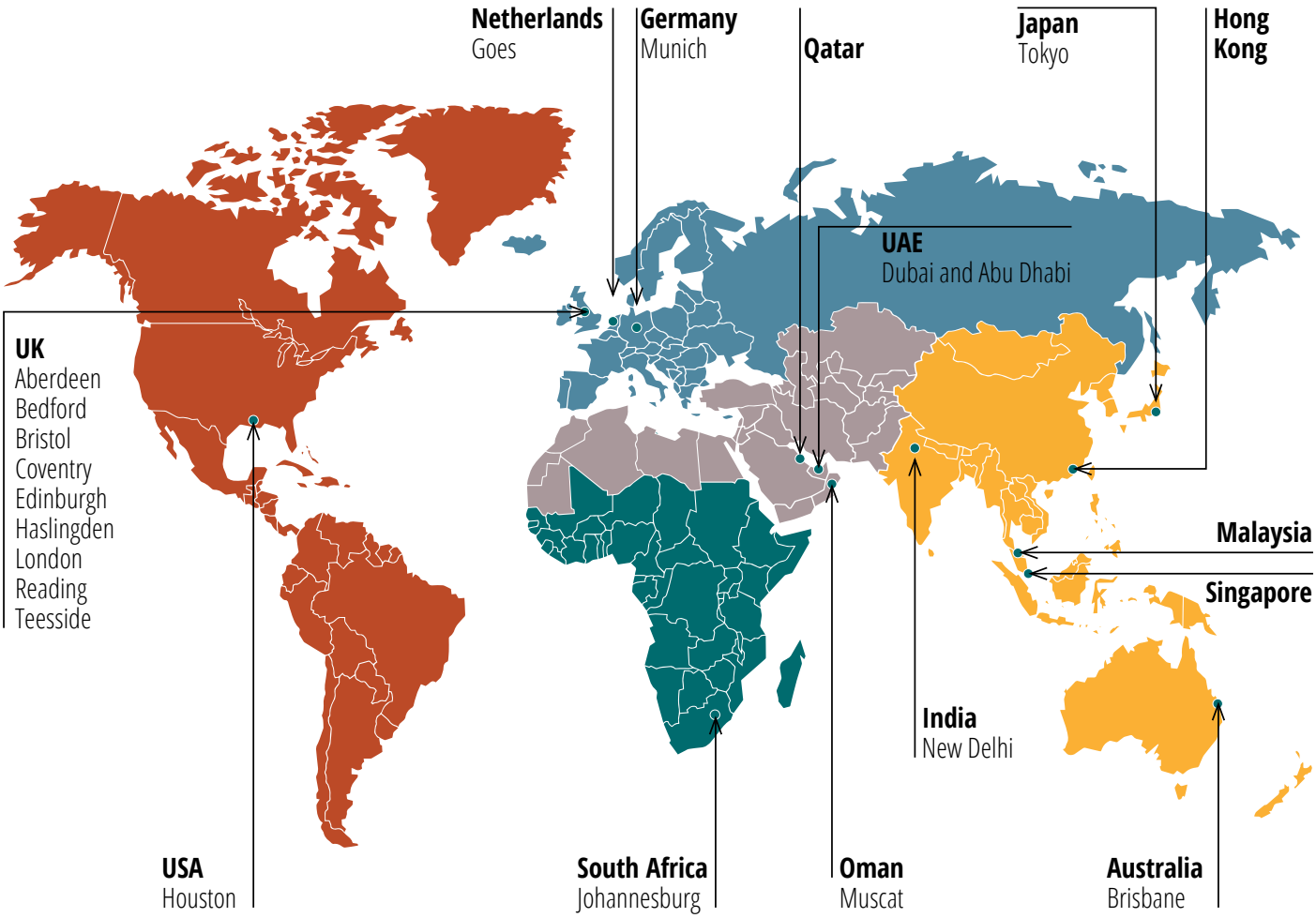
RICS QUEENSLAND GOLF DAY

Friday 17 May 2013

Driver Trett were proud to be the main sponsor of this year's RICS golf day held at the Virgina Golf Course in Brisbane. The event, which attracted over 45 players, proved to be a big success with all proceeds going to the Lighthouse Club, a charity which provides financial support to construction workers and their families in times of hardship through illness or injury.

The Driver Trett team led by Alastair Farr managed a respectable 2 over, scored on an Ambrose system. The day concluded with barbeque dinner, prizes for the winning teams and players, and a raffle featuring many donated prizes including two rounds of golf at the luxurious Palmer Coolum resort.

DRIVER TRETT WORLDWIDE



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In the next issue

The Middle East will be the main focus of the next issue of the Digest, with articles and news about the region, and as always there will also be a little something for everyone from across the world.

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.

BYTE 3:
FIDIC Rainbow Suite – 2

In their first article, Paul Battrick and Phil Duggan discussed the birth of FIDIC's rainbow suite. In this, the second article they provide a brief insight into the continued growth of the rainbow as other contracts have been produced to recognise the demands of the international construction marketplace.

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