

Issue 6 | June 2014

“ I am always amazed at the results that can be achieved when the correct mix of knowledge, experience, coordination, and enthusiasm are brought together. ”

DIALES EXPERT DAVID WILEMAN DISCUSSES
PLANNING, SHIPBUILDING, AND ONE DIRECTION
CONCERTS [Q&A, PAGE 2](#)



Welcome to the Driver Trett Digest

In this sixth edition of the Driver Trett Digest we have a wide range of topics, with contributions from our business all over the world and from a number of external organisations which adds to the overall flavour of this latest issue.

First up we have David Wileman's interview, which provides an interesting insight into the world of ship-building, not to mention his knowledge of the pop group One Direction. In our interconnected world, ideas regarding technical topics such as contractual matters and planning and programming are increasing in internet forums. David Waddle highlights some of the challenges this creates in his article *A Funny Thing Happened in the Forum*.

Adjudication seems to be spreading across the globe and the recent updates to the process in Australia are set out by David Hardiman in his article as well as the introduction of adjudication in Malaysia, covered

by Garth McComb. Further to that, Mike Turgoose discusses the main differences between the two in his article *Adjudication or Arbitration – You Decide*.

Our guest writers have covered an array of interesting and current topics. Andrew Denton, Richard Williams and Shy Jackson of Pinsent Masons address recent developments in dealing with the dangers of an on demand bond, Chris Kidd and Mark de la Haye discuss knock for knock liability in the offshore wind sector and Michael Sergeant takes us back to basics with a review of variations to contract, a topic well worth revisiting.

As always we welcome contributions on any topic related to the commercial or legal aspects of engineering and construction anywhere in the world. Our businesses continue to grow through some of the challenges of recent years and with markets stabilising and returning to growth,



Mark Wheeler –
Europe Technical Director

there will no doubt be further, albeit different, challenges ahead.

I'd like to say a big thank you to all of

our contributors and trust that you will enjoy this sixth edition of the Driver Trett Digest. ■

COMPETITION

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TELL US WHAT CELEBRATED ITS 25TH BIRTHDAY THIS YEAR.

The answer can be found in one of our articles.

Email your name and answer to
info@drivertrett.com by 31st July 2014.

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Q&A:
David Wileman

What do you do?

Whatever the job title, be it delay analyst or expert witness, I will always be a planner.

My CV will tell you that I am an experienced delay analyst who has provided expert witness reports and testimony on major projects including, by way of example, shipbuilding and oil and gas projects. Whatever project I am working on, whether it is a live project which is still being built, or in relation to the construction of a ship that has long been sailing the seas, I will always be found knee deep in schedules (or plans or programmes, whatever you like to call them – and I have had many long discussions on this point alone) working out how long, with how many resources it will, or did, take to build the project.

I like to think that planners are a bit of a breed apart. Whereas some people look at a project and see how much it will cost or work out what shape a ship's hull should be, as planners we are always taking the project drawings apart to understand what needs to be built first, which piece can go on, when do you need to place a purchase order for a piece of equipment that cannot be installed until way down the construction sequence and so on.

Why do you do it?

The fame, the fan base, and the money. Apologies, for a moment I was thinking about the fact that I have to take my daughter to see One Direction in concert. Lucky me!

I have always enjoyed engineering and especially being involved with major projects that cost millions of pounds and take ages to build. I am always amazed at the results that can be achieved when

the correct mix of knowledge, experience, coordination, and enthusiasm are brought together. Now working as an expert I get an added thrill that I am part of the process which assists third parties (adjudicators, arbitrators, and judges) to understand the complex issues which have caused delay to projects. Also, as a planner I get to work with lots of different types of bespoke planning software which helps to give me a cutting edge in an increasingly IT dependant society.

How did you get into the industry and how did you get to where you are today?

I entered the industry as a technical apprentice, who trained and worked in various major engineering companies for 16 years. However, my career path could have been quite different if I had not been diagnosed as colour blind, forcing me to give up a job working for BT. My technical apprenticeship was a brilliant four years which included everything from the first year in the apprentice school then being let out onto the shop floor learning about basic engineering processes such as welding, milling, foundry work, to working in drawing and production offices. When I finished my apprenticeship, which included day release and evening classes, I joined the planning department. Eventually I became a planning and project controls engineer on some of the largest and most complex ships, floating production storage and offloading (FPSO) installations, and fixed platform oil and gas projects. As well as planning, this role included the standardisation of systems and project control procedures, including the planning, monitoring, and control of major engineering projects.

A couple of the projects I worked on ended up in arbitration and consequently, as a witness of fact, I was afforded the opportunity to get a glimpse into the world of retrospective delay analysis. One of the consultant companies who also worked on one of the arbitrations offered me a job due to my experience using the Artemis bespoke planning software. With that, I moved into consultancy and have never looked back.

Specifically, I moved into contract and commercial consultancy and have hopefully established a reputation as an objective, experienced, and reliable expert witness on matters relating to retrospective delay analysis using a wide range of forensic planning techniques as an expert to establish, and demonstrate, critical delay and disruption.

Tell us about a unique project you've been involved with.

Without giving too much away I have worked on many projects and disputes that relate to projects which sit above the sea (oil rigs) and sit on the sea (ships). However, the most exciting project I have had the pleasure to be involved with is a project that relates to the construction of machines that will work under the sea, up to two kilometres below sea level to be exact. I am still in awe at both the buyer and builder who are working in what I consider to be the new world. They are building three huge machine tools which will mine the sea bed to release precious minerals which are then basically sucked up to a ship where they are sorted for later processing. The technology is completely different to the technology that can be used at sea level due to the pressures of working two kilometres below sea level. Not only do the tools work two kilometres under the sea level but the ship also has to be designed and equipped to recover the machines from that depth.

How long does a project usually take?

The projects I work on are, generally, at least one and a half years in duration. However, as a delay expert I have experience of projects being delayed by anywhere up to five years. Also, working as a shipbuilding delay expert I have plenty of experience of the ships never actually being finished, or at least the original contract for the ship being cancelled due to major delays.

What are the typical hurdles faced on a shipbuilding dispute?

One of the biggest issues that can be faced on a shipbuilding dispute relates to the

yard that the ship was due to be built in. When choosing a yard, potential buyers need to take many things into account such as availability of a slot to get the ship built, the price for the ship that the builder is willing to agree and even whether the global ship building industry is busy as this means, for example, engines may be difficult to source or take longer to source if lots of ships are being built at the same time. Not everyone can afford to have a ship built at the best yard. Therefore, economic constraints on buyers means that some boats are built in yards where the facilities and plant is limited when compared to some of the, and by way of example only, major Korean yards. That means that when you analyse delays you need, for example, to take into account the crane limits (as this directly relates to the size of the hull blocks that can be fabricated), coded welder numbers, and the numbers of CNC machines used for cutting plates as these factors all play a part in how quickly the yard could build the ship. There are many issues which must be taken into account in order to assist the arbitrator or judge.

Anything else to add?

In order to be a DIALES expert you need to have at least 15 years' experience in your chosen field and have either been cross-examined or undergone cross-examination training. That way, when you instruct a DIALES expert you can be sure that they have a wealth of experience.

Also, it may seem trite, but the depth of experience within Driver Group, from all engineering backgrounds, means that we have a huge pool of knowledge that can be tapped into for the benefit of our clients. As Driver Group is made up of Driver Project Services, Driver Trett, and DIALES we can provide comprehensive services to our clients which work both bottom up and top down. By this I mean that we provide highly experienced experts to develop policies and strategies which are taken forward into live projects by our project services arm; and conversely we can provide our clients with value for money services on major disputes by tapping into our wealth of personnel to provide blended rates. ■

Variations: A forgotten topic?

MAY 2014 SAW THE PUBLICATION OF A NEW BOOK, CONSTRUCTION CONTRACT VARIATIONS. PERHAPS SURPRISINGLY, THIS WILL BE THE ONLY CURRENT TEXT DEALING WITH THE LAW ON VARIATIONS. ONE OF THE AUTHORS, MICHAEL SERGEANT OF HOLMAN FENWICK WILLAN, CONSIDERS WHY THIS SUBJECT HAS BEEN LARGELY IGNORED.

There have been various books written on specialist areas of construction law, such as delay, disruption, and design liability. However, variations as a subject has been pretty much ignored. This may seem surprising in view of the fact that change to the contract work-scope is probably the most common cause of construction dispute. On practically every project there will be a schedule of disputed variations. They also form the underlying basis of many other types of dispute, such as those concerning delay, defects, and project termination.

The subject is often perceived as one that concerns valuation rather than involving "legal" issues. No doubt, quantum is an important angle when considering the law in this area and there are a number of important legal authori-

where the parties disagree on whether the contractor has an entitlement to be paid for the item at all (irrespective of subsidiary disagreements on quantum). The focus of our book is on the second category i.e. issues surrounding disagreements on principle, or what may be termed "liability" issues.

There are two main types of disagreement on principle. Firstly, the question of whether an item of work is within the contract scope and secondly, whether the work has been approved and instructed by the employer. Most disagreements on liability boil down to one or the other. Both involve complex issues of law which it is important to be aware of.

Work within contract scope?

With any sale of goods or services there



contractor is, or is not, obliged to build will therefore be a complex task. This will, of course, be the starting point for any analysis of whether a particular item of work is within the scope, or is a variation. Such an analysis needs to take into account the law concerning the interpretation of contracts which will govern how a tribunal (be it a court, arbitrator, or adjudicator) will need to resolve inconsistencies within the parties' agreement. Whilst the contract may contain a priorities clause which purports to set out which contract documents should be treated as having priority over others, such a clause still needs to be interpreted in the context of the common law rules on the interpretation of contracts generally.

Disagreements over scope will arise where the employer alleges that the contractor has an obligation to undertake an item of work which, whilst not specifically referred to in the contract documents, does form part of the contractor's wider obligations. For example, a design and build contractor may have an obligation to ensure that its design functions properly, such that it is required to alter that design and thereby undertake

extra works without this amounting to a variation. However, the way in which such alterations to a defective design are treated will depend on the precise wording of the contract. It may be the case that such necessary changes to the design need to be approved by the employer, and therefore may need to be instructed as variations under the contract.

Employers, however, need to be very careful in such circumstances. Contracts will often make no distinction between variations that are instructed because the employer has changed its mind as to what it wants and those that are required because of a contractor's default. Cases in the English courts have found that an employer can unwittingly become liable to pay for variations that were only instructed because the contractor's design has failed.

Lack of approval or instruction

As with any contract for the sale of goods and services, the seller is required to supply the defined product and can only provide something different if this change has been approved by the buyer. Most

Cases in the English courts have found that an employer can unwittingly become liable to pay for variations that were only instructed because the contractor's design has failed.

ties on valuation that the book considers. However, I am a lawyer, not a QS, and the subject of valuation is often best considered by analysing not just variations but the quantification of claims and costs more generally. See, for example, *Evaluating Contract Claims*, by Peter Davison and John Mullen of Driver, for an in-depth review of the quantification of construction claims, including variations.

The focus of our book is more directed towards liability issues. A variation account will often be divided into, firstly, disputes on quantum only (where liability is agreed but there is a disagreement about valuation), and secondly, disputes on principle,

may be a disagreement between the parties as to whether the seller has supplied the product described in the contract. With construction contracts this issue can be particularly difficult to resolve because the description of the product is complex and is normally contained in a large number of documents which have often been produced for different purposes. The works may not only be described in the specification and drawings, but also in the pricing documents and the programme. Contradictions, ambiguities, and even gaps in the description of the works are inevitable.

Determining what precisely the

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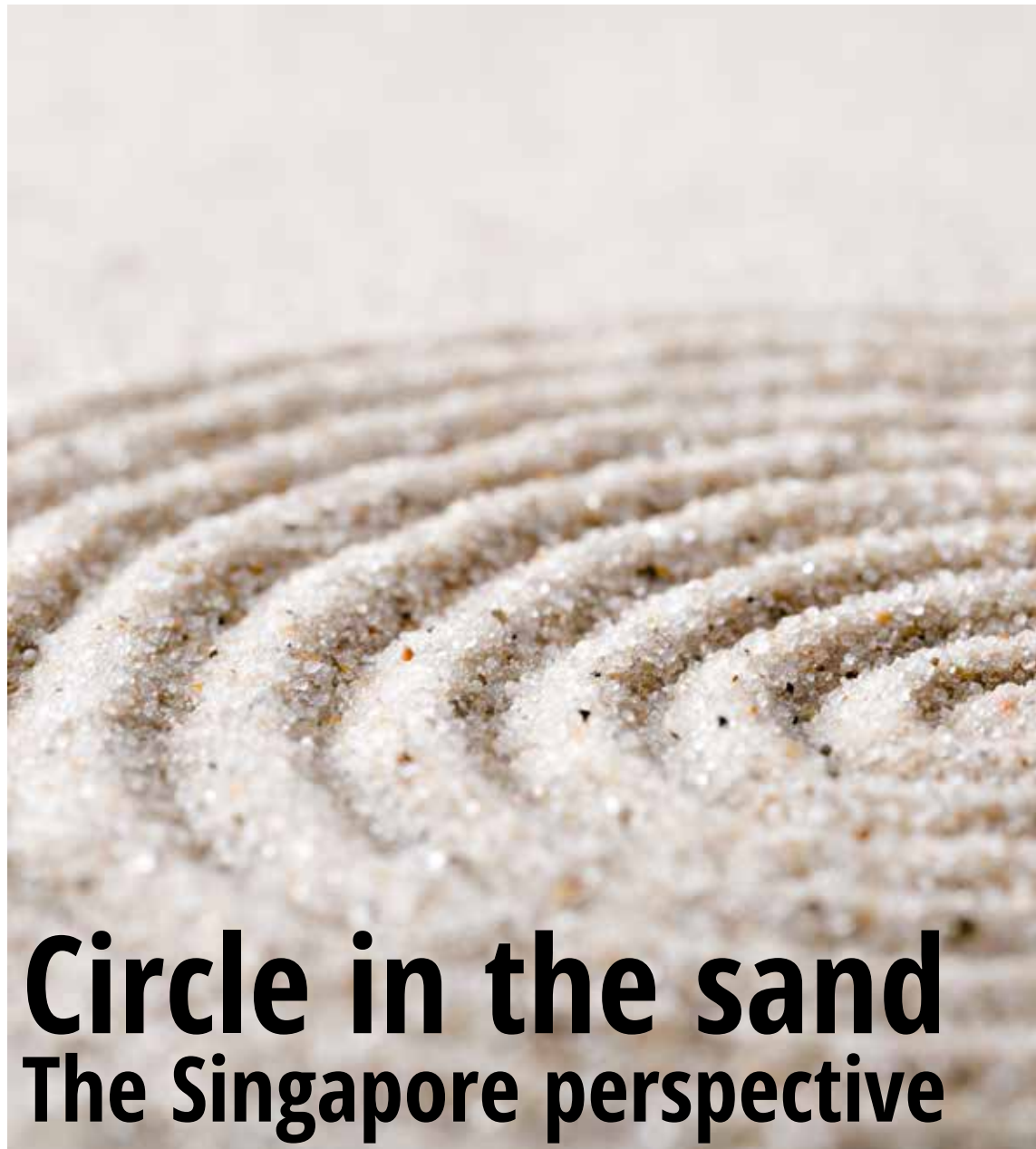
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contracts for the sale of goods will not incorporate an express variations clause because normally there is no need to make changes to the product once the contract has been entered into. However, variations are almost inevitable on construction projects and so it is necessary to include a mechanism to allow the employer to order changes. The contract will typically provide that the contractor's right to extra money and time under the contract is only triggered by an instructed change. No instruction means no entitlement.

Such an approach risks causing considerable injustice, especially where the change had to be made by the contractor simply in order to proceed with the project or where it had no opportunity to obtain an instruction before undertaking the extra work. Many of the reported cases on variations seek to grapple with this injustice and the courts have developed a number of grounds which a contractor may be able to rely upon in order to justify payment in the absence of an instruction. For example, in appropriate circumstances, the courts have found that the employer can be said to have waived the need for the contractor to get an instruction as a prerequisite to payment. Or, that the parties have reached an informal agreement that the contractor will be paid for the extra despite the lack of an instruction. On occasions, and in particular circumstances, they have found that the contractor has a right to claim for extra on the basis that the work was carried out under a separate contract. The courts have even entertained the notion that an employer can be said to be under a duty to instruct a variation in certain circumstances, such that the breach of that duty may justify compensation. There are, therefore, a variety of arguments that a contractor may be able to employ to ensure that the lack of an instruction is not fatal.

Whilst this area of law is complex, it is ultimately very interesting and of considerable importance when dealing with substantial variation accounts. ■

Construction Contract Variations by Michael Sergeant and Max Wieliczko, both partners in the construction team at law firm Holman Fenwick Willan LLP, was published by Informa on 26 May 2014.



Circle in the sand

The Singapore perspective

UMA MENON – SENIOR CONSULTANT, DRIVER TRETT SINGAPORE DISCUSSES THE COMPLEXITIES OF THE CONTRACT IN RELATION TO THE IMPORT AND EXPORT OF RAW MATERIALS

Being a small island nation with limited natural resources, Singapore relies heavily on import of raw materials for construction. Steel, aggregates, sand are mostly imported from neighbouring countries like Indonesia, Malaysia, and China, to name a few.

The above scenario is usually in the contemplation of parties entering into a construction contract. Contractors and suppliers need to be fully aware of the implications and inherent risks involved

while relying on imported material. For example, would a ban by a neighbouring country on the export of raw materials to Singapore be deemed a force majeure event?

The standard forms of contract would have a force majeure clause which addresses how to resolve situations where foreseeable events such as war, labour strikes etc. occur.

In contrast, frustration is the onset of an unforeseeable event which renders

the contract radically different and deals with contractual obligations in such an instance.

Recent cases have established that parties relying on force majeure clauses to claim for events that affected the supply of raw materials may be caught by the wording of such clauses.

In *Alliance Concrete Singapore Pte Ltd (Alliance) vs Sato Kogyo (S) Pte Ltd (Sato)*, the plaintiff had entered into three contracts in the year 2006 with the



ance stopped the supply of concrete in February 2007. Despite several meetings, there was no resolution of the matter and Alliance sued Sato in June 2007 for failure to pay for sand already supplied. Sato maintained that Alliance had breached the contracts by failing to supply concrete after the sand ban became effective.

Alliance argued that the sand ban had frustrated the supply contracts. According to Alliance, the force majeure clause would operate in two of the supply contracts to relieve Alliance from performing its obligations.

The High Court cited the Singapore Court of Appeal case of *Glahe International Expo AG v ACS Computer Pte Ltd* and another appeal [1999] in which the Court of Appeal had explained as below:

“... The law on frustration is well settled. A contract is considered frustrated when a supervening event (which has not been expressly provided for in the contract) takes place, the consequence of which is that the nature of the parties’ (or one party’s) obligations is so fundamentally or radically altered that the contract can no longer justly be said to be the same as that which was originally entered into by the parties.”

Therefore, it followed that even if the sand ban was unforeseen, the question was whether it had fundamentally or radically altered the contract from the original contract. In this case, it had merely become more expensive and difficult for Alliance to perform the contract obligations, but nevertheless it had not fundamentally altered the original contract. The increased cost of performing the obligations would be part of the inherent risk in a supply contract of this nature, barring any express contractual terms which negated such risk.

The courts held that the contract was not frustrated.

Alliance also sought to enforce the force majeure clause for two of the supply contracts.

However Sato argued that it had found the force majeure clauses suggested by Alliance to be unacceptable and therefore had not signed up to them. Instead, Sato had made a counter-offer by way of their own purchase orders which were signed by both parties. Therefore, the court found

the signed purchase orders to be valid and held that the force majeure clauses were not applicable.

The High Court also held that even if the force majeure clauses were applicable, the sand ban event would not have come within the ambit of such clauses so as to relieve Alliance from performing the contracts.

The High Court followed the Court of Appeal’s decision in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* and another appeal [2007].

The distinction between force majeure and frustration was first clarified by the courts in the above case as follows:

“Conceptually, it is true that a force majeure clause operates differently from the doctrine of frustration. Whereas a force majeure clause is an agreement as to how outstanding obligations should be resolved upon the onset of a foreseeable event, the doctrine of frustration concerns the treatment of contractual obligations from the onset of an unforeseeable event...”

Secondly, the effect of a force majeure clause “depend[s] on its precise language” as was stated by the courts and it was paramount as it would define the scope and ambit of the clause itself.

The two force majeure clauses in this Alliance case were as follows:

“We shall be under no obligation to supply the ready-mixed concrete if the products have been disrupted by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots, shortage of materials, acts of god or any other factors that could have arisen through circumstances beyond our control.” (the NTU FM Clause)

and,

“In the event of any circumstance constituting Force Majeure, which is defined as act of God, or due to any cause beyond ACS’ control, such as market raw material shortages, unforeseen plant breakdown or labour dispute, the affected party to perform its obligations shall be suspended or limited until such circumstance ceases.” (the Harbourfront FM Clause)

The High Court cited the Court of

defendant, for supply of ready-mixed concrete. Alliance was importing sand from Indonesia for manufacture of ready-mixed concrete. On 23rd January 2007, the export of sand to Singapore was banned by the Indonesian government and became effective as of 5th February 2007.

Meanwhile, the Building Construction Authority (BCA) of Singapore had taken measures to mitigate the impact of the ban. The BCA decided to release sand from its stockpile to address the escalating cost of sand while the government also committed to absorb 75% of the increase in cost of sand. BCA also suggested that

the remaining 25% of cost increase in sand should be shared between the contractors and suppliers subject to agreement of the parties.

The ban affected several suppliers including Alliance who sought to renegotiate the supply agreements with Sato. Alliance’s position was that it was no longer bound by the existing supply agreements due to the sand ban by Indonesia. On the other hand, Sato maintained that the existing supply agreements were valid but was agreeable to cost sharing for the increase in cost of sand. The parties did not find a common ground and Alli-



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Appeal in Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application [2011].

In the above case, the Court of Appeal held that, "[the] words 'disrupt' and 'hinder' connote a lower degree of negativity compared to the word 'prevent' and the word 'disrupt' suggests a datum measure of difficulty that interfered with the successful completion of the transaction concerned and unlike a situation involving 'prevention', a 'disruption' does not render further performance by one party, or by both, impossible."

In Holcim v. Precise, the Court of Appeal held that "the party relying on a force majeure clause ought to show that it has taken all reasonable steps to avoid the event or events concerned if there is the requirement that the event or events must be beyond the control of that particular party".

Alliance could not rely on the NTU FM Clause for a mere increase in the price of sand as this would not constitute disruption. In addition, Alliance had not taken all reasonable steps to mitigate the alleged disruption for the event to be classified as 'beyond its control' as was established by its refusal to take up sand offered on a

cost-sharing basis.

The High Court criticised the Harbourfront FM Clause as 'awkwardly drafted and difficult to understand'. It was noted that the Harbourfront FM Clause used the phrase "the affected party". The High Court held that even though the "word 'affected' instead of 'disrupted' might suggest an even lower threshold of hindrance" for the trigger of the Harbourfront FM Clause, this could not have been the parties' intent commercially. The word 'affected' therefore was interpreted as having the same hindrance level as 'disrupted' which was used in the NTU FM Clause. It therefore followed that, since the NTU FM Clause was not triggered, neither was the Harbourfront FM Clause.

In conclusion, it can be said that force majeure clauses will be scrutinised by the courts in Singapore for their precise language and the intent of the parties in a commercial light. As such contracting parties have to ensure that such a clause is drafted to adequately convey how their obligations are to be performed in such scenarios; without ambiguity and without room for alternative interpretations that may defeat the purpose of the clause. ■

MHPM Driver

A JOINT VENTURE TO DELIVER DISPUTE AVOIDANCE AND RESOLUTION TO CLIENTS IN CANADA

Driver Group is pleased to announce that we have entered a formal partnership with MHPM to offer a dispute avoidance and resolution service in Canada.

MHPM was formed in 1989 providing project management services. They lead construction projects to success and provide clients the information and advice they need to optimise their building and infrastructure investments.

Frank Holtforster, President and CEO of MHPM said, "we are pleased by Driver Group's decision to partner with MHPM. This relationship will permit MHPM's offices across Canada

to provide our clients with immediate access to Driver's world-class capabilities in the areas of claims and dispute resolution."

Dave Webster, CEO of Driver Group stated, "MHPM is a very well respected project leadership business in Canada with the world-class capabilities that Driver Group is exceptionally pleased to be associated with. This strategic partnership allows Driver to expand its core services through a well-established network of offices across Canada and I look forward to working with Franklin and his team in developing the opportunities we see available to us."

Adjudication or

MICHAEL TURGOOSE – TECHNICAL DIRECTOR, DRIVER GROUP EXPLORES FIVE MAIN DIFFERENCES BETWEEN ADJUDICATION AND ARBITRATION.

I was recently asked by a main contractor client suffering substantial delays and with large amounts of money in dispute whether they should adjudicate the dispute or go straight to arbitration (as required by the contract agreement). That's not an easy question to answer and it led me to ponder on what I would consider to be the five major differences between the adjudication and arbitration processes. I can't say the following necessarily represent the five most distinctive factors since others will no doubt take a different view, but they are certainly significant matters for consideration.

Whilst I am minded that adjudication under FIDIC forms of contract has been with us for far longer, a distinction is made for the purposes of this article between the foregoing contractual adjudication process and adjudication under UK statute. In other words, UK construction disputes post the implementation of the Housing Grants Construction and Regeneration Act 1996 (the Act).

It should also be remembered that a dispute may only be resolved in arbitration proceedings where a valid arbitration agreement clause exists in the construction contract between the disputing parties. Without an arbitration clause, the final arena for resolving disputes and receiving a final judgment binding on both parties is in the courts.

Whilst arbitrators (or two or more arbitrators) and adjudicators are generally appointed because of their expertise in a particular field and each has the primary role of deciding on the facts and holding on legal entitlement, to my mind there are a number of distinctions between the services performed by an adjudicator and an arbitrator.

1 Under the Act, an adjudicator works within the restraints of a defined timetable. Generally, the adjudicator has 28 days from receipt of

the referral to reach a decision, subject to extensions of time initially granted by the referring party. In contrast, there is no such statutory timetable, in arbitration proceedings.

Regardless of the defined timetable, many adjudications do run on much longer, by agreement of course. In the meantime, an arbitrator is bound by the principles and objectives of Section 1 to the Arbitration Act 1996 which provide for, "...fair resolution of disputes by an impartial tribunal without unnecessary delay and expense" and therefore arbitrations can be time limited to avoid unnecessary delay and expense if that is what the parties have agreed.

2 The arbitrator's award is final and binding on both parties (unless agreed otherwise by the parties under Section 58(1) of the Arbitration Act 1996) whereas an adjudicator's decision is binding only on an interim basis, that is until the parties agree that it is final and binding or shall become binding after a defined period of time or the dispute escalates to arbitration or litigation.

3 The arbitrator's award is subject to appeal on points of law only, unless the parties have excluded the right to appeal, whereas an adjudicator's decision will not normally be unenforceable in the event the adjudicator has misinterpreted or wrongly applied a point of law.

4 An arbitrator will usually seek security for future fees and will expend time against such amounts deposited in his account by each party during the currency of the proceedings. In other words, an arbitrator requires payment of his fees up front. Further, an arbitrator may impose a lien on his award i.e. the arbitrator is entitled to withhold the issue of the award until payment is

arbitration – you decide

received in full.

An adjudicator, on the other hand, does not generally have this luxury. More often than not, the adjudicator's fees are incurred then ultimately apportioned to the parties and invoiced when the decision is issued. Receipt of payment is then expected within the terms of the adjudicator's terms and conditions. There is no entitlement to delay the issue of a decision pending payment of fees and significantly, a late adjudicator's decision runs the risk of being held invalid and unenforceable in the courts.

5 A major difference between arbitration and adjudication is that the default position in adjudication requires the parties meet their own costs unless they opt-in and agree otherwise prior to commencement of proceedings.

Section 63(1) of the Arbitration Act 1996 allows the parties to agree and opt-out of the basis for recovering the costs of the arbitration.

On reflection, back in the mid 1990s, adjudicators were trained, primed, and ready to take on a much more inquisitorial role. We were told that we would be able to, and in all likelihood expected to, speak with key project personnel such as the clerk of works or engineer to find out what really happened on site. Most wouldn't consider taking such action now with the focus on natural justice having been sharpened.

Section 34(2) of the Arbitration Act 1996 also allows an arbitral tribunal to decide the procedure to be adopted in terms of written submissions and whether the strict rules of evidence apply and whether the tribunal will take the initiative in ascertaining the facts

and the law. It is true that few arbitrators adopt an inquisitorial approach either and, consequently, some might say that adjudication has become much more like a short form of arbitration.

Where adjudication was intended to be conducted during the currency of a project in a quick and economical manner, many adjudicators will now be faced with end of contract disputes involving applications for extensions of time and substantial amounts of money wrapped up in delay damage, prolongation, and disruption related claims. In this

respect, the two processes have again perhaps morphed into one as the similarities between adjudication and arbitration become more evident.

Nevertheless, the adjudication process, complete with warts and all, will provide an impartial decision that will often assist in highlighting the good and bad points in a party's case. Whether you win or lose in adjudication, armed with this knowledge, a commercial decision can then often be taken as to whether the case is worth pursuing further through the arbitration route. ■

Whilst arbitrators and adjudicators are generally appointed because of their expertise, to my mind there are a number of distinctions.





MARTIN SANGER AND EMMA HENLEY, WEATHERNET TAKE A LOOK BACK AT THE DIFFICULT WINTER WEATHER IN THE UK AND THE IMPACT THIS HAS HAD ON THE INDUSTRY.

Winter 2013/2014 was the wettest since records began as a seemingly uninterrupted series of storms battered the UK. Heavy rain and strong winds persisted through much of January and February and many areas experienced severe flooding and extensive damage. The impact on the construction industry has been widespread, with many claims submitted for time extension and delay. Demand for NEC and JCT weather reports to evidence and quantify these claims has been high.

For much of the UK, January is the coldest, snowiest, and stormiest month of the year. The first fortnight is particularly prone to storms and this year, January started true to form. Needles, Isle of Wight recorded a gust of 106mph on the 3rd and hail and thunder were also widespread during the first week. High winds combined with spring tides resulted in a number of storm surges, damaging sea fronts, and breaching coastal defences. The unsettled weather continued through to mid month,

after which it became a little less stormy but remained dull, damp, and misty as the frontal systems moving over the UK were slowed by pressure building over Scandinavia.

A very deep depression on the 26th brought widespread rain and gales – and snow for parts of Scotland (e.g. 12cm at Kindrogan, Perthshire). The low then drifted south over the UK during the next few days, resulting in further spells of rain. Colder air briefly occurred from the East on the 29th and 30th, but this was soon swept away – and on the 31st a vigorous low pressure system drove more gales and rain eastwards.

By the end of January, many parts of the Somerset levels had been underwater for nearly four weeks and over 28,000 acres of land had been flooded. South-east England experienced its wettest ever January and for the UK overall it was the third wettest January in a century.

Many NEC contract compensation events would have been triggered. For sites in the South, rainfall was exceptional, unprecedented in the last decade, and clearly iterative of an event that occurs less than one year in ten on average. Further North, whilst it remained significantly wetter than average for all of England, rainfall amounts were rather less extreme. In fact, northern Scotland actually experienced a drier than normal January (see figure 1).

The stormy weather of January continued through the first half of February. The Somerset levels remained submerged and continuous and heavy rain also caused severe flooding in Oxfordshire, Berkshire, and Surrey. The river Thames rose to its highest level for many years and many tributaries, smaller rivers, brooks, and streams burst their banks. A total of 9000 properties were inundated and insured losses approached £500m. Coastal areas in the South and West were also badly affected and there was significant damage to sea defences in Devon on the 5th. Just a week later, on the 12th, a severe storm (Tini) swept across Wales, Northern England, and Southern Scotland. This was immediately followed by another severe storm (Ulla) which blasted the South on the evening of Valentine's Day (the 14th) and early into the 15th Needles (Isle of Wight) recorded a gust of 109mph.

The last fortnight of February provided a little welcome respite. Conditions remained unsettled but it became much less windy, remained mild, and frosts were rare.

February as a whole was another very wet month for all of the UK and for the country as a whole, the 4th wettest in 100 years.

Not surprisingly, many claims for NEC contract compensation under clause 60.1(13) have been logged. Southern England and Wales were relatively the most wet, with a broad area covering Wales and Southern England receiving twice its normal rainfall, and some places nearly three times as much. Northern and Eastern areas were rather less wet and not all sites satisfied the required wettest year in ten to substantiate a claim for time extension.

Winter 2013/2014 has been extremely stormy. Weather conditions have been notably disruptive to many construction projects, especially in the South of the UK, resulting in significant delays to work. There has been an impact on the construction industry with much site damage, contracts falling behind schedule, and numerous claims for time extension. For most, the lengthening days and arrival of spring was welcome, providing a long awaited tonic and stimulus to make progress on site. ■

For more information email martin@weathermet.co.uk

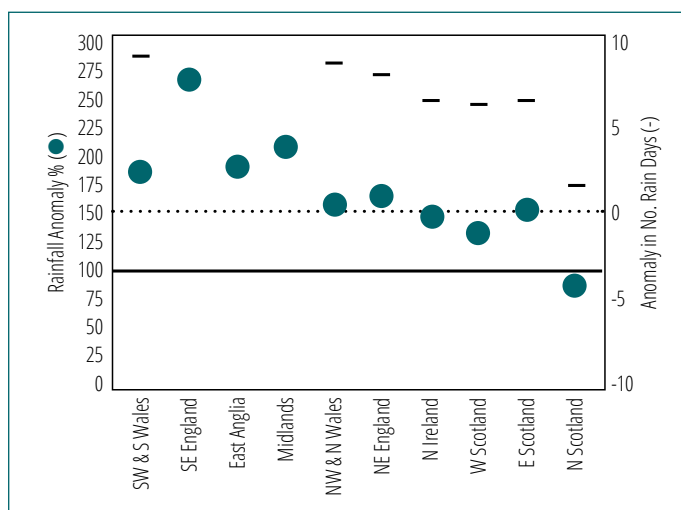


FIGURE 1: Rainfall anomaly for January 2014. The total rainfall anomaly ● is the percentage increase or decrease in rainfall that was recorded in each region compared to the January average (100%). The anomaly in rain days (-) represents the number of days of rainfall experienced in each region throughout the month above or below the January average (0).

The English court's developing approach to stopping an employer enforcing an on demand bond

ANDREW DENTON, RICHARD WILLIAMS, AND SHY JACKSON ARE PARTNERS AT PINSENT MASON'S LLP AND RECENTLY ACTED FOR DOOSAN BABCOCK IN SUCCESSFULLY OBTAINING AN INJUNCTION PREVENTING A CALL UNDER AN ON DEMAND BOND.

"The lifeblood of international commerce"

On demand performance bonds are a common feature of large international construction projects. They are procured by the contractor from financial institutions and provide the employer with financial security for a percentage of the contract price. The employer has an immediate route to payment from the financial institution in the event of performance failure or insolvency on the part of the contractor.

They are typically capable of being called with no conditions or a simple requirement for the employer to state that the contractor is in default. Issues often arise where the parties to the construction contract are in a dispute.

For many years, English courts have said they will not generally interfere to prevent payment on an on demand bond. As Lord Denning put it in *Edward Owen Engineering Ltd v Barclays Bank plc* [1978] Q.B. 159, "Barclays has given its guarantee – I might almost say its promise to pay – on demand without proof or conditions. They gave that promise, the demand was made. The bank must honour it. This court cannot interfere with the obligations of the bank." The rationale for this is simple. The courts will not interfere with the machinery of irrevocable obligations assumed by banks: they are the life-blood of international commerce.

Essentially they will do so only in clear cases of fraud of which the bank has notice (almost impossible to establish in the absence of extraordinary facts). The reported cases where a contractor has succeeded in stopping the bank from paying are few and far between.

Relationship with the contract

As an alternative to the almost impossible task of preventing banks from paying, contractors try to injunct employers from making a demand.

On demand bonds are however autonomous documents that exist entirely independently of the contracts whose obligations they underpin. The courts will therefore not imply terms into the contract to stop a demand. Further, in the absence of express provisions in the contract, they will not treat the position any differently from an injunction against the bank i.e. only clear and obvious fraud will do.

What happens where the contract does incorporate terms in relation to the bond? Is it the case that clear fraud is still the test?

"A strong case"

The first guidance to this question emerged in *Sirius International Insurance Co (Publ) v FAI General Insurance* [2003] 1 W.L.R. 2214. Sirius as the beneficiary of a letter of credit agreed it would only make a call where it had made payment out under an insurance contract with the agreement of FAI. The English Court of Appeal found that FAI's agreement had not been obtained and that Sirius was not entitled to make a call.

The English Technology and Construction Court developed this in *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC). The contract was FIDIC based, and included an obligation to provide an on demand bond which would become null and void on acceptance under the contract. The bond provided merely expired on a calendar date. An acceptance certificate was issued with a list of defects but the employer did not return the bond and then tried to call it. The employer argued that unless there was evidence of fraud it was not possible to prevent a demand from being made.

The court decided to grant an interim injunction stopping the employer from making a demand on the bond. This was because it was of the view that the employer was prevented from making a call under the terms of the underlying contract, which made it clear that the bond was to expire once the acceptance certificate was issued.



The court said that on an interim injunction application to restrain a call the court needed to be satisfied that there was a strong case. On the facts of the case it was so satisfied.

Doosan Babcock v MABE

The same principle was followed in the recent decision in *Doosan Babcock Ltd v Comercializadora de Equipos y Materiales Mabe Limitada* [2013] EWHC 3201 (TCC). The contract was also based on the FIDIC form and included a bespoke clause setting out an obligation to provide on demand bonds which would expire in certain events, including taking over.

Taking over could have happened in a number of ways. One of these involved the employer using the works. If it did so, taking over was deemed to have occurred and on request by the contractor, a taking over certificate was to be issued.

The judge held that, to the extent that the contractor needed to show that the employer had not acted in good faith by refusing to grant a taking-over certificate, it had a strong prospect of doing so in any future proceedings. The judge was influenced by the evidence put forward by the contractor demonstrating the use of the power plant by the employer.

The court also found a strong case that the relevant performance testing as provided for by the bespoke clause in the contract did not include the additional on site testing which the employer argued was needed before taking over would occur.

The court also made it clear that it could in any event rely on the decision in *Alghussein Establishment v Eton College* [1991] 1 All ER 267, which establishes the principle that "no man can take advantage of his own wrong". In this case, the employer would only be able to call the bonds because it had failed to grant the taking-over certificates, in breach of contract. Without that breach, the bonds would have expired.

Conclusions

A line of authority has emerged in the UK courts where there is a strong case that the call is in breach of an express term of the contract.

Employers and contractors should give heed to these cases in their contract drafting. Contractors may be able to lessen the risk of a call being made on an on demand bond where there is an underlying dispute.

It is however still the case that it is not easy or straightforward to obtain an injunction and each case will need to be considered on its own facts. ■

Energy and offshore

CHRIS KIDD AND MARK DE LA HAYE OF INTERNATIONAL LAW FIRM INCE & CO DISCUSS KNOCK-FOR-KNOCK LIABILITY IN THE OFFSHORE WIND FARM SECTOR, ASKING WHY IS IT IMPORTANT, AND WHAT ISSUES DO YOU NEED TO BE AWARE OF?

Conducting construction, operations and maintenance offshore poses a large number of challenges for developers, operators, and contractors. Typically, there are many parties involved, very large sums of money at stake, and constantly evolving and, therefore, potentially dangerous work environments to contend with. As a result, the allocation of risk between the parties is a fundamental issue for consideration at the outset of contract negotiations. In the offshore oil and gas sector, the 'knock-for-knock' regime has been tried and tested for decades. It is well understood and readily accepted as a key element in allocating risks between contracting parties. In the burgeoning offshore wind farm sector, although many parties are keen to contract on a knock-for-knock basis, there has been resistance from some.

This article explores the history and development of the knock-for-knock regime, highlights the key advantages of it, and looks at some important issues that parties should be aware of when drafting their contracts. In doing so, it is hoped that this article will serve to explain the benefits of knock-for-knock and why it is likely to remain of importance for wind farm construction and operation activity.

The history and development of knock-for-knock

The origins of the knock-for-knock regime can be traced back to the early 20th century, where it first appeared in the context of motor insurance. Following an incident between two or more vehicles, each insurer would bear the cost of repair to their own insured's vehicle, regardless

of which party was at fault for the incident. The rationale behind this agreement was that the administrative burden and cost of investigating each and every incident that led to damage would be disproportionate to the sums at risk, and that such losses would even themselves out over time.

The development of North Sea oil and gas exploration and production in the 1960s saw the introduction and development of knock-for-knock liability provisions in the energy sector. There is no precise definition of the concept, and the way in which it operates in each contract depends on the wording used but, broadly speaking, each party to a contract agrees to bear responsibility for, and indemnify, the other in respect of loss or damage to their own (and their contractors' and subcontractors') property, and injury to or death of their own (and their contractors' and subcontractors') employees, regardless of fault.

From the 1970s onwards, the concept was adopted in numerous standard form contracts, including many of those published by BIMCO and LOGIC. It is now well established and the English courts have upheld the validity of the knock-for-knock liability regime, with Morison J describing it as "a crude but workable allocation of risk and responsibility", and Lord Bingham recognising that it is "a market practice that has developed to take account of the peculiar features of offshore operations".

Commercial and legal advantages

In the context of any offshore energy construction project, the last thing that the parties (and in particular the operator)



want is delay and disruption. The knock-for-knock regime reduces the risk of both following an incident in two ways. Firstly, by removing the need for detailed and costly investigation which may well disrupt the ongoing project and, secondly, by reducing the scope for dispute and litigation between the parties. If risk is apportioned in a clear cut way the parties are more likely to resolve the consequences of an incident without resorting to litigation or arbitration. If it is clearly defined where risks fall and there is no scope for debate, the need for both parties to insure the same risk is removed thereby potentially reducing the overall insurance costs for the project.

Eliminating a blame culture also encourages the sharing of information

about incidents thereby enhancing the mutual establishment and operation of improved safety practices, for the benefit of all involved.

Insurers also generally encourage knock-for-knock. Protection and Indemnity (P&I) cover is the insurance of third party liabilities by shipowners, arising out of the operation of their ships. The cover is mostly provided by 13 P&I Clubs comprising the international Group. Each Club can provide cover up to about \$7 billion by means of an agreement with the other Clubs in the Group to share or pool certain liabilities. Under the terms of the Clubs' pooling agreement, certain special risks or claims (e.g. towage and heavy lift) can only be pooled if the insured member has contracted on acceptable terms which



include a watertight knock-for-knock clause, or certain risks (e.g. specialist operations) may in certain circumstances be excluded from the pool altogether. It is often not fully appreciated that a contractor is therefore often required by its P&I Club to contract on knock-for-knock terms, failing which additional cover must be purchased. Inevitably this comes at a cost which will either have to be absorbed by the contractor or included in the contract price. This explains why, in many cases, the need for a watertight knock-for-knock regime can be a deal-breaker for many offshore contractors.

Key issues to be aware of when drafting and negotiating contracts

One issue that often arises is the extent of the companies that should be subject

to the knock-for-knock regime. In other words, which companies should form part of each party's "Group"? The preferred approach is the so-called extended family arrangement, whereby the contractor (or owners') Group usually consists of the contractor (and possibly its parent company and affiliates), its subcontractors, and employees of any of the foregoing. The company (or charterers') Group, on the other hand, usually consists of the company (and possibly its parent company and affiliates), its other contractors and their subcontractors, its co-venturers and customers, and employees of any of the foregoing. In the context of offshore wind farm construction contracts, if the company is the developer or operator of the project (i.e. usually

one or more utility companies) then this demarcation of company Group should be sufficient to cover all relevant entities on the company's side of the fence. If, however, the company is actually an engineering, procurement, and construction (EPC) contractor or similar, then this demarcation of company Group will not capture the developer's other contractors and subcontractors, which can be problematic for the contractor.

Another issue that often arises is the type of conduct that the knock-for-knock liability regime is intended to cover. Clear wording is needed to entitle a party to an indemnity in the event of its own negligence, and this is usually agreed. A debate often arises as to whether knock-for-knock should apply in the case of gross negligence and wilful misconduct. This is a nuanced area of English law and, as such, the comments that follow in this short article do little more than scratch the surface. The English courts will allow commercial parties to rely on contractual clauses that exclude liability for losses arising from their own negligence, gross negligence or wilful misconduct, provided sufficiently clear wording is used. Although there is no set, defined meaning of the term gross negligence under English law, common use of the term in varying types of contractual documents has led to a general acceptance of it as meaning something more than simply plain negligence. It is accepted, however, that this difference is one of degree rather than kind – the term is generally construed as meaning a particularly bad or serious case of negligence.

Wilful misconduct, on the other hand, requires a much higher threshold than gross negligence as it involves a conscious decision to cross a certain line. Although there is no 'one size fits all' approach in the offshore wind farm sector, knock-for-knock provisions that cover negligence and gross negligence, but exclude wilful misconduct, are not unusual.

Finally, in negotiating contracts or considering the consequences of an event that might give rise to a claim, it is important not to lose sight of the shipowner's right under international limitation conventions to limit liability for certain claims to sums calculated by reference

to the vessel's tonnage. Most knock-for-knock clauses expressly state that nothing in the contract will deprive either party from relying on them. It is not always appreciated that this might result in unexpected consequences depending on the nature of the damage incurred and the size of the vessel owned (or chartered) by the party giving the indemnity.

This could arise, for example, in the context of a charter party for a small offshore support vessel (OSV) to be used in connection with offshore wind farm construction activity. Supposing a company within the charterers' Group (party A) caused significant damage to property belonging to a company within the owners' Group (party B), that may result in a direct claim by B against A in tort. If the contract between the charterers and A contained wide-reaching knock-for-knock provisions, then the charterers could be obliged to indemnify A in respect of B's claim, before seeking a subsequent indemnity against the owners under the knock-for-knock regime in the charter party. However, if the owners could demonstrate that the charterers' indemnity claim was in relation to "damage to property... occurring... in direct connection with the operation of the ship", the owners may be able to limit their liability in accordance with the tonnage of their OSV, thus potentially leaving the charterers with an irrecoverable shortfall.

Conclusion

Properly drafted knock-for-knock provisions backed-up by appropriate insurance cover can increase contract certainty and reduce the scope for delay and disruption to an offshore wind farm project which might otherwise result from investigating and arguing over who was at fault in causing an incident. Experience in the oil and gas industry demonstrates that this enables those involved in the project to get on with it in a more constructive manner, resulting in cost savings for all involved. Although there are a number of important issues regarding knock-for-knock that need to be considered carefully at the contracting stage, provided agreement on those issues is clearly reflected in the finalised contract, experience shows that this will pay dividends in the long run. ■

A funny thing happened on the way

**DAVID WADDLE – DIALES DELAY
EXPERT ARGUES THE PURPOSE
OF THE PROGRAMME.**

On 12 March 2014 there was a significant birthday; the World Wide Web (internet to you and me) was 25. The event reminded me of how much our daily lives have changed. 25 years ago I remember seeing my first fax machine on site, mobile phones often came with a small suitcase attached and green wax jackets were the 'must have' apparel. Now here we are using the internet to do things we never even dreamt of back then. I regularly use Google for research, type in the most obscure question and somebody out there will have an answer, not only is that amazing but the answer will appear on my screen in milliseconds.

The internet also gives me the opportunity to interact with other construction planners from all around the world via various forums and chat rooms. Some of the information is both interesting and useful, however, one has to remember to be careful how one makes use of that information. For me it is interesting to read the variety of opinions on a broad range of subjects, one expert however came in for some criticism. In the 2012 case, *Cleveland Bridge v Severfield-Rowen*, the judge noted that one of the experts 'was reduced to seeking informa-

tion from an engineering 'chat room' on the Internet' and had based some of his views on what one participant had said to another. The judge considered this to be extraordinary, possibly in part due to the fact that the welding outputs which were being discussed were taken from a petrochemical plant in Malaysia rather than a multi-storey building project in London. The result was that the source of information and, more significantly, the conclusions derived from it were considered by the judge to be unreliable.

In a recent planning forum which I followed, it was suggested that a savvy contractor could manipulate the programme so that all float disappeared leading to the question of float ownership being taken away. By manipulating the programme in this way the float became hidden to the exclusive benefit of the contractor. Also by making all activities critical, any employer change would guarantee the contractor's entitlement to an extension of time.

Regular readers of the Digest may recall David Bordoli's recent article covering the subject of float (Digest, issue 5, page 11). In this article David considered float and float ownership in more detail. I won't go back over the detail of float and its definition, you will have to read David's article for that, but I will emphasise that it is important to understand that float is

not something that is simply created. Float becomes apparent following a set of calculations known as a forward and backward pass. These calculations take account of several factors including activity duration, logic paths, leads and lags, calendars, resources and constraints. At the end of this process we are left with a critical path (or paths) and a calculation of float. You see, a programme is in fact a mathematical model of the project.

It is possible of course to manipulate the programme as suggested in the forum in order to give the project team whatever result it might want. A planner could revise activity durations or change programme logic in some way to affect the way the programme reacts during the forward and backward pass calculations. Such manipulation must be short lived however because the very first programme update will automatically generate float within the model, simply as an effect of the rate of progress, unless every activity progresses exactly to plan. This is true of course but there are several other factors involved. Maybe one of the first is the format of the programme. It will be difficult to spot any manipulated changes in a paper or PDF copy of a programme which may not show the logic links and perhaps consists of several thousand activities.

A demonstration of this concept of revising the programme was highlighted

in the 2005 case *Great Eastern Hotel v John Laing Construction*. It was acknowledged that the construction manager had revised the logic in the master programme as it carried out some of its monthly progress updates. The reasons for the change remained unexplained but the effect was that these changes had caused the programme to behave in a certain way when it was re-scheduled. In reality this meant that a delay to the programme was reported by the construction manager to be several weeks less than it actually was. The consequential effect of this under-reporting was that the employer then lost any opportunity it might have had to work with the construction manager to mitigate the delays.

It seems that in all of this, the true purpose of the programme is being forgotten. It is meant to be used as a management tool to assist the project team in making decisions, from ordering materials and resources, to procuring suppliers and assisting the design team to provide the right information at the right time. The programme, if properly prepared and utilised, can do all of this. Treated in the right way the programme can also assist the project team in evaluating the effect or potential effect of change and allow the team to be just that: a team. In *Great Eastern* it appears that this opportunity was lost.

AUSTRALIA NEWS

**DAVID HARDIMAN - DIRECTOR, DRIVER GROUP AUSTRALIA REPORTS ON
HOW THE QUEENSLAND GOVERNMENT HAS REVIEWED ITS BUILDING AND
CONSTRUCTION INDUSTRY PAYMENT ACT AND HAS COMMENCED MAKING
IMPORTANT REFORMS.**

The Queensland Building and Construction Industry Payment Act 2004 (BCIPA) provides a process of fast adjudication to resolve payment disputes within the building and construction industry.

In the last year, over A\$1bn of claims were submitted for adjudication in Queensland where a new level of adjudication maturity

has been reached with this month's release by the Queensland government of its Building and Construction Industry Payment Act – Amendments.

The Amendments outline key areas of reform and address important issues identified in stakeholder consultations.

In particular, the process of appointment

of adjudicators is overhauled. The reforms also raise the benchmark for the skills and qualifications of adjudicators. A number of changes are introduced to the adjudication process.

Appointment of Adjudicators

- The existing private adjudicator nominating authorities will be replaced by a single adjudication registry within the Queensland Building and Construction Commission. The Commission will register, monitor, and appoint adjudicators as well as ensuring that adjudicators act impartially and independently.
- Questions of jurisdiction under the Act will be determined by the adjudicator.

Skills and qualifications of adjudicators

- The knowledge requirements for registration as an adjudicator will be increased.
- Adjudicators will be required to participate in continuing professional development (CPD).

Adjudication process

- Unless the contract provides for a longer period, the time in which a payment claim can be made after the work was last carried out is reduced from 12 months to six months. There are exceptions related to claims for recovery of a final progress payment.

to in the forum

Collaborative working between all of the members of the project team should be standard practice and in reality, on the majority of projects, it is. Projects carried out with this type of team spirit are generally successful for all those who are involved in them. The NEC3 ECC contract is an example of one which goes a little bit further than most in promoting collaborative working. It even includes Clause 10.1 which states that the parties shall act "in the spirit of mutual trust and co-operation".

Two key factors which form the backbone of the NEC3 contract are transparency and the programme.

A truly savvy planner has a very effective role to play within any project team. It is not about manipulating the programme to provide the optimum commercial position for the contractor. It is about accurate reporting, the recognition of change and the effect of that change. It is not unusual for a planner to record progress, mark up the programme and provide a colourful document to adorn the project office wall. Nor is it unusual for the team to report delay whilst in the next sentence, state that the project will be delivered on time.

The NEC3 contract requires that the programme is updated on a regular basis, usually every four weeks. It also requires that compensation events or potential compensation events are notified as soon

as the parties are aware of them. Risk reduction meetings are required where these events are properly discussed and solutions are considered. Ultimately the effect of the compensation event is measured based on the effect it has, if any, on planned completion.

This whole process revolves around the programme. For it to operate successfully the programme must be as accurate, and dynamic, as possible. A manipulated programme would not be fit for this purpose.

There is a requirement in the contract for the programme to be assessed by the project manager and either accepted or rejected. The assessment of compensation events is based on the current accepted programme. What we see on many projects that are going through the dispute resolution process is that programmes have not been accepted or, in many cases, rejected. Often the project manager has in fact remained silent. I am sure that there are many reasons for this but I suspect that one of the main reasons is that the project manager does not understand the programme and is perhaps nervous of accepting a document which they do not trust and which may benefit the contractor in the assessment of compensation events.

It is possible for the project manager to seek specialist assistance if there is any part of the programme he does not



A truly savvy planner has a very effective role to play within any project team.

understand (if you have a 'friend' who might need some advice, we are here to help 'him') but really the first port of call must be the contractor's planner.

The NEC3 contract is just one specific contract but in reality the role of the programme is the same on just about any project. All of the parties must have faith in it, not just in its content but in its integrity.

The truly savvy planner and project team (there is no i in planner) will never manipulate the programme. It will always be an honest and transparent document, and in this way, good things will come to those who operate it. ■

Driver Trett provides a short seminar which discusses some of the 'tricks and traps' that can be hidden in the programme. For more information email info@drivertrett.com.

- The reforms do not impose an upper ceiling on the value of claims that can be submitted for adjudication. In recognition of the issues related to the size of certain claims, the time for submitting a payment schedule for claims in excess of A\$750,000 is extended from ten business days to 15 business days and the time for the adjudication response is increased from five business days to 15 business days. Similar timescales apply to claims related to latent conditions or time related costs.

- In other cases, the time for submitting the adjudication response is extended to ten business days.

- The adjudicator can, within specified

parameters, grant additional time to the respondent.

- The definition of business days around Christmas and New Year has been significantly reduced, presumably to curb the practice of delivery of ambush claims over the season of goodwill.

- The existing period of ten business days will remain unchanged for a respondent to serve a payment schedule in response to a payment claim. The imbalance of time compared to that available to a claimant preparing his payment claim is addressed by removing the restriction that respondents are limited in their adjudication responses to reasons contained in the payment schedule.



The amendments are scheduled to take effect on 1st September 2014 and apply to contracts entered into from this date.

All adjudication applications made on

or after 1st September 2014 will have to be made to the adjudication registry within the Queensland Building and Construction Commission. ■

Benefits of public private partnerships

**MAGGIE SELLWOOD - ASSOCIATE DIRECTOR, DRIVER GROUP AFRICA
EXPLORES SUCCESSFUL PARTNERSHIP ARRANGEMENTS AND EXPLAINS THE
BENEFITS FROM THE PUBLIC AND PRIVATE SECTORS JOINING FORCES.**

Introduction

This article identifies some of the potential benefits that can be achieved by well-structured public private partnership (PPP) concession contracts. Private sector involvement and financing of public infrastructure and services is a growing need as governments in developed and developing countries face increasing demands to improve basic infrastructure and services with limited financial resources. Meeting these needs is critical to ensure the provision of essential services, continued development, and economic growth.

The most successful partnership arrangements draw on the relative strengths of both the public and private

sector in order to establish complementary relationships between them. These collaborative ventures are built around the expertise and capacity of the project partners and are based on a contractual agreement, which ensures appropriate and mutually agreed allocation of resources, risks, and revenue returns.

Potential Benefits

PPPs are considered to benefit both the public and private sectors as both sectors have specific qualities, which if combined, can benefit both parties as well as the wider public as users of the services. Some of the key potential benefits of PPPs over alternative procurement methods are outlined below.

Private Sector Financing

One of the key benefits of PPP is to relieve part of the burden

of large capital expenditure on governments, thus reducing the need for tax increases to the public. In many countries the financing requirements of current and future infrastructure far exceed the public sector budgets. The availability of alternative funding via private sector borrowing represents an off-balance sheet method of financing the delivery of public sector infrastructure and services. The use of private finance can therefore allow the public access to improve services sooner than government spending programmes allow, or where they would not otherwise be provided. Furthermore, investment decisions under PPP contracts are based on a long term perspective rather than short-term concerns. The process helps to reduce government debt and to release capital to spend on other public services whilst allowing increased investment in public infrastructure, as distinct from alternative procurement models.

Private finance is provided on the basis that the projected project revenue cash flows are adequately demonstrated by a viable business case and where the expected return on the investment satisfies the lenders. PPP arrangements may include government subsidies as well as user fees and are required to demonstrate value for money. Some projects are more attractive to the investors and easier to finance than others in terms of the perceived risks associated with the project and the prevailing market conditions.

It is important to recognise that private sector financing of public infrastructure is only one benefit of PPP, and that PPP provides for a flow of long term infrastructure services under specified terms and conditions.

Risk Sharing and Value for Money

Under PPP arrangements, the government defines the public infrastructure and services required in the form of an output specification, ideally without being too prescriptive about the means of delivery, but with carefully specified performance criteria. The potential risks are identified and in the best case scenario, each party adopts those risks which it is best able and experienced to manage at least cost. The public sector can therefore benefit by transferring appropriate risks to the private sector, where there are the necessary skills and experience to manage them, in particular those associated with design, construction, and operation which can often lead to cost overruns.

The design risk, including the decision on the type of assets needed to deliver the service to the required standard, is left to the private sector who does not receive payment until the asset is available for use, with no funding provided by the public sector during the construction phase. This encourages efficient completion, on budget without defects in order that it becomes operational to provide the required services and to receive revenue from the users.

Lenders and the private sector will be reluctant to accept major risks such as exchange rate risk, policy and regulatory risk, and risks with existing assets which are outside their control. The acceptance of significant risks by the private party will be reflected in their price and their requirement for high level control over operations. The public sector typically retains regulatory and policy risk, planning, and environmental approvals, etc. Overall the risks are shared with both parties bearing some risks and responsibilities

involved in delivering the infrastructure and services.

Value for money is achieved as a consequence of the appropriate transfer of risks to the private sector over the long term concession period, rather than just the design and construction or refurbishment stages applicable in alternative forms of procurement. With the focus on whole life cost, rather than initial construction, the long term sustainability of the project is addressed. Repairs and maintenance are planned at the outset and therefore the assets and services are maintained at a pre-determined standard over the full length of the concession.

Value for money in PPP contracts is also realised by greater certainty in the timing and budget expenditure and the private sector usually bears the responsibility for cost and programme overruns. PPP projects are procured using competitive bidding processes and are therefore benchmarked against market standards and conditions. Furthermore, competition encourages lower prices and limits profits providing the benefit to the public users.

Combined Attributes of Public and Private Sectors

Another important benefit of PPP is that it can provide a way of combining the best respective skills, knowledge, assets, and resources of both public and private sectors. Government can benefit from the expertise and efficiency of the private sector in areas such as technology, innovation and managerial and organisational expertise, allowing

The most successful partnership arrangements draw on the relative strengths of both the public and private sector in order to establish complementary relationships between them.

them to focus on policy, planning, and regulation.

The public sector can delegate routine operations and avoid capacity constraints and bottlenecks. The improved design, construction, and operational efficiency brought by the private sector can result in cost-effective delivery of new or enhanced infrastructure and improved quality of services and facility management processes. These processes can lead to shorter delivery times and the development of best practice and added value on the basis of lessons learnt in the past.

Cooperation between public and private sectors may result in new assets or services, flexibility, and diversity that may not have been considered by working individually. Both parties, and ultimately the public users, stand to gain from the joint effort of providing services through the integration and transfer of public and private sector skills, knowledge, and expertise.

The mutual responsibility created in PPP agreements includes the sharing of risks between public and private sectors and PPP involves long term commitments by both parties. This is in contrast to traditional service contract relationships where the public sector retains control and the

contracts tend to be short term in nature, rather than lasting partnerships.

PPP also provides the benefit of facilitating the development of local private sector capability via joint ownership with large international firms. Subcontracting opportunities are provided for local firms in areas such as civil and electrical works, facilities management, security, cleaning, and building maintenance services, etc. It also provides local economic benefit and diversity to industries associated with infrastructure development such as construction, equipment, materials supply, etc. PPP can strengthen private sector ability and confidence, attract foreign investments, and stimulate increased employment and a healthy economic climate.

Increase in Quality of Services

Payments to the private sector in PPP projects are linked to performance, creating incentives and efficiency, with higher rates of return linked to high standards of performance. Thus the private sector only realises its investment if the assets and services meet the contractual performance criteria and obligations. No payments are made until the asset is delivered and working, and subsequent payments are subject to

reduction if service standards are not met. Performance related penalties provide for continued increase in standards, in advance of what is achieved in the public sector.

The profits made by the private sector are raised from increased efficiencies and economies of scale and not from cuts in the quality of service. Furthermore, the private sector will not do more than is contractually required and thus the incentives and performance criteria stipulated in the PPP agreement must be clear, output based, and relatively easy to assess and monitor.

Private companies involved in public-private partnerships have a high level of public accountability and are answerable to government agencies, various regulators, and often to the media and public. Regulatory bodies tend to be more rigorous to enforce regulations with private operators than they do with public sector agencies. It is in the interest of private party companies to establish a reputation for quality services.

In summary, efficiencies can be achieved from PPPs by integrating design and construction of public infrastructure with financing, and operation and maintenance using the collaborative intellectual and capital resources and assets of public and private sectors. ■

Bridging the gap

BY LEE PITCHER – OPERATIONAL DIRECTOR AND PATRICK MCEVOY – PROJECT MANAGER OF DRIVER GROUP MIDDLE EAST.

The missing link in Oman's coastal road network was opened to traffic on 31st December 2013 making it possible, for the first time, to travel directly from Hasik to Ash' Shuwaymiyah.

But the development was no easy ride for Lee and Patrick, as they had to negotiate a series of obstacles along the 87km link.

The first 7km at the Hasik end and the final 20km at the Ash' Shuwaymiyah end were relatively flat, but the remainder lay

in rugged, mountainous terrain without any access roads.

Pitcher said: "Making access was a major challenge in itself, as excavators had to work along the sides of deep valleys where no machinery had previously gone".

The remote location meant all accommodation, offices, laboratories, welfare, and maintenance facilities had to be on site, and three camps were built – one at each end and one in the middle, where an

80km dirt road had to be built to access it.

There were further complications when a landslide occurred in June 2012, in which 800,000m³ of the colluvium material moved towards the sea, affecting the left side of the alignment. The original alignment had already been re-routed further inland to avoid the habitat of the snow leopard in the Al Samhan nature reserve.

For the first time in Oman, reinforced wire mesh and rockfall barriers were used

to protect against rocks falling from deep cuttings extending to 80m in height. A short-span steel bridge was also used to cross a deep wadi (valley) on one side, while shotcrete, gabions, and simple wire mesh were also extensively used and concrete lined side ditches were built to control stormwater.

In the end, the job was delivered due to what McEvoy described as "the diligent application and close cooperation of the project team". ■

The principles of valuing delay and disruption

**KEITH STRUTT – OPERATIONS
DIRECTOR, DRIVER GROUP LONDON
CONSIDERS THE ISSUES THAT ARISE
IN VALUING DELAY ON PROJECTS.**

Introduction

What is meant by disruption and prolongation, and how do you value these in the context of a contract and the project which it regulates? Although these questions are found most often in construction disputes, the principles that underpin them – the nature and timing of damage and how to begin the process of establishing its value – are applicable to a much wider class of disputes.

In the following article I will attempt to describe the general principles underlying the valuation of delay and disruption and, hopefully, stimulate debate on the application of these principles in areas outside construction. The items we will consider are specifically value related, but as will become apparent, the issues cannot be considered in isolation of the delay itself – notwithstanding that most contracts treat the two subjects separately. Some common themes arise, such as concurrency, however, they are not always treated in the same way.

So, what exactly are we trying to describe? Perhaps a couple of definitions will help. Disruption is a noun meaning, 'to interrupt or impede the progress or continuity of a process'. Prolongation is a noun meaning, 'a prolonged or extended form, an added part, amount or degree, or range to which something extends'.

Whether a party will be entitled to recover costs and if so the extent and nature of that recovery will be dictated by the contract, common law, and possibly statute. Typically the contract will provide that a party is entitled to recover the actual costs that it has incurred as a

consequence of a particular delaying event. Alternately the contract may refer to pre-agreed rates and cost components that are to be applied in such an event.

Where the contract is silent on the basis of recovery, but nonetheless provides for recovery, the actual costs incurred would typically be the default position.

So what is actual cost? It is the cost incurred as a result of the delay but not necessarily, the costs incurred during

the delay. To gauge whether a cost is as a consequence of the delay it must be relevant, demonstrable, and have a close proximity to the delay event.

One of the most powerful tests for the relevance and proximity of a cost is the 'but for' test; but for the event I would not have incurred the cost. This is a very useful test to apply. If applied correctly it will assist greatly not only identifying what types of costs are relevant but also which elements of each are relevant.

Relevant

The phrase 'which sections are relevant?' may seem, at first glance, strange: surely if a cost is incurred as a result of the event it must be relevant? However, this is not always exactly as it appears. If the resource had a planned use in any case during the period of delay it is clearly not an actual cost of the delay. It was not incurred 'but for' the event. If the cost planned for was for two weeks but the delay resulted in it being incurred for four weeks, the two



week balance would, in principle, be claimable. This part incurrence relies also on the reasonableness of the cost being incurred. For instance, if a large item of plant is retained for an additional two weeks as the direct result of the delay, its cost should be claimable. What, however, is the position if the plant is retained for an additional two months? Whether the cost is recoverable would also depend on whether the cost could reasonably have been avoided. In other words, would it have been less costly to off hire or remove the plant and re hire it once the work could proceed? Clearly this question would depend on the circumstances, but if the retention of the plant was far more costly than if it had been removed and brought back when needed, the question of reasonableness will arise.

Demonstrable

The cost and its proof will depend on detailed records. As with all matters to do with this and related subjects you just cannot keep too many records.

So what type of records should you keep? The best place to start is at the beginning, the original quotations and order for supply or hire, preferably with

tender back-up to show that you have achieved the best price reasonably available. It is essential that if any question of incurring the costs over a longer period than is necessary could arise, that a detailed cost benefit analysis, including technical and logistic questions, is undertaken and re-evaluated regularly. It is necessary to make sure, particularly if the delay is protracted, that you keep the cost position under review and show that if the circumstances change you have taken the necessary reasonable action to mitigate the costs being incurred.

It is also important to remember that you are concerned with the cost incurred because of the delay only, not the overall cost of the delayed element. Just because the tender allowance is high for instance (high enough to perhaps cover the original cost and the cost of the delay as well) does not mean that cost has not been incurred and is reimbursable. The original bargain is not subject to alteration (whether too high or too low) it is the extra over cost of the delay that is in question.

The final element of the records, as always, is proof of payment. You must be able and prepared to prove your cost and invoices are not actual proof of payment,

only of potential liability.

Lastly, when exactly is the delay and therefore the cost, incurred? Many parties rely on the calculation of the delay and the additional time that results, for the period of the cost. This is not correct. Time and cost are not the same thing and must be treated separately for the following reasons.

It is entirely possible to incur a cost for delay without incurring a delay to the

and plant, equipment and site overheads are low – are likely to be significantly different to those incurred at the end, when the additional time is added.

And finally, concurrency, not however concurrent delay. Time for delay runs in parallel, it does not add when in parallel. There is only one arrow of time (well for our purposes anyway). Cost is always cumulative when in parallel. Three activities, any or all of which are on the critical

To gauge whether a cost is as a consequence of the delay it must be relevant, demonstrable, and have a close proximity to the delay event.

contract completion date. Any delay can occur and result in cost during a period of float on a task and not have any effect on the critical path.

Another consideration is when the cost occurred. The additional time that results from delay will always, from necessity, be added to the end of the period in question. The cost however may have been incurred much earlier. The costs involved in the early part of a contract – when work is beginning, staff levels are typically low,

path, delayed during the same week for a week, result in a single week delay. However, there are still three separate and cumulative, cost events.

The points are taken from the point of view of the party incurring the costs but, the questions they pose are equally appropriate from the point of view of the party who caused, or is responsible for, the delay in question. Just because you are liable for a bill does not mean you are liable for any bill that is presented. ■

Will hindsight promote the case for dispute adjudication boards?

WE ARE ALL TOO WELL AWARE OF MISTAKES MADE ON PREVIOUS PROJECTS AND THE CONSEQUENCES THAT FOLLOW. GRAHAM ATHERTON – OPERATIONAL DIRECTOR, DRIVER GROUP MIDDLE EAST ASKS HOW MANY OF US WILL PUT THAT PAST EXPERIENCE TO GOOD USE.

As construction activity in the UAE is on the rise, it is an inescapable fact that the industry will once again experience an increase in the number of disputes between the various contracting parties. Should employers and contractors embarking on construction projects put hindsight to good use and develop, at the outset, mechanisms for resolving the range of disputes that might be encountered during the execution of those projects? After all, they will by now have a good idea of the types of dispute

to expect and how much it cost to resolve them last time round. If so, then one of the most effective tools available is the Dispute Adjudication Board (DAB).

Although it was way back in 1999 when FIDIC completely revised its various forms of contract and introduced DABs as the principal means of dispute resolution across the new suite of contracts, the use of DABs in the UAE has been conspicuous in its absence. Instead of adopting what should be considered as a proactive approach to dealing with

disputes, it is more likely that employers will delete the DAB clauses, preferring instead to rely on the arbitral process, or the courts, to settle any disputes.

So, what does the FIDIC suite of contracts provide for in relation to DABs, how do DABs work, and why should contracting parties seriously consider adopting this alternative approach to settling their disputes?

FIDIC provides for DABs comprising one or three members who are appointed on either a full term or ad hoc basis.

Members of a full term DAB typically visit the site on a regular basis and disputes are referred to the DAB as and when they arise during the course

of the project. The appointment of the full term DAB expires upon the contractor's submission of a written discharge in accordance with the contract, which confirms that all disputes have been resolved.

Members of an ad hoc DAB are only appointed as and when a dispute arises, and their appointment typically expires when the DAB has issued its decision on that dispute.

How do DABs Work?

Dispute Adjudication Boards (DABs) use a process for dispute resolution based on adjudication, but combine this with

CONTINUED ON PAGE 18



← CONTINUED FROM PAGE 17

an intimate knowledge of the construction process. Having been appointed prior to commencement of the work, members of the board periodically attend site to become acquainted with the manner in which the contract is being executed. Adjudication is neither litigation nor arbitration. It is not final and may not be enforceable. That being said, it is a form of judicial process using the rules of natural justice and members of the DAB do use their own expert knowledge, and act inquisitorially.

It is true to say that DABs would normally be used for larger value contracts (typified by the UAE construction industry) with members usually appointed one from each party, and a third appointed by the other two. However, FIDIC does provide for the use of one adjudicator on smaller contracts. The parties must see the DABs as a tool to be used and should do so often, even for advice on an informal basis. Members of a DAB must sign statements of independence, and they must have the time and knowledge to deal with the matters as they arise. Decisions always need to be supported by reasons to satisfy the losing party and as the board's work is of an ongoing nature, they become part of the project process.

During their visits, time should be spent not only on resolving any disputes, but also on giving advice and obtaining knowledge of what is actually happening. It is not unusual for a board member to meet the parties separately to hear some background and for members of the board to act quite informally as between the parties.

It is only when a specific dispute is referred that procedures become formal and the jurisdiction to make determinations comes into effect. Thereafter, the board will convene on site for a hearing when necessary. The parties set out their case on one or two sheets of paper, stating their position. When there is a hearing it will almost invariably be without lawyers, and be presented by engineers. There is no wrangling on procedure. The board dictates the manner of proceedings, frequently acting inquisitorially, and often requiring



adjournments for further information. Dispute adjudication board (DAB) hearings take on average one or two days and after the hearing, the board will attempt to get a reasoned decision out as quickly as possible, normally within two weeks at the most. Most decisions are resolved by a majority unless the contract provides otherwise.

The informal part of their work, however, cannot be overemphasised. DABs assist the parties to find a decision amongst themselves quickly and can prevent disputes escalating to an impasse.

In addition to their determinations, the parties use the board for advising and giving opinions on a wide range of matters. It is a fast-track system and meets and deals with problems head on. It works because all parties cooperate. The objects of both parties are the same, i.e. to see a completion within a specified time and to pay a proper and fair remuneration. Disputes arise after the contract has started because of variations and unforeseen matters. Boards can resolve these things at an early stage. Without a board, a dispute remains unresolved and breeds dissatisfaction between the parties, leading to further disputes.

The board can be as flexible as the parties require. They can give binding determinations or recommendations. By requiring the provision of a DAB in their

contracts, employers immediately show they intend to act fairly. The system is now wholly supported internationally.

Why a DAB?

Primarily, the presence of a DAB will likely reduce confrontation and minimise disputes thus promoting a non-adversarial environment where timely execution of the work becomes possible. Parties tend to be less confrontational towards each other because

98% of the disputes referred have been concluded by the board's recommendation or decision without further referral to either arbitration or the courts, which is an impressive statistic.

Available data from the Dispute Resolution Board Foundation indicates that DRB costs range from 0.05% of final construction contract cost, for relatively dispute-free projects, to a maximum of approximately 0.25% for difficult projects with disputes. Thus, for a

Should employers and contractors put hindsight to good use and develop, at the outset, mechanisms for resolving the range of disputes that might be encountered.

of the knowledge and the presence of the board, and disputes are often resolved earlier than would otherwise be. Cash flow is therefore maintained, allowing parties to get on with the job of completing the project.

Although each party is responsible for paying half the cost of the DAB, the use of dispute boards has proven to be a most efficient form of dispute resolution offering early and cost-effective resolution of disputes in real time. Statistics obtained from the Dispute Resolution Board Foundation (DRBF) show that on projects utilising dispute boards, over

project costing AED100,000,000 with an average number of complex disputes, the parties could expect a fee of between AED100,000 and AED250,000. This is a far cry from the fees that the parties could be expected to pay in pursuing settlement of disputes through a process of arbitration.

Though there was initially some resistance to the DAB system in jurisdictions where it was adopted, parties are increasingly beginning to appreciate its advantages. As we see more new projects on the horizon, is this a better way forward for the UAE? ■

Statutory adjudication arrives in Malaysia

GARTH MCCOMB – GENERAL MANAGER, DRIVER TRETT ASIA PACIFIC EXPLAINS THE CIPAA ACT THAT HAS RECENTLY COME INTO OPERATION.

The Construction Industry Payment and Adjudication Act (CIPAA) came into operation in Malaysia on 15th April 2014.

According to the Kuala Lumpur Regional Centre for Arbitration (KLRC) website's announcement "The Minister of Works has approved CIPAA 2012 to apply retrospectively". In effect, CIPAA 2012 applies to all construction contracts (including inter alia the building industry, the oil and gas industry, the petrochemical industry, telecommunication, utilities, infrastructure, supply contracts, and consultancy contracts) with immediate effect, save those that have been exempted.

Only two exemptions from the Act have so far been announced, the first being contracts for any construction works that involve 'emergency, unforeseen circumstances and that relate to national security or security related facilities' and the second being 'construction contracts with the Government where the contract sum is Ringgit Twenty Million (RM20,000,000) and below'.

Increasing awareness and interest in CIPAA was clearly in evidence during



the KLRC's CIPAA conference themed "Getting Paid: CIPAA Updates" which was held on 25th February 2014 at Renaissance Kuala Lumpur Hotel which was attended by over 1,000 delegates.

Despite this however, I have recently

met with people directly engaged within the construction industry, including quantity surveyors, who have little if any knowledge of the Act and its implications. I envisage that the implementation of the Act will no doubt see a surge of interest in the remedies provided for under CIPAA.

Based on my experience, the profession most affected by statutory adjudication in the various jurisdictions in which it has been introduced is quantity surveying. I was surprised to learn that of around 500 adjudicators that have so far passed the KLRC's adjudication training exams only 8% were quantity surveyors (QS).

A comparison of qualified adjudicators by discipline in the UK, Singapore and Malaysia can be seen in the following table:

Having trained as a quantity surveyor myself, I firmly believe that QSs are ideally qualified to perform the role of adjudicator and help to decide the validity (or otherwise) of payment claims. I hope and expect to see many more QSs taking the KLRC training courses and joining the KLRC's panel of adjudicators.

For more information on CIPAA and its implications please contact our Malaysian office staff on +603 2162 8098. ■

Discipline	UK ¹ %	Singapore ² %	Malaysia ³ %
QS	35	19	8
Lawyer	35	29	60
Architect	6	7	4
Engineer	14	14	20
Other	10	31	8

Source: 1 – Glasgow Caledonian University Adjudication Reporting Centre 2 – Singapore Mediation Centre Website 3 – Professor Datuk Sundra Rajoo, Director, KLRC

Congratulations to our last competition winner, Robert Davies of A-one+, who received a copy of David Bordoli's co-authored book – **Handbook for Construction Planning and Scheduling**.

BYTES

UK SPRING SEMINARS – REPORTING UNDER THE NEC

Driver Trett is delighted with the success of our latest round of breakfast seminars Reporting under the NEC which was delivered to capacity crowds in 11 locations throughout the UK. The lively and interactive presentation received exceptional feedback with 97% of attendees rating this popular event as Good or Excellent.

Reporting under the NEC was clearly a popular topic, and we look forward to delivering our next round of seminars in the autumn. For information on future seminars please visit <http://www.drivertrett.com/> or follow the link to our enquiry form http://www.drivertrett.com/about/enquiry_form



OMAN SPONSORSHIP

Driver Group was pleased to be the main sponsor for the Thin Red Line Ball in Oman which raised OMR2,500 (£3,865) for Driver Group's nominated charity Down Syndrome Parent Support Group (DSPSG). The event took place at the Grand Hyatt Muscat on 21st March 2014, marking World Down Syndrome Day.

DSPSG is the only group in Oman which enables parents of children with Down Syndrome to meet and exchange ideas and experiences. They heavily rely on donations for the continued funding of their services.

DIALES NEWS

Following completion of another arbitration conducted under the rules of the Dubai International Arbitration Centre we are pleased to announce that Peter Davison has had his Arbitration Panel Certificate renewed by the UK based Chartered Institute of Arbitrators.

WHAT'S NEW WITH DRIVER TRETT?

Keep up to date with our latest news and events. For more details of the services and solutions that Driver Trett and the wider Driver Group can deliver, please visit our website **www.drivertrett.com**. Regular news and event updates are made to the website, so be sure to visit, or follow us on LinkedIn to keep up to date with our latest seminars and news.

In the next issue

The next issue of the Digest, as always, will be covering all industry sectors and include news and articles from around the globe. Please keep an eye on the website <http://www.drivertrett.com/knowledge.shtml> to keep up to date with ad hoc articles, Digest previews, seminars, and training events.

The Digest will always aim to be topical, and respond to requests and questions from our readers through the articles we publish. If you would like to submit a question or an 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 1: FIDIC RAINBOW SUITE 5

In the fifth of a series of articles on the FIDIC suite of contracts, authors Paul Battrick and Phil Duggan discuss many practical issues of using FIDIC contracts.

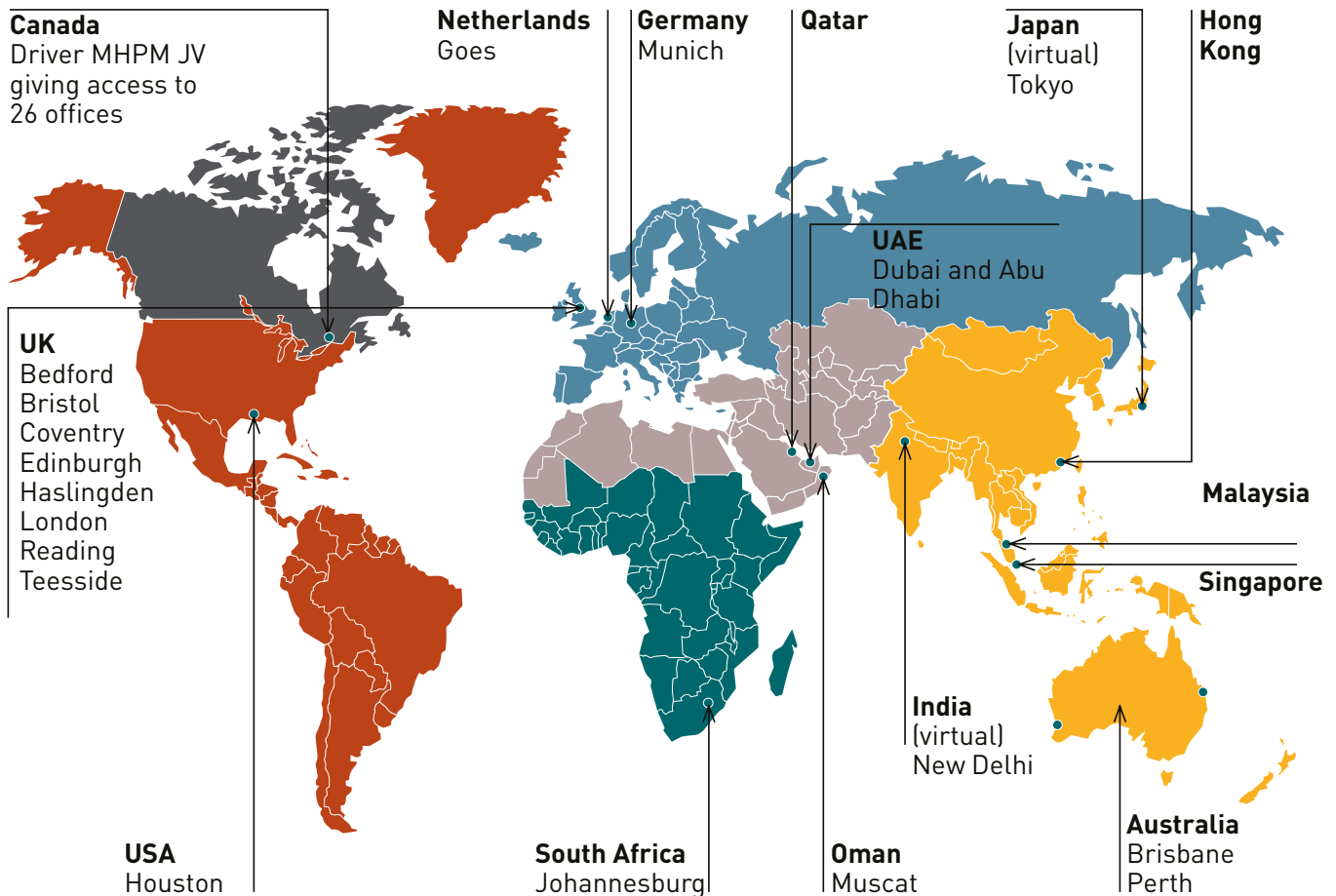


BYTE 2:

NEGOTIATION VS MEDIATION

In this Byte Keith Strutt – DIALES, quantum and delay expert discusses the differences between negotiation and mediation.

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