driver trett
ANALYSIS ACTION RESOLUTION

THE DIGEST

Issue 7 | September 2014

NEC3 arrives in Hong Kong. Are you ready?

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Welcome to the Driver Trett Digest

A very warm welcome to the 7th issue of the Driver Trett Digest where I'm delighted to officially announce the opening of our Sydney office (see page 15). In addition to Brisbane and Perth, Sydney becomes our third office in Australia. To celebrate our expansion in the region we have an Asia Pacific focus in this issue of the Digest.

Our front cover is dedicated to one of our vibrant Asia Pacific locations, Hong Kong, and we are paying special attention to the arrival of NEC. Tony Kwok from our Hong Kong office discusses issues relating to defined cost (page 16) and Carl Morris explores the clauses of the contract which relate to time (page 4).

To enjoy our full regional coverage please see page 15 for Focus on...Asia Pacific.

We are also pleased to present two guest articles in this issue. The first is Paul Scott of Shoosmiths LLP, looking at the UK courts' treatment of the doctrine of good faith (page 7). Secondly, in part one of a two part series, Anthony Albertini and David Owens of Clyde & Co LLP discuss pertinent issues to consider when entering into an EPC contract (page 10).

As always, we have topical articles from around our global business including Africa, Europe, and Middle East. In Africa, regional managing director Gerhard Bester provides an update on the organisational changes to our local business, while Christo De Witt and Simon Cowan discuss South Africa's first rapid-rail link, the Gautrain Project (page 8).

Our DIALES expert witness brand continues to grow and ahead of our launch in the Middle East, DIALES expert Lee Barry from our Dubai office provides a useful insight into the appointment of experts in the region (page 12).

For regular updates between issues please follow Driver Trett on LinkedIn and visit our website www.drivertrett.com. I hope you enjoy this issue of the Digest. ■

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NEC3, am I time barred?

CARL MORRIS – OPERATIONAL DIRECTOR, DRIVER GROUP EUROPE EXPLORES THE CLAUSES OF THE NEC FORM OF CONTRACT RELATING TO TIME AND THE IMPORTANCE OF INTERPRETING THIS AT SITE LEVEL TO SUCCESSFULLY ISSUE NOTIFICATIONS.

NEC3 contains provision at clause 61.3 for the prevention of a right or obligation from coming about beyond a stated period of time. Very often the operation of this clause is misunderstood at site level and opportunities can be missed. Clause 61 contains the provision for notifying compensation events and clause 61.3 deals with the contractor's notification in the following terms:

"61.3 The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if:

- the Contractor believes that the event is a compensation event and
- the Project Manager has not notified the event to the Contractor

If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not."

It is generally considered that the language of clause 61.3 is almost certainly clear and clean enough to be considered a condition precedent to the contractor's entitlement to recover compensation. Not forgetting the ethos of the NEC3, the intention is always to bring matters to the fore and not let things fester. The notification provisions under clause 61 are purposeful to maintain that ethos and promote transparency between the parties. The conditions also now include for a 'deemed acceptance' provision (clause 61.4) in the event the project manager fails to act or respond to the contractor's notification.

The wording of the clause is also interesting in that it requires the contractor to notify the project manager of an event which he expects to happen as a compensation event. This means that the contractor may notify an event which is not itself a compensation event but something that might give rise to a compensation event which has not been notified by the project manager.

The conditions contain provision for notification by the project manager or supervisor (clause 61.1) as well as the contractor (clause 61.3), however, we have seen problems being experienced at site level where notifications are missed and events not picked up in good time and in fulfilment of the contractor's obligations under clause 61.3. Under these circumstances is the contractor time barred?

It is important therefore that the contractor is alive and alert to notifications that it must raise and which largely are under its control.

So what can I notify?

The conditions are purposefully structured to assist the parties to understand what they can and can't be compensated for. Clause 60.1 lists all the compensation events available under NEC3 and consequently the contractor's site team need look no further than the conditions entered into and any amendments. However, further assistance can be gleaned from the NEC3 guidance notes which go further by suggesting the types of compensation events likely to be available to each type of notification. For the all-important provision at clause 61.3, where the contractor needs to act within a specified eight week time period to preserve its entitlement to compensation for either time or money, the guidance notes suggest that this procedure would normally apply to compensation events not covered by those in clause 60.1(1), such as:

- A failure by the Employer, Project Manager, Supervisor or others to fulfil their obligations (clauses 60.1(2), 60.1(3), 60.1(5), 60.1(6), 60.1(11), 60.1(16) and 60.1(18)).
- The Project Manager withholding an acceptance for a reason not stated in the contract (clause 60.1(9)).
- A happening not caused by any Party (clause 60.1(12), 60.1(13), 60.1(14) and 60.1(19)

It must be remembered that the contractor still has to notify the project manager of the occurrence of events which he expects to happen as compensation events, which the project manager ought to have notified under the provisions of clause 61.1, but the contractor will not be subject to any time bar up to the defects date for such notification.

So at site level the team need to be proactive so as not to lose out on its due entitlement. The contractor needs to be alive to events both in the immediate past, and for those that may impact in the future, and be aware that its obligation commences when the contractor believes that the event which he expects to happen is a compensation event. Whilst there is an element of subjectivity here and arguably at the contractor's discretion, keeping on top of the administration of the NEC3 is a practical way to avoid the effect of the time bar under clause 61.3.

So who needs to believe?

Belief being an individual's state of mind will not be without its complications, but is it the site team, is it the management team, or is it a sole director? The courts have erred on the side of senior management rather than servants or agents. So there appears to be some flexibility here in terms of the information flow from the site through to the management team which could reasonably take a

period of time. Also, to what extent of the knowledge in respect of any particular event is the NEC3 looking for?

The discovery of ground conditions can hinder a contractor. Initially he may try to work through it and prevent any critical delay and additional cost but later there is a realisation that it needs to be compensated for this occurrence. At what point in time should he have issued a notice? The contract is silent save for "the Contractor believes..." and "of becoming aware of the event". Sensibly though, and in a practical sense, it is likely that the test would not be so singular and examination of the facts and reports and correspondence would drive the decision of a third party, in the event the timing of any notification was challenged.

Another, alternative and practical step before the contractor enters into contract would be to amend the clause to, as a minimum, prevent a breach by the employer falling under any time bar provisions. This is advisable because the effect of the contractor not notifying an event within eight weeks of becoming aware of a compensation event is that it is not entitled to a change in the prices, completion date, or a key date. However, this does not fit squarely that an employer could still apply delay damages even though its own breach caused a delay to the works.

Some contractors carry the notion that by allowing such a circumstance to prevail may also impact upon the employer's right to apply delay damages. The general rule being applied by contractors is that if a contract does not provide an extension of time mechanism to cover delays for which an employer is responsible, a delay damages clause would be unenforceable. Whilst it is understood why such thought process is being followed, this may be a risky fall-back position without the suggested amendment above.

The case of Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2) [2007] EWHC 447 (TCC), [2007] BLR 195 tested a similar proposition in connection with time being set at large. However, it was held that if the facts are that it was possible to comply with clause 11.1.3 (in this particular case) and that Honeywell simply failed to do so (whether or not deliberately), then those facts do not set time at large. Time barring mechanisms within contracts have been challenged and tested under English law. However, the success of their operation will vary depending on the circumstance of the case.

In the recent case of Northern Ireland Housing Executive v Health Buildings (Ireland) Limited 13 February 2014 [2014] NICA 27 Court of Appeal for Northern Ireland, the court was asked to decide whether Health Buildings (Ireland) Limited (HBL) were time barred in relation to a claim for compensation arising out of an instruction. The proceedings related to a dispute arising out of a contract for provision of asbestos surveying services. The parties' contract was the NEC3 Professional Services Contract and contained clause 61.3 in the same format as set out above.

During a meeting on 10th January 2013, the Northern Ireland Housing Executive (NIHE) stated that the main type of survey required was likely to be a management survey with sampling, and that samples should be taken for analysis from every room where asbestos material may be present. HBL contended that the above direction constituted an instruction changing the scope of the work. On 23rd May 2013, HBL sent a document described as a compensation event notification. Weatherup J. decided that HBL's notice served under clause 61.3 was not time barred. NIHE argued that the contract envisaged early notification of events and those events should be dealt with when they arose. Weatherup, J. decided that the employer should have given written notification of the compensation event when it instructed a change to the scope of works.

As noted above under clause 61.3, HBL must notify NIHE of an event which has happened as a compensation event if he believes that the event is a compensation event and the NIHE has not notified the event to HBL. As NIHE had not so notified, HBL was entitled to give notice and by applying the strict wording of clause 61.3, NIHE could not argue that HBL's claim was time barred.

It is crucial that the contractor remains alive to the actions and inactions of the project manager and is familiar with the compensation events he can raise and give notice for under clause 61.3. Correctly resourcing the project to effectively manage the appropriate administration of the NEC3 is essential to the successful delivery of the project. To minimise this risk it is advisable to organise and complete regular commercial and contractual audits of live projects. ■

That old chestnut* – the importance of records

*an idiom meaning a story which has been repeatedly told before.

PETER DAVISON – DIALES EXPERT DISCUSSES THE IMPORTANCE OF KEEPING RECORDS, REFERRING TO THE LIVERPOOL MUSUEM CASE AS AN EXAMPLE.

Many contracts generate claims that present difficulties in relation to the expenditure of time. This occurs not only for site based personnel but also for off-site design and management teams, even where rates or prices are set out for evaluation of such time. There has been a history related to the quantification of such claims which has recently developed further in The Liverpool Museum case[1].

Two regular issues that arise in relation to claims for a party's internal staff costs in such circumstances are the suggestion that the staff would have been employed regardless of the events leading to the claim, therefore there is no loss or damage, and that a proper contemporary record of staff time related to the claim issue is needed to establish quantum.

These issues were considered in the Liverpool Museum case.

No loss or damage

If personnel expend time addressing issues such as defects and remedial works, has the employer incurred any additional cost if said personnel are permanent employees and would have been employed in any event? Does the employer have to demonstrate that he has incurred a loss by the claimed resources being diverted from work that would have generated an income or benefit to the employer's business?

It has been established for some time that the costs of employees can be claimed without demonstrating that the diversion of resource has been detrimental to the employer's business. In the Bridge Communications case[2] the claimant included the cost of management time expended in resolving difficulties caused by an inadequate concrete base. The claim was resisted on the basis that no additional cost had been incurred by the claimant and the claimant could not demonstrate any loss of income as a result of the diversion of management resource. The court held that the claimant could recover the cost of diverted management resources citing R & V Verischerung AG v Risk Insurance and Reinsurance Solutions SA (2006) EWHC 42 (Comm).

The judge in the Liverpool Museum case approved these authorities and cited the Court of Appeal decision in Aerospace Publishing[3], stating:

"In my judgement, an innocent claimant which has established its cause of action can recover its management time reasonably spent dealing with the consequences of the negligence or breach of duty in question. Although it could be said that it would have to pay salaries in any event to its staff and has therefore incurred no loss, the time of the staff is being deployed to remedy or otherwise address the otherwise recoverable loss and as a matter of causation it is equally being incurred for two causes, one the employment and the other the cause of action itself."

Thus the situation appears to be that it is not necessary to establish that the diversion of management, or similar, resources has caused any loss of income. The claim can succeed even if the resource would have been employed irrespective of the cause of the claim, assuming there exists a reliable record of the resources claimed.

But what record is required of the time expended by the claimed resources?

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Establishing time expended by in-house resources

Over thirty years ago the Tate & Lyle[4] case established that, while management time expended as a result of the cause of damage could be claimed, it was not acceptable to advance the quantification of that claim on a percentage basis, i.e. an addition to other costs calculated by a simple percentage addition, even if the percentage is otherwise supported by accounting data.

The judge in the Tate & Lyle case stated:

"I have no doubt that the expenditure of managerial time in remedying an actionable wrong done to a trading concern can properly form the subject matter of a head of special damage...I would also accept that it must be extremely difficult to quantify. But modern office arrangements permit of the recording of the time spent by managerial staff on particular projects...while I am satisfied that this head of damage can properly be claimed, I am not prepared to advance into an area of pure speculation when it comes to quantum. I feel bound to hold that the plaintiffs have failed to prove that any sum is due under this head."

The judge's remarks could equally have been made in respect of design team time, or any other time, claimed on a percentage addition basis, and the judgment was taken to indicate that records of time spent would be required to successfully establish the quantum of such claims in the future.

However, this situation has developed further in The Liverpool Museum case.

Are contemporary records required?

The Liverpool Museum case concerned design problems related to the steps, seats, and terraces to the new Museum of Liverpool constructed between 2007 and 2011. The problems were identified during the course of construction and resulted in extensive consultation between the various parties as to possible solutions, aborted remedial schemes and designs to finally overcome the problems. The client for the museums was involved throughout the process through its chief executive and premises director and "... it is clear that a substantial amount of time, energy and resource was applied by the Museum to seek ways to see what could be done and possibly to live with the problem.[5]"

From the previous authorities it might be thought that the time of the Museum resources could be claimed, without demonstrating loss of income etc., but that records of the time expended by the Museum staff would be required. However the Museum had not kept such records and the claim was based on an assessment made by the Museum's Trust Chief Executive of staff time expended in relation to meetings and discussions of the various issues. The judge said of the Chief Executive:

"She became even more involved when it began to emerge that there were problems with the steps and seats. She was a very impressive witness and one whose evidence I have no difficulty in accepting largely in its entirety. She was prepared to make concessions with regard to some of the quantum evidence which underlined her basic honesty and integrity...I found her immensely believable[6]."

Not surprisingly, considering the previous authorities, the Defendant sought to have the Museum's quantum rejected:

"Essentially, [Defendant's] Counsel argue that the Museum has not provided all the requisite documentation necessary to prove its quantum, in relation both to historical costs and to future in-house or management costs and in any event its quantum is undermined by the absence of such documentation[7]."

But the judge continued:

"I have however formed a strong view that in particular [the Museum Chief Executive's] evidence on quantum is reliable and, even if not supported by every conceivable contemporaneous document that might otherwise have been disclosed, largely probative, particularly supported as it was by other witness evidence and by expert evidence[8]."

The judge therefore came to the conclusion that, notwithstanding a lack of supporting documentation, the claimant had established the quantum of its claim:

"Turning to the quantification, it is fair and reasonable given the relatively general retrospective assessment done by [the Museum CEO] to adopt a reasonably cautious approach. I broadly accept the assessment which she makes in respect of herself which is 36.5 days worth of her time over the period but I reduce it to 30 days to reflect the fact that she said that she had discussed the percentages with [Museum staff member], they had both looked at their diaries and that it was difficult to estimate how much time they had spent discussing the particular issue...The same can be said for [Museum staff] for whom similarly 36.5 days were claimed; I allow 30 days...In relation to [museum staff] for whom 122 days are claimed...I round this down to 90 days...I can be confident that at least 90 days would have been applied by him to dealing with fallout from the steps and seats problems[9]."

Similar adjustments were made to the cost claimed for prospective remedial works.

Does this mean that in future parties can claim wasted management time, or similar resources such as design teams, on the basis of witness evidence without the need for any supporting contemporary documentation?

The application of caution...

While the judge's approach in the Liverpool Museum case appears to amend the Tate & Lyle approach, which in 1982 said, 'modern office arrangements permit of the recording of the time spent by managerial staff on particular project' and therefore rejected a percentage addition calculation, I believe it would be very premature to consider that the prime importance of contemporary documents has been abandoned. The importance of contemporary documents would seem to apply all the more in the 21st Century when the time recording systems of 1982 have moved into the digital age and are even more adaptable to recording project time expenditures in every way required.

There are good reasons to expect that contemporary documents will still retain their prime role:

- Like all judgments, the Liverpool Museum case has to be considered in its own circumstances and the judge made it clear he was unhappy with the parties' failure to settle the dispute in the light of liability admissions. Was he therefore more willing in this case to find a route to quantum than he might otherwise have been?
- The judge found the Museum's CEO to be a particularly convincing and honest witness and was therefore willing to accept her evidence with regard to time lost.
- Notwithstanding the above, the judge still treated the evidence with caution and reduced the time awarded.

I do not expect that the importance of contemporary documentation and records will significantly diminish any time soon.

It is easy to apply hindsight to any situation and be critical of people for not recording time spent on an obviously contentious issue, especially when that issue runs on for long periods and it must be obvious that the cost of it will be in issue later, but in the absence of a first class witness and the acceptance of 'cautious reduction' contemporary documents will maintain their prime importance. ■

1 The Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd and PIHL UK Ltd & Galliford Try (JV) (2013) EWHC 2403 (TCC)

2 Bridge UK Com Ltd (t/a Bridge Communications) v Abbey Pynford plc (2007) EWHC 728 (TCC)

3 Aerospace Publishing Ltd v Thames Water Utilities (2007) EWCA Civ 3

4 Tate & Lyle Food Distribution Ltd v Greater London Council (1982) 1 WLR 149

5 Judgment at paragraph 23

6 Judgment at paragraph 33

7 Judgment at paragraph 95

8 Judgment at paragraph 96

9 Judgment at paragraph 143

Good faith revisited

IN ISSUE 4 OF THE DRIVER TRETT DIGEST, MARK WHEELER – MANAGING DIRECTOR, DRIVER GROUP EUROPE LOOKED AT THE CONCEPT OF 'GOOD FAITH'. HISTORICALLY, THE ENGLISH COURTS HAVE BEEN RELUCTANT TO RECOGNISE A GENERAL DOCTRINE OF GOOD FAITH IN THE PERFORMANCE OF CONTRACTUAL OBLIGATIONS, AND THERE IS NO GENERALLY APPLICABLE LEGAL DEFINITION OF THE CONCEPT. PAUL SCOTT, ASSOCIATE IN SHOOSMITHS LLP'S CONSTRUCTION TEAM LOOKS AT HOW THE COURTS HAVE TREATED THE DOCTRINE OF GOOD FAITH IN RECENT CASES, AND HOW THE CURRENT STATE OF THE LAW MIGHT BE RELEVANT TO CONSTRUCTION CONTRACTS.

An obligation to act in good faith is an express obligation placed upon all contracting parties in many jurisdictions based on civil codes, and a duty of good faith is implied into various categories of contract at English law as appropriate (for example, partnership, agency and insurance contracts, and other contracts which involve fiduciary obligations). While a number of standard forms of construction and engineering contract include obligations which might be characterised by some as good faith type obligations without actually using the specific words (for example, core clause 10.1 of the NEC3 contract) and some types of contract (particularly those which give rise to a partnering arrangement) may specifically use the words 'good faith', historically, there has been no pervasive concept of good faith that applies generally to contracts governed by English law.

The position was summarised neatly in the judgment of the High Court in Interfoto Picture Library v Stilleto.

"English law has, characteristically, committed itself to no such overriding principle [of 'good faith'] but has developed piecemeal solutions in response to demonstrable problems".

This did not stop a number of parties to cases before the Technology and Construction Court (TCC) seeking to rely upon implied duties of good faith in the years since that judgment (for example, in Bedfordshire County Council v Fitzpatrick; Francois; Francois Abballe v Alstrom UK; and Hadley Design v The City of Westminster). However, in each of these cases, the court declined to imply the general duties of good faith contended for.

Despite this, in the more recent judgment in Yam Seng Pte v International Trade Corporation, Leggatt J implied a number of obligations into the parties' agreement which contained absolutely no express good faith obligations. The learned judge characterised these as obligations upon the parties to act in good faith.

In this case, the parties entered into an agreement by which the defendant granted the claimant exclusive rights to distribute Manchester United branded toiletries in various territories in the Middle East, Asia, Africa, and Australasia. The contractual instrument that the parties signed up to was rather brief, and was negotiated by the parties directly without recourse to lawyers. The claimant made various allegations as to the conduct of the defendant, including late shipment of orders, failure to supply products, and failure to adhere to agreed minimum retail prices. Many of the matters complained of by the claimant, perhaps as a result of the brief nature of the written agreement between them, were founded upon an allegation that the defendant had breached an implied obligation to act in accordance with principles of good faith. This submission found favour with Leggatt J, who considered the question of whether or not a duty of good faith ought to be implied at paragraphs 119-154 of his judgment (in which he also, helpfully, summarised the position at both English law and in a number of other jurisdictions). Leggatt J concluded this section of his judgment by stating his view that:

> Historically, there has been no pervasive concept of good faith that applies generally to contracts governed by English law.

"the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced".

Hot on the heels of Yam Seng Pte, the judgment of the Court of Appeal in Mid Essex Hospital Services NHS Trust v Compass Group was handed down. This was another case where the court was required to grapple with the concept of good faith, although this time the question was not solely whether a duty of good faith ought to be implied into an agreement, but also what the scope of an express good faith contractual clause ought to be.

The facts of the case were that the respondent was engaged by the appellant to provide catering and cleaning services, and the agreement provided for the respondent to meet certain agreed service levels with service failure points and financial consequences for the respondent in the event that the agreed service levels were not met. Following a first instance decision which provided for a broad application of an express contractual good faith provision (and in particular a finding that the respondent was entitled to terminate the agreement following a number of financial deductions by the appellant on the basis that those deductions offended the contractual 'good faith' provision), the appellant contended that the good faith obligation ought in fact to be construed narrowly and ought not be applied to the contractual provisions relating to service level failures. The respondent, relying heavily on Yam Seng Pte, contended that the contractual good faith clause should be construed widely and applied to the service level provisions, and/or that a general duty of good faith ought to be implied into the contract in any event.

The Court of Appeal decided that the effect of the contractual good faith provision was merely to require the parties to work together honestly to achieve the effective transmission of information, and the full benefit of the respondent's

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services to the appellant. These were the express stated intentions of the good faith provision as set out in the wording of the clause. Accordingly, provided that the appellant operated the service level provisions and associated financial penalties properly, the appellant could not be criticised and the good faith provision was not relevant. Lord Justice Jackson summarised the position by stating that:

"The obligation to co-operate in good faith is specifically focused upon the two purposes stated in the second half of that sentence. Those purposes are: i) the efficient transmission of information and instructions; ii) enabling the Trust or any beneficiary to derive the full benefit of the contract."

The Court of Appeal also decided that there was no need to imply a general obligation of good faith into the contract, and therefore declined to do so.

The message to any party defending a dispute arising from construction contract with no express good faith obligation at present, is not to be surprised if you face a contention that an implied duty of good faith has been breached. Although many commentators have suggested that it was a case that turned in its particular facts (in particular, the fact that the businesses of the two companies in question were run almost entirely by single individuals who personally negotiated a rather brief contractual instrument), and notwithstanding the outcome of Mid Essex Hospital Services NHS Trust, Yam Seng Pte remains good law, at least until issues of good faith come before the Appeal Courts once again. Parties ought therefore to carefully consider their conduct during the course of a contract in the light of Yam Seng Pte in order to head off any allegations of a breach of this type of implied term.

In the event that a contract does contain an express good faith obligation, then parties should pay attention to the judgment in Mid Essex Hospital Services NHS Trust to give some guidance as to how the courts might construe that obligation. Following the judgment of Lord Justice Jackson, the specific parameters of a good faith provision will be key. Parties should also take care when negotiating good faith provisions, to ensure that their expectations as to the scope of that obligation are clearly reflected in the drafting. ■

Gautrain, Sub Saharan Africa's first rapid-rail link

CHRISTO DE WITT AND SIMON COWAN – DIRECTORS, DRIVER GROUP AFRICA DISCUSS THE GAUTRAIN, A RAPID RAIL LINK IN SOUTH AFRICA.

The Gautrain is an 80-kilometre rapid transit railway system in Gauteng Province, South Africa, which links Johannesburg, Pretoria, and OR Tambo International Airport. It was built to relieve the traffic congestion in the Johannesburg–Pretoria traffic corridor and offer commuters a predictable and rapid alternative to the airport. There are few infrastructure projects in Sub-Saharan Africa that can compare in size and technical complexity.

In 2006, the Gauteng Provincial Government signed a 20 year public-private partnership (PPP) contract with the Bombela Concession Company, which includes local and international partners. As part of the conditions of the Concession Agreement, Bombela are required to estimate future passenger numbers as a planning input for system developments and revenue projections. To date, the Gautrain has carried close to 40 million train passengers and just over 10 million bus passengers with train punctuality in excess of 98%.

Driver Group Africa (Driver) has worked on the Gautrain Project in various roles since 2010, providing planning expertise, claims and commercial support and a rail scheduling timetable optimisation assessment. In our latest appointment on the Gautrain Project, Driver, in association with Techso[1], was commissioned by Bombela to undertake a passenger demand forecast with the purpose of predicting the Gautrain patronage five years into the future. This appointment is in fact a reappointment from the previous year, and forms part of Bombela's annual assessment and submission obligations to the Gautrain Management Agency.

The Gautrain five year demand forecast model

It was considered prudent to develop a means of forecasting that would be Gautrain specific, sensitive to a number of external factors, comply with Bombela's reporting requirements under the concession agreement, all while being relatively simple and practical. Furthermore, it was important that the model be expandable to allow for future enhancements.

A prominent part of this study was the development of a transport mode-choice model. The principle employed was that for each journey, the user has the choice of either using their private vehicle or making use of the Gautrain. In this study, the modelling only included two modes – private vehicle and Gautrain rail (accessed by private vehicle, bus, or walking).

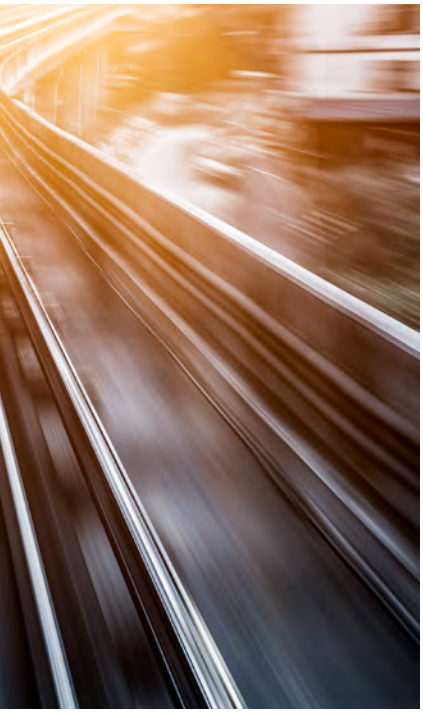
For each journey there are a number of costs associated with each of the modes including direct out of pocket costs, running costs, and travel time combined with a value of time. A mathematical model is subsequently used to calculate the expected mode split for each origin and destination (OD) pair. The current model does not restrict demand to remain within the supply capacity. This means that a theoretical demand is predicted without capping it to, for example, the actual current passenger-carrying capacity of the trains or buses.

The modelling was undertaken by using a combination of the PTV VISUM software and customised algorithms programmed into a spreadsheet using Visual Basic for Applications.

The PTV network was enhanced by adding:

- the Gautrain stations and bus routes
- dummy/proxy zones that would be used to connect private car trips with the Gautrain stations in order to provide access to the stations
- centroid connectors to the Gautrain bus routes to provide a walk link from the zone centroids to the bus routes

The resulting PTV model consists of 510 zones. Each one of the zones had a corresponding number of trips being produced by it and trips attracted to it.



The main purpose of the network representation is to calculate the journey cost between the different OD pairs for each of the different modes. This includes the calculation of the following:

- private vehicle travel time
- private vehicle travel distance
- travel time using the Gautrain rail, bus, and walking modes

The model compares the cost and travel time of a car trip to one that uses the Gautrain. This approach assigns each zone to a Gautrain station based on the direct distance to the nearest station. Additionally, zones that are next to existing bus routes are assigned to the specific Gautrain station which that bus route serves.

Each journey by Gautrain consists of a combination of three separate trip portions:

- from the origin zone to the nearest Gautrain station,
- from the Gautrain station closest to the origin zone to the Gautrain station closest to the destination zone
- from the Gautrain station (closest to the destination zone) to the destination zone

The journeys to and from the Gautrain stations are executed with public transport or by private vehicle. The private vehicle journeys to and from stations are a combination of passengers being picked up or dropped off by private car and those that park their vehicles at the station.

It is generally accepted that because a model is a simplified representation of reality, and because of the challenges in modelling subjective decision making processes, the outputs will never be 100% accurate. The validation of a typical model is consequently judged on whether the outputs are sufficiently accurate for the purposes for which it has been developed. In judging whether a model is fit for purpose, the typical approach compares the outputs of the model to observations. The difference between these observed and modelled values is then typically expressed (using a statistical formulation) by means of a goodness of fit statistic.

With the modelling approach taken for this project it is possible to recreate the base year's observed data to a very high degree of accuracy, but the value of the model naturally lies in how well it can predict future Gautrain patronage.

In light of the above, the focus of the model that was developed for this study was on forecasting deviation from the base year (and not so much on how well it would imitate the base year conditions). To this end, it was fortunate that highly detailed Gautrain patronage OD data is available and the model could therefore be calibrated and validated by forecasting the Gautrain patronage during historic periods.

The future

There is a desire to extend the existing network to other locations and the proposed rail network will ultimately consist of a high-speed rail link between Johannesburg and Durban and rapid rail links to various areas around Johannesburg and Pretoria. It is understood that feasibility studies for these extensions will start within the next few months. ■

[1]Techso is a Pretoria based company, providing services in transportation, law, community development, training and capacity building, and technology applications. Techso have many years of experience in these areas, gained both locally and internationally.

Regional management change – Driver Group Africa

We aim to continue growing the business by providing professional services across Driver's competencies.

The financial year 2013/2014 has been a transitional year for Driver Group (Africa) during which the regional managing director's role has been transferred from John Messenger to Gerhard Bester. John was the driving force behind the development of the group in the region, including the setting up of the Driver Group Africa business, forming the joint venture with a local partner, (owned and run by Gerhard) and establishing the fledgling company. It was because of his vigour and tenacity that Driver Group Africa quickly found its own feet. John is remaining with the Driver Group but is now turning his attention, and expertise to other matters.

Gerhard Bester is a professional civil engineer with over 24 years' experience in a wide variety of construction industry activities. Gerhard has particular experience in transaction advisory services on public private partnerships (PPP) and concession projects including toll roads and office accommodation for national government departments and the current South African flagship hospitals programme. Gerhard has held senior positions in the project management and construction management of large multi-disciplinary projects including bridges, roads, civil infrastructure, and mining environmental rehabilitation projects covering all aspects of site investigations, preliminary design, feasibility studies, detail design, drafting, scheduling, and contract documentation.

Gerhard will be supported within Driver Group Africa by three operational directors, Simon Cowan (programming and scheduling), Christo de Witt (project management, public-private partnership and Driver Project Services activities) and Gavin Murphy (claims and expert witness services). Gerhard says 'nothing fundamental will change to the business set up by John, we aim to continue growing the business by providing professional services across Driver's competencies, increasing visibility and expanding more into Africa'. ■

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EPC contracts – contractor claims and employer remedies

IN THE FIRST OF THIS TWO PART ARTICLE ANTHONY ALBERTINI AND DAVID OWENS, CLYDE & CO LLP OUTLINE SOME POINTS TO CONSIDER WHEN USING AN EPC CONTRACT.

Engineering, procurement, and construction (EPC) contracts are frequently drafted as turnkey agreements – the contractor builds the works and all the employer has to do is turn the key to the finished plant. The employer's aim is to pass almost all of the potential risks inherent in the project to its EPC contractor, and the contractor prices the contract accordingly.

The employer simply wants the project to be delivered on time and to perform to spec, and leaves it to the contractor to work out how this should be done. In return the contractor prices on the basis of the extra risks it is taking on.

Having contracted to pay a premium price for the works, the employer will want to be able to take action to ensure the plant is delivered on time and to spec, or to recover its losses if it is not (and the financing for the plant may well be based on price and time certainty). It will want the contract drafted to minimize the contractor's chance of claiming additional time or money. Nevertheless, the contractor can still make claims in specific circumstances.

Here we look at the typical EPC project, in terms of the types of claim that an EPC contractor can make, the procedure for bringing a claim and resolving a dispute, the remedies the employer will have, and some points to consider when negotiating an EPC contract in the first place. ■

Variations

The most common reasons for an extension of time (EOTs) and increases to the contract price on EPC contracts are changes to the specifications for the project post-tender. For example, on a power plant, variations to the fuel specifications will probably necessitate some plant redesign, with consequent cost and time increases. It therefore makes sense for the employer to ensure that the specifications are as accurate as possible before the project begins.

Employers will often want to pass on the risk of errors or inconsistencies in the employer's requirements to the contractor. This is the approach taken in the FIDIC Silver Book (EPC Turnkey), whilst in the FIDIC Yellow Book (Plant and Design Build) the risk stays with the employer if an experienced contractor would not have spotted the error pre-tender.

The parties should consider the pricing mechanism for variations carefully. Some EPC contracts require the parties to agree the additional cost and EOT involved in a variation before work starts on it, but the danger is that protracted negotiations can then cause further delay to the variation and the project.

An alternative is to have variations priced by the engineer, as in the FIDIC Yellow Book. However, the contractor will be reluctant to accept such a clause – although the engineer is supposed to act impartially, he is paid by the employer and the contractor will be concerned he will be the employer's man.

In general construction works, contractors often make their margins on variations. However, EPC contracts are frequently used for technically complex works such as process plants, and widespread variations can cause a contractor serious problems. EPC contractors will thus often want to include a cap on the total value of variations which can be instructed on an employer's behalf.

The contractor will also want to ensure it can reject a proposed variation on safety or technical grounds. This is particularly relevant for complex plants, where late changes to carefully designed plans and construction sequences may make them almost impossible to achieve.

Acceleration

The EPC contract is likely to require the contractor to accelerate the works if they have been delayed by a contractor's risk event. However, if the employer wants an acceleration of the works just because it needs them to be ready earlier than planned, it will have to bear the extra costs.

Changes to legislation

Changes in law during the course of the project are often a contractor's risk event in EPC contracts, and may be particularly relevant to EPC projects, where they can affect not just the construction methods, but what has to be built as well.

Ground conditions

If an employer puts a project out to tender, it may opt to commission its own report on site ground conditions, and to pass the results to the tendering contractors. This encourages more tenderers to submit prices, as they don't have the costs of getting their own report. Even so, the successful tenderer is still likely to find itself made responsible for ground conditions. Project funders want certainty of time and cost from EPC contracts, and ground conditions are generally not a risk that they are prepared to accept.

Possession of site

The employer may not grant possession of the entire site immediately. For projects which cover a large area, it may give the contractor possession of only part of the site initially, handing over the remainder in sections as necessary. If so, the contract will need to reflect this.

The contractor may not have exclusive possession of the site – it may have to allow other contractors or utilities companies to work alongside it. In such circumstances the EPC contractor may be able to claim a price increase or an EOT if others working on site interfere with or delay its work. However, the employer can avoid such claims by passing the responsibility for coordinating the work of others on site to the contractor in the contract.

Not only possession of site but also access to site should be considered. The FIDIC Silver Book form allows the EPC contractor to claim an EOT and its additional costs if it cannot gain access to the site. This may be particularly relevant to EPC projects which are unpopular with locals, where demonstrators may block access.

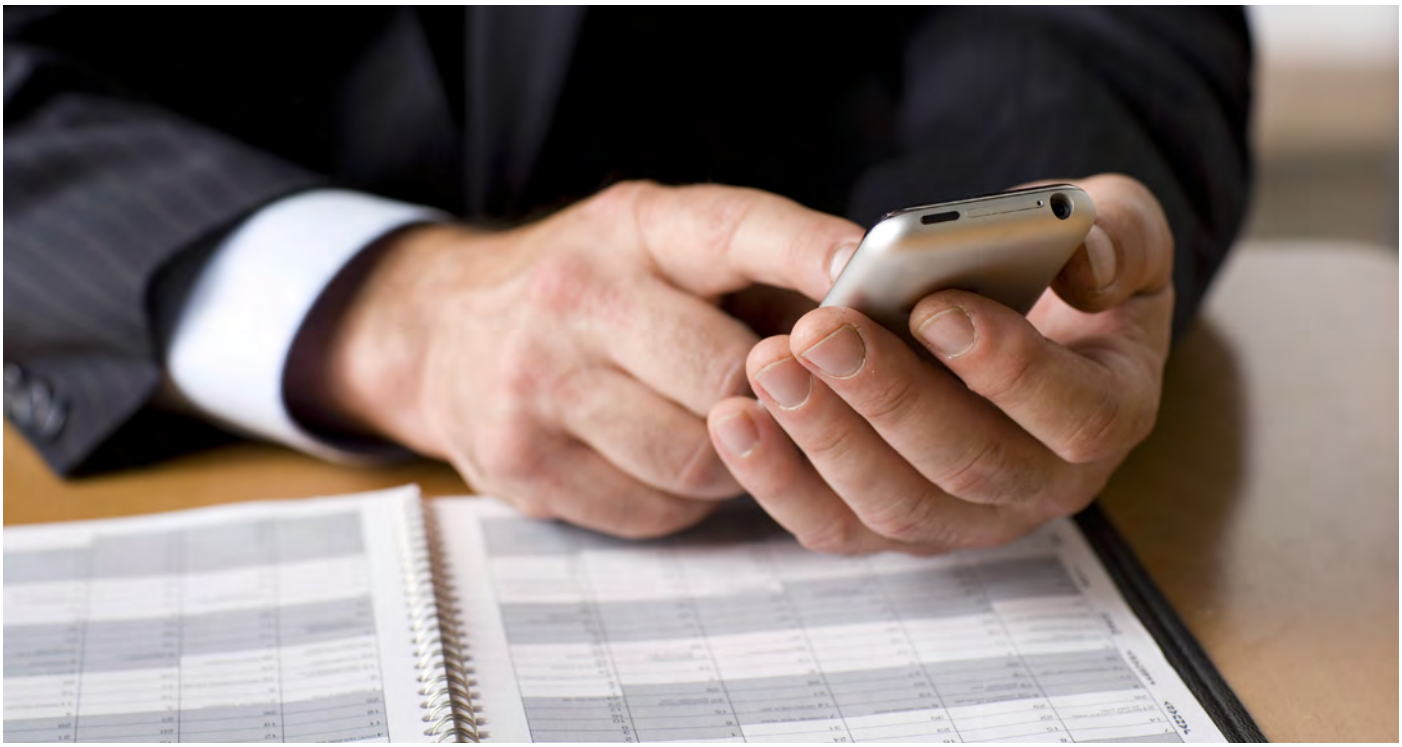
Force majeure

A force majeure event will entitle the contractor to an EOT, and so the contractor will want the contract to have a wide definition of force majeure, including a general allowance for anything that could not have been reasonably foreseen by the parties at the start of the contract. Conversely, the employer will want certainty, and so want a list of just the specific events that will be considered as force majeure.

Force majeure events are generally neither parties' responsibility, and so while the contractor normally gets an EOT for a force majeure event (excusing it from liquidated damages for the period involved), it often doesn't get costs.

Contractors can suffer spiraling expenses during a protracted force majeure event. Consequently it may want the ability to terminate the contract if a force majeure event delays its works beyond a specified period.

In the next issue of the Digest the second part of this article covers the claims procedure, delays to completion, rectifying defects, poor performance, and poor reliability, concluding with the method of dispute resolution.



Dear Diary,

Are smart phones or paper diaries better at keeping records?

Earlier in this edition of the Digest, Peter Davison reviews the decision in Liverpool Museum v AEW Architects and the extent to which that decision impacts on the need to keep contemporaneous records (see page 5). Reading this article, coupled with some recent experiences, led me to wonder whether the changes in recent years that have all but consigned the paper diary to history in favour of electronic gadgets, have affected the amount of detail that people in management record.

I am not suggesting that senior construction staff ever recorded their innermost thoughts and feelings in the way that Adrian Mole, 13 & 3/4 used to. Certainly I have yet to see graphs on site recording the growth of Scandinavian timber imports.

Up until about five years ago, I used to purchase an A5 week to view diary every year as a matter of course. It contained all personal and professional appointments, and a note of what I was working on from Monday to Friday. The Blackberry era came, and the use of the diary for appointment reduced, until Apple and Microsoft (who between them seem to run the world) allowed iPhones and Outlook to synchronise. At this point, my paper diary was abandoned.

A couple of years ago, when working with one particular client, it became clear that the only records they had of a particular problem project came from the site manager's A4 diary which, while grubby and coffee stained, contained very detailed contemporaneous notes of who was there, what they were doing, and what problems were causing delays. After inspecting the diary, I asked to copy it and was advised that it was indispensable to the site manager who was using it. It was agreed he would copy it for next week.

When we met the following week he had, to his director's deep concern, mislaid the diary. At that time it was clear that this battered old £2.99 diary was probably worth in the region of £250,000, and so serious efforts were focussed on its recovery. Thankfully it was found under the seat of an Astra Van some days later. Some months later, the case settled favourably with the diary proving crucial.

I have no doubt that if handed a smartphone, and refused a diary, the chap in question would not have recorded half of the information he had manually noted. I also have no doubt that the next generation, who started with smart technology, probably did not record the information in the first place. So what's the way forward?

Having a clear record keeping policy is always the starting point, and then having an audit to ensure that it is happening seems logical. Some training as to why good records are important for senior and commercial staff as well as project delivery teams and also training on the power of new technology, which can be very powerful if well used. Take for example the QS who emailed himself a video of the flooded site, to record the effects of a period of poor weather. No diary can do that. Perhaps a review of personal record keeping at appraisal time should also be on the agenda.

Personally, I now have a library of A5 note books, in which I have to write the day and date myself, before adding daily notes. This is definitely not a backward step, as my smartphone now reminds me regularly to update the notes!

MARK WHEELER – MANAGING DIRECTOR, DRIVER GROUP EUROPE.

The use of experts in the Middle East

LEE BARRY – QUANTUM EXPERT, DIALES PROVIDES INSIGHT INTO THE EFFECTIVE APPOINTMENT OF EXPERTS AND ADVICE ON HOW TO WORK WITH THEM.

Since the global credit crisis in 2008 and 2009, the Middle East has seen a large increase in the number of disputes referred to arbitration. As the majority of the construction works were undertaken in the UAE (specifically Dubai), it is fair to say this is where the biggest increase has occurred.

These disputes have taken many years before they are heard by a tribunal, a significant amount of legacy disputes have only been resolved in the last couple of years. In fact, there are still a large number of legacy disputes in the arbitration process today.

There are key decisions both parties need to consider when referring a matter to arbitration and, thereafter, throughout the arbitration process. These include

- What disputes should be referred?
- When should they 'press the button'?
- What legal team should be engaged? (lawyers and counsel)
- Should they engage claims support services?
- Which experts are required?
- When are they required?
- Who should they choose?

CHOOSING YOUR EXPERT

The choice of expert is very important and may be fundamental in obtaining a positive outcome to the arbitration. The following are some pointers to consider:

1. Ensure your expert has experience and knowledge of the issues in dispute. For example, if the main issues are a result of termination of the contract, you should ensure your quantum expert has past experience of loss of profit claims.
2. Ensure your expert has worked in the region and market (or at least similar) where the dispute has occurred. This is important as standard practices can change from place to place. It also helps in understanding external factors which may have a fundamental bearing on the dispute.
3. Always consider the expert's personal principles. For example, if you have carried out a delay analysis using the as-planned v as-built method, you may wish to engage an expert who prefers this method.
4. If you have not used the expert before then you may consider a beauty parade. It is invaluable to ensure that your expert can deliver under pressure and has the correct knowledge and experience you are looking for.
5. Review the expert's experience of being under cross-examination. It is essential that your expert present their opinion in a clear and concise manner to ensure the expert's evidence assists the tribunal. That said, you may wish to engage an expert who you have worked with and trust but who has not yet obtained experience under cross-examination.
6. Consider the experts relationship with your legal teams, other experts, opposing experts and the tribunal. A good professional working relationship can and often does lead to trust amongst the parties as to the opinions provided.

DISCIPLINE OF EXPERTS

The discipline of the experts you may need to engage will depend heavily on the nature of the disputes and may depend, to some extent, on the experts employed by the opposing party.

Experts can cover general issues such as delay, quantum, architectural, accounting, property revenue, project management, and design, as well as specialist issues such as lift performance. Your legal team will be able to provide you with details of the types of experts you are likely to need to engage.

TIMING OF APPOINTMENT

There are many schools of thought over when to engage an expert and how to ensure the expert is and continues to be independent. There are no fixed rules to state when you need to appoint an expert, except maybe the timetable for submission set out by the tribunal.

Therefore, you may want to appoint the expert prior to entering into the arbitration or prior to submitting the statement of case. In order to ensure the expert maintains their independence, they should not be asked to make the claims. However, obtaining their opinions on principles such as the type of delay analysis to be used would save you both time and money. It will also help the legal team in producing the pleadings without the need to amend them later.

Alternatively, you may wish to employ the expert after the initial pleadings have been issued (either by one party or by both parties). The advantages of this is knowing the exact scope of work you want the expert to look at as well as knowing what the other parties position is on the various claims. The disadvantage is that if the expert disagrees with your analysis, further work and possibly re-pleading may need to be undertaken.

Finally you may consider appointing the experts after all pleadings have been submitted. Similar to above, this will ensure that the instructions to the expert are comprehensive and may limit the time the experts have to complete their review. However, if there are no further opportunities to submit additional documentation or pleadings, the expert may provide a negative opinion based on the information submitted to the tribunal.

EXPECTATION OF YOUR EXPERT

Your expert must act independently and the expert's overriding responsibility is to the tribunal. It is essential that you allow your expert to provide their opinion, within the limitations of their instructions, without demanding that the expert support your case regardless of the evidence, or lack thereof. That being said, providing further and better particulars (as long as admissible by the tribunal) may result in a different opinion by either expert.

You should not expect, or request, your expert to act as a 'hired gun'. Your expert's task is to provide their opinion on the disputes or claims put forward by the parties. The expert should never look to submit new claims where one has not

been pleaded. The hired gun approach is both detrimental to the expert and to the party who engaged the expert. A common example is that both parties would be claiming costs as a result of delays and both parties support their costs with invoices and payment receipts. The expert should (ensuring all documents are correct) accept the amounts claimed. However, if the expert, in their own opinion, requires bank and cheque details, this should be requested from both sides. Failure to do this will show bias to one party and it is likely that the tribunal will consider all the evidence put forward by the expert to be biased.

You should expect your expert to hold regular meetings with the opposing expert in an attempt to narrow the issues. This is essential for a number of reasons. The tribunal will, in most cases, expect the experts to undertake this exercise. Firstly, it narrows the disputes raised in the hearing and therefore saves time. Secondly, it gives the parties a good understanding of the likelihood of any of their disputes and claims which helps in settlement discussions (and again saves costs).

You should not expect your expert to deal with legal issues or liability issues (unless this forms part of their expertise and is stated in their instructions). Legal and liability issues are for the legal team to address and the tribunal to decide.

WORKING WITH YOUR EXPERT

You should always ensure that you carefully read both your expert's and the opposing expert's reports carefully. In many instances the expert will note that their opinion is due to lack of evidence, interpretation of evidence, or some action or inaction which could be remedied. Again, subject to the tribunal allowing further evidence, it may be possible to provide what the expert's need which in turn may allow them to support the claim raised.

Meetings between the expert, the party, and the party's legal team are essential to ensure all documents have been considered and any misunderstandings resolved.

You should not be afraid to question the opinion of your expert, as the expert will certainly be questioned under cross-examination. ■

The great concurrency and EOT swindle

NICK JONES – SENIOR CONSULTANT, DRIVER GROUP MIDDLE EAST DISCUSSES DELAY AND CLAIMS FOR EXTENSION OF TIME.

When a contractor submits a bona fide extension of time (EOT) claim, employers are entitled to ask the contractor to consider their own concurrent delay. To respond to this with authority, the contractor must consider the merits of the individual case with guidance from legal precedence. Most construction professionals understand concurrency as two simultaneous events and if (any) one had not occurred then the other would have caused delay to completion. But would it?

To answer this, an analysis of leading legal cases has been undertaken to define concurrency scenarios.

Justice Dyson in Malmaison[1] gave the following example:

"If no work is possible on a site for a week not only because of exceptionally inclement weather, but also because the contractor has a shortage of labour... the architect is required to grant an extension of time of one week."

Where there are two concurrent events, both of which are independent, the contractor is entitled to an EOT in respect of the compensatable delay. However confusion arises when 'true concurrency' does not occur.

The situation was given clarity in Royal Brompton Hospital[2]:

"...an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which In fact, by reason of the existing delay, made no difference."

This scenario highlights the criticality of the timing of events on the approved programme.

In Chestermount Properties[3] Justice Coleman stated:

"where a relevant event occurred during a period of culpable delay, the revised completion date should be calculated on a net basis".

In this case, the contractor is entitled to an EOT but only in respect of the additional delay caused by the compensatable event – net effect.

The Court of Appeal in McAlpine Humberoak[4] upheld Lord Justice Lloyd's decision that:

"If a contractor is already a year late through his culpable fault, it would be absurd that the employer should lose his claim for unliquidated damages just because, at the last moment, he orders an extra coat of paint."

This is commonly known as the 'dot on' principle.

CONCLUSIONS

The Walter Lilly[5] judgment, et al, highlights that the best way to resolve cause and effect and, as a side issue, dissolve concurrency arguments, is by prospective analysis as the events unfold. The judgments understand that the impact(s) are likely to change as the project develops:

"Therefore it is necessary to have regard to how long individual items actually took to perform and not just have regard to what one party or the other at the time was saying it would take".

The concurrency grey area appears to be due to the different directions previously given by the English and Scottish courts in their approach to resolving concurrent delay. Walter Lily[6], however, sheds some light on the situation and states:

"As... a delay expert, one has to get a handle on what was delaying the project as it went along".

Also, the argument for a dominant event has three fundamental flaws.

The delay in granting prospective EOT determinations seems to be caused by the embarrassment if predicted awards become greater than actually required at completion and thus the financial position of one party is exaggerated. However, a wait and see approach to genuine EOT evaluations is hugely frustrating to contractors and projects often then trend towards a spiral of negativity and increased costs as a result. A legal hurdle to overcome this would be the administrator's ability to re-evaluate EOT awards at completion. ■

[1] Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd TCC (1999):
[2] Royal Brompton Hospital NHS Trust v Fredric A Hammond & Others (2000) EWHC
[3] Balfour Beatty Ltd v Chestermount Properties [1993] 32 Con LR 139
[4] McAlpine Humberoak Ltd v McDermott International Inc. (No1) [1992]
[5] J Akenhead -Walter Lilly v Mackay TCC (2012)
[6] J Akenhead -Walter Lilly v Mackay TCC (2012)

The importance of an integrated project master baseline programme

IN THE FIRST OF A SERIES OF THREE ARTICLES, CHRISTIAN MERRETT – ASSOCIATE DIRECTOR, DRIVER GROUP MIDDLE EAST CONSIDERS THE IMPORTANCE OF THE MASTER BASELINE PROGRAMME.

Failure to plan is planning to fail, it's a fact! From the smallest group of planned tasks to large multidisciplinary complex mega projects, the consequence of failure is inevitable. The majority of contracts in use particularise, to varying degrees, the obligation of the contractor to produce a construction programme. From this, the employer (usually through the engineer) will monitor the performance of the contractor and assess the progress of the works. The contractor will similarly use it for progress and reporting purposes but will also use it to monitor costs, risk, and to identify key stages in the works to initiate key activities. Often the programme is only issued for acceptance once the contract has been awarded and the focus is on the contractors undertaking the works and not the project as a whole.

Imagine a large infrastructure project where due to its scale and complexity there is a requirement for several large contractors to undertake the works. Each of the contractors is engaged under an EPC contract to carry out its own portion of the works. It is therefore reasonable to assume that critical processes such as design submissions and approvals, long lead for the delivery of specialist equipment could potentially have a significant impact upon the completion of a section of the works but more significantly, failing to meet a particular date is likely to have recurring effects upon other contractors.

Employers often get caught in the trap of thinking that the contractors will all fall nicely into line with little or no intervention from its project management team. Unfortunately not. Even at the preconstruction and tender stage, the contractor(s) should not only be made aware of their duties in respect to coordination between the consulting engineer and the other parties, and similarly the employer's management team must not only be aware of this, but both must have the tools to manage and monitor the process. Typically, the employer must develop the master baseline programme by considering the following simple yet essential areas.

- Bid and scope interface – Work scope for each contractor must be clearly and precisely defined as, quite often, the thing that is forgotten is the thing that causes the problem, regardless of size. Don't assume that someone else will take care of it.
- Timing and details of critical information exchange – It is important not only for the contractor to demonstrate his knowledge of his critical programme issues but also the master baseline programme must take this into consideration and reflect it.
- Periods of review and approval – Something that is very much open to abuse. Quite often, all parties consider they are entitled to more time than agreed or than is reasonable in the absence of clear agreement. The employer feels as though it has so many comments to make on a submission due to what it perceives to be an issue of non-compliance that any additional time taken is the fault of the contractors and that prolonged review period is therefore justified. Similarly, contractors feel they need more time to factor in employer preferential design changes, and so it goes on. These periods can compound and be responsible for very large delays.
- Bid negotiation periods – These often fall foul of extension to incorporate several rounds of queries and meetings.

> Quite often, the thing that is forgotten is the thing that causes the problem

It is not necessary for the master baseline programme to be of particularly high detail but as a minimum it should reflect and identify all the project stakeholders and the key milestones showing handover and deliverable stages. Furthermore, the process must be clearly communicated and managed throughout the project and not assumed that the contractors are always adhering to these principles. ■

Part two of this series will be published in the next edition of the Digest and will further explore the topic with examples.

Focus on... Asia Pacific

Welcome to Focus on Asia Pacific. In the Chinese calendar, the current lunar year is the year of the Horse. This is part of a 12 year cycle of animals that make up the Chinese zodiac, and which interact with the five elements: wood, metal, fire, water, earth. 2014 is the year of the wood horse which some astrologers predicted would be a fast year, full of conflicts, with wood providing fuel for the energetic horse sign. The latter part of the year is 'yin fire', increasing the potential for heated clashes even more. The good news is that Driver Trett, and the DIALES expert team, are on hand to diffuse these potential disputes!

Spurred on by the year of the Horse, our Asian business has been very active in the past 12 months and continues to grow, establishing an office in Hong Kong and further expanding our operations in Australia. I'm delighted that we have first class teams in place in each location, and to announce the opening of our new Sydney office (see below). David Hardiman, director for Australia, discusses the launch, and Richard Inman, local manager for the Sydney office, has provided an article outlining amendments to New South Wales security for payments legislation.

Turning to Hong Kong, the global spread of the NEC contract continues apace. Already used extensively in the UK, the NEC contract has travelled east. Following successful pilot projects in Hong Kong, it will be used for public work procurement from 2015 onwards. Tony Kwok, from our Hong Kong office, discusses issues related to NEC defined cost. We also have an interview with Ivan Cheung, a director in our Hong Kong office, and group secretary of the NEC Asia Pacific Users Group. ■

Driver Trett announces the opening of its third office in Australia

In addition to the inauguration of Driver Trett's Perth office earlier this year, August 2014 saw the opening of our offices in Sydney, with Richard Inman as local manager.

Whereas the Perth office is some 3,606km (2,240 miles) from our Brisbane base, Sydney is relatively close at approximately 732km (455 miles). Such distances provide an indication of the continental spread of our client's work locations.

With the recent budget announcement, the New South Wales (NSW) Government has shown its commitment towards ensuring the state continues to move towards sustainable economic growth.

The NSW State has committed $60 billion into Infrastructure projects over the next four years, outlining the Government's priorities in the foreseeable future. Major investments into Rail and Road projects will ensure the critical issues of congestion are being resolved, working towards the city's economic and social prosperity by delivering world class transport and road networks.

Some key transport projects currently planned or in the early stages of delivery include the delivery of the $14.9 billion WestConnex Motorway project, the $8.3 billion North West Rail Link, $1.6 billion CBD and South East Light Rail, the $3 billion NorthConnex along with the Pacific Highway Upgrade, and the $1.1 billion Darling Harbour Live Project. In addition there is the major Barangaroo Development currently in progress, the planned second Sydney Airport at Badgery's Creek, and investments being made across health, water, energy, and land.

NSW is entering a once in a generation opportunity to reimagine how it plans and prepares for the state's future growth, which makes it the ideal time for Driver Trett to establish its presence in Sydney.

Based in Sydney's CBD, our office is a short walk from Wynyard train station and Circular Quay's train station and ferry terminals located in Sydney harbour, which is home to the iconic landmarks of Sydney Opera House and Sydney Harbour Bridge. ■

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Issues relating to defined cost under NEC3 ECC

TONY KWOK – ASSOCIATE, DRIVER TRETT HONG KONG TAKES A LOOK AT THE IMPACT OF DEFINED COST UNDER THE NEC CONTRACT.

The NEC is known for its flexibility in terms of offering different main options to allow, amongst other things, the employer to deal with its risk appetite with a particular project.

Across the different main options of the Engineering and Construction Contract (ECC) one of the things consistent throughout is the use of defined cost. By that, the default position for assessment of compensation events would be calculated via defined cost.

In addition to its use in assessment of compensation events, defined cost is also the assessment method for payment under options C, D, and E.

With it being an integral part of both payment and compensation events, issues are likely to arise where both the employer and contractor are trying to safeguard their respective positions. Common examples would be that employers will want to make amendments and contractors will dispute over its interpretation.

Assessment

Regardless of whether the assessment of defined cost is for payment or compensation events, the underlining principle is the same and generally defined as 'the cost of components in the (shorter) schedule of cost components'. There would be differences between the different options as to the exact definition of defined cost, given its varying application across different payment mechanisms. For options C, D, and E, payments due to subcontractors also form part of the defined cost in addition to those cost components in the schedule of cost components (SOCC).

Schedule of Cost Components

However, with the common denominator being reference to SOCC (or the shorter version if option A or B is adopted), it plays an important part in the assessment of defined cost. The SOCC can be considered in simple terms, a guidebook to refer what categories of actual cost the contractor is entitled to be reimbursed from the employer. It does not specifically exclude cost elements, but rather allow the project manager the flexibility to interpret the type of substantiations provided to him by the contractor as to whether those costs incurred can be categorised as one of the items listed within the SOCC. The only exception to this would be section 7 of the SOCC which relates to recovery of insurance money.

For some clients new to the NEC, there is sometimes a temptation to include a list of exclusions within the SOCC, given its importance in defining reimbursable cost, to specify what cost items are not considered as defined cost, with a perception that this provides more clarity and that disputes can be minimised between the employer and the contractor.

It would appear convenient and straightforward to interpret those cost items already included in the SOCC against those added in as exclusions. However, potential disputes will likely arise as to those in-between items where neither the inclusions nor exclusions cover.

Moreover, there may be items of cost which can be construed as both a defined item in the SOCC or an exclusion added in by the employer. Again, this could be a fertile ground for dispute.

Of course, there may be instances where exclusions are deemed necessary either as an employer's specific requirement or something that is necessary due to the nature of the project. One must consider the appropriateness of amending or adding to the SOCC on a case-by-case basis.

Our advice to would-be employers looking to adopt the NEC is to seek proper advice from experienced practitioners on how best the contract is applied and what amendments (if any) are required to ensure the project achieves its goal.

The SOCC is just one of the elements where we have seen and experienced on how defined cost can become a ground for dispute in terms of payment and compensation events. There are others, such as interpretation of disallowed cost and administration of open book account in support of defined cost. In some way, defined cost and other elements of the ECC are interrelated. When issues arise, the various provisions and mechanisms of the contract must be read hand-in-hand to maximise its effectiveness both as a contract document and a project management tool. Again, the emphasis is to understand the contract through practical training as well as to engage proper advice before it is too late. ■

Amendments to Australia's East Coast Security of Payment Act

RICHARD INMAN – SENIOR ASSOCIATE, DRIVER TRETT AUSTRALIA PROVIDES A SUMMARY OF AMENDMENTS TO THE NEW SOUTH WALES BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 1999 (SOPA) AND AN UPDATE ON THE IMPLEMENTATION OF AMENDMENTS TO THE QUEENSLAND BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004 (BCIPA).

Since their commencement in 2000 and 2004, the New South Wales and Queensland Security of Payment Acts have facilitated the majority of adjudication applications made by parties to a construction contract in Australia.

In Issue 6 of the Digest (page 12), David Hardiman reported on how the Queensland Government has reviewed its Building and Construction Industry Payments Act 2004 (BCIPA) and has commenced making important reforms. Those reforms were scheduled to take effect from 1 September 2014 with the amended BCIPA applying to Queensland construction contracts entered into on or after this date.

In the summer of 2014, Queensland Building and Construction Commission (QBCC) confirmed that the Transport, Housing and Local Government Committee had been granted extra time to provide its report back to the legislative assembly on the Building and Construction Industry Payments Amendment Bill 2014. QBCC circulated the Committee's Report No.52 on 2 September 2014, which incorporates 18 recommendations, one of which is that the Building and Construction Industry Payments Amendment Bill 2014 be passed. The extra time granted to the Committee has delayed the amended BCIPA's scheduled effective commencement date of 1 September 2014. At this stage there has been no new effective date confirmed and the unamended BCIPA remains applicable in its entirety.

Reforms have been made to the New South Wales Building and Construction Industry Security of Payment Act 1999 (SOPA). These reforms took effect from 21 April 2014 and the amended SOPA now applies to New South Wales construction contracts entered into on or after this date.

Amendments to the Act were passed by the New South Wales Parliament in November 2013 and were in response to the commissioned Collins inquiry, which was undertaken by Mr Bruce Collins QC. This was an independent inquiry into construction insolvency; to look at the reasons and extent of insolvency within the construction industry and to find ways to better protect the interests of subcontractors. The New South Wales Government states that it views the amendments to the SOPA as part of its commitment to strengthening the security of payment framework.

In summary, the amendments to the SOPA are:

- The introduction of prompt or maximum payment terms for progress payments
- The requirement that payment claims made by a head contractor include a supporting statement declaring subcontractors it has engaged have been paid what is due and payable
- The removal of the requirement for a payment claim to state that it is being made under the Act

These amendments are further explained below.

Section 11 – The introduction of prompt or maximum payment terms for progress payments

This now provides a maximum period of 15 business days for the head contractor to receive payment from the principal following the issuing of a payment claim, and a maximum period of 30 business days for a subcontractor or supplier to receive payment from the head contractor or another subcontractor following the issuing of a payment claim.

Payment terms incorporated into a construction contract which provide for longer payment periods have no effect.

Section 13 – The requirement that payment claims made by a head contractor include a supporting statement declaring subcontractors it has engaged, have been paid what is due and payable

There is now a requirement that head contractors must not serve a payment claim on a principal unless it is accompanied by a supporting statement declaring that subcontractors they have engaged have been paid all payments that have become due and payable in relation to the construction work concerned.

Head contractors are free to develop their own document, however it must include all the information set out in the Building and Construction Industry Security of Payment Regulation.

If the head contractor fails to provide a supporting statement within its payment claim to a principal, it can receive a maximum penalty of $22,000 and if it knowingly provides false or misleading information in its statement, maximum penalties of $22,000 and/or three months imprisonment apply.

Section 36

Authorised officers from the Department of Finance and Services (DFS) have the power to investigate compliance with supporting statements and to prosecute failure of compliance. Failure by the head contractor to comply with a notice under Section 36 of the Act or knowingly providing false or misleading information may result in a maximum penalty of $22,000 and/or three months imprisonment.

The introduction of the supporting statement has been deemed necessary by the New South Wales Government to address what it considers to be the practice of false sworn statutory declarations being issued under the construction contract in relation to payments owed to subcontractors.

Section 13(2) – The removal of the requirement for a payment claim to state that it is being made under the Act

Section 13(2)(c) required the payment claim to include a statement that it was a payment claim made under the Building and Construction Industry Security of Payment Act 1999 but this requirement has now been removed. The remaining requirements of Section 13(2) still need to be complied with.

Removal of the requirement of Section 13(2)(c) has been seen by the New South Wales Government as a means to promote greater use of the Act, especially for subcontractors who have been reluctant to rely on the provisions of the Act for fear of losing future work.

The New South Wales Government has also announced reforms to its construction procurement procedures and these include:

- Implementing rolling financial assessments of contractors engaged on Government contracts
- Establishing a trial of project bank accounts (trust accounts) on selected Government projects commencing during 2014

In addition, consultation is currently in progress in relation to a proposed model for the statutory retention trust.

Further updates will be provided on these issues as information becomes available.

Once the final Queensland BCIPA amendments have been confirmed, and their effective date established, we will be able to provide a summary setting out the key differences between this Act and the amended New South Wales Act. ■

Q&A: Ivan Cheung

What is your role at Driver Trett?
I joined Driver Trett in Hong Kong (HK) as director in May 2014.

I am a chartered quantity surveyor with over 22 years of experience in cost and contract management and contract advisory services. I lead a specialist team based in HK to provide strategic procurement and contract advice including consultancy services on projects using NEC3.

My key service focusses on dispute avoidance and dispute resolution including such roles as an NEC3 adviser, mediator, dispute resolution adviser, expert witness, adjudicator, and arbitrator.

What are your aims with Driver Trett?
The name Driver Trett is still relatively new to the HK construction industry. Our aim (together with other directors within the office) is to become one of the prominent players within the dispute avoidance and resolution circle. Our foremost target is the HK market with the objective of extending beyond the region into places like Macau (China) and areas around South East Asia.

To sustain this growth, we are always on the lookout for the right mixture of talents to work within our team dynamics. Not only are we looking at the individual's qualifications and experience (I think that's a given), we are always looking for those who can adapt best with differing situations and environments especially with our mixed pool of clients.

Over the recent years, I have been particularly involved with the development and implementation of NEC3 in HK. With the experience and connections built up over the years, I hope that our continuing good work can lead to the name Driver Trett being considered the best in class as NEC3 advisers in HK.

What services do you specialise in?
I am a chartered quantity surveyor (QS) by profession but have developed my skills around the construction dispute field of work. Naturally, most of my work revolves around numbers and I mainly provide services on quantum related matters. Aside from my dispute resolution work, I also provide advice on strategic procurement and contractual matters and in particular, on the implementation of the NEC3.

I am a practicing arbitrator and an active mediator to construction disputes. I also coach students on mediation courses outside of work.

I guess you can say I do the lot! But for now, I have particular focus on NEC3.

What are your thoughts on the development of NEC3 in Hong Kong and where do you think it is heading?
With the HK government looking to adopt NEC3 as their main choice of contract for their projects in 2015/2016, there's certainly momentum gathering in terms of interest. Its use has certainly expanded since the first project in Fuk Man Road in 2006 – a project that I was adviser in.

Recently, we've had many enquires and invitations to provide training or become advisers to organisations ranging from employers, consultants, and to contractors. Given that HK is relatively green in terms of using the NEC3, understandably there is some resistance to its use over the local general conditions of contract (GCCs) which have been around for many years. However, I do feel that the HK government has taken a very bold step, one which I think is right in terms of developing the industry for the future. Given my exposure to the industry in HK and my roles as arbitrator, mediator, adjudicator, and expert witness, disputes arise on a day-to-day basis in almost every project.

I'm not saying the NEC3 can stop these disputes, but at least it's a platform for the parties to enhance their communication and project management practice. Certainly, the pilot NEC3 projects in HK thus far have been quite successful in the sense that you can observe a change in attitudes between the employer and contractor personnel, especially front-line site staff. The atmosphere in site meetings appears to be collaborative and definitely less claims orientated! There are even teambuilding events and social gatherings between the employer and contractor – quite unheard of in HK!

In terms of where it's heading, I'm no psychic so I can't tell for sure. But I certainly hope the NEC3 is the start to a less adversarial industry in HK. ■

Five minutes with John Mullen

What does your role involve?
I am a director of Driver Group plc, having joined the business over 30 years ago. In my time with the Group I have held various roles as director and regional managing director. These days, I mainly focus on working for their expert services division, DIALES, as an expert witness in large international arbitrations.

What do you love most about your job?
My work as an expert witness takes me to various parts of the globe and I am still occasionally in awe of the nature and size of some of the World's largest construction projects. Whether it's a new international airport, skyscraper, or petrochemical facility, the scale of achievement can be breathtaking.

What has been your most memorable project and why?
My most memorable commission has been a highways arbitration in the Sultanate of Oman that I worked on from 2005. Not a huge matter, with a claim of US$65million, but it was my first introduction to the country and its people and I made a number of good friendships as a result. It led to our setting up a local LLC and became a springboard for our development of the Group's four Gulf offices which are serviced by a handful of expert witnesses.

What is the most challenging thing about your job?
Given the size of some of the projects I am involved with, the part of my role that I most enjoy is attempting to simplify the evidence with which arbitrators have to deal. This aim can be challenging, but the hardest part of my work is cross-examination by counsel. I learnt a long time ago that preparation and integrity are essential to withstanding this process, and a realisation that counsel will be much cleverer than me. I now realise where the brainy boys from my school went after A-levels, whilst I headed for a red-brick BSc in quantity surveying!

Where do you see the construction industry in five years?
Over the coming years, I'd like to see the UK industry exporting more. Whilst materials supply and contracting can be cut-throat against international competition, we Brits should be exporting far more of our professional skills in design and management. ■

John Mullen's new book can be found on www.wiley.com

For more information about DIALES expert services please visit www.diales.com

The answer to our competition from issue 6 to tell us what celebrated its 25th birthday in 2014 was found on page 12. Congratulations to our winner who correctly answered with the World Wide Web.

BYTES

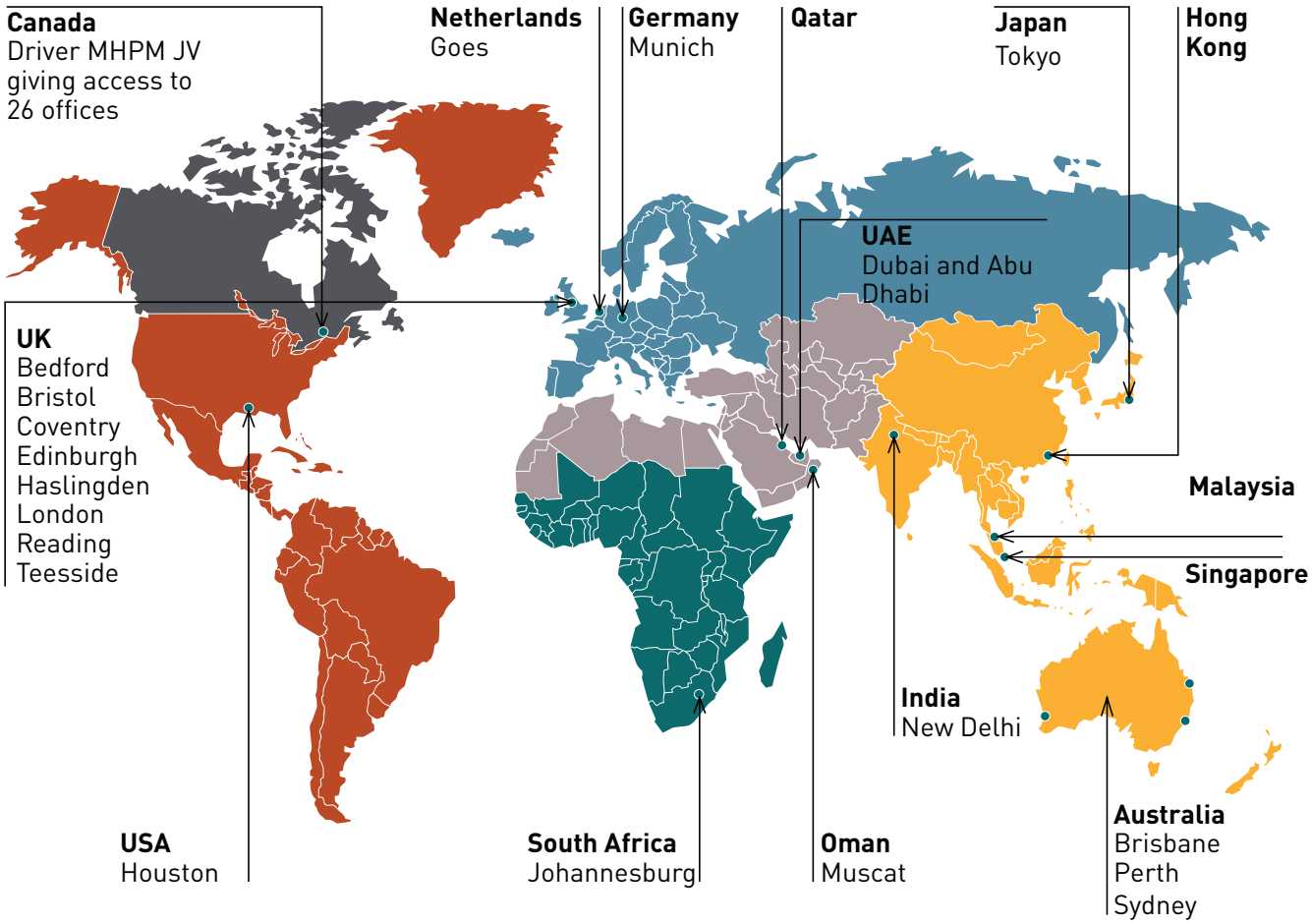
BYTE 1:
FIDIC RAINBOW SUITE 6

In the sixth 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:
TRIBUNAL APPOINTED EXPERTS IN INTERNATIONAL ARBITRATION

DIALES expert John Mullen talks about the role of experts in international arbitration tribunals.

DRIVER TRETT WORLDWIDE



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