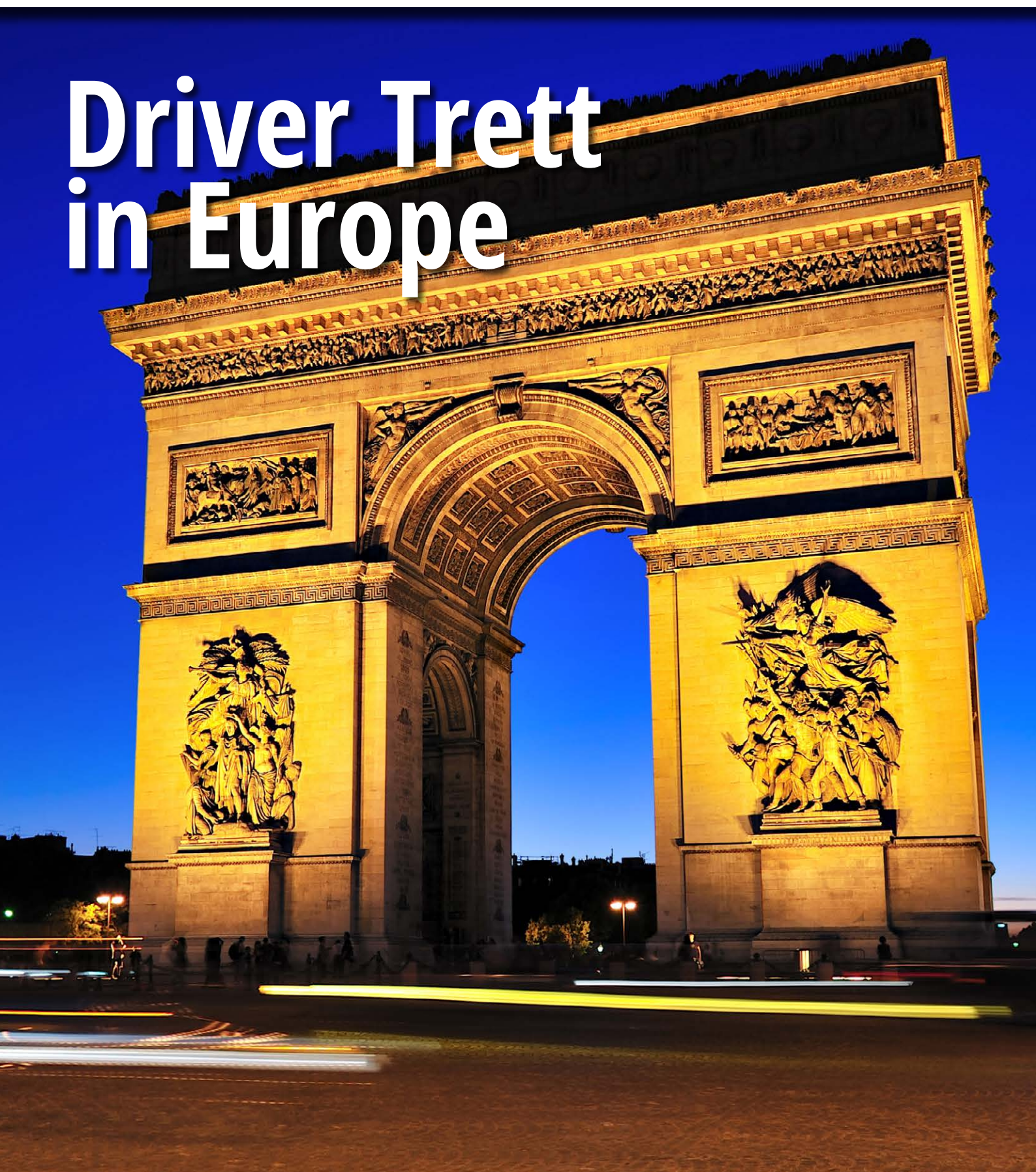


# Driver Trett in Europe







## Welcome to the Driver Trett Digest

A very warm welcome, or should I also say *je vous souhaite un accueil chaleureux*; or *ik heet u van harte welkom*; and lastly *herzlich willkommen* to the 8th issue of the Driver Trett Digest. The reason for starting my introduction in this way reflects the multi-lingual and multi-cultural focus of this edition, and nicely demonstrates some of the languages in which Driver Trett employees communicate and work on a daily basis.

This is particularly evident in our Netherlands and Germany offices and I am very pleased that three articles in this issue are from staff located in these countries. Hugo-Frans Bol considers extension of time in the context of the principle of *Redelijkheid en Billijkheid* (Reasonableness and Equity) that is embedded in the Dutch Civil Code. Ben van de Biggelaar explains how a Naval Architect is now heavily involved in oil and gas projects. Although not German, Ian Smith has lived in the country for over 13 years and looks

at some of the challenges faced by cultural differences.

The theme of differences in business practices around the globe is continued by Walied Abdeldayem who explores court appointed experts in the UAE. Our Asia Pacific region is also represented by Philip Allington's article on the SCL delay and disruption protocol and Janus Botha of Driver Group Africa provides an update on their plans for an accredited planning and programming training course.

We are also very pleased to see two articles from guests. One by Lucy Martin of Shoosmiths LLP looking at set-off under English law, and part two of the series discussing pertinent issues when entering into EPC contracts written by Anthony Albertini and David Owens of Clyde & Co.

I very much hope you enjoy this edition of the Digest and please follow Driver Trett on LinkedIn and via our website [www.drivertrett.com](http://www.drivertrett.com). ■



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Mark Castell  
Regional Managing Director





# The Society of Construction Law delay and disruption protocol – how far can you go?

**PHILIP ALLINGTON – DIRECTOR, DRIVER TRETT HONG KONG – WAS A PANEL MEMBER AT THE CONSTRUCTION LAW INTERNATIONAL CONFERENCE IN KUALA LUMPUR. HE GIVES HIS PRACTICAL PERSPECTIVE, IN PARTICULAR, TO HIS EXPERIENCE IN HONG KONG.**

A session in the three-day Construction Law International Conference in Kuala Lumpur 18 – 20 September 2014 (CLIC2014) was devoted to reviewing the Society of Construction Law (SCL) Delay and Disruption Protocol 12 years on. In that time there have been important changes in contracts, approach to uncertainty, and guidance from case law that affect delay analysis systems.

## Continuing Problems in Construction Project Performance

Over many years, research has indicated the negative image of the construction industry. In the UK and in Hong Kong the Egan<sup>1</sup> and Tang<sup>2</sup> reports noted the unpredictability or expected failure of construction projects in terms of delivery to time.

Others focussed on the uncertainty of information affecting project risk from the

outset. The 1965 study<sup>3</sup> by the Tavistock Institute of Human Relations reported that “At the time of contract a programme is required... agreement by a collusion in acceptance of unreality” and “... not possible to put exact dates... programme can only be based on assumption about the variety, quantity and timing of future application of resources.”

Writing in 2003, from his experience in resolving disputes, Judge Thornton<sup>4</sup> noted information gaps leading to delay, disruption, and a failure to identify risks. In the same year Professor Uff<sup>5</sup> noted unethical manipulation of critical path analysis programming technology to make exaggerated claims bearing no relation to reality.

A reaction was premised on the idea that a more scientific approach to construction project management would lead to improve-

ment. The SCL Protocol follows this model with an emphasis on ‘good planning practice’ and quantitative analysis to the extent of recommending calculation of potential future delay, even when the outcome is already known. Such principles polarised views leading to an unresolved debate.

## Protocol Developments

The prescriptive approach intensified with the 2004 publication of the PFE Change Management Supplement, a set of terms and conditions to be added to the JCT 98 form of contract (and others) so that it aligned with the SCL Protocol in creating systems that would provide data to operate the recommended delay analysis. It also introduced a role of Risk Manager, effectively to operate the contract’s system.

More recently (2013) the Chartered

Institute of Building published its Complex Projects Contract, said to be the first form to follow the SCL’s Delay and Disruption Protocol. The CIOB cites statistical research on failure in project completion to time. Its website says managing time is the focus to ensure projects are delivered to specification on budget and without delays, unlike existing contracts which target failure only through persuasion and financial compensation for failure.<sup>6</sup> The contract introduces new roles and responsibilities such as the project time manager, auditor, and data security manager.

There has been comment on the efficacy of the modified and new contracts. Writing in 2005, barrister Aeberli described the PFE Supplement as ‘the tail wagging the dog’<sup>7</sup> while Nabarro<sup>8</sup> refers to the Complex Projects Contract as ‘administra-

tively burdensome' and notes 'the limited number of qualified specialists required to operate it'.

## Developments in Hong Kong – Managing Risk and Uncertainty

The Protocol, and the two later derivative forms, are forms of risk management through managing uncertainty. Risk was also a theme of the Tang Report, which was followed up by two risk-focused initiatives by the Hong Kong Government.

The first in 2005<sup>9</sup> was the adoption by the Environment, Transport and Works Bureau of a Risk Management User Manual for public works. It also notes failure in project outcomes in respect of budgets and programmes (amongst others listed). It further noted that "projects within the Public Works Program are conducted within an environment of uncertainty, where complete and perfect information relating to a project is never available until the project is complete". It is essentially a qualitative system of risk management in contrast with the quantitative systems advocated by the SCL Protocol et al.

The second initiative was the progressive adoption of the UK's New Engineering Contract for public works projects. This major commitment since 2006 includes extensive training for project staff in all works departments. After pilot schemes, the Works Bureau now says that from 2015/2016 public works will generally be procured using

the NEC suite of contracts.

The NEC forms offer various risk profiles and generally place the programme at centre stage in managing time and time-related problems. At all times there is only one 'accepted programme'; historical programmes may not be referred to. So delay assessment is always prospective and there is no as-built programme. Uncertainty is introduced in risk contingency (referred to by some as float) and the system is navigated and managed by 'early warnings' and 'compensation events'. These are familiar principles but the commitment to appropriate training and development of contract users has been missing from the SCL Protocol and its derivative systems.

## Comment and Guidance from the Courts

Case law related guidance on the SCL Protocol is limited but some judgements have considered reliance on deterministic systems of delay analysis and alternatives that require consideration.

Early on, Judge Humphry Lloyd<sup>10</sup> noted that the demonstration of cause and effect required the establishment of a critical path, initially and at later material points. This principle has been re-stated since; for example in 2012 Justice Akenhead<sup>11</sup> noted that one needs to consider what critically delayed the works as they went along and that a "traditional" delay analysis uses the claimant's programmes to identify the critical path.

So far so agreed, but the courts became uneasy with the possibilities for manipulation of 'black box' analysis (previously noted by Professor Uff). In 2004 and 2005, this was expressed by Judge Wilcox<sup>12</sup> regarding untested facts in CPA-based delay analysis and hypothetical answers that could be produced. On as-built critical paths in 2007 Lord Drummond Young<sup>13</sup> said that imposed logic had the same possibility for error and suggested using methods that pre-dated the use of computer software on complex construction projects.

Such a style would inevitably lead to a clash between the apparent certainty provided by CPA and more heuristic systems based on fact but including the ambiguity of site records (including as-planned v as-built comparisons<sup>14</sup>). Faced with this choice, say in alternative expert opinions, the courts seem to have

chosen the latter. Justice Akenhead went as far as to commend objective views based on available facts to say what probably delayed the works.

## A Split Community

Developments since the publication of the SCL Protocol suggest the emergence of two schools of thought for delay analysis – the Scientific Management School and the Empirical School.

The Scientific School is long established in general management thinking and is now embraced by many for delay analysis. This was inevitable given the development of operational research from the 1950s including complex modelling techniques such as CPA.

To what extent can such models be relied upon to provide correct answers? In the face of reported failures of construction projects with respect to delivery to time, systems oriented practitioners have sought to force more reliable models by imposing more rules and now system marshals. Indeed, there are now organisations promoting themselves to define and codify programming and delay analysis systems<sup>15</sup> and to provide practice accreditation. This has led to a narrow view of programme disturbance such that EOT has come to dominate over other forms of analysis such as disruption.

Paradoxically, 60 years of systems development has so far not demonstrated improvement in performance, costs have never been justified and there remains a significant lack of training, qualification, or recognition of this as a profession or career path.

By contrast, the Empirical School accepts the inevitability of uncertainty in the process given 150 years of experience including the emergence and decline of many panacea systems along the way. Relative outsiders such as members of the judiciary seem to have less problem in accepting the difficulty and support simpler objective analysis based on available facts and giving imprecise solutions. One might say that it is more acceptable to be vaguely right than precisely wrong. The problem is that this approach has not provided any evidence of change to the good or cheaper solutions either.

Perhaps the broad (qualitative and

quantitative) principles of risk management could offer support. Both sides already agree on the importance of record keeping.

## Areas of Agreement

A CLIC conference delegate reported that the SCL drafting sub-committee is considering updating the Protocol. The plan is to review comment since publication and to simplify the recommendations.

Though some extreme methods of delay analysis have been developed, the community essentially agrees on a relatively short pick list. Labelling can be simplified even further to prospective, comparative, and retrospective. The courts already seem to agree on the comparative approach.

All methods respond positively or negatively to basic criteria which may be considered in selection:

- Desired outcome of the analysis for example EOT or cost
- Availability of information including witnesses
- Amount of cost or time needed to complete the analysis
- Dispute resolution process – from negotiation to formal hearings

That is to say there is no requirement to have a single deterministic solution. ■

<sup>1</sup> Egan, J. Rethinking Construction: Report of the Construction Task Force, [1998] London: HMSO.

<sup>2</sup> Tang, H (Chairman) Construct for Excellence: Report of the Construction Industry Review Committee, [2001] HK Gov publication.

<sup>3</sup> Tavistock Institute of Human Relations – Interdependence and Uncertainty: A Study of the Building Industry. First published 1966. This ref digest version 2001.

<sup>4</sup> Anthony Thornton, Lessons in Civility – Building Magazine [28 November 2003].

<sup>5</sup> Duties at the Legal Fringe: Ethics in Construction Law [Jul 2003] SCL.

<sup>6</sup> 'World's first time management contract for complex projects' – [June 2014] CIOB Website.

<sup>7</sup> The PFE Change Management Supplements: Are they What the Construction Industry Wants? [December 2005] SCL.

<sup>8</sup> Nabarro – Construction and Engineering Newsletter – [October 2013].

<sup>9</sup> Risk Management for Public Works, Risk Management User Manual – HKSAR Gov't Environment Transport and Works Bureau [June 2005].

<sup>10</sup> Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth [2002] BLR288.

<sup>11</sup> Walter Lilly & Company Ltd v Giles Patrick Mackay [2012] EWHC 1773 (TCC).

<sup>12</sup> Skanska Construction Ltd v Egger (Barony) Ltd [2004] and Great Eastern Hotel Company Ltd v John Laing Construction [2005] 99 ConLR 45.

<sup>13</sup> City Inn Ltd v Shepherd Construction Ltd [2007] CSOH 190.

<sup>14</sup> As listed and including Alstom Ltd v Yokogawa Australia Pty Ltd (No 7) [2012] SASC 49.

<sup>15</sup> For example the American Association of Cost Engineers (AACE) or the UK's Guild of Project Controls.

Developments since the publication of the SCL Protocol suggest the emergence of two schools of thought for delay analysis – the Scientific Management School and the Empirical School.

# Driver Group Africa certificate in planning and programming

IN DIGEST NO 5, DRIVER GROUP AFRICA ANNOUNCED ITS INTENTION TO REGISTER AN ACCREDITED TRAINING COURSE IN SOUTH AFRICA FOR THE TRAINING OF PROJECT PROGRAMMERS. THE OBJECTIVE IS TO ASSIST IN THE IMPROVEMENT OF THE GENERAL PROGRAMMING SKILLS LEVEL IN THE CONSTRUCTION INDUSTRY WITHIN SOUTH AFRICA. JANUS BOTHA, SENIOR PLANNING CONSULTANT, DRIVER GROUP AFRICA DESCRIBES THE CERTIFICATE IN PLANNING AND PROGRAMMING.



## Background

The planned course is set against a regulatory framework headed by the South African Qualifications Authority (SAQA). SAQA is a statutory body, regulated in terms of the National Qualifications Framework Act, and mandated by legislation to oversee the development and implementation of the National Qualifications Framework (NQF). A number of Sector Education and Training Authorities (SETAs) were established to cover all industries in South Africa.

The Services Sector Education and Training Authority (SSETA) was established in terms of the Skills Development Act. The Services sector is subdivided into five Chambers, of which Management

and Business Services is one. Project Management is one of the services which falls under this chamber with Programming and Scheduling below that.

Accreditation is being sought from SSETA and Driver Group Africa is currently awaiting an inspection to review the learning material and the Quality Management System in place.

The course is being registered as an NQF Level 4 with a credit value of 12 credits.

## The Training Course

The course is of five days duration and includes interrelated practical exercises to reinforce the learning.

The course content is designed to focus on the basic principles of programme,

the process of creating a programme and the tools needed to do so. The target audience is the novice or prospective planner and the planner with less than two years' experience. To achieve these goals, no software specific content is included in the course material.

The first part of the course covers the basic theory of programming. The different types of network diagrams and task relationships are discussed and then the Critical Path method of scheduling is introduced. Participants are required to calculate the float in a precedence diagram network by hand, by calculating a forward and backward pass.

The next study unit covers the process of creating a project programme by establishing the information required to create a good programme. Methods for generating a Work Breakdown Structure (WBS) and WBS workpack dictionary are introduced, followed by activity definition, duration estimating, and activity sequencing.

Once a project programme is established, integrity checks are carried out, the programme is baselined and then the process of statusing the programme is covered. An extensive array of reports on the programme content is also intro-

duced to participants.

Finally, time impact analysis is undertaken to prepare the participants with a complete set of tools to understand programming; including the creation of a programme, reporting on it, and how to undertake what-if scenarios.

A full theoretical knowledge assessment is completed at the end of the course and a workplace assessment carried out during the following six weeks by the participant's employer. This is to ensure that the skills and knowledge developed during the course can be put into practice.

### Further Training Workshops

A shortened version of the full course has also been developed for equipping site supervisors and managers with an understanding of the programmer's needs and the information required to create and status a programme. This version can be presented as a half day seminar and covers all the theoretical aspects of the full course and can also be tailored to suit client specific requirements.

An advanced version of the course is also planned for development that will cover detailed time impact analysis and

forensic delay analysis. The various techniques and protocols will be discussed and practised, introducing participants to the theory and practical skills of analysing programmes as part of claims preparation or defence.

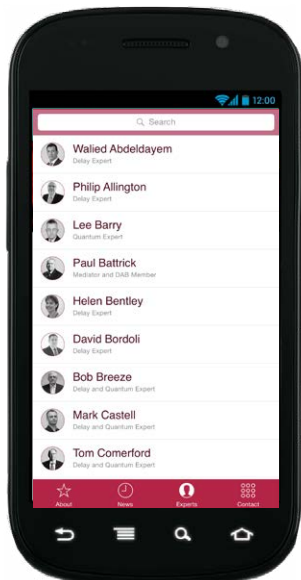
Finally, the possibility of expanding the range of project control and administration related subjects to create a curriculum for a project support qualification is being investigated. The subject matters being considered include project control disciplines; such as estimating, cost control, programming and quantity surveying; general contract knowledge, contract administration, contractual communication, reading and interpretation of engineering drawings and first line management skills. ■

**For more details of these courses or bespoke planning training, please contact Janus Botha of Driver Group Africa at janus.botha@driver-group.com .**

**Training workshops on planning, contractual and commercial subject matters are also undertaken in our other locations. Please refer to our website for further details (www.drivertrett.com).**

The course is of five days duration and includes interrelated practical exercises to reinforce the learning.

## DIALES LAUNCH MOBILE APP



The end of 2014 saw the launch of the DIALES construction expert witness app for iPhone, with a donation in January 2015 to Médecins Sans Frontières for each download in 2014.

### What is the DIALES app?

The DIALES app provides quick and easy access to global quantum, delay analysis, and technical experts.

Users can search the expert database by keyword for a precision search, or use the simple filters to narrow the expert pool to reflect the required expertise, experience, and regional knowledge.

Once the ideal expert is identified, users can email them directly, review their experience highlights, and read or email a full PDF

profile. For those looking for more broad advice or discussion, users can easily identify their local office through an interactive map, or simply send an enquiry email.

The app also streams the latest news and articles from DIALES, keeping users up to date with new expert appointments or insight from our internationally published team.

The DIALES app is currently available for download for iPhone and iPad, with an android version scheduled for release in Spring 2015. Users wishing to access the android version can register their interest to receive an alert on launch.

To download the iPhone app or register to be alerted when the android app goes live visit [www.diales.com/app](http://www.diales.com/app) ■

### WIN A SAMSUNG GALAXY TAB

Spring 2015 will see the launch of the android version of the app, and to celebrate we are going to be giving away a Samsung Galaxy Tab for the lucky winner to download the app, among many other features.

**For your chance to win the tablet answer this simple question:**

**Q.** How many DIALES experts currently have the first name David?

**A.** Send your answer to [info@diales.com](mailto:info@diales.com) with the subject line – 'Android app competition' by the 31st March 2015.

The winner will be notified by email. For more details regarding the DIALES experts, their skills, and services visit [www.diales.com](http://www.diales.com)





# New Rules of Measurement vs Standard Method of Measurement

**MARK BLACKMORE – SENIOR CONSULTANT, DRIVER TRETT – HIGHLIGHTS SOME OF THE KEY DIFFERENCES BETWEEN SMM7 AND NRM.**

Many people in our industry would have come across the Standard Method Measurement (SMM) in one form or another, whether referenced in a contract particular or document on the consultancy side of the fence, or more frequently when preparing bills of quantities or schedules of quantities for traditionally procured projects.

The first edition of the SMM was published in 1922 to standardise the process of measurement, which, prior to this time, varied greatly and frequently gave rise to complaints from contractors expected to price bills of quantities.

The standardisation of measurement methods enabled some consistency and reassurance in the production of bills of quantities to be priced by contractors tendering for projects.

The Seventh Edition of the Standard Method of Measurement was published in a new format to SMM6 and now used the Common Arrangement of Work Sections for Building Works (CAWS) as a basis to achieve

Co-ordinated Project Information (CPI) for the construction industry.

Although this gave guidance for the creation of bills of quantities, there was still a large divergence between different surveying practices and even quantity surveyors in the preparation and presentation of cost estimates and cost plans for the earlier stages of a project.

Recognising this problem, the Royal Institution of Chartered Surveyors (RICS) developed the New Rules of Measurement (NRM). A standard set of measurement rules and essential guidance for the cost management of construction projects and maintenance works contained within three volumes.

NRM1 (Order of Cost Estimating and Cost Planning for Capital Building Works) was first published in March 2009. This was subsequently revised and the second edition was issued in 2012, becoming operative on 1 January 2013.

NRM1 details the rules of measurement for the production of cost estimates and cost plans, and also provides guidance in

respect of cost items not included within the measured works, such as preliminaries, overheads and profit, design fees, etc.

The guidance is aligned with the RIBA Plan of Work and/or the OGC Gateway Process, dependent on the project being undertaken, and provides the user with explanations of the different methods of cost planning and estimating, appropriate to the current stage of the project.

NRM1 is in essence a new guidance document, prepared and issued in response to the need for some regularity to the estimating and cost planning of projects at the early stages of either the RIBA Plan of work or OGC Gateway.

The second volume in the NRM set is NRM2, entitled Detailed measurement for building works, was published in April 2012 and became operative on 1 January 2013. This guidance replaced SMM7 for best practice in measurement on 1 July 2013. From the end of July 2013 the RICS were recommending that NRM2 was used in place of SMM7.

NRM2 is basically an enhanced version of SMM7, hence its replacement by the RICS as the best practice guidance, and in common with NRM1, is aligned with the RIBA Plan of

Work and OGC Gateway Process.

When comparing NRM2 to SMM7 the major change is the document layout. There are no longer any references to CPI, and where lettering was used within SMM7, which was correlated to the National Building Specification (NBS) categories, this has been replaced by numbers.

Aside from the formatting of the new guidance, there are some fundamental changes to the “ancillary” works that no longer need to be measured. An example of this could be that detail items, such as a brick on end head detail to a window opening would no longer need to be measured.

There are also items which require a different method of measurement, for example:

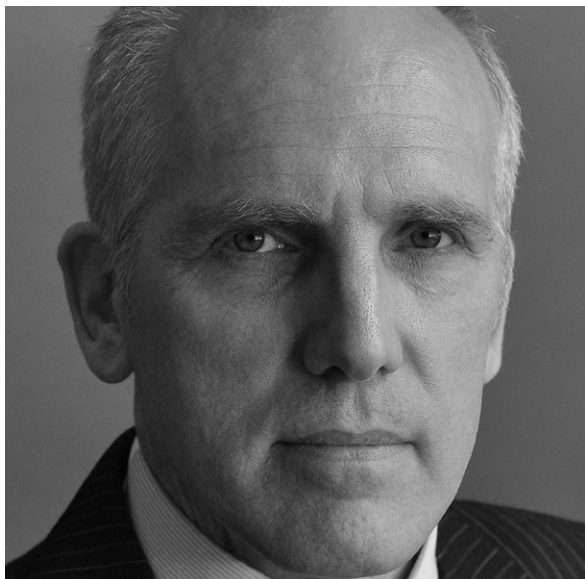
- Glazing supplied with windows and doors. The glazing panes are now enumerated and size given rather than being measured by m<sup>2</sup> as per the SMM7. Any engraving or etching, which was previously measured as m<sup>2</sup> or design work enumerated is now measured as an extra over item and numbered.
- Below ground drainage has also changed, the excavation, bed, and surround is included within the drain run length as a composite item.
- Natural and reconstituted stonework is now measured under the same element.
- The weight categories for steelwork has varied significantly.

These changes will obviously have an impact on the preparation and style of the bills of quantities or schedule of quantities which contractors will be required to price. When pricing a project which has been measured under the NRM scheme, estimators will need to be fully conversant with the new measurement rules to ensure that their pricing includes suitable allowances for all works which are now deemed included within the measured quantities so as to avoid any potential financial difficulties later in the project.

The final volume within the NRM suite is NRM3, entitled Order of Cost Estimating and Cost Planning for Building Maintenance Works. This was published February 2014, and became operative on 1 January 2015. These measurement rules mirror those upon which NRM1 is based, but give further detail on the methodology to be used in calculating maintenance costs through the life of the building. ■



## Introducing our latest DIALES expert – Stuart Macdougald-Denton



**DIALES ARE DELIGHTED TO WELCOME HIGHLY REGARDED AND EXPERIENCED ARCHITECTURAL AND CONSTRUCTION EXPERT, STUART MACDOUGALD-DENTON**

I am delighted to be joining DIALES to lead the technical (architecture and engineering) expert witness team. I have 30 years' professional experience, 23 of which have been in private architectural practice and the rest with main contractors.

As an architect, I have led successful design teams and delivered a diverse range of projects using a variety of contract forms. In design management, I helped deliver the Stirling Prize winning Sainsbury's botanical sciences laboratories in Cambridge, a 1480 cell prison complex, 18 schools, 3 hospitals, residential and student accommodation, offices, and retail

developments.

In my 13 years as an expert witness, I have prepared independent reports and given expert opinion in connection with over 100 disputes and HSE prosecutions, have been cross-examined on a number of occasions and have acted as adjudicator in construction disputes.

I currently also deliver the following seminars: Design Co-ordination & BIM, Design Process, Building Functionality, and A Practical Approach to Design and Build.

Kind regards,  
**Stuart Macdougald-Denton**

## OGCA Construction Symposium Canada

Driver Trett will be exhibiting at the Ontario General Contractors Association (OGCA) Construction Symposium in Ontario, Canada from 9 to 11 April 2015. The event offers business and educational sessions with focus on safety, technology, and legal issues.

Ron Fernandez from Driver Trett Canada will be speaking at the event on 11 April on the subject of record keeping. The presentation covers the importance of good records, and how claims can benefit, or suffer, if attention is not paid to this key topic.

**For more information on the OGCA Symposium or the services offered by Driver Trett Canada please contact [info@drivertrett.com](mailto:info@drivertrett.com)**



## The court appointed expert under the UAE legal system – the flip side of the coin

**WALIED ABDELDAYEM - ASSOCIATE DIRECTOR, DRIVER UAE PROVIDES AN INTRODUCTION TO THE ROLE OF THE COURT APPOINTED EXPERT UNDER THE UAE LEGAL SYSTEM<sup>1</sup>, HIGHLIGHTING THE IMPORTANT DIFFERENCES BETWEEN THE FUNCTIONS AND RESPONSIBILITIES OF COURT APPOINTED EXPERTS AND PARTY APPOINTED EXPERTS IN ARBITRATION PROCEEDINGS.**

### How does it work, and how is the court expert appointed?

Commercial disputes heard by the UAE legal system courts are generally conducted with an exchange of written submissions without oral advocacy or witnesses' examination. The UAE courts are empowered to appoint one or more experts to give opinion on any of the issues in dispute. Should the court decide to appoint an expert, the court's decision must determine the issues for which it requires assistance and define the expert's assignment.<sup>2</sup>

Typically, the court appoints an expert from the experts registered in the schedule/list of experts. The court also assesses the amount to be deposited with the court treasury on account of the expert's expenses and his remuneration.<sup>3</sup> In special circumstances the court may decide to appoint one or more experts who are not registered in the experts' schedule. The court could also approve other expert(s) from or outside the schedule of experts in case both parties agreed on certain expert(s).<sup>4</sup>

## Court appointed expert as a fact finder

The court expert is expected to embark on a fact finding mission, gather evidence, hear the parties, and may visit the governmental or non-governmental entities or authorities to obtain relevant information. The expert's visits, inspection of official documents, gathering evidence from the relevant authorities and organisations is often a necessity but also poses a big challenge to the expert. In this context, it is worth noting Article 82.3 of UAE Law No. 10 of 1992 which provides:

Any governmental, or otherwise, body may not refuse, without legal justification, to let the expert take knowledge of whatever books, registers, documents or papers



in their possession, in implementation of the judgment delegating the expert.<sup>5</sup>

This function of the court appointed expert as a fact finder is rather different from what may be expected from a party appointed expert in arbitration and under common law jurisdictions. In fact, it may even be damaging to the expert's evidence and may be perceived as an act of bias by the expert. In this context, it may be worth noting Mr Justice Akenhead's comment in the *Walter Lilly* case where he said:<sup>6</sup>

He frequently descended into the arena of disputed facts and liabilities in which he was not the relevant expert... Some parts of his report were based on

conversations and information which were not in evidence...

Therefore, whilst the party expert in arbitration has to be very careful when dealing with fact and should give extra care not to tread on the toes of the tribunal, the court expert is on the contrary expected to gather facts from its primary sources and attempt to reveal the truth for the court's consideration.

Also, in the case of a party expert in arbitration, the flow of information is generally between the party expert and the instructing lawyers. Certainly the party expert can request information from his instructing lawyers and may advise whether

such information is likely to exist based on his analysis or experience in similar circumstances. However, conducting inspections – without being instructed to do so – to look for evidence or gather facts beyond what was provided to him, is not within the party expert's responsibilities. The party expert does not have authority or power to force either party to provide him with certain documents.

### Meeting and hearing the parties

The court expert in the UAE shall invite the parties for a first meeting to discuss the case, hear their positions, ask questions, etc... this first meeting is a must. Failure



to convene the parties shall entail the avoidance of the expert's work.<sup>7</sup> The expert manages the meeting(s) and this often exposes him to legal arguments, tactics and forensic games, which may present a real challenge for the court expert. Therefore, in this setting the court expert will not only use his technical expertise but more importantly his skills in managing the parties and ensure that the process is conducted fairly and in accordance with the law.

In contrast, the party appointed expert's interface is mainly the lawyers who instructed him. Apart from the joint expert meetings, which may or may not happen, and the cross-examination in the hearings, the party appointed expert enjoys a protective shield that isolates him from the legal battles which may be occurring between the parties.

The party expert is not concerned with the tactics and strategies which may be set out by the legal teams or the parties. Certainly the expert is one of the vital instruments and his role is crucial in many cases. However, the expert is not (and should not) be actively concerned with enhancing or forming any tactical advantages over the other party. Equally the expert is not responsible for managing or administering the arbitration proceeding. His role is mainly technical.

## Who can (or cannot) be a court appointed expert?

The Law of Experts defines an Expert as "a natural person acting as an expert and registered in the List."<sup>9</sup> The List is the register or schedule containing the expert's information and maintained by the Ministry of Justice.

Experts (who would like to be considered by the court for appointments) are required to register in the courts list of experts, from which the court make appointments.<sup>10</sup> The application to register in the list can be obtained from the Ministry of Justice, filed and submitted to the Ministry of Justice for approval, paying the fees, and passing the Ministry tests. After registration, the expert is required to take oath before the court.<sup>11</sup>

UAE Federal Law No. 7 of 2012 Article 3 and Cabinet's Decree No. 6 of 2014 Article 3 provide the conditions that must



apply for an expert to be registered in the court. The main points that are worth highlighting are:

1. To hold an approved academic qualification approved by an accredited university or high institute in the field of specialisation
2. To have postgraduate experience in the field of experience applied for the registration therein, of at least seven (7) years for nationals and for at least fifteen (15) years for expatriates

## What about the Quantum and Delay Analysis Experts?

The law provides a list of the professions and specialisations which are recognised by the Ministry of Justice.<sup>12</sup> Surprisingly, the most demanded specialisations in almost every construction dispute in the UAE are not recognised. There are no quantum or delay analysis categories in the specialisations permitted for experts to be registered under.

This does not mean that there are no quantum or delay experts qualified in the Experts List maintained by the UAE Ministry of Justice. It just means that these two specialisations are not distinguished, by their own rights, in the List, and therefore the court may not necessarily consider these specialisations when making an appointment.

For parties in construction disputes,

who perhaps are used to referring their disputes to arbitration where they have control over proceedings, choosing their own experts, and so on, having to endure such situations where they have to fight their dispute in the court is worrying to say the least. Clearly it represents serious risk and uncertainty to the parties, who have not only lost the control they would have enjoyed in arbitration, but also are unlikely to know who the court appointed expert is, and what the capabilities are of such an expert in the two areas of specialisation where they are needed most.

## What can be done when the issues at dispute are related to delay and quantum?

Parties may separately appoint their own experts at their own expense. The party's own expert in this setting would not give opinion or evidence before the court. Rather, his main role is to prepare the report for the court's appointed expert consideration.

Such solution is very practical and vital in some instances. Given the relatively low remuneration and tight time the court appointed experts often have, the party own expert(s) can narrow the issues and ensure the court's expert has the relevant information, especially if they can have objective discussions.

It's worth noting, that the parties' experts

in this context have no obligation to be independent, and therefore their role is in fact to act as an advocate for their instructing party, which is entirely unlike the position of parties' experts in arbitration. That said, maintaining objectivity is a key so that the court appointed expert could give weight to the own party expert's report.

## Conclusion

The current expert laws in the UAE do not meet the full expectations of parties in construction dispute. For example, the non-existence of very familiar specialisations, namely quantum and delay experts, increases the risk that the appointed expert may not possess the required specialisation. It seems that the court does not fully appreciate the level of expertise and specialisation that is expected from a delay or quantum expert, especially from the standards of parties coming from common law or arbitration background.

As a consequence, the role of a 'party own expert' in litigation has emerged to cater for the circumstances where either party considers his position to hinge on one of these specialisations, in an attempt to bridge the gap.

The roles, responsibilities, and challenges of an expert appointed by UAE court are significantly different than an expert who has been appointed by a party in arbitration, and are also different than a party own expert in litigation in the UAE. While the same individual could be able to perform these roles, on separate occasions of course, he has to be mindful that the rules of the game completely change once the line is crossed from one direction to another. ■

<sup>1</sup> For the purpose of this article, the UAE Legal System refers to the Federal and local Emirates Courts and does not include the DIFC Court.

<sup>2</sup> Federal Law No. 10 of 1992 – Article 71(1).

<sup>3</sup> Federal Law No. 10 of 1992 – Article 69.

<sup>4</sup> Federal Law No. 10 of 1992 – Article 70.

<sup>5</sup> UAE Federal Law No. 10 of 1992 Article 82.3

<sup>6</sup> Walter Lilly & Company and Mackay 2012 EWHC [2012].

<sup>7</sup> UAE Federal Law No. 10 of 1992 – Article 81.

<sup>8</sup> UAE Federal Law No. 7 of 2012.

<sup>9</sup> UAE Federal Law No. 7 of 2012 – Article 1.

<sup>10</sup> This does not apply to experts in arbitration proceedings.

<sup>11</sup> UAE Federal Law No. 7 of 2012 – Articles 5 and 6.

<sup>12</sup> Table of Expertise and Specialisations as appended to the Cabinet's Decree No. 6 of 2014 in relation to the Executive Regulations for UAE Federal Law No. (7) of 2012 – Regulation of the Profession of Experts before Judicial Authorities.



# Set-off in construction contracts

**LUCY MARTIN – SOLICITOR IN THE CONSTRUCTION TEAM AT SHOOSMITHS LLP – TAKES A DETAILED LOOK AT THE ISSUE OF SET-OFF UNDER ENGLISH LAW.**

Managing cash flow is of the utmost importance to parties at all levels in the construction supply chain. One way of seeking to manage cash flow is to set off sums payable either against sums recoverable under the same contract, or under one contract against sums recoverable under another. It is therefore important to understand how and when a right of set-off can be validly exercised.

The principle behind set-off is clear. It allows for the offset of competing monetary claims to produce a single amount owed by one party to another.

Various rights of set-off exist under English law with no need for a contractual set-off clause:

- Legal set-off allows a court to give a judgment for the balance due between two parties for reciprocal claims which are unconnected to and independent of each other. Legal set-off may only apply

where both of the claims are liquidated or capable of being ascertained with certainty and ease. It is not generally available as a self-help remedy outside of litigation and applies to debts only. Further, it is to be used as a shield and not a sword (i.e. it can be used only as a defence to a claim).

- Equitable set-off allows a party to set-off a cross-claim against another party provided that it is 'so closely connected with the original claim that

It is important that parties set out clearly what rights exist between them at an early stage

it would be manifestly unjust to allow the claim without taking into account the cross claim'. It can only be used for closely connected claims, which does not necessarily mean that they must be under the same contract (indeed, the Court has recently confirmed that there is no requirement for a cross-claim to arise out of the same contract for equitable set-off to be available), but it may be difficult to argue equitable set-off for different contracts where the only connection is the contractual parties. What is required is a close connection, which can be determined on the facts of each case. For example, a cross-claim under separate building contracts, where both contracts relate to connected works on the same construction project may be a basis upon which to exercise equitable set-off. Unlike in legal set-off, the

claims do not have to be liquidated and a right of equitable set-off can be exercised outside of court.

- Insolvency set-off is a right of set-off that arises under insolvency legislation and is triggered by the Insolvency Rules 1986 (in the case of liquidation and administration) and the Insolvency Act 1986 (in the case of bankruptcy) if a contracting party to a building contract becomes insolvent. Insolvency set-off is mandatory, which means that it cannot be restricted, extended, or contracted out of by agreement of the parties and takes precedence over other forms of set-off exercised before the insolvency. The problem with these various rights of set-off is that each is subject to different limitations.

In order to give clarity as to what specific remedies of set-off are available to parties and when, contractual set-off clauses can be included in building contracts. This allows the parties to extend or limit the general set-off rights available to them in order to clarify the precise circumstances in which set-off can be exercised before any dispute arises. A contractual set-off clause would, for example, grant the express power to a party to set off a claim under an unconnected contract between the same parties, and can account for (or specifically discount) future or contingent claims that are not yet due and payable such as future payment of liquidated damages. It is important that parties set out clearly what rights exist between them at an early stage in order to avoid confusion and disputes at a later date.

Care should be taken when inserting a set-off provision into a building contract. The Unfair Contract Terms Act 1977 can apply in some business-to-business transactions where the terms are deemed to fail the 'reasonableness test'.

It is also important to remember that the starting place for making a valid deduction from a payment due under a building contract is a timely and valid Pay Less Notice. If no valid Pay Less Notice is, or has been issued, any attempt to exercise a right of set-off may fail. ■

**For further information, please contact Lucy Martin on 03700 86 4153.**



## EPC contracts – contractor claims and employer remedies

IN THE SECOND OF THE TWO PART ARTICLE, FROM ISSUE 7, ANTHONY ALBERTINI AND DAVID OWENS, CLYDE AND CO. LLP OUTLINE SOME POINTS TO CONSIDER WHEN USING AN EPC CONTRACT.

### The Claims Procedure

The contractor will need to be sure it follows the claims procedure to the letter. For example, under the FIDIC Silver Book the contractor must notify the employer of a claim event within 28 days of it occurring, and must submit its full claim within 42 days of the event, or it could lose its right to claim.

This makes sense for the employer – it means claims can be considered and assessed while the facts are still fresh in everyone's minds, and stops a rush of claims at the end of the project.

However, for the contractor this timetable can be very difficult. It must decide quickly whether an event will delay it or cause it additional cost, and then swiftly collate and submit evidence of this, often before it can be sure of what the full effects of the event will be. Failure to do so can cost the contractor its entitlement to additional time or cost.

### Poor Performance

A central requirement of an EPC contract will be that the finished plant achieves the specified performance levels. Indeed, a contractor can generally decide how the plant will work, so long as it achieves the specified outputs and environmental targets.

There can be two target performance levels set in the contract. The contractor will be required to undertake "tests on completion" to demonstrate that the plant is operational before practical completion is certified, but may then have some time to tune the plant to produce a higher guaranteed performance level specified in the contract.

The contractor is normally liable to pay performance liquidated damages (LDs) for the period between practical completion and the date when the plant achieves the higher guaranteed performance levels. The level for such performance LDs is normally set by reference to the employer's expected loss of revenue from the under-performing plant.

The contract may include an overall cap on the total amount of delay and performance LDs that the contractor is obliged to pay. Employers should carefully consider the level of this cap – if a plant has been greatly delayed, delay LDs may use up all of this cap, meaning that no performance LDs will be payable whatever the performance level of the finished plant.

### Poor Reliability

In addition to requiring guaranteed performance levels for the completed plant, the specifications in the EPC contract are also likely to require that the finished plant is operational and available for use for a specified minimum number of days in its first year of operation. Again, LDs may be payable if this reliability level is not achieved.

The FIDIC Silver and Yellow Books take a slightly different approach, making "trial operation" part of the tests on completion. If the contractor cannot demonstrate that the completed plant operates reliably during trial operation, the taking over certificate will be delayed and the contractor may incur delay LDs.

### Rectifying Defects

Like many construction contracts, EPC contracts will incorporate a defects liability period, during which the contractor will be obliged to correct all defects identified. However, under the FIDIC Silver and Yellow Book forms the employer is entitled to an extension of the defects liability period of up to two years if defects are so bad that the plant cannot be used for its intended purpose, or even a reduction in the contract price. If an unrectified defect deprives the employer of substantially the whole benefit of the plant, it can terminate the contract and recover everything paid to the contractor for the works.

Following the end of the defects liability period there will be a longer warranty period, during which the contractor will be obliged either to correct, or to pay for the correction of, any latent defects identified. Where the plant includes specialist equipment, the employer may also want warranties from the suppliers, or at least manufacturers' guarantees. This will ensure that the employer is not confronted by the failure of an essential piece of equipment during the warranty period, which the contractor is not able to correct.

### Delays to Completion

Liquidated damages clauses for delay are the norm under EPC contracts, and the employer needs to consider carefully what the daily rate for such LDs should be. Usually an employer would want to ensure the LDs rate reflects its loss of profit and other losses it will suffer if the project is delayed. However, on EPC projects this loss of profit can be substantial, and the employer may actually opt to set the LDs rate below the level that would fully compensate it. Quite simply, high LDs rates can scare away potential tenderers, or make the contract price unaffordable.

The contractor will be particularly concerned to ensure that there are watertight caps on the levels of delay LDs that it has to pay, as well as an overall cap on the level of all types of LDs payable under the contract.

The employer will need to ensure that EOTs are granted for delays it causes, so that time for completion does not become "at large", causing LDs to become unenforceable.

The timing of any deduction of LDs is also important. The delay to the project may be partly caused by the contractor's cash flow problems, and deducting LDs from the contractor's monthly invoice while the project is ongoing will exacerbate this, and could slow the project even further. It may thus be better for the employer to deduct LDs from the retention monies instead.

An alternative approach used in the FIDIC Silver Book is to link payments to the contractor to the achievement of specific milestones. This encourages the contractor to keep the project on track during construction and commissioning, rather than only allowing the employer to take action over delays at the end of the project, when the completion date has already been missed. The contract might also include bonuses for early completion, based on the additional profit the employer could make from having the plant available early.

Of course, delays can become so bad that the employer worries for the success of the project, and EPC contracts often allow it to terminate if the contractor fails to proceed with the project according to the programme.

### Method of Dispute Resolution

Valuation of claims for additional time and cost are frequently a cause of disputes on EPC projects, where the employer will be under particular pressure to keep the project to time and on budget regardless.

CONTINUED ON PAGE 12

The parties will thus need a robust dispute resolution procedure. The procedure often allows for levels of escalation, firstly to the parties' senior management, and then to the Engineer, and only once the parties have gone through these steps will they be able to move on to the more expensive (and time consuming) stage of litigation or arbitration.

Under the FIDIC Silver Book form, the role of the Engineer in the dispute process is replaced by a Dispute Adjudication Board (DAB). This is a standing board appointed at the start of the contract, of either one or three members who are independent from the parties. Either party can refer a dispute to the DAB, which will then investigate the dispute and issue its decision within 84 days. If either party is dissatisfied with the decision, it may issue a notice to the other party and refer the dispute to arbitration. If no such notice is issued within 28 days, the DAB's decision becomes final and binding on the parties.

As EPC contracts are often used on highly technical projects requiring specialist knowledge, the same specialist knowledge may also be needed to understand and resolve disputes. EPC contracts often include Expert Determination as part of the dispute

resolution process, under which the parties appoint an expert who understands the technical background to the dispute, and who will then use his technical expertise to make a decision.

The parties should consider whether the expert's decision should be final and binding. Whilst final and binding decisions give certainty, there can be no guarantee as to the "quality" of an expert's decision, and a party may want to be able to take further action if the decision is obviously wrong.

A project in the UK may be covered by the provisions of the Construction Act. If it is, the parties will be able to refer disputes to adjudication at any time. This means they can simply cut across the contractual dispute resolution process and expert determination provisions and instead go straight to adjudication.

However, it is worth noting that many types of EPC works are excluded from the Construction Act provisions, including drilling for oil or gas, tunneling works, certain works on power stations and works to water and sewerage plants.

# Focus on...Europe



Welcome to Focus on Europe. In this section we turn our attention to our business in Europe, highlighting the importance of understanding differences in culture and language when delivering Driver Trett's services.

Hugo-Frans Bol and Ben van den Biggelaar from our Netherlands office and Ian Smith from Germany offer an insight into some of the differences in these countries compared to others around the globe.

It is an exciting time for Driver Trett in Europe as our services become increasingly recognised in the market. Our success has prompted our expansion in the continent and the next Driver Trett office will be opening in France in April.

More information on our new Paris office will be released soon. To keep up to date with this and other news please visit [www.drivertrett.com](http://www.drivertrett.com) and follow us on LinkedIn.

## SEMINARS



Driver Trett's latest round of breakfast seminars are now underway in the United Kingdom. The Spring series uses a scenario based presentation and considers some of the challenges faced when managing sub-contracts under the NEC3. In the last year over 1,000 engineers, surveyors, and commercial managers have attended Driver Trett breakfast seminars. Feedback showed that 96% of delegates rated them either good or excellent.

Driver Trett offers other seminars on various topics and can provide in-house training to suit our clients' requirements. For more information on the training and seminars we offer at Driver Trett please visit the knowledge section of our website. <http://www.drivertrett.com/knowledge/seminars.shtml>



## Q&A: Ian Smith

**IAN SMITH – DIRECTOR DRIVER TRETT GERMANY – TALKS ABOUT HIS EXPERIENCE OF DELIVERING DRIVER TRETT'S SERVICES IN GERMANY.**

**Digest:** Ian, it's now two years since the Driver Trett operations in Germany were started, how do the services you and your team provide differ from those provided elsewhere?

**Ian Smith:** The main differences relate to language and culture, otherwise it's the same range of services.

**Digest:** How would you say these first two years have been?

**Ian Smith:** This has probably been the most intense period of my career to date due to the number of different challenges involved. The reward comes when you notice that Driver Trett is becoming an increasingly recognised name in the market. Of all my time here in Germany, this has certainly been the most exciting.

**Digest:** How long have you lived in Germany?

**Ian Smith:** I first came over in the early part of 1999, spent roughly three years near Frankfurt. I went back to Scotland in 2002 and came back one year later. I've been here ever since.

**Digest:** What made you decide to go back in 2003?

**Ian Smith:** I received an offer from a renowned contractor in the power generation business to lead a group of contract managers engaged in projects to build power plants. I spoke German and had first-hand experience of the German culture, both professionally and socially. It was an easy decision to make.

**Digest:** Is that what are sometimes called claim managers?

**Ian Smith:** Not quite. The main focus of the task was to properly administer the respective contracts. The management of claims was certainly an important but smaller part of the task. The avoidance

of contractual differences was and still is a big part of German culture, from my perspective in the industrial plant business.

**Digest:** Why do you say contractual differences and not contractual disputes?

**Ian Smith:** That's one of the significant aspects that differentiates the Anglo-Saxon and the continental approaches to construction contracts. Let me explain that in a little more detail. In the UK, the contractual claim and contractual disputes are seen as being "part of the business". Here in Germany and I understand other parts of mainland Europe, the philosophy is more about reaching a consensus or compromise at a project or even managerial level before resorting to legalistic disputes.

**Digest:** How does that work, particularly given that many contracts have very strict time limitations?

**Ian Smith:** To understand that, you have to look at how construction contracts work under German law. Basically, a contractor can submit their claims at any time up until the final account. There are strict rules about the timing and content of notifications, but that can still leave a lot of time open to allow the parties to discuss, review, negotiate, and settle.

**Digest:** Does that mean that there are fewer formal disputes in Germany compared with the UK?

**Ian Smith:** At the end of the dispute resolution process, that it is to say arbitration or court proceedings, I suspect that the UK probably has slightly more formal proceedings than Germany. Parties are quicker and more prepared to declare a dispute. Having said that, in the past ten years or so, I've noticed



The reward comes when you notice that Driver Trett is becoming an increasingly recognised name in the market. Of all my time here in Germany, this has certainly been the most exciting.

a growing recognition, both on the employer and contractor side, that the parties to a contract are more willing to assert their contractual rights.

**Digest:** So, do you see a dispute culture developing in the German construction industry similar to that in the UK?

**Ian Smith:** I don't think so. Adjudication in the UK is a firm part of the dispute resolution process and has certainly contributed significantly to the number of recognised disputes. Even though discussions are taking place in Germany about the possible introduction of an adjudication process similar to that used in the UK, I still think the German approach to seeking an amicable solution to contractual issues will prevail, quite rightly, for a long time.

**Digest:** Ian, thank you very much for your time. ■



# Reasonable 'clear' grounds for claiming an EoT in The Netherlands

**HUGO-FRANS BOL - OPERATIONS DIRECTOR, NETHERLANDS CONSIDERS EXTENSION OF TIME IN THE CONTEXT OF THE PRINCIPLE OF REDELIJKHEID EN BILLIJKHEID (REASONABLENESS AND EQUITY) THAT IS EMBEDDED IN THE DUTCH CIVIL CODE.**

The perception of contracts and how to go about them varies significantly across the different parts of the globe. Many different historical and cultural facets can, as we know, play a role in this. Take for instance the influence of a principle like Redelijkheid en Billijkheid (Reasonableness and Equity) in a 'Code Civile' country like The Netherlands. This principle is codified in article 6:248 par. 2 of the Dutch Burgerlijk Wetboek (Civil Code) as: "A rule, to be observed by parties as result of an agreement, is not applicable insofar this,

under the given circumstances would be unacceptable under the requirements of reasonableness and equity..."(translated). One should especially note the open characteristics of 'under the given circumstances'. In the Netherlands, this has as a consequence that parties, when dealing with (construction) contracts, often try to use this concept of Redelijkheid en Billijkheid to argue their view on the contract and its procedures or even to reason a case outside of the contract. This approach to contracts is being faced more and more by a formal contractual approach with no room for a reasonable interpretation of the given circumstances. This clash can be seen increasingly on Dutch domestic civils and building works. Internationalisation and increased competition seem to be important factors in this development.

In our day to day work of advising clients on contracts and claims, we are regularly confronted with reference to

'the given circumstances' as a ground for entitlement. Often, this entitlement is then rejected on contractual grounds... and of course the right answer is in the middle. Therefore, in order to avoid these discussions, I will hereunder detail the two most common problems relating to claims for termijnverlenging (extension of time) in the Netherlands and try to show where there is a grey area that is subject to a successful argumentation involving 'the given circumstances'. These commonly experienced problems are, firstly, contractors and other parties involved in construction contracts that are often not (fully) aware of which procedural steps to follow in requesting a termijnverlenging and, secondly, what contractual grounds there are for claiming that termijnverlenging. For this exercise, I will use the standard Uniforme Administratieve Voorwaarden (UAV2012) as reference. The 2012 edition is the current version in use. This version

is slowly taking over from its predecessor of 1989. The UAV are a traditional style contract used for building and civil works.

Where claims for additional works and other changes are commonly recognised and submitted, mostly in the correct and proper contractual way, claims for termijnverlenging are often (perhaps purposely) not issued, just simply forgotten or submitted too late or incorrectly. This is odd because the widely used terms in the UAV are pretty straight forward.

It is Paragraph 8.4 that deals with the request for a termijnverlenging. This paragraph states that the contractor can request and is entitled to a termijnverlenging when it cannot be expected to deliver in time as agreed and that it can prove that the delay encountered and claimed is on the project's critical path. This paragraph further sets out that the request has to be done in writing and submitted to the employer at least 14



days before the agreed delivery time. The Employer is also allowed to grant a termijnverlenging on its own initiative. Paragraph 8.5 then deals with the grounds that can give rise to such a termijnverlenging. These grounds are the following: overmacht (force majeure), voor rekening van de opdrachtgever komende omstandigheden (employer risk circumstances), het namens de opdrachtgever aanbrengen van besteks-wijziging (changing of the work) or wijzigingen in de uitvoering van het werk (changes in the execution of work). Is this 14 day period of par. 8.4 UAV 2012 then fatal and does a contractor lose its entitlement when it is too late with its request? Not per se as one might expect. When for instance a contractor has made it clear, during the execution of the works, in letters, emails, or minutes of construction meetings that the abovementioned grounds were apparent and causing delay to the project's critical path, this often sets aside the formal aspects for requesting a termijnverlenging. The rationale behind

this is that as the employer also has the right to grant a termijnverlenging, it should do so when it is clear enough that actions by that employer are causing a delay to the delivery date. Again a good example of the 'given circumstances' as described above.

When it comes to the grounds for claiming a termijnverlenging, as stated above named in paragraph 8.5 of the UAV2012, the given circumstances here also have their meaning in particular cases. Take for instance bestekswijzigingen 'changing of the work'. In paragraph 36 UAV2012 these changes are addressed in more detail. The most common bestekswijzigingen are of course additional works. It is well known that contractors can claim termijnverlenging when additional work is instructed and this additional work influences the project's critical path and delivery time. Often this kind of termijnverlenging is claimed as described in the contract. Sometimes this is forgotten or simply the additional work will not, or is unlikely to, cause a delay to

The perception of contracts and how to go about them varies significantly across the different parts of the globe.

the project's milestone(s). In these cases there will normally be no right for a termijnverlenging. Besides this normal route for claiming for a termijnverlenging it can also be that the amount of additional works means that it can no longer be expected for the contractor to deliver in time or meet all the project's milestones. This particular amount is derived from article 36.3 UAV2012 where it is stated that the contractor is obliged to carry out a total of additional works up to 10% of the contract sum and the contractor should be able to absorb such a percentage of additional work in its schedule. But, when the sum of the additional work increases to over the 10%, this surplus gives rise to a termijnverlenging.

Therefore it is important to note that this set of rules is drafted in order to ensure a balanced support of interest of the parties involved. So, when undertaking works in the Netherlands, one should not forget to take into account the justified interests of the other party for understanding the rights and obligations as contractually agreed. ■

## Five minutes with Ben van den Biggelaar

### Why and when did you join Driver Trett?

I am a naval architect by profession and so was originally involved in the design, construction, maintenance and operation of marine vessels and structures. My roles evolved and I worked in various commercial and technical positions within the shipbuilding and ship conversion industry and developed an interest in contracts and claims. About 20 years ago, I met Barry Kirby, the original director of Trett Netherlands to explore employment possibilities. Barry suggested that I had to gain more experience 'in the field' and develop broader knowledge and so I enrolled for a two year part-time MBA course and took on some challenging project management tasks. Some 10 years passed before I contacted the company again and was then employed.

### Was it worth investing those additional 10 years?

Yes, like many of my colleagues at Driver Trett, we understand the chal-

lenges project teams face during the execution of the works because we have experienced them ourselves. We understand that many project decisions have to be taken under constraints and may not always respect the contractual procedures, or are even shortcuts. This understanding helps me better advise and support the client's project team when I am assisting on live projects or in claim or dispute situations.

### What type of activities do you undertake?

I have mostly undertaken assignments in the offshore, marine, and oil and gas sectors supporting clients in procurement of (sub)contracts, contract management, and claims. I am part of a team in the Driver Trett Netherlands office that has significant experience of these types of projects.

### What do you love most about your job?

The diversity in the work and in the type of projects I have worked on. But above all, I enjoy the global nature of my work and the diversity of people I meet and work with.

### What has been your most memorable project and why?

I assisted an upstream offshore company on a very large scale conversion project which included many challenges that had never been tackled before. For example, separate fabrication and installation contracts in Brazil and China, importation of constructed works into China and a heavy lifting campaign in China. These all had to be undertaken under constraints of time, costs, and local content requirements.

### What is the most rewarding thing about your job?

When I can make the difference in putting together a claim to the satisfaction of the client or getting a (sub)contract in place despite major constraints.



### Where do you see the oil and gas industry in five years?

The shale gas developments have changed the scene and together with the fluctuating oil price have a large impact on how oil and gas companies can and will invest. The investments that are being made are getting bigger and bigger and consequently, so are the projects, the supply chain subcontracts and the risks. This puts more importance onto the role of the people who are involved and the need for experience and knowledge. In my view, this puts more emphasis on the importance of the services that Driver Trett can offer. ■

For more information of the services that Driver Trett can offer please visit [www.drivertrett.com](http://www.drivertrett.com)



## BYTE 1: FIDIC RAINBOW SUITE 7

In the seventh of the series of articles on the FIDIC suite of contracts, authors Paul Battrick and Phil Duggan continue their discussion on the many practical issues of using FIDIC contracts, based upon their working experiences.

## 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](http://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.

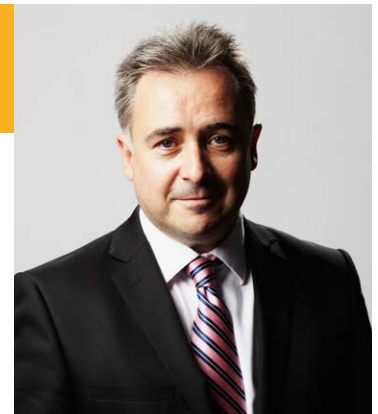
## DRIVER GROUP SUPPORT THE DIABETIC CENTRE

Driver Group took on a gruelling 10k walk to raise much needed funds for The Diabetic Centre, Dublin. On Friday 21 November 2014, 15 members of the Driver team based in the Oman office took part in the 10K trek on Seeb Corniche, Muscat. Setting off at sunrise to beat the midday sun, the walkers were lucky to witness one of Oman's most spectacular sunrises over the Gulf of Oman. The walk was in aid of The Diabetic Centre, Our Lady's Hospital, Crumlin, Dublin, Ireland. So far the team have raised nearly 3,000GBP for the centre which makes make a life changing difference to thousands of children across the world. For more information on the Diabetic Centre or to contribute please visit <https://www.justgiving.com/KevinMcPhilomy/>

## BYTE 2:

### NEC3: TIME TO TRADE IN?

Mark Wheeler, Driver Group COO for Americas, Europe and UK discusses the NEC3 contract and asks the question is it time for an upgrade?



## BYTE 3:

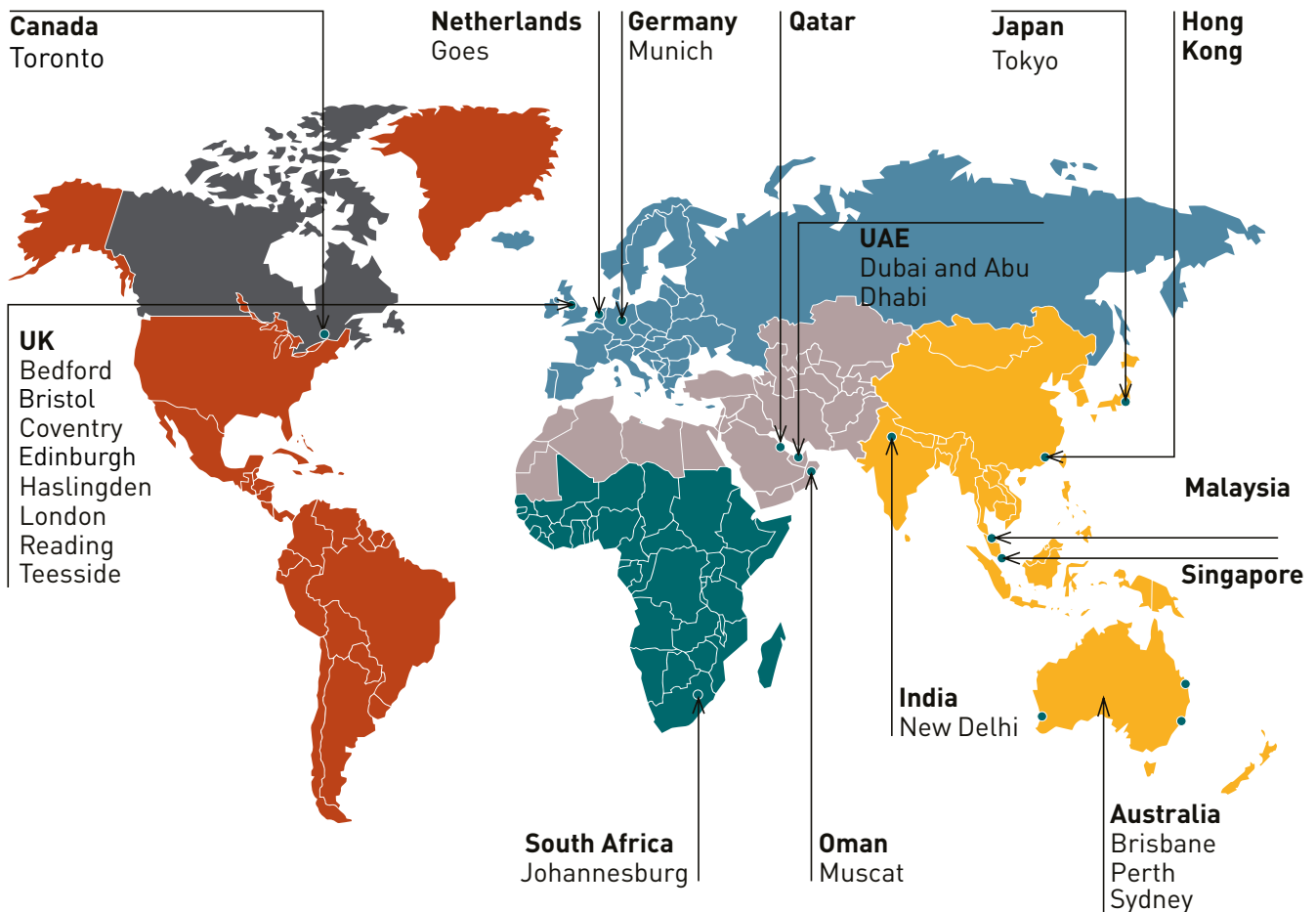
### THE IMPORTANCE OF A BASELINE PROGRAMME

The second part of Christian Merrett's – Associate Director, Driver Group Middle East the importance of an integrated project master baseline programme.





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\*from March 2015

The screenshot displays the DIALES app interface, which features a grid of expert profiles. Each profile includes a headshot, the expert's name, and their primary expertise (e.g., Quantum, Delay, Technical). Below the name, there are icons for various filters: a star for favorites, a magnifying glass for search, a clock for experience, and a document for contract details. The grid is organized into rows and columns, with each row representing a different expertise category. The interface is clean and professional, with a red header bar at the top of each profile card.

Mark Wheeler  
Quantum and Technical Expert

John Mullen  
Quantum Expert

R Peter Davison  
Quantum Expert

Waliid Abdelayem  
Delay Expert

Andrew Agathangelou  
Delay and Technical Expert

Philip Allington  
Delay Expert

Lee Barry  
Quantum Expert

Paul Batrick  
Mediator and DAB Member

Helen Bentley  
Delay Expert

David Bordoli  
Delay Expert

Bob Breeze  
Delay and Quantum Expert

Mark Castell  
Delay and Quantum Expert

Tom Comerford  
Quantum Expert

Alistair Cull  
Quantum Expert

Phil Duggan  
Quantum Expert

Alastair Farr  
Delay Expert

Ron Fernandez  
Delay, Quantum and Technical Expert

Michael Foster  
Quantum Expert

David Hardiman  
Delay and Quantum Expert

Leslie Harland  
Delay and Quantum Expert

Jean Peter Ho  
Quantum Expert

Michael King  
Quantum Expert

Stephen Lowlesley  
Delay Expert

Stuart Macdougald-Denton  
Delay and Quantum Expert

Garth McComb  
Quantum Expert

Uma Menon  
Quantum Expert

Carl Morris  
Quantum Expert

David Palentine  
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