driver trett DIGEST

Issue 13 | March 2017

Adjudication, Arbitration and above all ... Avoidance

DIGEST

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Welcome to the Driver Trett Digest

Welcome to this Middle East focussed Driver Trett Digest. This, our 13th issue, takes a closer look at the roles at play in dispute resolution across the region and the wider international construction market; from experts and arbitrators to lawyers, construction contractors and developers alike.

I consider myself very lucky to be working in a fantastic region like the Middle East, with all the innovative projects it boasts and the unique challenges that they bring. I am often asked, "what makes the Driver team different in this region?" and my answer is always that it is, "the diversity of our team and the close working relationship we have with each other". This was recently proven on a complex large-scale dispute in the UAE where Driver Trett were able to provide the delay, quantum, and technical experts to work closely to support our client. It is further demonstrated in this issue, where experts, researchers, claims consultants, and clients alike share insight and explanation on a variety of dispute resolution processes and approaches.

From Sean Hugo's outline of third-party funding of disputes, to regional Diales quantum lead Paul Taplin's frank analysis of the effect of a controversial new law under Article 257, and what it means to UAE experts; the issue addresses current and topical developments. This theme continues as Paul Battrick introduces the long awaited FIDIC Yellow Book and its likely market implications.

I am delighted to welcome two guest writers to this issue. Alan Henderson from Clyde and Co. UAE considers the application of adjudication in the Middle East. Whilst Paul Darling OBE QC from Keating Chambers in the UK looks at the roles of those involved in international arbitration.

Diales principal John Mullen looks at termination of construction projects, which some might say is all too common in the region, structural engineers Hooman Baghi and Stuart Holdsworth address the importance of accuracy in architectural and structural design, and Diales researcher Ruby Shaw examines how complex technical explanations in expert reports can be made more palatable for lay readers.

Back in the Middle East, Stephen Osuhor outlines the value, processes and techniques of effective project management; and Christian Merrett explores the never-ending debate around the application of concurrency in dispute resolution, the lessons that can be learned from its history in the UK, and how it fits in the local market and regulations.

I hope you enjoy this issue of the Digest. If you would like to discuss any of the articles, contribute in the future or have any feedback, please do get in touch.

Lee Barry
Managing Director - Middle East

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Impartial ... or imprisonment!

PAUL TAPLIN – HEAD OF DIALES, MIDDLE EAST EXPLORES THE CONCERNS FACING ARBITRATORS AND EXPERTS PROVIDING SERVICES IN THE UAE, IN THE FACE OF A REVISED PENAL CODE.

An unexpected recent amendment to the UAE Federal Penal Code is set to have a profound impact on those practicing as arbitrators, or experts, in a country which has worked hard to position itself as a worldwide and regional hub for arbitration.

With effect from 29 October 2016, Article 257 has been amended by Federal Decree Law No 7 of 2016 to read as follows (this is an unofficial English translation):

"Anyone who issues a decision, expresses an opinion, submits a report, presents a case or proves an incident in favour of or against a person, in contravention of the requirements of the duty of neutrality and integrity, *while acting in his capacity as an arbitrator, expert,* translator or fact finder appointed by an administrative or judicial authority or selected by the parties, shall be punished by temporary imprisonment [defined under Articles 28 and 68 of the Penal Code to mean between 3 and 15 years].

The aforesaid categories of persons shall be barred assuming once again the responsibilities with which they were tasked in the first instance, and shall be subject to the provisions of Article 255 of this law." *[emphasis added]*

When contrasted with the previous version the differences can be seen (again this is an unofficial English translation):

"An expert who is appointed by a judicial authority in a civil or criminal action, and who knowingly asserts a matter contrary to the truth or misconstrues such matter, shall be punished by detention for a period of at least one year, and shall be precluded from being an expert in the future.

The expert shall be sentenced to temporary imprisonment if his mission relates to a felony."

There are a number of key differences, but perhaps the most important is that the duty now applies not only to experts appointed by a judicial authority (likely to be court appointed experts) but to anyone who issues a decision, expresses an opinion, submits a report, presents a case, or proves an incident in favour of or against a person. This includes arbitrators and expert witnesses acting in private arbitral proceedings.

The requirement for committing the violation 'knowingly' has been removed, presuming therefore that it can be performed 'unknowingly'.

The process for making a complaint (regardless of the merits) is to bring it to the attention of the police. The recipient of such a complaint will likely have their passport retained whilst the matter is being investigated. There is no timescale for the investigation to be carried out and completed, therefore even the most spurious of claims could see the recipient confined to the UAE for a considerable period of time until eventually acquitted.

The new amendment will be of particular concern to those acting as sole arbitrator, as it is easy to see how a disgruntled party (of which there is always likely to be one) could use this as an unscrupulous tactic when on the receiving end of an award not in their favour.

Indeed, there have already been a number of arbitrators hearing cases seated in the UAE who have resigned from tribunals for fear of being subject to vexatious criminal proceedings.

So, what about experts? In the majority of cases there are two experts (one appointed by each party) which would seem to make the test of appearing to be "... in contravention of the requirements of the duty of neutrality and integrity ..." a little more challenging, especially in instances where the experts are able to reach agreement on various items.

But what about those instances where the opposing party appoints an expert who perhaps doesn't understand, or indeed doesn't wish to embrace, the independent nature of the role that experienced practitioners abide by? It seems feasible that, where experts are not able to agree, then there is an easy exposure to a claim regardless of how potentially unmeritorious it is. When considering an appointment, the problem is that an expert might not know who is appointed for the other side and therefore cannot make a judgement call at the time of enquiry or engagement.

And what about a jointly appointed expert? In this instance, it appears that the expert could have similar exposure to that of a sole arbitrator.

Many practitioners are suggesting that there is an overreaction to the new amendment and that, in practice, it was rare for parties to file criminal proceedings under the previous code. However, prior to the recent amendment there were no specific grounds for bringing criminal proceedings against arbitrators, or experts, who were alleged to have been in breach of their obligations.

It seems as though the mere threat of being on the receiving end of a claim has already been enough for some arbitrators to resign. If nothing else, it will certainly make individuals think long and hard about the potential repercussions before accepting an appointment.

The general perspective of the legal and expert community in the UAE is that the code needs to be amended in some way, and indeed a degree of lobbying of the relevant authorities has already begun. The feeling is that there is a real chance that the past 20 years of considerable effort put in to establishing the UAE as a worldwide recognised hub for international arbitration is at serious risk of collapse, unless it is repealed, changed, or clarified.

That said, the UAE government has always taken positive steps to ensure the growth of arbitration in the region. They will no doubt understand the concerns raised about the new amendment and the effect it may have on international arbitration in the country.

We therefore wait to see whether any of the current concerns are found to be justified and what measures, if any, the UAE government intends to take to remedy the situation. ■

Claims following the termination of construction contracts

JOHN MULLEN - PRINCIPAL, DIALES EXPLORES THE VARIOUS APPLICATIONS OF TERMINATION CLAUSES AVAILABLE TO EMPLOYERS AND CONTRACTORS UNDER THE FIDIC RED BOOK CONTRACT.

The last global economic crash saw a large number of international arbitrations of claims for the termination, or wrongful termination, of construction contracts. In many parts of the world, that crash was preceded by (and related to) a period of particularly high construction activity, and even 'over-heating'. Most termination disputes arising from the events of 2007 to 2009 have passed through their various dispute resolution systems, so now may be a good time to reflect on their typical features, from the perspective of a quantum expert.

Before looking at the typical components of termination claims and counterclaims, I start by broadly outlining the contractual bases for them. These can be 'for default' or 'for convenience' clauses. By way of illustrative examples, I quote the Federation Internationale des Ingenieurs-Conseils' Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 1999 Edition (FIDIC Red Book).

The most common ground for termination by a contractor alleges default by the employer in its obligations to pay certified amounts. This is more likely in a period of severe economic downturn, where employers fall short of funds. Provisions entitling a contractor to terminate for this cause usually precede the right to terminate with a right to suspend work (or to reduce its rate). As a result, in this context, the claims and counterclaims that follow termination are likely to also include costs related to the suspension or reduced rate of work, for example the under-utilisation of equipment, staff and labour.

The most common ground for termination by an employer for default alleges failure by the contractor in its obligations →

to perform the works. This is more likely where a period of economic downturn is preceded by one of great economic activity, such that contractors have been over-stretched. However, the background to such an assertion often includes disagreements as to responsibility for the delays to progress, with the contractor claiming extensions of time and costs related to delay and, perhaps, disruption. Here the claims and counterclaims that follow the termination are particularly likely to also relate to responsibilities for delays and their financial consequences.

Some construction contracts also provide the employer with the right to terminate for what FIDIC Red Book clause 15.5 refers to as 'the Employer's convenience'. This is intended to cover significant changes in circumstances (such as economic or political ones) that mean the employer no longer wants to continue with the project. This was a feature of the last economic crisis, if sufficient funding to complete a project was no longer available or it was rendered no longer economically viable. However, under most jurisdictions 'convenience', in this context, does not stretch to a desire to give the work to another contractor, and FIDIC Red Book clause 15.5 expressly states: "The Employer shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor".

With substantial falls in tender prices, employers that procured work in an overheated construction market in 2007 might have looked at tender prices in 2009 and regretted their timing; particularly, for example, where the sale or rental value of a building being constructed had dropped sharply. In these circumstances, a number of termination disputes at that time saw contractors assert that a purported 'termination for default' was actually an abuse of the 'termination for convenience' provision, and that the employer's real motive was to re-tender the remaining parts of a project at a significant saving.

Whether it is the employer or contractor that has purported to have lawfully terminated the contract, it is often the case that the other party will assert that the termination was wrongful. In this event, the terminating parties' claims will be countered by claims for breach or repudiation of the contract.

The consequences of all of the above are that the quantum practitioner will be faced with a variety of claims and counterclaims, made on a variety of bases. These are outlined as follows.

Contractor's lawful termination

Here the contractor will broadly be entitled to the value of all work done and its costs or losses resulting from the termination. For example, FIDIC Red Book sets this out in clauses 16.4 and 19.6(a) to (e) as follows:

"... amounts payable for any work carried out ...". This should involve a complete measure and valuation of all work done, including variations, usually by a joint survey between the contractor and the employer's quantity surveyor; often with photographic records and even video recording. Common problems include failure to carry out the survey jointly and issues as to whether the work carried out at the date of termination was in accordance with specifications, which occasionally requires the input of engineering expertise.

"... the Cost of Plant and Materials ordered for the Works ...". This should be part of a similar joint survey to that described above, and is also commonly subject to the same problems. Invoices should confirm the costs, including delivery charges. A further occasional issue is whether materials on a site were properly for that project? It not being unknown for contractors to over-order materials, or to use large areas on infrastructure projects to store materials intended for other, more restricted, sites.

"... any other Cost or liability which in the circumstances was reasonably incurred ... in the expectation of completing the Works". Common examples of this include:

- The purchase of expensive items of equipment, for example cranes.
- The construction of major temporary works, for example a concrete pre-casting yard.
- Recruitment of staff and labour. This is particularly relevant to major international projects, where a contractor brings large numbers of employees into a country for a particular project; incurring costs such as agency fees, health checks, transport, visas, etc.

Quantification of such items will include considerations such as: the capital costs; the extent to which they would have been 'written-down' on that project; residual values; the extent to which its costs have been recovered through the value of work done; and the extent to which those costs would have been recovered on the work omitted by the termination.

"... the Cost of removal of Temporary Works and Contractor's Equipment...". These are usually capable of being recorded, or are the subject of charges from suppliers. They may also include charges for the remaining period of a fixed hire term.

"... the Cost of repatriation of the Contractor's staff and labour ...". These usually include transport and visa cancellation costs and may include compensation payments. A consideration is whether the contractor would have had to repatriate those employees at the end of the contract anyway, a matter that varies between projects.

"... any loss of profit or other damage sustained by the Contractor." This is a particularly problematical head to prove and quantify, and submissions vary greatly in their level of detail. Those based on a tender build-up, beg the question as to whether that level would have been achievable in practice, which usually requires consideration of what the contractor was achieving pre-termination. More sophisticated loss of profit claims analyse the profitability achieved pre-termination and project that across the remaining work. This approach is particularly credible on repetitive work such as housing schemes. However, profits on the foundations to a high-rise building do not establish the same profit such as those on mechanical, electrical and plumbing (MEP) services and finishing trades.

Similar claims to these may be made by subcontractors and passed on as part of the contractor's termination claim. However, they can be of varying degrees of detail and substantiation.

Employer's lawful termination

Here the employer will broadly be due to pay the contractor the value of all work done, but to recover its costs or losses resulting from the termination.

The value at termination will include all work done, including variations, materials on site and entitlements to delay and disruption. For example, FIDIC Red Book clause 15.3 puts this as: "... the Engineer shall proceed ... to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work executed in accordance with the Contract".

The employer's recoveries are put in FIDIC Red Book clause 15.4 as follows:

"... (c) recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works ...".

Typically, these include:

- Procurement costs of engaging a new contractor, including professional fees in preparing new tender and contract documents.
- The extra-over costs of the replacement contractor, although, as noted previously, there might even be a saving. A common complication here is 'scope creep', where the new contract includes work that was not part of the terminated contractor's scope.
- This will require ensuring that variations instructed to the new contractor would not have also been variations for the terminated contractor. Common

The most common ground for termination by a contractor alleges default by the employer in its obligations to pay certified amounts.

examples include remedying defective work not discovered when the works were surveyed at termination.
- Other direct costs of completing construction, such as maintaining a site camp, offices and site security, where these are not part of the replacement contract.
- Additional professional fees in relation to the new contractor and its works. This should be the subject of new consultants' agreements, or addenda to their existing agreements. It usually results in debate as to whether they were reasonable and why additional fees were incurred at all.
- Damages for delay to completion. This will include time lost whilst procuring the replacement contractor. It will also require consideration of the reasonableness of the replacement contractor's programme and its relationship to the terminated contractor. This also often involves analysis of delays to the replacement contractor, responsibility for those, and whether they would have also impacted the terminated contractor.

> The most common ground for termination by an employer for default alleges failure by the contractor in its obligations to perform the works.

Employer's wrongful termination

Where the contractor considers the termination wrongful, claims will be for damages for breach of contract. Such claims will usually comprise similar heads to those outlined above, but might also include:
- Loss of reputation. This is particularly difficult to quantify and prove. It requires establishing the reputational damage and that work profitable was lost or denied as a result.
- Such disputed terminations often include a period of uncertainty following the purported termination, during which the contractor will retain resources until the contractual situation is confirmed. This can mean that a claim for demobilisation is preceded by a claim for a period of ongoing costs of resources.
- Similar claims are likely from subcontractors. As noted above, these can be in varying degrees of detail and substantiation.
- A claim in relation to any call on a performance bond, which coincides with termination.

This is a brief paper on a very broad topic that will be covered in much more detail in the forthcoming third edition of the book Evaluating Contract Claims by John Mullen and R Peter Davison, to be published by Wiley Blackwell later in 2017. ■

The Middle East – the next home for adjudication?

ALAN HENDERSON – SENIOR ASSOCIATE, CLYDE & CO LLP UAE CONSIDERS WHETHER ADJUDICATION COULD AND SHOULD SUCCEED IN THE MIDDLE EAST AND WHAT IS NEEDED TO MAKE IT HAPPEN.

In issue 11 (March 2016) of the Digest, Colm O'Suilleabhain of Driver Trett Abu Dhabi, considered why adjudication should not be dismissed as a potential method for resolving disputes in the Middle East. This article follows up on that premise and explores the obstacles that are currently preventing the effective use of adjudication in the Middle East. It also expands upon the previous view of why, ultimately, adjudication may well have a place in the resolution of construction disputes in the Middle East.

As outlined in the previous article, adjudication is most prevalently used in the United Kingdom, albeit the number of adjudications being commenced has dropped from its peak of 2,000 per year around 15 years ago, to roughly 1,000 per year in 2016. It was introduced via the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), which came into force in 1998. The HGCRA was designed to abolish bad payment practices and improve cash flow in the UK construction industry.

Prior to the introduction of adjudication, a party with an outstanding payment had no choice but to issue court proceedings for recovery of that payment. This meant that a party might have to wait months or even years to get a decision and even longer for payment.

The introduction of adjudication made it possible for parties to obtain a decision in just 28 days. If enforcement by court was required, that generally took place within a further 14 days. Each party to a construction contract was given a statutory right to adjudicate which involved a short hearing without oral evidence. This transformed the way parties recovered payment in the United Kingdom construction industry.

Although the underlying intention was to improve cash flow in the industry, one of the greatest criticisms of adjudication has become that there is no restriction as to what disputes are determined by it. It has become commonplace for parties to refer all kinds of disputes to adjudication, including those that are completely unsuited for a 28-day fast track procedure. For example, we have seen tens of million pound disputes referred to adjudication with both parties appointing QCs.

Adjudication decisions issued pursuant to the HGCRA are 'interim binding' – meaning they are binding unless and until one of the parties decides to refer the dispute to litigation or arbitration.

The success of adjudication in the United Kingdom has resulted in it being used in other jurisdictions, such as Australia and Singapore, on similar terms to the United Kingdom.

Middle East Adjudication

In the previous article, it was discussed how adjudication has seen less traction in the Middle East than other dispute reso-

lution methods. Adjudication appears to only be used when referred to in a multi-tier dispute resolution process of the dispute adjudication board (DAB) type, found in the FIDIC 1999 suite of contracts at clause 20. It can also arise through an ad hoc agreement between the parties, separate to the construction contract itself.

The older FIDIC 1987 Red Book is still largely used in the Middle East and it is only in the last few years that we have seen the 1999 suite increase in popularity. The DAB process within the 1999 suite of contracts however, has still not been widely used. Rather, more often than not, this process is removed from contracts with employers and contractors reverting back to the more comfortable, tried and tested process of an engineer's decision, amicable discussion, and arbitration.

The types of disputes that are most typically referred to adjudication in the Middle East include:

a) Simple measurement or valuation disputes, referred to a quantity surveying adjudicator to resolve an impasse or impose a ruling that both parties can refer to.

b) Broader 'final account' disputes, where the parties cannot face the prospect of lengthy or costly arbitration proceedings, and opt instead for a quicker resolution by engaging a third party neutral to adjudicate the account. This can be quite an extensive exercise where extension of time, prolongation and other claims can be included.

Potential use of adjudication in the Middle East

The issues outlined in Fig.1 are not impossible to overcome. For many reasons, the introduction of an alternative, shorter forum for the resolution of disputes in the construction industry in the Middle East is an attractive option.

The typical features of a construction contract in the Middle East tend to involve:

- Extremely harsh contract conditions.
- Incomplete designs.
- Requirements for contractor-led design development and significant variation account and delay claims.

Yet, there is an unwillingness to confront those claims head on, resolve them and pay them. This results in large exposures by main contractors (and the subcontract supply chain) to unresolved payment issues, which then stagnate for a number of years, or move slowly towards lengthy and expensive arbitration proceedings. Adjudication could unlock a large measure of this – if used properly – by:

- Resolving issues early and when they arise.
- Improving cash flow that would flow down the subcontract supply chain.
- Reducing large final account disputes.

Moves have been taken to introduce adjudication in Qatar through its Q-Construct scheme. The proposed Q-Construct Adjudication Rules will lay down the procedure to be observed and will be contractually binding upon the adjudicating parties.

In essence, Q-Construct is a fast track adjudication scheme which is intended to deal with disputes that arise within the context of construction projects. The procedure is designed to be simple and streamlined, with cases being determined by specialist adjudicators who are registered with the Qatar International Court and Dispute Resolution Centre (QICDRC).

Modelled after the Technology and Construction Court (TCC) of the UK, which is a specialist court that deals principally with technology and construction disputes, Q-Construct has been designed specifically to deal with construction related disputes in a manner which is both fast and cost effective, allowing construction projects to continue with minimal delay. This is a strong sign that we may be on our way to adjudication becoming more commonplace in this region.

However, caution would be needed if adjudication was to be formally introduced in the Middle East:

- There would need to be strong statutory support to make it work. The concern and risk for employers and contractors pursuing adjudication, in the absence of a formal recognition of it as a valid and binding dispute resolution mechanism in the legal systems in the Middle East, is a significant hurdle to overcome.
- There would also need to be a focus on upskilling the construction professionals currently resident in the region, to accommodate the number of quality adjudicators that would be required. After all, satisfaction with the adjudication process is only as good as the decision that is rendered and the quality of analysis and thought that is put in to it.

In short, the road to the introduction of adjudication as an effective tool for the resolution of disputes in the construction industry in the Middle East is not blocked. Caution is needed by those considering embarking on the adjudication journey if its use is to be successful in the Middle East. ■

FIG. 1 OBSTACLES TO ADJUDICATION IN THE MIDDLE EAST

Taking account of the nature of the legal system and construction industry in the Middle East, the principal reasons why I consider adjudication is not more widely used here are:

1. Adjudication is not recognised in the underlying civil codes as a form of dispute resolution and does not give rise to a binding award. The law provides only for disputes to be resolved via the court or arbitration processes. Adjudication is therefore, only of contractual effect. In order to gain an effective and enforceable adjudication award, it is then necessary for a successful party to pursue matters through arbitration or the local courts.

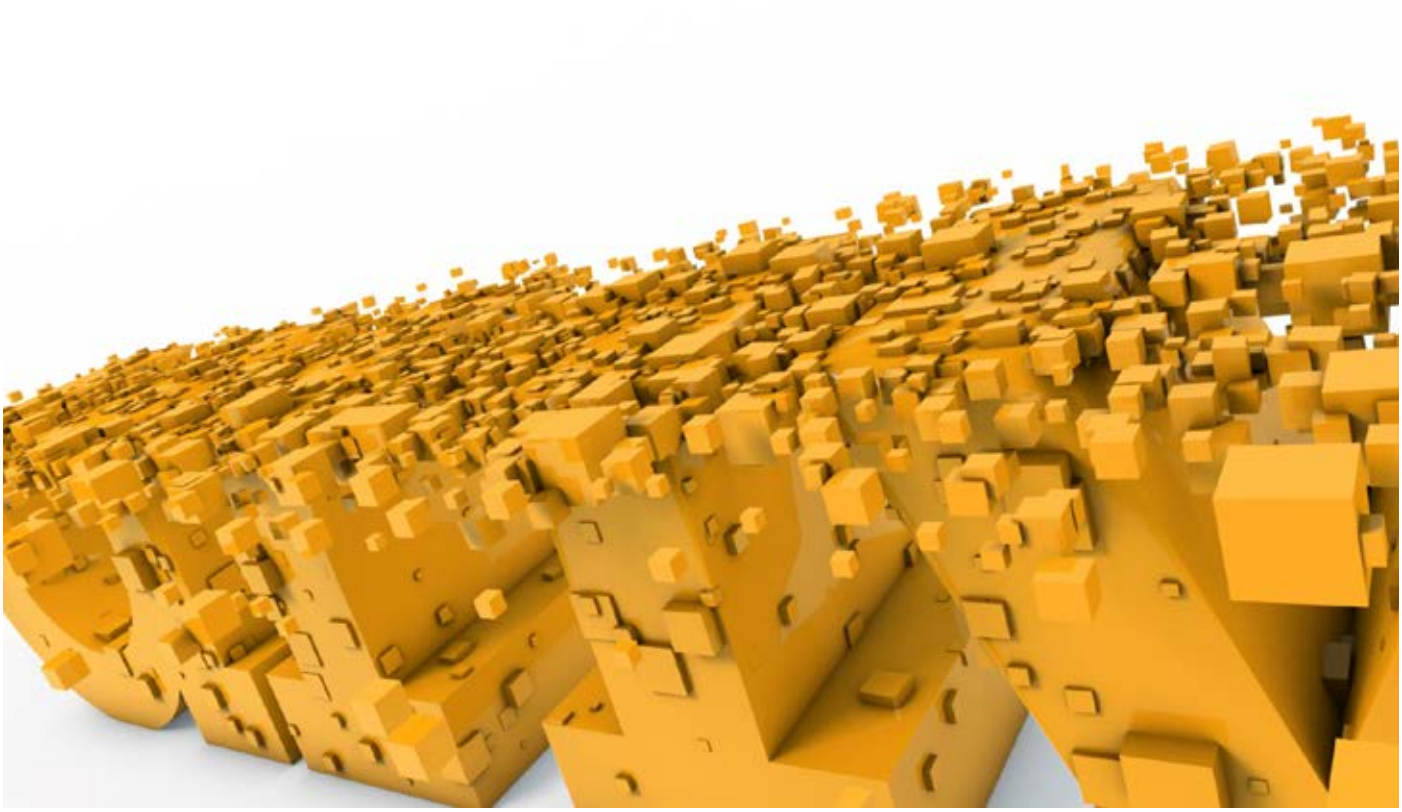
2. The issue of enforcement through arbitration or the courts is not then a straightforward matter of simply 'endorsing' the adjudication. Rather, it is necessary to re-litigate the substance of the dispute afresh. So, with that in mind, the adjudication process is viewed as adding a layer of bureaucracy to a process when parties to a dispute would rather just get straight on to arbitration and avoid the unnecessary expense associated with adjudication. Adjudication is not seen as providing a quick or effective way of resolving a dispute. Parties are averse to the risk of spending time and money going through the process only to have to go through a similar process again in a legally recognised forum such as arbitration or local court.

3. At the employer-main contractor level, to a degree there remains a master-servant mentality. Employers recognise adjudication is a key to potentially unlocking better cash flow and swifter resolution of payment issues for the benefit of contractors and see the process as benefitting contractors far more than employers. Employers do not seem ready for that mind shift just yet, and prefer to let claims drift to the end of a project when a 'deal' can be done, or issues rolled in to the price of the next project.

4. As there is then this blockage at the employer-contractor level, the incentive for a main contractor to adopt adjudication in its contracts with a largely international supply chain is missing. Main contractors simply risk being caught in the middle if they introduce mechanisms that benefit their subcontractors, but lack similar recourse against their employers.

5. To a certain extent, there is also a distrust of 'new' techniques and evolution in the Middle East. The FIDIC 1987 Red Book is now losing ground to the 1999 FIDIC books, but it is still at the heart of many construction projects in the region. The reason for that is because employers understand, and are more comfortable with, the 1987 version. They also have their standard amendments which shift the risk profile in the employer's favour. The assumption is that a contractor would have something to gain (and therefore the employer something to lose) by moving away from this. The same is true of movement away from arbitration and the court system to adjudication and other forms of alternative dispute resolution (ADR).

6. Finally, there is also a limited pool of potential quality adjudicators in the Middle East. In my view, where adjudication is on foot and is intended to operate within a tight timeframe, it is necessary to have adjudicators 'on the ground' – and there probably aren't enough in the Middle East. Arbitration is less of an issue, as expertise is often flown in and the timetable more relaxed.



Expert reports - deconstructing the technical

RUBY SHAW - RESEARCHER, DIALES TECHNICAL TEAM EXPLAINS THE BENEFITS OF UTILISING HIGHLY-SKILLED, BUT NON-TECHNICAL, RESEARCHERS TO ENSURE THAT EXPERT REPORTS ARE FOCUSSED AND FIT FOR PURPOSE, I.E. INFORMING LAY PEOPLE REGARDING COMPLEX TECHNICAL DISPUTES.

A history graduate and a team of experts involved in some of the most highly complex technical disputes, who produce cutting edge sculptures that push the boundaries of physics and engineering, may at first appear an unlikely union; however, this is no accident.

Structural and architectural concepts, such as 'weld-thru decks' and 'curtain walling', were certainly completely alien to me when I joined the Diales technical team several months ago, but the intention is to use this technical inexperience to our advantage. A key part of the role of our researchers is to review and critique the expert reports, ensuring that they are appropriate for the audience and tailored towards their needs. We are normally instructed by lawyers, and although in some cases they have a good general understanding of structural and architectural matters, it is rare that they have a detailed understanding of the specific issues our experts are instructed to address. It is therefore important to select an appropriate level of technical detail for our reports. For a team of experts with substantive experience in the fields of architecture, structural engineering, building surveying, and mechanical and electrical (M&E) engineering, it can naturally prove difficult to gauge a layman's level of familiarity with, and accessibility to, complex technical concepts.

In an attempt to achieve the correct balance between incorporating crucial

technical content and enabling the reader to digest the arguments put forward, our researchers essentially place themselves in the shoes of those who will read the report, especially the tribunal. We identify any aspects of the report that are likely to cause confusion, including technical concepts that require further explanation or jargon that needs defining. No doubt phrases such as 'add a definition here', 'include a diagram to show this', or 'expand on this point' must wear thin on our experts at times, but if added clarity is provided to our reader through this process, then it is worth the perseverance.

Our researchers are also required to place themselves in the shoes of opposing parties, which is an aspect of the role that I find particularly interesting. By testing the opinions of our experts, the logic behind them, and the evidence put forward to support them before they take to the witness box, we can provide some comfort and reassurance to our experts. Any areas of their reports that require further substantiation can be identified at an early stage, allowing further evidence to be gathered to add robustness to the arguments. Technical experts are also expected to apply professional judgements to the factual situations they encounter, including determining whether reasonable skill and care was taken, comparing the quality of the build with current professional standards at the time, and making judgements based upon 'the balance of probabilities'. Whilst our experts are of course trained in the application of these tests, researchers can help to navigate it, drawing together the evidence required for a judgement to be made and identifying any inconsistencies in the opinions reached.

Checking that terminology ... aligns with that of the documentation provided is essential in ensuring clarity for the reader.

As I am sure most experts will have experienced, the amount of documentation involved in large cases such as international arbitrations, can be overwhelming. Having a researcher on hand to carry out elements of the preliminary work helps to take some of the weight off the experts. Under the control and direction of the appointed expert, our researchers are tasked with quickly getting to grips with the documentation. Tasks may include reviewing the expert's instructions; noting the crucial points; and taking part in discussions to devise an approach to carry out the detailed analysis and create a framework for the reports, to ensure that all issues are addressed in a logical and sophisticated manner. Where more than one expert is working on a case, the researcher also acts as a middle man, helping to provide continuity by ensuring that all of the experts' approaches to the issues are consistent.

Technical and legal matters aside, a fresh pair of eyes can also help to eliminate grammatical and typographical errors that have the potential to detract from the high-level technical expertise contained within the report. The well-known phrase that 'little things make a big difference' comes into play here. Meticulously checking that all headings are formatted correctly, all lists have consistent punctuation, and the names of all parties to the dispute are abbreviated correctly throughout, adds the finishing touches to the report. The importance of asking a peer to carry out this 'sense check' was drilled into me throughout my university studies and, from my experience, I think it is fair to say that even for the most confident and experienced writers, it's extremely difficult to identify these errors in your own work.

Of course, appropriate language is a crucial element of the reports, especially making sure that any legal terminology is used correctly, as well as avoiding colloquial phrases and contractions. Checking that terminology used within the report aligns with that of the documentation provided is essential in ensuring clarity for the reader. One of our recent reports,

...the correct balance between incorporating crucial technical content and enabling the reader to digest the arguments put forward...

for example, had the potential to cause confusion through its use of two descriptions - 'Block A' and 'Development A' – to describe the same area. By checking that this actually reflected the phrasing of the documentation provided, and adding a footnote to alert the reader to this, we aimed to avoid any unnecessary confusion.

There are also several elements of the expert reports that require little technical expertise at all. The consideration of introductory sections by a researcher, including the background to the case and listing the documents and instructions received, enables the experts to focus more on the 'nitty-gritty' technical analysis, such as calculating wind loads and reviewing soil data (which I am assured is a lot more interesting than it may sound)! The added benefit for our client is that this comes at a lower cost. With experts focussed on drafting those aspects where technical expertise is required, it enables us to produce a report in a cost-efficient manner, without compromising on the quantity and quality of technical advice required by our client.

Although the presence of our researchers is currently limited to the Diales technical team, hopefully this provides some food for thought as to how a similar role could be applied to the fields of quantum and delay, and their respective expert report writing. It is worth noting that, although quantum and delay experts may be used to support from junior colleagues, this is rare among technical experts whose work doesn't often lend itself to team working. In many ways researchers fulfil a similar role to the quantum and delay support teams, with responsibility for reviewing, researching, and analysing the documentation, but they also bring a different perspective. As 'outsiders' to these disciplines, we can relate very closely to our clients and their lawyers, and hence provide assistance in achieving greater clarity. Through my brief encounters in the quantum and delay world, I have already become acquainted with jargon such as on-site 'gangs' - which turned out not to be the group of hooded youths I was imagining - so I look forward to what other revelations might arise! ■

International arbitration – the runners and riders

PAUL DARLING OBE QC - KEATING CHAMBERS OUTLINES THE ROLES AT PLAY IN AN INTERNATIONAL ARBITRATION AND THE TRUTH OF THE MATTER, THAT NOTHING BEATS EXPERIENCE.

Some people say that international arbitration is a grand club of arbitrators, lawyers and experts. I think that is a little harsh. Nevertheless, there are many features of international arbitration, its people and its practice which differ widely from domestic litigation, arbitration and adjudication which set the international arbitral community apart. The purpose of this article is to shine a light on that world and to talk a little about the roles of each of the participants.

One starts with the arbitrators. Sometimes there are three, other times there is one and occasionally, in my experience, two or five. In international arbitration the norm is three. Each party appoints its own and then either between them or, particularly if the two arbitrators cannot agree, the arbitral institution will appoint the president or chairman. For the purposes of appointing the chairman, parties will very often be permitted to liaise with their nominated arbitrator to agree a choice. There is, apparently, a mini-industry in appraising arbitrators for their views, practices, etc. before allowing them to be appointed. What does X think about global claims or concurrency? Is he pro claimant or an employer's man? What about the dynamic between potential chairman A and arbitrators B and C? Will A side with B or with C instinctively? I hope that I burst no one's bubble by saying that my experience is that all of that is vastly overdone. In my experience, arbitrators approach substantive and procedural matters with an open and fair mind, and trying to identify their advanced prejudices is simply a waste of time.

Then you have the lawyers. Very large sums are spent on lawyers in international arbitration. Appointing an experienced lawyer to run an arbitration is key. The key skill is to take advantage of the nature of the process, but to do so economically and without spending a fortune in fees. Some, but not all, lawyers manage this. Experience is the key. Knowing the shortcuts, and equally importantly where one should not take a shortcut, is paramount. Whilst every arbitration would be different, it is essential to have a legal team that can manage the documentary evidence, prepare the witness statements, draft written submissions or briefs, and be able to take maximum advantage of the hearing. Teams need to be built which encompass those skills.

Hearings in international arbitrations are much, much shorter and more condensed than UK court hearings or arbitrations. The advocate really has to be absolutely clear, in advance, what his points are and what he is trying to achieve. He needs to know what he can leave and what he must pursue. He needs to be able to create a quick impression with the arbitral tribunal about whether or not this is a witness to be trusted. In this respect, international arbitration is particularly unforgiving. Witnesses know that they are only going to be giving evidence for comparatively short periods and, very often, all the skill of the cross-examiner is needed to achieve the best results.

The need for an expert to be thorough and honest is never greater than in an international arbitration. A party-appointed expert needs to be able to cut through swathes of material presented in writing in an authoritative and quickly digestible way. Tribunals getting to grips with big cases need the expert evidence to be comprehensible. The expert has to then be able to defend his case, very often, in quite a short cross-examination. That makes it all the more important that the expert has not made silly, if irrelevant, errors because if they have they undermine his credibility. Experts need to be able to express themselves clearly and succinctly and to be able to stand up to robust and effective cross-examination. It is also important to remember that experts need to be able to perform at their highest level in experts' meetings. Tribunals always find experts' agreements very helpful and ensuring the agreements are digestible and properly reflect the experts' agreements and their differing views is key.

From time to time, an expert will be asked to be a tribunal expert. That involves considerable difficulties. The expert is advising the tribunal. They will often be subject to cross-examination from both sides. On the one hand, they have to give the tribunal all the help they want, but on the other remember that they are not the person deciding the dispute.

Then there are the factual witnesses. In the first instance, their evidence will be given by witness statements that, in international arbitrations, will nearly invariably stand as evidence in chief. They are the ultimate leading questions. "Is this witness statement prepared over several weeks by your solicitors at great expense poured over by the entire team and reviewed and edited at great length true to the best of your knowledge and belief?" Answer "yes". You surprise me.

Witness statements really do need to be in the witnesses' own words. Otherwise, like answers to leading questions, they will not provide the help to the tribunal that they are intended to give.

Then comes cross-examination. Again, the skill of the cross-examiner and the skill of the witness becomes key. As with experts, you have to pick your points and create an overall impression. As a witness you have to remember your role. You are there to answer the questions and not argue the case. However, you have to avoid the questions leading you down alleys. Interestingly, witness training has been getting a less enthusiastic review from tribunals, both courts and arbitrations. The witness has to go about doing his job in accordance with the rules – i.e. truthfully. There is nothing so devastating as a truthful witness, who has prepared his own witness statement, and who gives appropriate respect in response to an over robust cross-examination. As against that, the witness who argues the case and seeks to tailor his answers comes across very badly.

So, all of these players have their own different roles in this process. I think that to call it a club is really harsh but boy, does experience help! ■

The value of project management

STEPHEN OSUHOR – DIRECTOR, DRIVER TRETT UAE OUTLINES THE KEY ASPECTS AND BENEFITS OF ENGAGING A PROJECT MANAGER, ESPECIALLY IN THE EARLY STAGES OF A PROJECT LIFE CYCLE, AND THE VALUE THIS DELIVERS TO THE CLIENT.

Project management can mean different things to different people, but essentially it is the application of proven and repeatable processes and techniques in order to achieve project success. Project management does also require intuitive skills and experience, given that the processes involve managing and relating to people and all projects will have unique situations.

Prior to my current role, I was a project director for a private sector development company overseeing large mixed-use schemes. I always found that the advice and assistance from my most trusted project management consultants was invaluable, and the relationships we built over time meant that they could often anticipate my requirements, in advance of me giving any specific instructions.

In my experience, the benefits of appointing a project management consultant will come from hiring a good professional at the very start of the project. The project manager (or person leading the project management team) should be the client's right-hand man right from the very beginning, and someone that the particular client has a natural affinity to.

It naturally takes some time to develop a relationship with an external consultant, and during this bedding-in period the client should try to divest as much of their own knowledge as possible. The project manager needs to benefit from the client's depth of knowledge in their own field of business and understand the traits that are specific to that client organisation. At the same time, the client needs to benefit from the structure and experience that a good project manager will bring to the implementation of their project, right from concept stage.

In the UAE, we tend to find that a lot of disputes have arisen due to lack of adequate planning at the inception stages of the project, and also a lack of appropriate risk management processes being implemented to manage the inevitable issues that arise.

> "Plans are worthless. Planning is essential." -
> **Dwight D. Eisenhower**

Some of the main areas of benefit that a project manager can bring to any project are as follows:

PROJECT BRIEF

This is one of the main areas where many major project failures can be traced back to. An incomplete, inadequate or ill-informed project brief can set the project off on a path that gives it little chance of success. Whilst eventually there can be some re-adjustment of the project in order to bring it back into line, invariably such re-adjustment will come at the expense of time, cost and quality which will invariably result in overall dissatisfaction.

The project manager will assist the client in writing a brief that comprehensively covers all aspects of the development process, and is not just confined to the intended building uses, design aspirations, and commercial objectives. If the brief needs to remain flexible initially (for example, can the concept be developed to suit either hotel or residential apartments?), the specific parameters for flexibility will be clearly defined so that time is not wasted in pursuing irrelevant or inappropriate options.

DESIGN DEVELOPMENT AND COST PLANNING

These front-end activities need to be carried out with absolute rigour, so that the results of the project team's efforts are precise and relevant to the project brief. It is very difficult to go back to the drawing board once the design process has reached a certain stage, it is therefore critical to ensure that the work is accurately validated at each key decision stage, right from concept sketches through to tender and beyond.

Quite often, organisations consider that large elements of a project can be addressed later in the project cycle and will make cost allowances by way of provisional sums. Rarely do these provisional sums get expended without significant risk to the overall aims of on-time and on-budget project delivery.

The project manager will instigate a formal process of continuous review to ensure that these activities stay on track.

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RISK ANALYSIS AND MANAGEMENT

It is quite often the case that the first in-depth risk analysis is carried out much later in the project delivery phase than it should be. This is mainly due to lack of appreciation of the benefits of recording known and perceived risks at concept stage.

The project manager will set up procedures to assess, record, and manage the risk profile for the project, which typically requires the input from many different sources at various stages. The method of disseminating the risk information is also an important consideration for the project manager; in order to ensure that recipients, with varying perspectives, will be able to digest and act upon the information rather than ignoring it because they do not fully understand the implications.

PROCUREMENT ADVICE

The method of procurement for any project should be selected on the basis of the specific criteria relating to that project. Where the client has an absolute desire to utilise a particular procurement route, the whole project needs to be aligned to the chosen route. It sounds obvious, but a project should not be procured through a traditional route if there is not enough time, or funding, to produce a very detailed design and specification prior to tender. Similarly, it is not wise to contemplate a design and build route without permitting sufficient scope, within the tendered design and specification, for the contractor to carry out its own design.

The requirements for risk transference in any procurement route and the method of doing so, must be assessed by the project team, agreed with the client, and accurately recorded within the contract documents. Failure to do so will only result in problems somewhere down the line. There are many horror stories that have arisen due to attempts to try and hide risk transference to the contractor, on the basis that this might result in lower tender prices. This is sheer folly, because when such risks are realised the whole project will inevitably suffer – irrespective of where the contractual liability eventually rests.

The project manager will assist the client in reviewing every aspect of the project and the client's key objectives relating to time, cost, and quality. This can then be used to formulate a robust procurement strategy which includes explicit risk transference. The project manager will subsequently ensure that all members of the project team remain focused on delivering in accordance with the strategy approved by the client.

TENDERING AND CONTRACTOR SELECTION

The process of pulling together all of the necessary documentation for tendering purposes is one that requires a high degree of diligence, in order to ensure nothing of relevance will be missed. It should never be limited to just the design, specification and pricing documents. For example, there could be particular aspects of an anchor tenant's requirements that need to be considered within the phasing and handover processes.

The shortlisting of contractors, and their eventual selection, must not only be done by reference to matters such as technical ability and financial stability, but also other 'softer' issues such as affinity to the incumbent project team. For example, if the lead designer and contractor do not appear to be able to relate to each other, or have historic issues between their respective organisations, this can result in major problems further down the line.

The project manager will instigate robust procedures for the selection process, which will seek to ensure that the correct decisions are made, and for the right reasons.

THE PROJECT MANAGEMENT PLAN

Every project should have a specific project management plan (PMP), which sets out the procedures and requirements for managing the project. Some of the procedures might be generic, but most should be tailored to ensure that the structure and processes within the client organisation are accurately reflected. The PMP is an invaluable tool in communicating the many facets of good project management to the relevant key personnel on the project. It is also something that should be continually monitored and updated where necessary or appropriate.

The project manager will commence preparation of the PMP early in the project cycle, and ensure that it is a robust document prior to the tendering process. The PMP should therefore be included in the tender documentation, so that the tendering contractors can take heed of all the necessary project control procedures and make due allowances within their pricing.

To summarise, professional and disciplined project management can provide very important benefits and ensure that specific project objectives are effectively accomplished.

It is widely accepted that time is money. A dedicated project management resource, which by its nature will introduce structured and managed processes, provides opportunities for time and cost savings over the lifecycle of any project – whether it is through obtaining timely approvals, ensuring professional validations, or just the ability to bring focus to bear on critical tasks without being distracted by other competing business interruptions.

Organisations that continually develop and improve their project management capabilities are proven to increase their competitive advantage and reduce their risk. A Project Management Institute (PMI) study shows that projects carried out by organisations that are high performing in project management, meet original goals and business intent two and a half times more often than those in low performing organisations (90% vs 36%). High performing organisations also waste about 13 times less money than low performers [source: PMI 2015 Pulse of the Profession®: Capturing the Value of Project Management].

The main characteristics of a project will not change regardless of whether project management processes are applied or not. The value of project management is that events within the project will be dealt with proactively, rather than in a haphazard and reactive manner, which in turn increases the chances of success. ■

Third-party funding: kicking the tyres

SEAN HUGO - ASSOCIATE DIRECTOR, DRIVER TRETT OUTLINES THE PRACTICE OF THIRD-PARTY FUNDING AND HOW IT APPLIES IN THE JURISDICTIONS OF THE UNITED KINGDOM AND THE UNITED ARAB EMIRATES.

History of Third Party Funding

The funding of litigation or arbitration is a costly undertaking. There are countless circumstances whereby claimants who have meritorious legal claims are precluded from accessing justice because they cannot cover the legal costs. In these types of situations obtaining finance from a third-party may provide a viable solution[1]. Sound business reasons may also lead a party towards third-party funding.

What is Third-Party Funding

Meredith and Mackinnon describe Third-Party funding[2] as: "A party who has no existing interest in the dispute but provides financing for some or all of the claimant's legal costs and disbursements in return for part of any recovery whether via settlement or judgment/arbitration award. It is non-recourse funding whereby the third-party funder will not require any repayment of the finance provided." An antagonist may cynically liken third-party funding to 'betting on the horses'.

Financing litigation or arbitration, with the sole intent of receiving an investment return, appears to be a financially ludicrous proposition but the practice can be highly lucrative for the party financing the litigation or arbitration. Taking an investment interest in the legal claim of another party is not new, it has been around for hundreds of years, possibly longer, as some suggest the practice can be traced back to the Roman era.

THE STRUCTURE OF THIRD-PARTY FUNDING

This can generally be separated into two categories: (1) Litigation Crowdfunding and (2) Corporate Third-Party Funding.

Litigation Crowdfunding

Litigation crowdfunding is obtained from multiple unrelated funders who independently have an interest in the outcome. The interest ranges from purely personal reasons to investment return, "most recently Grahame Pigney, a retired IT consultant, raised over £170,000 on a legal crowdfunding site in order to assist in funding the 'Brexit Case' reaching the Supreme Court"[3]. On the opposite end of the scale, until recently[4], invest4justice.com developed a business model for crowdfunding litigation with the aim of providing an investment return to the independent funders. Once signed up to the invest4justice.com, platform contributors could review case information and evidence and ask the litigant or legal team further questions before finally committing funds to a case. Once the full litigation fees were raised, a crowdfunding agreement was developed outlining each funder's contribution and the agreed return on this contribution. Published information from invest4justice.com stated that: "statistics taken from various courts show that roughly one in two cases win and there is approximately a 94% chance of obtaining compensation if four cases are funded"[5].

Corporate Third-Party Funding

The principles are similar with corporate third-party funding institutions but the mechanics of the process are slightly different. Typically, corporate third-party funding institutions require that lawyers are instructed prior to approaching them for funding. The specific lawyers instructed play a large part in the decision-making process of the corporate third-party funders; as do consultant experts, who may consider technical issues and the likely recovery in monetary terms. Corporate third-party funders must be sure they are backing a 'winning horse', right case, right lawyers and experts, and also the right claimant. If the decision is made to provide funding to the claimant, and the claimant agrees to the third-party funder's terms, then a contingency fee agreement is entered into by both parties.

When third-party funders get the right outcome on the right case it can be extremely lucrative. The underpinning principle of third-party funding is that the cost of accessing justice is typically far lower than the final amount that can be won as compensation[6]. The viability of the business model is evidenced by Burford Capital LLC (a third-party funder listed on the London Stock Exchange). In the financial periods 2013 through to 2015[7] it recorded revenue growth, attributable to the provision of third-party funding, of 123% and an average operating profit margin of 80% over the same period[8].

Ethics of Third-Party Funding

The practice of third-party funding has passionate protagonists on both sides and is quite frankly a morally challenging topic. One of those protagonists in the 'against' corner is Lisa Richard[9] who stated (in an article authored in 2014) that: "No matter how much proponents try to dress up litigation funding, the reality is not pretty: litigation funders meddle in litigation, turning a profit for themselves at the expense of the parties to litigation, attorney-client relationships and the integrity of the U.S judicial system"[10]. Richard cited the case of Chevron Corporation vs. Donzinger. Donzinger was the lead plaintiff in a mass-tort environmental contamination lawsuit, brought by Donzinger on behalf of Ecuadorians who had suffered harm as a result of Texaco's operations in Lago Agrio, Ecuador. Judge Kaplan held that the, "decision in the Lago Agrio[11] case was obtained by corrupt means". Kaplan said, "the evidence showed that an American attorney Steven Donzinger and his legal team bribed an Ecuadorean judge to issue an $18 billion judgment against the oil company in 2011"[12].

The opinions in the 'for' corner suggest that third-party funding is here to stay, and not just for small or cash strapped firms. →

Indeed, many claimants are pursuing what they consider to be their entitlements using third-party funding as a matter of choice and in doing so shifting risk and cost off of the balance sheet. Many global law firms have also bought into third-party funding and often promote its use to their potential clients, corporate and otherwise, when bidding for work in connection with large disputes.

Third-Party Funding in the UK

The antique common law doctrine of 'champerty and maintenance' historically determined the legality of third-party litigation funding. Maintenance being defined as the situation that exists when a party supports litigation, without having any interest in the outcome. Champerty being defined as a form of 'aggravated maintenance' whereby a party supports litigation with the specific intent of sharing in the spoils[13].

Prior to 1 January 1968, 'champerty and maintenance' was considered a crime at common law and by statute[14]. Subsequently the Criminal Law Act 1967 abolished criminal and civil liability with respect to 'champerty and maintenance' under the law of England and Wales. However, s. 14(2) of the 1967 Act states that, "...the abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal"[15].

Interestingly the UK's close neighbour Ireland, who inherited the Maintenance and Embracery Act passed in 1634[16] while under British rule, have upheld the doctrine in the Statute Law Revision Act 2007. In 2016, in the case of Persona Digital Telephony and Anor. v Minister for Public Enterprise and Ors.[17], Justice Donnelly held that third-party funding is illegal in Irish law. The court found as follows: "In conclusion, maintenance and champerty continue to be torts and offences in this jurisdiction. From the Irish authorities above mentioned [Statute Law Revision Act 2007], there is a prohibition on an entity funding litigation in which it has no independent or bona fides interest, for a share of the profits..."[18].

A recent development with respect to

> ...third-party funding is here to stay, and not just for small or cash strapped firms.

third-party funders being liable for costs, within the jurisdiction of England and Wales, is in the case of Essar Oilfields Services Limited v Norscot Rig Management PVT Limited (2016)[19]. The court upheld the decision of a sole arbitrator relying upon s59(1) and s63(3), who determined that Essar was liable for US$4 million of costs of which a portion included third-party funding costs. A key factor in the arbitrator's mind when making his award was the conduct of Essar. The arbitrator considered that Essar had deliberately sought to financially damage Norscot such that Norscot would abandon their claims. Third-party funding was therefore a lifeline for Norscot and the arbitrator recognised this, "Norscot had no alternative, but was forced to enter litigation funding ... It was blindly obvious to [Essar] that the claimant ... would find it difficult if not impossible to pursue its claims by relying on its own resources. The respondent probably hoped that this financial imbalance would force the claimant to abandon its claims"[21].

In the case of Excalibur Ventures v Texas Keystone and others[20], the Court of Appeal decision further confirms that a costs order may be made against a party who has provided funding, i.e. without being a party to the claim .

Funds were provided to Excalibur, the claimant, who had submitted claims to the value of $1.6 billion. The judge noted that the claims "failed on every point" at the original trial, not in the least due to "false and misleading statements" made by Excalibur's leading witness, and that there had been a "resounding, indeed catastrophic defeat" for Excalibur.

The Court of Appeal considered that since third-party funders seek to derive benefit from a decision in favour of their client just as much as their client and that the, "derivative nature of a commercial funder's involvement should ordinarily lead to his being required to contribute to the costs" such that they should also have to pay costs if so awarded.

Given the legal and ethical standing of third-party funding, an important consideration going forward is how the industry is regulated in order to prevent abuses that have been perpetrated in the past. In the UK, the Association of Litigation Funders (ALF) is one such body who describe themselves as, "an independent body that has been charged by the Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of litigation funding in England and Wales"[22]. The regulatory body sets out that its primary role is to ensure the practice of ethical behaviour, ensure improved use and application of third-party funding in the interests of prudent financial risk management, and help shape the legal and regulatory framework with respect to third-party funding.

Third-Party Funding in the United Arab Emirates (UAE)

The UAE has a federal court system, as well as the common-law jurisdictions of Dubai Financial Centre Courts (DIFC) and Abu Dhabi Global Markets Courts (ADGM). Third-party funding of litigation within the civil jurisdiction of the UAE is not prohibited by the law. Keith Hutchison of Clyde & Co. points out that the UAE has not traditionally been considered as a market, largely owing to the level of uncertainty and unpredictability of the legal processes and outcomes[23]. His article states that this trend is being reversed, both by the way in which local courts and parties to a dispute perceive the arbitration process and by the establishment of dedicated specialist financial courts within the UAE. Unlike the UK, where the litigation finance industry has setup a self-regulatory body (ALF), the UAE has no such body. Edward Brown of Al Tamimi and Co recently looked into crowdfunding platforms in the UAE and noted that, "any financial service or activity in the UAE or the DIFC is regulated by the Central Bank, the Securities and Commodities Authority (SCA) or, in respect of the DIFC, the Dubai Financial Services Authority (DFSA)"[24]. Although there appear to be no legal issues with the practice of third-party funding in the common-law jurisdictions of DIFC, ADGM or the civil jurisdiction of the UAE federal courts, it would be prudent for all parties to fully understand where they may trespass into territory of existing regulatory bodies in the UAE.

Conclusion

There are certainly numerous factors to consider when evaluating the use of third-party funding. The divisiveness of both peoples' opinion with respect to the ethics of the practice and the legality in different jurisdictions bears witness to this fact. The principle of third-party funding is sound. In many respects, if the process is left uncorrupted, it ensures that the most meritorious claims are pursued. Going forward, regulatory bodies like ALF will be key to ensuring that third-party funding is practiced ethically and in the interests of justice. ■

[1] Interchangeably the terms "Litigation Financing" and "Litigation Funding" are also used
[2] I. Meredith & T. Mackinnon, 'Third-Party Funding of Construction Disputes: An Overview of Litigation and Arbitration Finance' (Klconstructionlawblog.com, 13 October 2016) <https://www.klconstructionlawblog.com/2016/10/third-party-funding-of-construction-disputes-an-overview-of-litigation-and-arbitration-finance/> accessed 5 January 2017
[3] Sophie Hannaway, 'Is crowdfunding the future of financing litigation?' (Dispute Resolution, 22 December 2016) <https://www.roydswithyking.com/is-crowdfunding-the-future-of-financing-litigation/> accessed 5 January 2017
[4] invest4justice.com removed its website in or around the end of 2016.
[5] <invest4justice.com>, 13 November 2016
[6] <invest4justice.com>, 13 November 2016
[7] Burford Capital LCC Financial Results
[8] 2016 interim results were not considered as the results were significantly improved by the demise of the British pound.
[9] President of the US Chamber Institute for Legal Reform at the time she authored the article.
[10] http://www.dandodiary.com/2014/03/articles/litigation-financing-2/guest-post-the-real-and-ugly-facts-of-litigation-funding/
[11] Lago Agrio was a mass-tort environmental contamination lawsuit.
[12] Rlcassin, 'Ecuador judgment against chevron tainted by corruption US judge says' (Petro Global News, 5 March 2014) <http://petroglobalnews.com/2014/03/ecuador-judgment-against-chevron-tainted-by-corruption-u-s-judge-says/> accessed 5 January 2017
[13] Giles v Thompson [1993] 3 All E.R. 321, 328, CA.
[14] Chitty on Contracts (Sweet & Maxwell, 32nd ed., 2015)
[15] Chitty on Contracts (Sweet & Maxwell, 32nd ed., 2015), at 16-057
[16] Maintenance and Embracery Act 1634
[17] Persona Digital Telephony Ltd and Anor. v. The Minister for Public Enterprise and Ors. [2016] IEHC 187
[18] Persona Digital Telephony Ltd and Anor. v. The Minister for Public Enterprise and Ors. [2016] IEHC 187
[19] Essar Oilfields Services Limited v Norscot Rig Management PVT Limited [2016] EWHC 2361
[20] Excalibur Ventures LLC v Texas Keystone Inc [2016] EWCA Civ 1144
[21] Robert Wheal & Others, 'Excalibur Litigation: Court of Appeal Confirms that Funders Will be Put to the Sword' (White & Case - Client Alert - Commerical Litigation, November 2016) <n/a> accessed 5 January 2017
[22] Associationoflitigationfunders.com <accessed 7 December 2016>
[23] Keith Hutchison,'Legal developments and funding in the UAE', [2016], Vannin Capital – Funding in focus Content Series | pg. 5
[24] http://www.tamimi.com/en/magazine/law-update/section-14/jun-jul/crowdfunding-platforms-in-the-uae.html

How accurate is the design? (part one)

STUART HOLDSWORTH AND HOOMAN BAGHI - STRUCTURAL ENGINEERS, DIALES TECHNICAL EXPLAIN THE REASONS WHY A LACK OF FOCUS ON ACCURACY CAN BE A KEY FACTOR IN COMPLEX TECHNICAL DISPUTES.

In order to answer the title's question, it is necessary to consider what a design is, the level of accuracy required or expedient for a design, how this accuracy is to be measured (numerically, cost, efficiency, buildability, by errors and omissions, etc.), and at what point or stage the measurement is to be made?

For the purposes of this article, we shall consider that design is the name given to the means for giving body and form via a creative and inspirational, yet rational process. The process starts with a defined requirement, evolving into a finished usable and functional object or form. To design is to create, fashion or construct according to a plan; commencing with a concept and finding form through calculation, specification, and drawing to the constructed article.

Within the construction industry, designs are developed to meet a requirement, which is usually described in a brief and developed by means of an iterative dialogue between the customer and the appointed 'lead designer', usually an architect. The lead designer and employer will agree the solution to the brief (sometimes managed by project managers) through a process that utilises visual aids such as drawings and computer graphics, and written specifications that define the requirements before they are further developed by a team of specialists for construction. There will be constraints and compromises - all to be agreed with the employer - which are often necessitated by costs, site restrictions, or the planning process, etc.

Accuracy, as defined in the technical sense, is the degree to which the result of a measurement, calculation, or specification conforms to the correct value or a standard. More subjectively, it may relate to the state or quality of being correct or precise.

To determine the accuracy of the construction design process, as subjectively defined above, it is necessary to measure the level of success by consideration of the correctness, or precision, achieved in interpreting the brief. This measurement can usually be made by considering the extent to which the functional requirements of the brief are met, including meeting the stated performance, keeping to the agreed cost, and building to the agreed programme.

Contractually, the requirement for accuracy can be both implied and explicit. Most contracts have implied requirements through the contracted party's obligation to undertake the work with "due skill and care", or make indirect provision through a required performance or reference to agreed standards that set implied criteria for accuracy, which is measured by the precision of the interpretation of the requirements. Explicit requirements are usually numeric and obtained from codes of practice or national standards and stated directly within specifications attached to the contract documents for the construction phase. These values provide exact points of reference from which to measure accuracy.

It is impossible to create an absolutely accurate construction. Deviations from the absolute are therefore required and these are expressed either as deflections, where movement is likely, or tolerances which result from the accumulation of margins of error during the build process. These deviations are either specified in national standards or derived by considerations of the design requirements by the specialist. Tolerances are usually spatial and result from the build-up of measurement errors. Tolerances are also required to allow for any variations in outputs, such as those of mechanical plant.

To achieve the required accuracy, all of the tolerances must be cumulatively acceptable in order for the outcome to be satisfactory. If achieved, the overall result can be considered suitably accurate.

The construction industry, that is bespoke and craft led, has large tolerances. For example, it is considered acceptable to allow positional inaccuracies of 10mm[1] or more, and deflections of up to 20mm in service. Although these tolerable allowances may be intended to simplify the construction process, if →

not fully and properly considered, the cumulative impact of large tolerances can result in many problems; particularly when coordinating the interfaces between various elements and materials. As a result of pressure to meet the contracted programme for the works, these problems are frequently resolved on site by the intuition of the craftsmen constructing the element of work. The results of this craft led intervention strategy are mixed. If unsuccessful, latent defects can result which often appear many years after the completion of the build.

At the detail design stage, the coordination of tolerances between elements and materials to be used in the construction is vital. A major source of high-value claims, by contractors against the professional team members contracted to design the works, is insufficient consideration of the coordination issues caused by the accumulation or variation of tolerances.

Appearance is important and the accuracy of the finishing and finishes is key to achieving the desired look. The measurement of the appearance for accuracy is often subjective, and as a result may require on site or field trial builds that set an agreed standard for the component or part.

How is accuracy to be measured?

The measurement of accuracy can be derived from the standard. Accuracy stated numerically as a value or dimension can be physically measured and proven or disproved. However, the more subjective accuracy requirements may require legal interpretation and judgments to resolve. For example, "due skill and care" as a standard for the accuracy of the work required by a professional appointment contract is always likely to be interpreted broadly by the contracted parties and, as a consequence, result in a contentious dispute.

Examples

For example, on a recent dispute we have been involved with, the structural engineer did not consider the possibility and consequences of a pattern loading occurring on a slab due to tanks used in the production process being filled and emptied sequentially. Therefore, the structural engineer did not exhibit due skill and care. On another project, the contractor's structural engineer designed the steel frame supporting a plaster board wall structure up to 16m high which supported special finishes and did not make due allowance for the differing tolerances specified, thereby also failing to exhibit the required skill and care.

The steel structure was specified with a set of allowable tolerances including a positional tolerance that could vary by 10mm between columns on plan, and a further vertical tolerance of 5mm in any storey height. The finish surface of the wall was required to have a flatness with 1mm in any 3m and verticality within 3mm of the required position. The two tolerances were not compatible without either reducing the tolerances for the steel frame structure, or building in provision for adjustment between the plasterboard and steel frame that would accommodate the variations between each set of tolerances. The engineer or technician responsible for the design of the steel frame either did not examine, or did not properly consider the consequences of the interaction of the two sets of tolerances and the contractor claimed on this basis.

A further contentious area, frequently the cause for a claim, is the interface between façade and structural frame (for further technical challenges relating to curtain walling see Ben Chamberlain's article in issue 12 of this Digest, page 26). Typical curtain walling systems can accept a small range of differential movements (much less than the deflections allowed under load for the supporting structure) without causing problems for the supporting secondary structure and glazing, or the weathertightness of the system. The curtain walling will typically accommodate only half of the movement allowed for the main structure.

The allowable initial positional tolerances between that of the main structure and the curtain walling are also different and much reduced (typically less than a third) for the curtain walling from that of the supporting structure. Due allowance has to be made for this in the connections between the two elements. If the design of the main structure edge beams (supporting the walling system) is not properly coordinated, the beams will not perform as required when attached to the curtain walling. An inadequate design will also prevent the curtain walling system from being correctly attached, or performing as required, without significant and expensive modifications to the supporting structure.

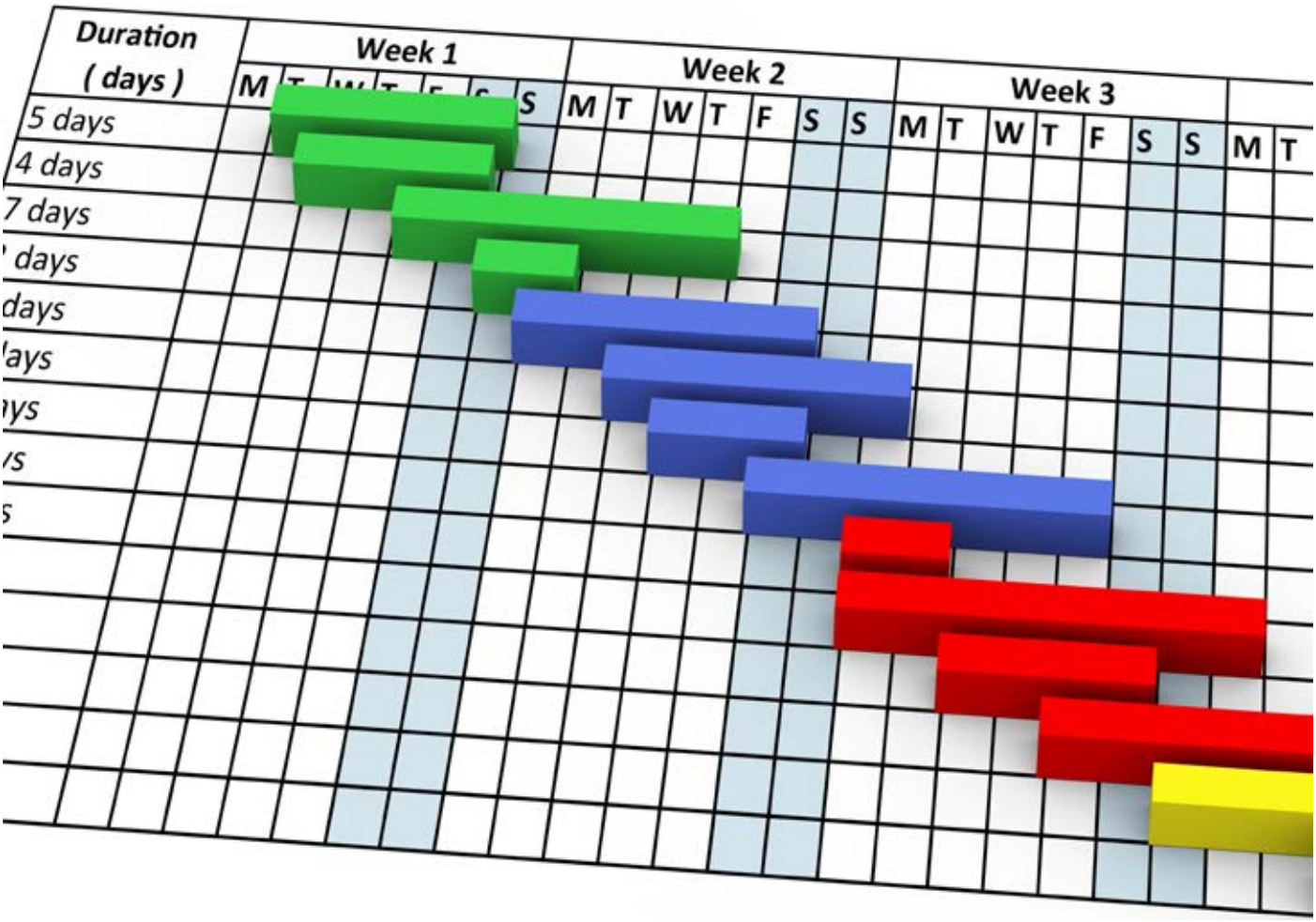
> Accuracy ... is the degree to which the result of a measurement, calculation, or specification conforms to the correct value or a standard.

Other common issues are the surface tolerances of the concrete structural finishing of composite floor structures. There are many advantages of using composite weld through floor structures, including low cost and rapid construction and hence this form of structure is popular. However, during construction, and particularly when longer clear spans without columns are a feature of the design, this form of construction is extremely flexible and can move as the structural concrete is placed; thereby causing problems with the vertical alignment and flatness of the finish. If this problem is not recognised at the outset, and appropriate finishes specified to enable the flatness compatible with the final surfacing materials to be obtained, then considerable costs and delays will be incurred in remedying the problem. This may involve surface grinding and/or the addition of thin screeds. This is a frequent source of dispute between the design team and contractor; the architect having specified a directly laid final floor surfacing attached to the finished structural concrete floor of the concrete slab requiring an SR1[2] finish (3mm allowance below any point under a 3m straight edge) that is compatible, and cannot be achieved by this form of construction without the application of further levelling screeds that need to be both accommodated in the structural design and in the overall dimensioning of the building.

For further explanations regarding the effects of design accuracy, you can view part two of this series in the next issue of the Digest, later this year. ■

[1] BS 5606 Guide to accuracy in building.

[2] BS 8204 Screeds, bases and in situ floorings. Concrete bases and cementitious levelling screeds to receive floorings. Code of practice



Concurrency in the United Arab Emirates (UAE)

CHRISTIAN MERRETT – DIRECTOR, DRIVER TRETT UAE EXPLORES THE CHALLENGES OF CONCURRENCY, ITS APPLICATION TO UK DISPUTES AND THE POTENTIAL PITFALLS FOR THE UAE CONSTRUCTION INDUSTRY.

I frequently find myself meeting clients who are keen to brief me, profess their inner most concerns, and share their opinions in respect to the delay incurred on their projects.

Since working in the Middle East, and particularly in the UAE, I increasingly see clients who are keen to suggest that I, (the delay analyst) should focus on dealing with the issues of concurrent delay. When asked to discuss this subject, my immediate reaction is for my heart to sink. But my reticence on concurrency may be forgiven, as it is not necessarily the problem in identifying concurrent delay (although as we know can be interpreted differently by different delay analysts) but more a concern as to the risks associated with it and how, and in what way, the client feels they will benefit? They may be venturing into unchartered waters!

The subject of concurrent delay frequently arises under the laws of England and Wales, and Scotland. The perpetuating debate of concurrent delay still leaves the academics, lawyers, consultants, and even the judiciary arguing continually as to the correct approach to this issue.

As with all texts regarding concurrent delay, I feel it is fitting to start with a brief definition. In this instance, I refer to the definition provided by John Marrin QC, in which he states:

" ... the expression 'concurrent delay' is used to denote a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency."[1]

So why is it we are so concerned about concurrent delay? To start at the very beginning, it is important to look at the established legal doctrine of the 'prevention principle'. Originally from the tort and →

CONCURRENCY IN THE UK

To place concurrent delay into some perspective I take a starting point from the UK, in which the issue of concurrent delay has undergone various challenges by the judiciary and the legal profession.

The orthodox approach

Resulting from the conclusion of the Malmaison[3] case, and then soon followed by the 2012 case of Walter Lilly[4], the approach to dealing with concurrent delay by considering 'relevant events' was generally considered as the best approach so far.

Dyson J presiding over the Malmaison case summarised that, in cases of concurrent delay the contractor is entitled to an extension of time (which acts as a defence to the employer's claim for liquidated damages) but is not entitled to recover any time-related costs. He further stated:

"Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (non-relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour."

This was also followed and refined in subsequent case law from Royal Brompton Hospital National Health Trust v Hammond and Ors[5], Adyard Abu Dhabi v SD Marine Services[6], and Walter Lilly & Co Ltd v Mackay[4].

However, just as we thought it was safe to get back into the water along came the 'apportionment approach' to the assessment of concurrent delay.

Further to that of Malmaison, the 2007 Scottish case of City Inn[7] took an entirely different approach in the assessment of concurrent delay and divided opinions between England and Scotland. It allocated the responsibility for concurrent delay by applying what some consider to be a 'fair and reasonable' approach of the culpability of delay. This was achieved by assessing the relative causative potency and the significance of the competing cause(s) of delay.

In many ways, apportionment is considered as contributory negligence in a contract. The apportionment approach has also attracted judicial criticism[6] who claim that it opposes the long established legal doctrine of the 'prevention principle'[8]. And so, the debate continues.

To bring this to up to date, the shipping case of Saga Cruises BDF Limited v Fincantieri SPA [2016] deals with delays that arose from contractual responsibilities for both the ship owner Saga (claimant) and the shipyard Fincantieri (respondent). With reliance on cases such as Malmaison and Adyard, the judge was mindful to distinguish that:

"to distinguish between (on the one hand) a delay which, had the contractor not already been delayed would have caused delay but, because of an existing delay, made no difference, and (on the other hand) a delay that is actually caused by the event relied on"[2].

The judge in Saga went further to quote from paragraphs 279 and 282 of Adyard:

"There is only concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time... The act relied upon *must actually prevent the contractor from carrying out the works* within the contract period, or, in other words, must cause some delay." *[emphasis added].*

The court therefore held that:

- Events for which Fincantieri was responsible had delayed the completion date. This gave Saga a prima facie entitlement to liquidated damages.
- While a number of events for which Saga was responsible had occurred within that period which *might have been* capable of causing delay, they *did not operate to "cancel out" the delays Fincantieri caused. [emphasis added].*
- Fincantieri was not entitled to rely on delays for which Saga was responsible as stopping time running under the liquidated damages clause. Saga was entitled to liquidated damages.

It is interesting to see that the judge provided sound reasoning that they felt that the delaying events that the claimant was responsible for, were supervening[9] events that occurred against the existing delaying events by the respondent and was therefore not a case of true concurrent delay.

contract, this has a long and significant history in the UK and the Commonwealth. It basically states that a party to a contract could not benefit from a delay which a party had caused itself.

This was examined by Lord Denning MR in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board. Whereby Lord Denning stated:

" ... It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for the non-completion in that time."

> ...a party to a contract could not benefit from a delay which a party had caused itself.

"It is to avoid the consequences of the prevention principle that virtually all sophisticated construction contracts include an extension of time mechanism."[2]

Meanwhile, back in the UAE employers grow increasingly excited about the prospect of defeating the opposing contractor by relying on concurrent delay. But important and more fundamental questions remain unanswered.

- How much has concurrent delay been tested in the UAE or the Middle East?
- Does the UAE civil code acknowledge the principle of concurrent delay or, for that matter, the prevention principle?
- Are employers and contractors familiar with aspects of concurrent delay and how it can be interpreted?
- Would the current English or Scottish law be influential in assisting tribunals and the courts in ruling on issues of concurrent delay?

The above are typical questions that I have been unable to seek clear answers upon, regardless of whom I speak to or carry out research, therefore my options are reduced to rely on what little does exist on the subject.

Anecdotal evidence suggests that some foreign lawyers attempt to 'shoehorn' their legal principles into the UAE legal system. Concepts such as 'concurrent delay', 'extension of time', 'prevention principle' and 'time at large' are not expressly provided for in UAE law. However, the fact that they don't exist should not be of great concern as other provisions could provide a similar result[10].

However, there may be some glimmer of hope; whilst noting the contents of Article 246 relative to the doctrine of Good Faith I look towards Articles 290 and 291 of the UAE civil code which state: Article 290

"it shall be permissible for the judge to reduce the level by which an act has to be made good or to order that it need not be made good if the person suffering harm participated by his own act in bringing about or aggravating the damage". Article 291

"If a number of persons are responsible for a harmful act, each of them shall

"Today we are going to decide who to blame."

be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability".

Does the above therefore infer that there is potential to apply apportionment? One possible interpretation is that it may allow a judge (or arbitrator) to 'apportion' liability for concurrent delay. Could this resemble the approach taken in the City Inn case?

Contractors in the UAE are frequently seeing the introduction of what are termed as 'anti-Malmaison clauses'. These clauses have been cunningly developed to defeat any claim of concurrent delay by the contractor, by extinguishing any entitlement for time or money in the instance of concurrent delay. In my experience the existence of these clauses is making contractors 'sit-up and think'!

Does the recent growth of the 'anti-Malmaison' clause just demonstrate an overreaction to something that appears to be relatively untested in this part of the world? Or, is it done in the anticipation that the floodgates to concurrent delay cases will change the face of construction claims in the UAE?

In my opinion, the issue of concurrent delay is far from settled, even when it is still being tested in the UK. So, what is the future looking like for places such as the UAE? Will they be influenced by judgments based on assessing relevant events or will they adopt the apportionment approach?

Who knows? But it will very be interesting to see what the future holds for the UAE in respect to concurrent delay to see if they suffer the growing pains that the UK are experiencing. ■

[1] John Marrin QC - 'Concurrent Delay', SCL paper 100 (February 2002)

[2] Harry Smith, Concurrent delay – the "Saga" continues, 22 August, 2016, Construction Blog, Practical Law, http://constructionblog.practicallaw.com/concurrent-delay-the-saga-continues/

[3] Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd 70 Con. L.R. 32(QBD(TCC))

[4] Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC); [2012] B.L.R 503 (QBD(TCC))

[5] [2001] EWCA CIV. 2006

[6] Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

[7] City Inn Ltd v Shepherd Construction Ltd [2007] CSOH 190; [2008] B.L.R. 269 (OH)

[8] The meaning of the "prevention principle" arising from the established common law principle that a party to a contract could not benefit from a delay in which a party had caused itself. – Early case of Home v Guppy (1838) 2 M & W 387.

[9] Supervening - occur as an interruption or change to an existing situation.

[10] Dealing with concurrency in construction delay claims, Al Tamimi & Co. 2014

Concepts such as 'concurrent delay', 'extension of time', 'prevention principle' and 'time at large' are not expressly provided for in UAE law.

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Q&A: The FIDIC rainbow suite

PAUL BATTRICK – DRIVER TRETT AND CO-AUTHOR OF THE FIDIC RAINBOW SUITE OF ARTICLES, RECENTLY ATTENDED THE FIDIC USERS' CONFERENCE IN LONDON. THE EVENT SAW THE FIRST PUBLIC VIEWING OF WHAT IS LIKELY TO BE THE NEW FIDIC YELLOW BOOK, TO BE ISSUED LATER IN 2017, ALONG WITH REVISED COPIES OF THE RED AND SILVER BOOKS. DRIVER TRETT DIGEST CAUGHT UP WITH HIM TO FIND OUT WHAT HE THOUGHT OF THE NEW EDITIONS.

This year's FIDIC Users' Conference in London was billed as being very special, why was that?

The first edition of the FIDIC Rainbow Suite of Contracts, notably the Red, Yellow and Silver Books, was issued in 1999. Whilst they are still a widely-used set of contracts, FIDIC decided (some years ago) that they needed a spring clean and set about re-drafting these three forms, with the Yellow Book being the first to be publicly viewed. This conference was where we could actually get hold of an authorised draft copy and listen to members of the drafting task force note their reasoning behind the revisions. Sight of the first draft of the Yellow Book has been mooted for some years now, and to finally see it was cause for some excitement.

Did the new version of the Yellow Book live up to expectations?

Let me just say that many senior practitioners from across the construction industry including lawyers, engineers, and consultants as well as employers have the view that, "if it ain't broke why fix it?".

So, what is FIDIC's reasoning in revising all of these forms?

There were many reasons given as to why the forms needed to be revised, they included:

- To enhance the project management tools and mechanisms.
- To reinforce the role of the engineer.
- To balance risk more fairly.
- To achieve clarity, transparency, and certainty.
- To reflect current best international practice.
- To address issues that have been raised since the previous contracts were brought into use.

And, perhaps most significantly;

- To introduce the theme of dispute avoidance into the contract.

That is quite a list. Does this mean that the new Yellow Book looks significantly different?

Well it's still yellow, but there are some differences to how it looks when you flip through the pages. FIDIC noted that the word count is 50% higher and there are 108 pages as opposed to 63. It somehow looks more complex, and I note that there are now 90 defined terms whereas before there were 60. There is one additional clause, as clause 20 (claims, disputes and arbitration) has been split into two clauses; clause 20 is now employer's and contractor's claims and the new clause 21 is disputes and arbitration. If clarity was an objective, I am not so sure it will readily be achieved. For instance, the new sub clause 20.2, claims for payment and/or extension of time (EOT), stretches over some three pages, which suggests that is it not going to be so simple to administer.

With a 50% higher word count and so many more pages, I am sure that you could write a lengthy article noting and discussing all the changes made, perhaps that will come in the next Digest, but could you highlight just a few changes please?

I will most definitely be writing that article soon, either for the Digest or perhaps on social media. In the meantime, perhaps the most interesting changes are:

- The imposition of a time bar relative to the contractor submitting his particularised claim; this will send shudders through the bodies of all contractors but may bring some wry smiles to engineers and employers.
- Notwithstanding the above regarding the imposition of time bars by the engineer, under sub clause 20.3, can be referred to the dispute adjudication board (DAB).
- It is intended that the DAB will be a 'standing DAB' as with the current Red Book. In this respect, it is hoped that the DAB will take on a dispute avoidance role as advocated by organisations such as the Dispute Resolution Board Foundation (DRBF). Indeed, the DAB can invite the parties to make a referral if it becomes aware of an issue or disagreement.
- There is, like in other forms of contract, a distinct early warning procedure. This could have been considered to have been somewhat hidden in previous versions. This too is a feature of the dispute avoidance concept.
- There are increased programming obligations upon the contractor. This includes a positive obligation on the contractor to update the programme whenever it ceases to reflect actual progress. The programme is also to show all activities logically linked, showing earliest and latest start and finish dates, float, and the critical path.
- There is a reference to concurrency of delay, which is to be assessed in accordance with 'rules and procedures' stated in the 'particular conditions'. Perhaps there will be a desire for the parties to consider the revised Society of Construction Law (SCL) Protocol when it is issued?
- There is more reference to time limits and the consequences of failure to abide by them. One, that caused some consternation amongst the contracting fraternity related to engineer's determinations within a new sub clause 3.7. If the engineer fails to make a determination within the relevant time limit, the engineer shall be deemed to have given a determination rejecting the contractor's claim. The contractors consider that should be the other way around.
- Generally, the role of the engineer appears to have been reinforced with a greater amount of discretion on their part, with a greater number of clauses and uses phrases such as, "in a form acceptable to the Engineer". One example being the form of the contractor's statement or payment application.

The changes appear to require more contract administration, is that how you see it?

Most definitely. The contractor who fails to properly administer the new forms will definitely not be able to gain its entitlements without considerable difficulty, if at all. In fact, one delegate noted this and suggested that there should be an obligation within the contract for the contractor to provide the appropriate resources. This would attempt to ensure that all contractors were obliged to make adequate allowances within their tenders and no contractor would be disadvantaged by another under-pricing its obligations.

Finally, do you see the new Yellow Book as an improvement and that claims and disputes will be avoided, as FIDIC hope?

I will keep my powder dry on that one. However, in one of the sessions the delegates were asked for the views as to whether there will be more, less, or the same number of claims under the new Yellow Book. We had electronic voting so the answer was accurate, it was:

- Less claims 24%
- No change 26%
- More claims 50%

Only time will tell... ■

BYTES

BYTE 1:
LOOK WHO'S TALKING.

Mark Wheeler – Chief Operating Officer, Driver Trett explains inherent risks of being careful what you wish for (out-loud) and how contract language may be evolving.
http://www.driver-group.com/global/knowledge/articles/

IN THE NEXT ISSUE

The next issue of the Digest, as always, will be covering all industry sectors and include news and articles from around the globe. Please keep an eye on the website www.driver-group.com to keep up to date with ad hoc articles, Digest previews, seminars and training events. The Digest will always aim to be topical and respond to requests and questions from our readers through the articles we publish. If you would like to submit a question or an article request to the Digest team please email marketing@drivertrett.com with DIGEST in the email subject line. We are always pleased to receive feedback from our readers and welcome the opportunity to develop the Driver Trett Digest into a valuable read for those involved in the global engineering and construction industry.

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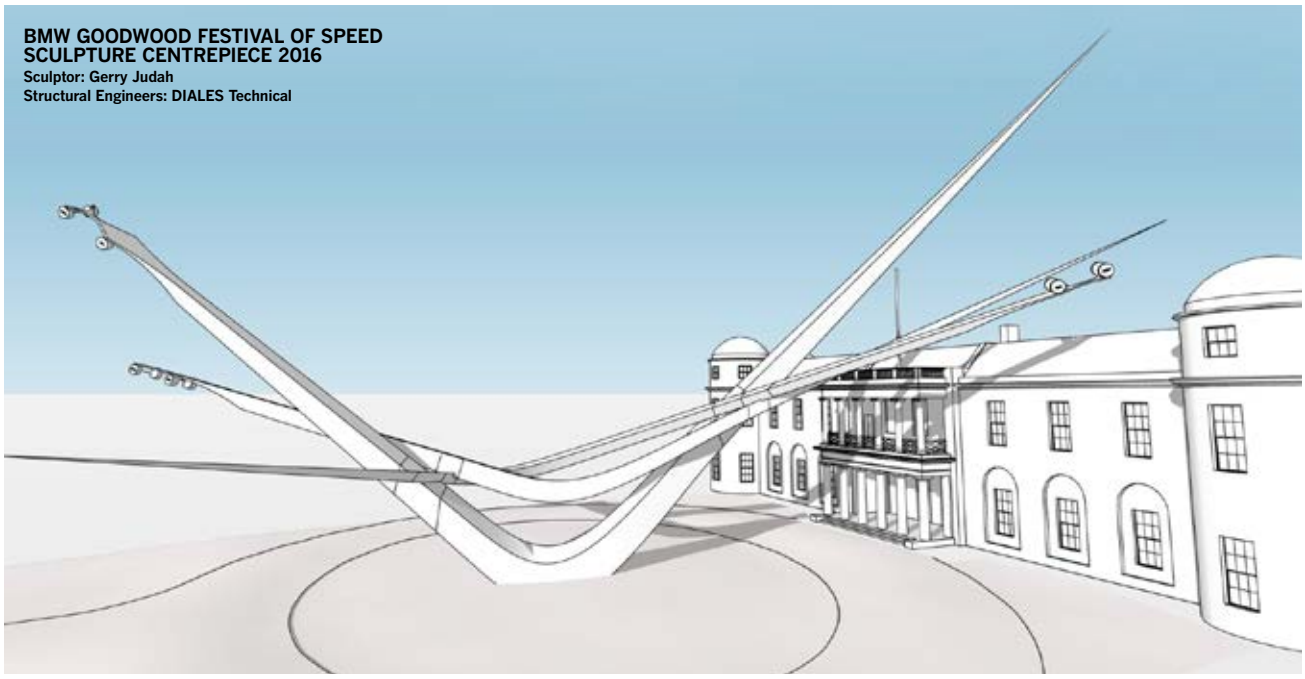

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