

Issue No : 12
Published : Spring 94
Article No : 1
Author : Roger Trett
Title : Introduction - Who Owns the Float?

WHO OWNS THE FLOAT?

The old chestnut arises yet again. There is considerable discussion and misunderstanding in relation to float and, in considering the various aspects of float in this Digest and the next, we hope to put it to rest.

"Float", as defined by BS 4335, is "the time available for an activity or path in addition to its duration" and "critical path" is defined by the same standard as a path with least float". There has probably never been a programme, at least on a building or construction project, in which every single activity, or path, has been critical. Float is rather loosely talked about as though it were an entity like the programme itself.

In planning terms there are a number of different types and definitions of float (of which more elsewhere in this Digest issue) which all relate specifically to individual activities rather than paths or programmes as a whole. However, contractors are in the habit of submitting programmes with 'project float', i.e. a programmed completion earlier than the contract completion with an inherent path, or paths, of criticality up to the programmed completion date and not the contractual completion date.

Whichever definition or reference is preferred (project float or activity float) delay often occurs and when it does, the 'float' gets used. Inevitably, disputes arise regarding entitlement to extensions of time in which the question at the head of this piece is one of the central issues.

So who does own the float? The contractor may claim that, since he prepared the programme and therein created the float, it is his. The employer will argue that he is paying for it and it is therefore his. In reality, since float can only be calculated at activity level (through critical path analysis), it must therefore belong to the activity.

When particularising claims for extensions of time where float has allegedly been used, it has always been necessary to examine each activity, and its float, although over the years many claimants have got away without such investigation. Recent cases have confirmed that global claims are almost bound to fail (remember *McAlpine Humberoak Ltd -v- McDermott International Inc [1992]*).

To give an example of how the problem of float ownership and usage manifests itself; an employer causes delay to an activity which has a duration less than the float on the activity. The contractor causes further delay in the execution of the works, which results in the activity finishing after the contract completion date. Is there any entitlement to extension of time? If so, how much? Answers please, on a postcard.....

Finally, and on a more personal note, following the recent articles on ADR I am pleased to announce that I am an accredited Mediator with CEDR to go with my appointment to the British Academy of Experts panel of Mediators.

Issue No : 12
Published : Spring 94
Article No : 2
Author : A Smith
Title : International Experience 3 - Much Confucian

MUCH CONFUCIAN

Alastair Smith reminisces on his experiences in working in the Peoples Republic of China.

"You've got to help me" he implored. "Don't look now, but they're watching us". At first I thought he was paranoid, but later, as I glanced over his shoulder, I noticed in the far corner of the dining room two strangers staring in our direction. One instinctively knew they were secret police.

He was a British journalist who had approached our table because we were the only Westerners in the hotel. He explained how he had obtained permission from the authorities to visit certain towns in China to write some travel articles. But apparently he had found a much more interesting story in the villages where, 10 years after Mao, there were still incidents of intellectuals being 'employed' to carry out menial work in the fields. As this was something the authorities were sensitive about, his investigations had attracted their attention and disapproval.

The sequel to the story is that next day the errant journalist was arrested and deported over the border to Hong Kong. The moral of the story is, if you're going to work in China, keep your mind on the job and do not get involved in anything deemed to be political. But then that advice applies to most countries that the average construction 'expat' is likely to visit.

The above incident occurred in 1986 when I was a Quantity Surveyor working on a major construction project for a Hong Kong employer in China's Guangdong Province. Lest you think that such incidents occurred frequently, it must be said that my colleagues and I never had any real problems with the authorities during all the time we were operating in China.

The People's Republic of China is essentially a communist state and, compared with other such states past and present, it is now relatively successful. It's agricultural system works well, its economy is sound and there appears to be little social unrest, Tiananman Square excepted. Of course, it could be said that if China were a capitalist state like, say, Hong Kong or Taiwan, it might be far more successful than it actually is.

Perhaps with this in mind, and since the death of Chairman Mao, China has undergone a process of liberalisation whereby some of the more extreme institutions of the Maoist regime have been dismantled, while new, more sensible ideas are being tried out. Not the least of these is the establishment of Special Enterprise and Development Zones in economically strategic parts of the country.

One such example is Shenzhen, just over the border from Hong Kong. The next province to Shenzhen is Guangdong (Canton) and although it is not officially a Special Enterprise Zone, it seems far more inclined towards capitalism than some other parts of China are. Therefore Guangdong, together with Shenzhen, act as socio-politico-economic buffers between capitalist Hong Kong and communist China.

Over recent years there has been a lot of development work going on in Guangdong including hotels, golf courses, roads, power stations (nuclear and coal-fired) and industrial projects. Some of the development demands Western expertise and/or investment, hence our presence there in 1986.

For the future, vast civil engineering projects are planned and the Chinese are now less averse to letting work to foreign contractors. As far as payment is concerned, it is possible to set up hard currency or barter deals. Unfortunately, the remoteness of China from Great Britain makes our contractors somewhat uncompetitive unless they have a base in Hong Kong.

CONTRACTUAL ATTITUDES

Some Chinese contractors, usually the larger ones, are very efficient and seem knowledgeable about the latest developments in civil engineering and international commercial practice. Smaller contractors are often lamentably inexperienced in such matters and tend to be ill at ease with capitalist business principles.

This was brought home to me one day during pre-contract negotiations with a local contractor. He informed me, through an interpreter, that the contract favoured the employer and was unfair to the contractor. As I had personally assisted in drafting the document and had screened it to remove any 'contractor bashing' characteristics, I was anxious to find out what the problem was.

"Well, for example", he said indignantly, "We have to supply the labour, plant and materials, we must complete the work on time or suffer a penalty, we have to work in accordance with the specification and build exactly what is shown on the drawings. All you have to do is pay us the money!".

Thus a basic contractual arrangement taken for granted in the West was regarded with distaste in China. In this instance, the remedy was simple, namely to incorporate in the contract a 'bonus for early completion' clause. (Proponents of ADR will immediately recognise this as a win-win' deal, ie both parties are happy with the negotiated result: a rare event).

DISPUTE RESOLUTION

In China, the only thing a foreign employer can do with claims is to negotiate (for the sake of appearance) and then pay up. The locals hold all the aces. They know how the system works; you are a stranger in their country, you feel vulnerable and they know it. And don't kid yourself you're going home before the thing's sorted out!

The Chinese love negotiation and are masters at it, using every psychological trick in the book. In the unlikely event of you getting the upper hand during negotiation, your adversary is likely to call upon the local political commissar to instruct you in the error of your ways.

SAFETY

It seems to me that as far as religion is concerned, most Chinese are Confucians and/or fatalists and I believe this is the reason why, in my experience, they do not take safety very seriously. After all, if you believe you are going to die on a predestined date, why look both ways before you cross the road?

Such attitudes mean that enforcement of safety on site can be an uphill struggle. Generally the workers' sole concession to safety was to hold a quasi-religious ceremony on Day One, let off a few firecrackers to ward off evil spirits and then get on with the job. Safety helmets were worn on site, but only in the rainy season, and off site all year round (as a status symbol).

Even the hour long bus journey between our site and hotel was a harrowing experience. There was no rush by the expats to sit in the front seats. Overtaking manoeuvres were accompanied by utterances from the Western passengers, initially in the form of groans and then, as the oncoming headlights grew stronger and more life threatening, by repeated cries

of "Get in yer b****d". One almost welcomed the halts in our journeys, while the remains (in the undertaking and vehicular sense) of road accidents were cleared away.

So, did I enjoy my stay in China or was I glad to 'escape'. No doubt about it, it was a rich and rewarding experience of which I still have vivid memories. However, they tell me that if I continue with the counselling, some day I might be able to face boarding a bus again!

Issue No : 12
Published : Spring 94
Article No : 3
Author : Alan Lumley
Title : Claim Consultant as Litigator - The Pitfalls

Claim Consultant as Litigator - The Pitfalls

Alan Lumley considers the practical issues and John Redmond the legal pitfalls associated with the claim consultant as litigator.

Background

When a client has a construction dispute that needs to be formalised by way of arbitration or litigation, should he instruct his claims consultant or his solicitor?

Trett's view has always been that a claims consultant must first prepare the technical basis of the case and provide a practitioners view of the problems and it is for the legal profession to decide upon the legal merits and turn the claim into formal pleadings. The solicitor then manages the legal proceedings for the client and can be well assisted by claims consultants on technical matters. Further, those claims consultants with experience and qualifications can be brought in to act as expert witnesses, which in its final analysis, is a non-partisan, wholly independent role.

Practical Issues

1. Training

Claims consultants are usually quantity surveyors or engineers having gained experience in the disputes field. Some have undertaken post-qualification legal training, particularly law degrees and bar exams. However, their main discipline is a technical, not a legal one.

The primary discipline of solicitors on the other hand, is law and its procedures. A solicitor's training goes far beyond that level of knowledge gained by obtaining a law degree and passing the bar exams.

2. Independence

The role of the solicitor is to champion the client's case; to present it in the best possible way, in light of the available evidence and the relevant laws and using commercial skills. solicitors act partially, in favour of their client.

The claims consultant's role is to initially prepare the claim. In doing this, he must take a realistic attitude to the strengths of his client's case. If it is strong enough to stand legal scrutiny, the claims consultant can assist the solicitor in dealing with such matters as Discovery and Further and Better Particulars. Claims consultants also prepare experts reports. The latter is a duty to the tribunal - not the client.

It is unrealistic to have a claims consultant preparing the claim, issuing the formal Statement of Claim, dealing with Discovery and Further and Better Particulars and then acting as expert. The latter role must be completely separated from the rest - no matter how honest, independent etc, the individual, if he is closely associated with the organisation running the case, the judge or arbitrator will always have doubts about the independence of his views.

3. Project Manager

A good commercial lawyer is trained to be the 'project manager' of the dispute process once it becomes formal. He knows when and how to proof witnesses, how to co-ordinate experts, when his barrister ought to be preparing for the case etc.

4. Skills

A client's case will be better served if the claim is well researched, substantiated by evidence and excellently presented. If Further and Better Particulars are thoroughly answered, 'cause and effect' shown, the strength of the arguments will be seen by the other side.

This requires knowledge of advance claims techniques, data management, critical path analysis etc. Lawyers do not possess these skills and the claims consultant should strive to improve his knowledge and abilities in this area. On the other hand, solicitors are daily dealing with courts, barristers, Rules of the Supreme Court, arbitrators, High Court actions etc. The Law Society lays down strict CPD requirements and lawyers keep up-to-date both with current case law and changes in legal procedures.

5. Arena

Claims consultants who offer to 'run' cases in place of a lawyer usually follow one route - arbitration. This is because they have no right of audience in High Court proceedings. Yet, if there is no arbitration agreement, why arbitrate?

Certain procedural matters may arise in an arbitration in which a client could be better serviced by taking steps outside the arbitration process. With a limited legal training, wider aspects of law and legal procedures are likely to be unknown to the claims consultants.

Legal Pitfalls

1. Privilege

A party to a dispute in litigation or arbitration is obliged to disclose all documents in his custody or control having any relevance to the dispute, except those documents which are 'privileged' from production.

Communications between a lawyer and his client for the purpose of legal advice are always privileged, and need not be disclosed to another party in a dispute. This is called '**legal professional privilege**'. It only applies to legal people, and not non-legal consultants.

This was the issue in a case reported last year - *New Victoria Hospital V Ryan* [1993] - which involved a claim for unfair dismissal before an Industrial Tribunal. The employers, the hospital, engaged a firm of industrial relations consultants to handle a dispute for them and to provide a full service in the Industrial Tribunal as well.

The employer had taken advice about an employee, Mrs Ryan, from the consultant and, having received the advice, dismissed her. She complained to the Industrial Tribunal. Mrs Ryan's counsel sought an order for discovery of all correspondence passing between the hospital and the consultant relating to her employment, to which the Tribunal agreed. The hospital appealed, saying the correspondence contained confidential legal advice in relation to the dismissal of Mrs Ryan and they claimed legal professional privilege from disclosure.

The argument failed. Mr Justice Tucker said that legal professional privilege did not apply to "*unqualified advisers such as personnel consultants*". "*Privilege*" he said, "*should be strictly confined to legal advisers such as solicitors and counsel, who are professionally qualified,*

who are members of professional bodies, who are subject to the rules and etiquette of their professions, and who owe a duty to the Court".

This decision is of very considerable concern to those claims consultants who offer to carry out a complete disputes service without lawyers. Some claims consultants have argued that there is another class of privilege which covers all documents which come into existence at the instance of the party himself, with the dominant purpose of being used in connection with anticipated litigation. Authority exists for this argument, but it really doesn't square with the Ryan case and there is, therefore, some confusion.

What is clear, is that documents including letters between a claims consultant and the client before arbitration is contemplated are open and will be subject to examination by the other side, if things go that far.

Once arbitration is started, it may be difficult to know whether letters of advice etc from the claims consultant are privileged or not. On the basis of Ryan, there will be no 'legal professional privilege', but it is possible that there will be privilege on other grounds.

2. Costs

Formal arguments about claims consultants wearing lawyers hats also popped up in *Piper Double Glazing Ltd v D.C. Contracts Ltd* (December 1992 - unreported). Piper were represented in an arbitration by a claims consultant and succeeded. The arbitrator ordered D.C. Contracts to pay costs which were to be "taxed" by the Court.

Whilst the Court decided they could deal with the bill just the same as if it were a solicitor's bill, they said it had to be prepared exactly the same as a solicitor's formal bill for Court taxation.

Whereas solicitors are used to charging in accordance with the Court Rules for taxation, it can sometimes be difficult to distinguish between the various elements of service provided by a claims consultant when he is wearing all the various hats at once. For example, the cost of preparing the claim for loss and expense will not be part of the costs of the arbitration, although it may be part of the loss and expense itself. The cost of preparing the formal pleadings in the arbitration will be part of the costs of the arbitration and so will be the cost of preparing to give expert evidence. However, the cost of preparing to give evidence will be assessed as witness fees and not as the equivalent of the solicitor's fees. If you find that confusing, just think what the bill itself will look like!

Conclusion

In a construction or engineering dispute, both the claims consultant and the solicitor have the same overall objective of achieving an outcome which is favourable to their client. However, the claims consultant and lawyer have distinct parts to play which require different skills and experience.

Issue No : 12
Published : Spring 94
Article No : 4
Author : S Briggs
Title : Float - Part I

Float - Part 1

The Oxford English Dictionary devotes no less than 2½ pages to the verb/noun in question giving meanings connected largely with ships, lavatories, petty cash, the theatre (there is even a meaning in prison slang not fit to be reproduced here!), yet it contains no reference to planning/programmes/time analysis etc.

The word has its roots in the Teutonic word 'fleut-' and the Old English 'flot-' both meaning "the action or state of floating" and the use of the word to describe spare time in planning terms must therefore have just evolved - who knows?

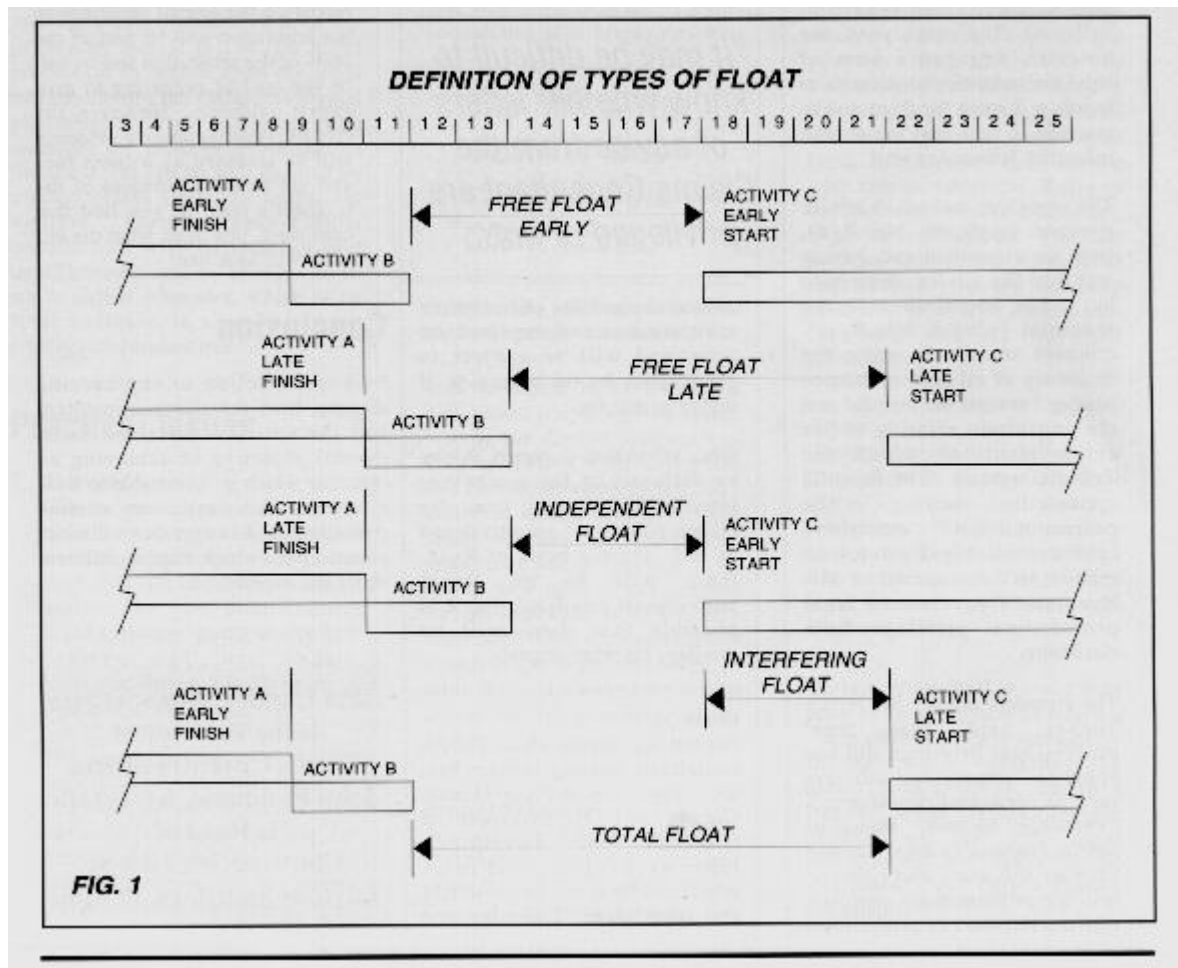
Anyway, as the lead article in this issue mentions, there is a definition in the British Standard Glossary of Terms used in project network techniques (BS 4335:1987). For the record, that document carries other definitions which are worth a mention here.

Total float is defined as "*The time by which an activity may be delayed or extended without affecting the total project duration.*"

Free float is "*The time by which an activity may be delayed or extended without delaying the start of any succeeding activity.*"

Independent float is apparently "*The time by which an activity may be delayed or extended without affecting preceding or succeeding activities in any way.*"

I have some difficulty in relating to this latter one in construction terms -it is not likely that an activity, once planned, will have its duration changed or extended until it gets started and something happens to change it. By this time, preceding activities must be complete and they cannot therefore be affected. Oh well - I know what they are trying to say and hopefully, the diagram a fig.I will explain it without further words.



From the above it can be seen that the only true float on any activity is free float i.e. any delay or extension, up to the amount of free float on any activity, will have no other effect either on the project or any other activity. More about this later.

So, where does it come from? Float, in all its guises, is a product of time analysis and is, in its simplest form, calculated as the difference between the earliest and latest start (or finish) times for each activity.

For the unfamiliar, **time analysis** is a process usually carried out by computer these days in which start and finish times are calculated for activities in a project network (NB a network is defined by the aforementioned BS as "a representation of activities and/or events with their inter-relationships and dependencies").

The process consists of three parts. Firstly, a forward pass, which calculates early start and finish times based on preceding activity restraints and activity durations; secondly, a backward pass calculating the latest start and finish times; finally, a float pass which establishes the difference between early and late. In a path of activities where there is no difference, or where the difference is at its lowest, the chain of activities are referred to as the critical path (hence the name 'critical path analysis').

In construction terms, it is usually the contractor's responsibility to prepare and submit programmes and most, if not all, of the standard forms have a clause stipulating this. Although the number of contractors using proper critical path analysis is still lower than those who don't, it is encouraging to report that nowadays most contractors are using computers to prepare and enhance their planning programmes.

There is, however, a drawback. Just about every planning software package includes a number of standard report formats among which there is normally a standard or default bar chart.

This is the document (sometimes referred to as a GANTT chart) which is most often used to illustrate a programme and it nearly always includes 'total' float. So when the contractor publishes his programme it will often show huge amounts of total float on any non-critical activities. This has two effects. Firstly it can de-motivate the contractor's own personnel (there's no hurry to do that this week - look at all that float!), and secondly, it can give to the professional team the impression that the contractor has potential to absorb delays on their part (without recompense). In reality, of course, any delay to anything greater than free float will have an effect.

The next article in this series (to be published in the next issue of the Digest - provided that the printing deadline exceeds the float on the drafting of the article) will deal with, among other things, the contractor's entitlement to time and the effect of delay on critical and non-critical work.