

Issue No : 24
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Article No : 1
Author : Roger D Smith
Title : The As-Built But For Method of Delay Analysis

In the summary of delay analysis methodologies featured in the last Trett Digest, I promised a more detailed review of each method in forthcoming issues. In this issue the *as-built but for* method is considered in such detail as to identify the principles. Issues such as multiple delays, concurrency, 'who owns the float', and the like are not considered.

The *as-built but for* method relies upon being able to reproduce the programme of works as it was actually built. In addition a detailed listing of the delays to each and every activity and the duration of those delays on the programmed works is essential.

The method relies upon logic linking the activities on the as-built programme including all the delaying events identified. The analysis proceeds by removing the delaying events, one-by-one, from the as-built programme and the difference in the overall programme duration before and after each removal is said to represent the critical delay due to the particular delay item removed. For example, if the last activity in the project happens to be a 5-day additional painting activity, then when this compensable delay is removed, the programme can finish 5 days earlier. Thus, **but for** the additional painting delay event, the programme could have finished 5 days earlier. Hence the term *As-Built But For* (ABBF) method.

Once ABBF analysis is underway, the programme no longer represents the real as-built programme but is only a simulation of what the as-built programme might have been had the delay events not occurred. This programme is sometimes referred-to as the *Simulated As-Built Programme* (SABP).

The process of removing delay events generally starts with the last event on the critical path. The SABP is re-analysed and a new critical path (or paths) is potentially established. The process is then continued until every such delay event has been removed. What is left at the end of the analysis is a programme which represents how the project could have been built had none of the delay events occurred.

As always, the accuracy of the analysis will depend on the quality of the information on which it is based. The more information that can be provided in support of any assumptions made (whether related to activities or logic links) the more credible will be the results produced. Such information will generally be gained from site records in whatever form they exist and the importance of accuracy, completeness and reasonable logic cannot be over-stressed.

Ideally and for the ABBF method to work properly, the as-built programme should be created by using the planned programme as the starting point and then be transformed into the as-built programme by building up delay periods, changes in sequence, changes in duration of contract works and additional work. This will help to produce not only a complete and accurate as-built programme but one which, at the end of the ABBF analysis, represents a reasonable (albeit) alternative 'Contract' programme.

I have provided a simple example of the As-built But For method below. The starting point is the original programme for the works identifying the original intention. It is often the case that this programme will satisfy contractual obligations in terms of form and content. However, this may not be adequate for the proposed analysis. Typically logic and resource requirements will not be identified and may have to be introduced by 'back fitting'. In so doing, a degree of subjectivity will have been introduced that may lead to questions being raised of the whole analysis.

For the purpose of this article the planned programme is a fairly simple one of 27 weeks overall duration and 11 activities as shown on [figure 1](#). This programme contains logic but for simplicity, resources have not been considered here. Resource analysis will be the subject of a separate article.

Ideally programme changes from initial intention through to the 'as-built' programme should be identifiable and supportable by reference to relevant records. [Figure 2](#) indicates the 'as-built' periods for activities on the original programme. The actual period taken to complete is 30 weeks.

[Figure 3](#) shows how the 'as-built' activities are linked together. The logic adopted should be justifiable by reference to actual records. This is the part of the ABBF method that can attract the most criticism for its subjectivity. If the as-built programme is incomplete and/or is too large, then the logic can quickly become vulnerable to incorrect (or preferential!) interpretation. My advice here is to keep the as-built programme as simple as possible.

The reasons for any change in logic should be identified in a narrative in the same way that changes to activities can be identified. These changes in logic may need to be 'removed' from the SABP during the analysis in the same way as delay activities are removed - otherwise the final result may be a programme that does not work.

The critical path is identified in [Figure 3](#) and differs from that envisaged originally i.e. it identifies 'float' on activity numbers 5 and 6. This model represents the 'as-built' programme.

The remaining task is to carry out time analysis *simulations* on this programme (the 'but for' part) to identify what would have happened had the delaying events not occurred.

In this example for brevity, all of the delay events are considered together. The first task is to effectively remove the delay events by setting their durations to zero.

[Figure 4](#) demonstrates the result after 'zeroing' but before Time Analysis.

When the networked programme is re-analysed, the effect on the completion date can be identified. After the analysis the programme is as shown in [Figure 5](#). It can be seen that this 'but for' analysis changes the critical path back to what was originally anticipated, and the overall duration collapses by 2 weeks to 28 weeks. Thus, 2 weeks delay to completion may be said to be attributed to the delay events.

What is left is 1 week of Contractor's 'culpable' delay (the original finish was week 27). 'Culpable' delay will be considered in a future Digest!

This example is, of course, over-simplistic. In reality there will always be numerous delaying events and in order to press a claim one would need to particularise the delay caused by each delaying event. This will require the ABBF procedure to be carried out for each event (that is to reset each activity duration to zero and re-run the time analysis at the end of each iteration). If the SABP is quite large (e.g. 1000's of activities) this could prove time consuming and really requires the use of CPA software with a programming language.

Although the principles of the ABBF procedure are straightforward, it may involve considerable time in development of the 'as built' programme for analysis purposes. Check list for this procedure:

1. Tender / initial programme - Logic linked and resourced if possible.
2. Regular updates of tender / initial programme with changes to working programmes documented and explained.
3. Records maintained of actual progress, resources, instructions etc.

4. As-built programme developed during project life
5. Identification of actual programme logic with delay related activities separately identified
6. Reset delay activities to 'zero' and re-analyse network.

Pros and Cons of the **As-Built But For** Method.

I think the three main strengths of the ABBF method are that:-

- The method is based on the as-built programme so it has a 'golden thread' of truth about it which the basic Impacted Method does not
- The 'process' is easy to understand
- The method can be automated giving the approach a degree of 'scientific' kudos.

The weaknesses, however, should be of concern:-

- The user can fall into the trap of relying on the result just because it appears to be 'scientific' and appears to model the 'truth' when it often is neither
- This method is dependent on subjective logic links which were never agreed in any Master Programme (or the like) - so are open to criticisms of subjectivity.
- If the ABBF analysis is performed with no user intervention - issues like mitigation and the relevance of the timing of alleged late information can be ignored - leading to unsustainable conclusions.
- In particular, removing delay events (and logic links) retrospectively (i.e. considering delay events in relation to the eventual as-built programme rather than the progress at the time the event occurred) does not reflect the way the works progressed - so may not be appropriate for most standard forms of contract (e.g. JCT).
- The credibility of this method relies on the accuracy and completeness of as-built programme so it can be a time consuming and very expensive approach.

In future articles, I will give further detailed examples of using delay analysis methodologies.

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Author : Michael Black
Title : Global Claims

In the first of a three part series, **Michael Black, QC** reviews the general principles behind this old chestnut.

In *J Crosby & Sons Ltd v Portland Urban District Council (1967) 5 BLR 121* the Contractor made a "General Claim for Delay and Disorganisation". Donaldson J held:

"Since, however, the extent of the extra cost incurred depends upon an extremely complex interaction between the consequences of the various denials, suspensions and variations, it may well be difficult or even impossible to make an accurate apportionment of the total cost between the several causative events.... I can see no reason why [the Arbitrator] should not recognise the realities of the situation and make individual awards in respect of those parts of individual items of the claim which can be dealt with in isolation and a supplementary award in respect of the remainder of these claims as a composite whole [136]."

It is important to note the limitations of this approach:

(1) the global approach is only justified in cases where it is difficult or impossible to make an accurate apportionment;

(2) where elements of the claim can practicably be isolated the Arbitrator must make individual awards;

(3) the approach is one of last resort and cannot be used to lump all delaying events together to justify a total overrun or financial shortfall.

In *London Borough of Merton v Stanley Hugh Leach Ltd (1985) 32 BLR 51* the Judge was asked to answer a number of questions, one of which was:

Do the terms of the contract [JCT 63] permit the Contractor to recover direct loss and/or expense under Clause 11 (6) or 24(1) in respect of any alleged event when it is not possible for the Contractor to state in respect of any such alleged event the amount of loss and/or expense attributable thereto?

The Judge followed the decision in Crosby and expressed himself in the following terms:

"If application is made ... for reimbursement of direct loss or expense attributable to more than one head of claim and at the time when the loss or expense comes to be ascertained it is impracticable to disentangle or disintegrate the part directly attributable to each head of claim, then, provided of course that the Contractor has not unreasonably delayed in making the claim and so has himself created the difficulty the Architect must ascertain the global loss directly attributable to the two causes, disregarding, as in Crosby, any loss or expense which would have been recoverable if the claim had been made under one head in isolation and which would not have been recoverable under the other head in isolation.

... a rolled up award can only be made in a case where the loss and expense attributable to each head of claim cannot in reality be separated and secondly ... a rolled up award can only be made where apart from practicable impossibility the conditions which have to be satisfied before an award can be made have been satisfied in relation to each head of claim. [102-3]"

Thus, additional guidelines were added to those set out above, namely:

(1) that the Contractor must not have delayed in making his claim and thereby created the difficulty in apportioning the loss and/or expense between causes;

(2) even if the consequences of the individual heads of claim cannot be disentangled from each other, nonetheless the Contractor must still establish that each head of claim qualifies him for the benefit sought;

(3) thus, the actual basis of each claim must be identified separately;

(4) the Judge emphasised that loss and/or expense consequent on a cause that could have been considered in isolation must be disregarded in assessing the global loss.

If elements are included in a rolled up claim which clearly cannot be the responsibility of the Employer, or in respect of which the Contractor has failed to comply with the contract, since the claim is global in nature, the Court will hold that it is impossible to sever the good from the bad and therefore the Contractor has not proved his case.

In the case of *Wharf Properties Limited v Epic Cumine Associates (No. 2) (1991) 52 BLR 1*. The Plaintiff Developers retained the Defendant Architects for a project on the waterfront, Kowloon, Hong Kong. The Plaintiffs became liable to pay HK\$317,712,799 to the contractors for delay and lost rent amounting to HK\$199,910,544. They commenced proceedings against the Architects alleging negligence in the administration of the contract. In their pleading they alleged that due to the complexity of the project it was not possible to isolate individual periods of delay and attribute them to specific acts or omissions of the Architects. The Privy Council considered Crosby and Merton and made comments of general importance to the presentation of claims. Lord Oliver said that:

"Those cases establish no more than this, that in cases where the full extent of extra costs incurred through delay depend upon a complex interaction between the consequences of various events, so that it may be difficult to make an accurate apportionment of the total extra costs, it may be proper for an arbitrator to make individual financial awards in respect of claims which can conveniently be dealt with in isolation and a supplementary award in respect of the financial consequences of the remainder as a composite whole. This has, however, no bearing upon the obligation of a plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial. [The Architects] are concerned at this stage not so much with the quantification of financial consequences ... but with the specification of the factual consequences of the breaches pleaded in terms of periods of delay. The failure even to attempt to specify any discernible nexus between the wrong alleged and the consequent delay provides... 'no agenda' for the trial. [20-1]"

The significance of the above is to add a further and extremely important qualification to the use of rolled-up claims: the concept is limited solely to the quantification of claims, it cannot be applied to the proof of claims. A Claimant must prove, on a balance of probabilities, a link between specific events and the delay or disruption relied on. This can only be achieved with admissible and persuasive evidence.

In *Mid Glamorgan County Council v J Devonald Williams and Partner (1992) 8 Const. L.J. 61* Mr. Recorder Tackaberry QC, sitting as a deputy Official Referee held

"A proper cause of action must be pleaded.

Where specific events are relied upon as giving rise to a claim for moneys under the contract then any pre-conditions which are made applicable to such claims by the terms of the relevant contract will have to be satisfied, and satisfied in respect of each of the causative events relied upon.

When it comes to quantum, whether time based or not, and whether claimed under the contract or by way of damages, then a proper nexus should be pleaded which relates each event relied upon to the money claimed.

Where however a claim is made for extra costs incurred through delay as a result of various events whose consequences have a complex interaction that renders specific relation between event and time/money consequence impossible or impracticable, it is permissible to maintain a composite claim." [69-70]

In the next issue, Michael Black reviews some specific examples of how the courts have applied these general principles.

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Author : Justyn Jagger
Title : Arbitration in Asia

Introduction

The early 1990's saw an enormous amount of investment pour into construction and infrastructure projects throughout Asia. However, the economic crisis of 1998 signalled a downturn in investment and triggered a range of commercial disputes. Due to the fact that these disputes often involved contracting parties domiciled in two separate jurisdictions and a project undertaken in a third, the parties increasingly chose arbitration as the mechanism of dispute resolution.

In the first of a series of three articles, Justyn Jagger, an international arbitration and litigation lawyer of the Singapore office of international law firm Herbert Smith, outlines the arbitration process in six Asian jurisdictions, the People's Republic of China, Hong Kong S.A.R., Singapore, Indonesia, Thailand and Japan.

The People's Republic of China

International Arbitration Law

International arbitration in the PRC is governed by both the Civil Procedure Law 1991 and the Arbitration Law 1994. The Arbitration Law 1994 will only recognise arbitrations conducted in China under the auspices of a designated Chinese arbitration institution (also known as an arbitration commission) such as the China International Economic and Trade Commission ("CIETAC"), and will not recognise ad hoc arbitrations.

International Arbitration Institutions

There are four types of arbitration institution in China: (1) approximately 150 local arbitration commissions set up in cities across China and administered by the local government such as the Beijing and Shenzhen Arbitration Commissions; (2) labour arbitration commissions which hear labour disputes; (3) the China Maritime Arbitration Commission which handles marine disputes and (4) CIETAC which specialises in hearing international or foreign related disputes, 669 references in 1999 alone.

The Role of the Courts in International Arbitration.

The Chinese Court hierarchy comprises: (1) the Basic Court; (2) the Intermediate Court; (3) the Provincial Supreme Court and (4) the National Supreme Court. The Arbitration Law provides that where there is a valid arbitration agreement in existence, the Court will only intervene in limited circumstances. For example, the Court may determine the jurisdiction of the arbitral tribunal or grant interim measures for the protection of property or evidence. Otherwise, the supervision of the arbitration rests with the arbitral tribunal and the chosen arbitration institution.

Enforcement

The award of a recognised arbitration institution, such as CIETAC, is enforced by an application to the Intermediate Court in the province where the respondent is domiciled or its assets located. The court may refuse to enforce an award in limited circumstances: (1) if there is no valid arbitration agreement; (2) if the respondent was not notified to appoint an arbitrator, or take part in the proceedings, or was unable to put its case for reasons beyond its

control; (3) the tribunal or arbitration procedure did not conform with the chosen arbitration institution's rules or (4) the arbitral tribunal ruled on issues beyond its jurisdiction.

China acceded to the United Nations Convention for the Recognition and Enforcement of Foreign Awards 1958 ("The New York Convention ") in January 1987. Therefore, enforcement of an arbitral award, given in a foreign jurisdiction that is also a signatory of the New York Convention, may be achieved by an application to the Intermediate Court of the province in which the respondent or its assets reside. The grounds for refusal of enforcement, set out in Article V of the New York Convention, are concerned mainly with the failure of due process.

The Courts will not, however, enforce an arbitration award resulting from an ad hoc arbitration. Similarly, if the seat or venue of the arbitration is specified to be China, the award will only be enforceable if the arbitration was supervised by a recognised Chinese arbitration institution. A foreign arbitration institution, such as the International Chamber of Commerce International Court of Arbitration ("the ICC International Court of Arbitration"), is not a recognised arbitration institution for the purposes of an arbitration conducted in China and any award from such an arbitration will not be enforceable

Hong Kong S.A.R.

International Arbitration Law

Arbitration in Hong Kong is governed by the Arbitration Ordinance which governs both domestic and international arbitration. The rules governing international arbitration are based upon UNCITRAL Model Law which underpins the international arbitration law of many Asian jurisdictions.

International Arbitration Institutions

The Arbitration Ordinance recognises both ad hoc and institutional arbitrations. Therefore, international arbitrations may be conducted in Hong Kong under the auspices of an overseas international arbitration institution, such as the ICC International Court of Arbitration, or through the Hong Kong International Arbitration Centre ("HKIAC"). Between 1985 and 1998, a total of 1,602 disputes were referred to the HKIAC.

The Role of the Courts in International Arbitration

The role of the Hong Kong Courts in arbitration is limited due to the relatively extensive powers of the arbitrators. Under the Arbitration Ordinance, arbitrators may make orders for interim protective relief, such as injunctions, and for the production of documents. Although the courts have similar powers, such references will usually only be made for orders concerning third parties over whom the tribunal does not have jurisdiction.

Enforcement

An arbitration award made in Hong Kong is enforced in the same way as a judgment of the Court except that the claimant seeking to enforce the award must first apply to the Court for leave to enforce. An application for leave to enforce an international arbitration award may be refused, or an application to set aside that award may be granted, on the grounds set out within Article 34 of the Model Law. Those grounds are, principally, concerned with due process. If the respondent applies to set aside the award, it must do so within three months of receipt of the award.

Hong Kong forms part of China which is a signatory to the New York Convention 1958. Foreign arbitral awards from other signatory countries are, therefore, enforceable in Hong Kong, subject to the provisions of Article V. Following the passing of the Arbitration (Amendment) Ordinance in Hong Kong on 1st February 2000 and the issuance of a Notice of the Supreme People's Court of China on 24th January 2000, arbitration awards in China and

Hong Kong are mutually enforceable. Enforcement will only be refused in circumstances similar to those contained within Article V of the New York Convention. In this way China and Hong Kong have re-established the position with regard to enforcement of awards under the New York Convention as it was prior to Hong Kong's accession to China in 1997.

Singapore and Indonesia

In the next edition Justyn Jagger will examine arbitration in Singapore and Indonesia.

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Author : Philip Harvey
Title : Adjudication Under FIDIC

Over the last few years attempts to change the contracting climate in the UK have become increasingly obtrusive, if not increasingly effective. The mutual compatibility of separate Conditions of Contract, (the Engineering Construction Contracts, for example), the adoption of common user language (dumbing down?) and legislation under the HGCR Act of 1996 come to mind. Recommendations made by Latham, Egan and Woolf also refer, and then there's partnering, ADR.....

Well, the FIDIC Conditions of Contract have been changing too, and in much the same way. The FIDIC rainbow, Red (works designed by the Employer), Yellow (Plant or M/E designed by the Contractor), Silver (Turnkey designed by the Contractor) and Green (short form for minor works designed by both or either), are all now to a common format, in simple everyday English, and replace the engineer's traditional "independent adjudicator" role with a separate adjudicating panel. The new FIDIC Conditions are designated in accordance with who carries design responsibility, rather than in accordance with the type of work - civil or mechanical/electrical, and the shift in attitude is reflected in the changed authority of the Engineer. He is retained, as traditionally employed by the Employer, under the Red and Yellow books, but replaced in Silver and Green by the Employer himself or his representative. All the books (albeit Green in a simplified form) set out in Clause 20 a common dispute procedure which provides:

- Notice of claim within 28 days of the event, a Condition Precedent to any recovery at all.
- Full detail to be submitted within 42 days of the event.
- Engineer or Employer to give a detailed response, yes or no (no sitting on the fence) within a further 42 days.
- If no agreement, Engineer or Employer to consult with Contractor before making a "fair determination".
- Either party may refer that decision to the Disputes Adjudication Board (DAB). If no DAB has been appointed, then that shall be done within 28 days of the decision to refer.
- The DAB shall give a decision within 84 days.
- Dissatisfaction with the decision must be notified within 28 days or it becomes final. Such a notice is a Condition Precedent for subsequent arbitration.
- A further 56 days cooling off - amicable settlement period must elapse before arbitration can be started.

That's the basic procedure, and if you are going down that path you will obviously read the Clause and the Appendix very carefully and follow the provisions precisely. However, a few general comments might be made.

It's not quite the same as the "28 day - adjudication - at - any - time" UK procedure, is it? Getting a decision will take about 6 months. It won't match the UK procedure for cheapness either - three high powered adjudicators making repeated visits to site, staying in hotels, meeting at intervals and to discuss the dispute.....

The constitution, establishment and working of the DAB is prescribed in Clause 20 and the Appendices thereto. Generally made up of three people (one elected by each party to the contract, a Chairman by the two elected) they are each required to be experienced in the work, in the interpretation of contract documentation, and fluent in the relevant languages. Quite a tall order. A hydro plant would involve major civil works and major M/E works, very different fields of expertise. Engineers with experience as Arbitrators are probably the best bet, with the Chairman from a legal background.

The books vary as to when the DAB should be set up - Red on award of contract, Silver when the first dispute arises. The idea was that the DAB is unlikely (or at least less likely) to be needed for 'off-site' work, so it should be set up when site work starts. That is, at once on a civils contract under Red Book, but possibly after a long manufacturing lead-in for Yellow and Silver contracts.

If the DAB is set up in response to a specific dispute, as the Silver Book provides, then its expertise can be selected to suit. If set up on day one, when any sort of dispute might arise, over specialised adjudicators are best avoided.

I have no doubt that the DAB should be established on day one, irrespective of the type of work, and encouraged to function from that moment by intermittent site or works visits and briefings. Despite, and in fact contrary to, the particular provisions of Clause 20, experience shows that the most effective contribution of the DAB is a "nudge nudge, wink wink, do you really think that argument should be pursued" response to ongoing events. An informal, but informed, source of advice to both parties from three wise men who are increasingly familiar with the project, with the parties thereto and with each other can work wonders in cooling things down. OK, so it costs money, but the potential savings on dispute resolution, working relationships and non-productive argument are enormous.

Unlike the UK 1996 Act, the adjudication provisions included in FIDIC are not in themselves mandatory, though if the project comprises a construction contract under the Act and is carried out in the UK, then the UK Act kicks in. But overseas the parties can change the adjudication provisions by agreement and, perhaps, introduce rather more urgency into the proceedings.

It is worth noting that the inclusion of an adjudication procedure, particularly in the Silver Book, substantially reduces the authority and influence (clout might be a better word) of the Employer. There is an 'immediate' appeal against any decision he might make, and the Contractor doesn't have to honour it either, provided he says he won't within 14 days (Clause 3.5).

Incidentally, the DAB should not be confused with the Disputes Review Board of the World Bank Standard Bidding Documents. Decisions made by the DAB are binding unless changed in arbitration, those made by the DRB are recommendations only.

Replacing Engineer's Decisions by a DAB is welcome. But it's no quicker and it's more expensive. The main advantage, to both parties, depends on a rather more pragmatic approach than usual to the small print of the Contract Conditions. If the three members of the DAB are wise men, then the system can work wonders.

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Author : Anthony Farrow
Title : Partnership of Conflict

Tony Farrow recently spoke at a conference in Hong Kong regarding the role of the Expert Witness. His paper asked whether the Expert's role produced a partnership relationship with both the instructing Solicitor and the Court or Arbitration Tribunal, or whether the relationships created *conflict*.

It is my experience that Solicitors and Experts often develop a working relationship over a number of cases and so continue working together over some time. In this way, they work in partnership, benefiting from a greater understanding of each others working practices. This obviously benefits the clients, but the more this relationship develops, the greater the potential conflict when the Tribunal demands high standards of independent and objective reporting.

Considering the instructions Experts receive, it used to be that they would be quite comprehensive and cover such matters as :-

- background to the case
- the Client's position ie its financial position on a contract, for example
- how the claim has been prepared
- weaknesses of the case and claim
- seek recommendations for improving the case or claim
- ask for assistance in carrying out exercises for pleadings
- require a Report
- attend meetings, and
- give evidence at a hearing

I would emphasise that in the past, instructions openly debated the weaknesses (and strengths) of the client's case and sought assistance in improving the claim (or Defence). For example, a claim may be made on a total cost/global basis and needs breaking down into individual elements of causation. In this way, the Solicitor seeks to work in partnership with the Expert.

The Expert's traditional role was, in the first instance, to assist with case preparation and then undertake the Expert Report role later. The degree of case preparation input could lead to conflict with the Tribunal, that is to say, the Expert may be commenting on his own case.

However, since the Woolf Report and the CPR changes in England and Wales, the nature of the Expert's instruction have been changing as well. On the one hand, they have become briefer, the 'less written the better' approach, so that there is no debate about the strengths and weaknesses of the case, nor written instructions about assisting with pleading matters, for example.

On the other hand, instructions have become more comprehensive, with some Solicitors taking **time** to specifically draw attention to the standards to which Experts must comply. These latter instructions accept that the Expert's ultimate role should be seen more as a partnership with the Tribunal, rather than with the Solicitor.

On a general note, I would also add that the more comprehensive the Expert's instructions, the greater will be his effective utilisation - with very brief instructions, it is easy to undertake unnecessary work or address the wrong issues.

Turning to the present day role of the Expert, the Academy of Experts Guidance Notes to Experts, identifies the **Advisory Expert** role - where the duty is to the Client; and the **Reporting Expert** role, where the duty is ultimately to the Tribunal.

In fact, one can separate the roles entirely, and I have experience of one such case. The particular Solicitor appreciated that the level of input he and the Client required in case-preparation work would compromise the Reporting Expert's objective and independent role. Consequently, one of Trett Consulting's competitors were appointed Advising Expert and I was appointed Reporting Expert. The Advising Expert attended all internal meetings, I only attended a few. The Advising Expert was very 'hands-on', I was not. In this way my role had no conflict with either the Solicitor's requirements or the Tribunal.

Turning to the Single Joint Expert, we have a number of such appointments. Instructions are far more comprehensive, having been jointly agreed by both parties Solicitors. Conflict does occur, however, when the Expert needs to go beyond or behind those instructions, or wishes to interview staff, for example. One party agrees to a request, the other does not, sort of thing.

In most Single Joint Expert cases, the parties generally retain their own Advising Experts, hence there is a cost implication.

To summarise my views, there are conflicts throughout the process; those with Solicitors include both case management issues, such as poor instructions, as well as the Expert becoming too involved in a very partisan process. However, I firmly believe that my biggest contributions to the Dispute Resolution Process have come from working with Solicitors and Clients in advising on the case or claim, well before a hearing in front of a Tribunal takes place. Tribunals demand a very high standard from Experts, rightly so, but this involvement of the Expert with the Solicitor and Client is seen as a potential conflict.

However, a competent and well trained Expert is, in my opinion, able to balance the two roles of Advising and Reporting Expert.

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Author : Barry Kirby
Title : Dutch Courage - The Resource of Experience is Enormous

In the period, 1994-2000 Trett Consulting was involved in over forty disputes of which ten were subjects for arbitration , [seven of which were settled prior to trial and three were satisfactorily settled by arbitration.] Only one was the subject of litigation, the remainder were commercial claims settled satisfactorily without the need for litigation or arbitration.

Trett Consulting's current workload involves fifteen major accounts in Holland, one in Nigeria and two in the UK. These cases involve contract administration, preparation of contract terms and conditions, Joint venture formulation, acquisition and auditing. In the arena of disputes, three cases are undergoing arbitration and two are in litigation. A further two are the subject of mediation.

The industry sectors we have worked in include, Shipping, Offshore & Marine, Petrochemical, Pharmaceutical, Building and Civil Engineering [Tunnels, Railways, Bridges], Paper Mills, Food and Fertilizer Processing, Water Treatment and Defence contracts. We have extensive experience in Boiler and Turbine installations, in the Power, Gas and Incinerator sectors and developments in Biomass.

The work for our European clients has encompassed many major projects in the Netherlands and in other parts of the world the statistics are:-

Australia [1], Belgium [3], Bratislava [1], Brazil [1], France[1], Germany [3], India[2], Indonesia[1], Italy [1], Nigeria[1], Norway[1], Poland [1], Spain [1], Sweden [2], Turkey [2], UAE [2] and UK [4]

Our work has brought us into contact with lawyers from the USA, UK, and Sweden as well as numerous legal practices in Holland. We have dealt extensively with the Dutch Civil Code and addressed complicated issues such as sub-contracts in England under Dutch Law and contracts in Holland under English law. Other projects have involved the laws of, Belgium, France, England & Wales, Scotland, Switzerland, Germany, Sweden, Turkey and Nigeria.

What has Trett learned from Europe and Holland in particular? The short answer is a great deal, some snapshots are:-

In only five of over fifty disputes covered by arbitration, litigation, mediation and negotiation in the past seven years has there been any heavyweight reliance on points of law. With one exception, these have been minor or procedural in context in the final outcome. The Dutch arbitrators have an uncanny sense of fair play and display considerable common sense.

At least a general understanding is required of the various codified legal systems of Europe as well as the precedence and rigidity of the US/UK systems. There is at times an abhorrence in the European construction industry for what is commonly termed the "Anglo-Saxon" methods of dispute resolution. We have thus learned to be flexible in approach and not to fix our efforts and ideas on any one system.

Many large contracts, especially those receiving funding from Brussels and involving international contractors in consortium, are governed by the English language. The command of language especially in the Netherlands is second to none, yet we have learned that the literal translations of words such as "delivery" [Dutch -"levering"] and "takeover" [Dutch-"overname"] are interpreted in contractual terms in fundamentally different ways. Basically one culture, includes commissioning and testing, whereas the other excludes such activities.

Such differences of understanding abound in consortium agreements, especially when things go wrong, thus requiring extreme clarity and extra definition in their preparation. Two UK majors delayed their plans for establishing consortia in Europe after consulting Trett. Both had the similar comments viz:-

Our marketing people do not possess Trett Consulting's local knowledge of contracting commercial or fiscal matters. Our existing plans if pursued would have led us eventually into conflict."

The Dutch system of arbitration reflects Dutch culture. It is anything but adversarial and is generally reasonable in approach. It can and will entertain global claims and always provided that the case is fully and properly prepared and further that it is easy to read a resolution will be forthcoming in a reasonable time. Our opinion is that it will take considerable time for this system to be altered.

It is frequently stated that arbitration is cumbersome, protracted and expensive and commercial organisations are therefore, seriously considering ADR for the settlement of disputes. This process is attractive when it works and is reputed to be cheaper and quicker. Here in Holland, however, our observations show that ADR processes sometimes give more weight to the negotiating power of the protagonists than the rights and wrongs of a dispute. Further there is not much of a track record and a great deal of education is needed before ADR revolutionises dispute resolution in the Netherlands.

The cost of arbitration can be high but the experts' fee structures are not the cause, they are an effect. UK engineers need to ensure that the best UK practices are understood in the EC, but should be ready to learn about the construction practices in mainland Europe and to consider adoption of the better ones for use in the UK.

Sadly, Barry Kirby has passed away since writing this article. Any queries regarding this article or our operations in the Netherlands should be directed towards John Lott of our Netherlands office