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Article No : 1
Author : Doug Jones and Frank Bannon
Title : Australian Trends in Infrastructure Provision

In the past few years, Australian governments (both state and federal) have considered the use of both public and private sector capabilities in infrastructure development. This is most clearly exemplified in the growth of Public Private Partnerships (PPP), a term which has migrated to Australia from the United Kingdom. While the label may be relatively new, the employment of the private sector in the financing and delivery of Australian infrastructure services is well-established. Federal and state governments are aware of the need for a coordinated policy harnessing private involvement in further development.

THE Australian understanding of such a "partnership" is probably unique in that it entails not only an arrangement between public and private sectors for mutual benefit, but an "alliancing" approach to infrastructure delivery consistent with the dictates of efficiency and probity.

PPPs in Australia may either be identified with certain contracting structures designed to utilise *private* financing for infrastructure projects, or to engage the private sector in *publicly* financed infrastructure projects. This article gives a brief overview of the Australian experience in relation to these.

Build, own, operate and transfer (BOOT) projects, which have been employed since the 1980s, are currently seen as the predominant contractual structure for Australian PPPs. Schemes such as the Sydney Harbour Tunnel and urban tollways in Sydney and Melbourne involve a familiar model: the private financing and construction of a facility which is owned and operated by the private investor for a lengthy concession period, at the end of which the asset is transferred to the state. The government can retain ultimate control of the asset while transferring operational risks to the private sector. New forms of PPP which involve private financing (known as Private Financing Initiatives (PFIs)) generally expand or adapt the Build Own Operate Transfer (BOOT) legacy.

The Victorian Government is at the forefront in encouraging private investment in public infrastructure projects. In its *Partnerships Victoria* initiative, the Victorian Government has adopted an "optimal risk allocation" approach which presupposes that the private party will bear all risks associated with design, construction and operation.

In a similar vein, consultations between the New South Wales Government and the private sector led to the NSW Government's publication of a Green Paper - *Working with Government*, in November 2000. The Government proposes to develop a comprehensive PPP policy for the delivery of public infrastructure services which will optimise financial arrangements and planning. The Victorian and New South Wales applications of PPP contracting structures are already encouraging projects in the transport and water sectors and are inspiring other States to follow suit.

A further example of a PFI method used in Australia is the operating franchise, which has been adopted by State governments as an alternative to selling off existing infrastructure. Private investors purchase rights to the ownership and operation of a pre-existing public facility for an agreed concession period, during which revenue goes to the investors. The most sophisticated franchise model adopted to date has been the rail franchises let by the Victorian Government in 1999, which were used to capture private sector skills and efficiencies without locking in a single operator in perpetuity. Franchisees in turn receive financial incentives from the state where pre-defined levels of operational performance are exceeded.

While the PPP methods described above involve private financing, it is generally acknowledged in Australia that "PPP" incorporates delivery methods which, although purely publicly funded, establish a close working relationship between public and private sectors.

Thus, the well-established Design, Construct and Maintain (DCM) contract can be considered a PPP where it is used in the case of a private contractor delivering a public facility and then maintaining it for a significant period of time. An example of a DCM PPP is the private provision and maintenance of the next generation of rolling stock for the NSW State Rail Authority.

Even more illustrative of the partnership between public and private sectors is the use of "alliancing" in the provision of infrastructure. A form of "relationship contracting", alliancing seeks to revolutionise the often confrontational and counter-productive relationships which develop between owner and contractor. It does this by formally aligning the commercial interests of the parties, and by having the parties "contract away" most rights to litigate or arbitrate a dispute. Parties are forced to resolve differences collaboratively, and non-owner parties obtain a profit as a share of savings made against the target price, and as bonuses awarded for outstanding results as against performance benchmarks.

Alliancing is especially attractive to government in the delivery of specific infrastructure projects as it is tailored to the achievement of the owner's special objectives. For instance, the Northside Sewerage Tunnel in New South Wales was a successful project alliance for the Sydney Water Corporation (SWC). Project alliancing was deemed the method best able to ensure completion before the Sydney 2000 Olympic Games (SWC's overriding objective), whilst offering flexibility in design.

Strategic alliances may present a more suitable delivery option when contracting for the maintenance, operation or upgrade of existing infrastructure. These are long-term arrangements for the outsourcing of services on a cost-plus basis with commercial drivers facilitating meetings of the government's objectives. Examples include the Infrastructure Works and Maintenance Services Providers contracts let by the NSW Rail Access Corporation.

Private sector involvement in the provision of infrastructure is well established in Australia. Bearing in mind that private financing may not always be appropriate for the individual project, the Australian experience with PPPs indicates that federal and state governments will continue to look for innovative ways to collaborate with the private sector in the financing, delivery and management of public facilities.

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Article No : 2
Author : Julian Cohen
Title : How much Proof is Enough Proof?

In the last Trett Digest, Lawyer Julian Cohen explained the concept of the ‘burden of proof’ and the ‘standard of proof’. In this follow-up article, he discusses the issue of ‘proof’, as may arise on construction and engineering cases. In this article he can do no more than to give you some brief thoughts on various aspects of construction and engineering cases in relation to the burden and standard of proof. In any event, the judgement calls that need to be made will depend to a very large extent on the particular claim and who you represent.

A whistle stop tour through these factors:

The contract

(i) Contractual requirements

It is, of course, absolutely imperative that care is taken to ensure compliance with any specific contractual requirements in relation to the claim. A failure to do so can be fatal to the claim – or, at the very least, introduce another (unnecessary) battle that you need to fight.

There is often a temptation at an early stage to avoid providing notices and /or details of claims as required by the contract – on the basis either that following the contractual procedure is too difficult and costly or, because it., may cause the other party to become hostile. In my experience, however, a failure to comply with procedural requirements in the contract often comes back to haunt you. After all, if you do not comply with the contractual requirements and you end up with a full blown dispute, is it realistic to assume that the other party will not exploit your failure (however much they have previously encouraged informal working practices)? Early thought should also be given to whether the contract excludes claims for certain types of costs or losses.

If particular types of loss are excluded, it may be legitimately possible to re-package some of those losses so as to bring them within other heads of loss that are recoverable. For example, some costs may legitimately be capable of being allocated to a variation order or to prolongation. If the contract allows a profit element on variations but not prolongation costs, it would obviously be sensible for the claim to include these costs in the variation claim.

Timing and objective

(ii) The stage of claim

This is a fundamental consideration. For example, the levels of proof appropriate for a commercial claim and the same claim in an arbitration are usually quite different.

Arbitrators and, particularly, judges expect a fairly high degree of proof. The breakdown of the costs and losses claimed and the substantiating proof are usually expected to be reasonably detailed to show that the costs and losses have actually been incurred.

If, for some genuine reason, it is difficult to prove specific actual costs and losses, the claimant is usually expected to show that its assessment is the best estimate that he can reasonably produce and that it fits with reality.

On the other hand, commercial claims often do not need to be prepared in so much detail or be substantiated to the same extent. Plenty of claims are routinely accepted or negotiated with a much lower level of proof. It would be neither cost nor time efficient to do otherwise. In addition, the other party to a contract already has its own knowledge about the project and the dispute – whereas an arbitrator or judge has no background knowledge at all.

When a claim is being prepared it is therefore important to identify how much proof is appropriate for that stage. It may also pay to think ahead.

For example, it may be worth considering how a commercial claim may need to be developed to meet the higher degree of proof that will apply if the claim later goes to arbitration. Ideally, it should be possible to develop the existing commercial claim in more detail. However, a fresh approach is sometimes needed for the arbitration (detailed delay analyses are often postponed until an arbitration is inevitable for cost reasons). In that situation, a decision needs to be made as to how much work to put into the commercial claim so as to maximise the chances of settling the claim whilst minimising wasted work if it is necessary to proceed to arbitration.

(iii) The purpose of the claim submission

Clearly, the purpose of the submission should dictate how the submission is prepared and presented.

For example, a much lower level of substantiation may be required if the claim is put together to comply with contractual notice provisions (although careful regard should be had to the contractual requirements to ensure compliance).

If the purpose of the claim is to enable a negotiation, the level of proof needs to be considered in the context of the negotiating strategy and what is likely to influence the other party.

On the other hand, if the aim of the claim is to be persuasive and to lead to the maximum amount of money being recovered, the claim usually needs to be well substantiated and supported with a higher level of proof.

The nature of the claim itself

(iv) The amount of money involved

The amount of time and money spent on proving costs and losses needs to reflect the amount of money at stake. Small claim items do not usually warrant the same degree of proof as large ones.

On the other hand, cutting corners even with small claims items exposes you to risks – both in relation to the small claim items themselves and also potentially in relation to knock on effects with other and larger claim items. If, for example, a defending party can show that a sufficient number of the smaller claims are unsubstantiated or, worse, exaggerated, this can sometimes affect the credibility of all of the submitted claims.

(v) The complexity of the claim

In very general terms, the more complex a claim, the greater extent of the proof needed. This is in part because there tend to be more elements to prove in a complex claim than a simple one. It can also be because in a complex claim it is less obvious that [a] leads to [b]. There may be a great number of other explanations. A demonstration of factual accuracy and a logical progression is important.

The law, however, recognises that some claims are so complex that it is almost impossible to prove each element of them – or that to do so would be fiercely expensive and time consuming. When that situation arises, a different approach to proof may be appropriate.

A good example is the approach to the pleading of global delay claims in relation to which there is a significant amount of case law. The judicial debate on the acceptability of global claims tends to be in the context of whether a particular pleaded global claim is so defective as to mean that it should be struck out and not even considered by the arbitrator? 1

The current judicial approach is that global claims are discouraged but can be pleaded if it is genuinely not feasible to identify and plead how each specific loss was caused by each specific breach.

So, for example, delay claims should not be pleaded globally if it is possible to link specific causes and effects. Instead, each item of loss should be linked to a specific cause and this linkage proved. However, where it is impracticable to disentangle the specific losses and link them to specific causes, a global claim can be pleaded. The causes of delay and the actual losses still need to be identified but it is not necessary to plead how each specific delaying event caused each head of loss.

Even if a global claim can be pleaded, it does not mean that the judge or arbitrator will find a global presentation persuasive at the end of the case. The claimant can not simply say it is too complicated to prove, so he should be

awarded everything he claims! Persuasiveness will depend on the facts, whether the claimant could reasonably have been more specific, and how the global claim is presented. Indeed in practice, some arbitrators expect a higher level of proof that the claimed losses are to the account of the other party where there is a global claim than where the claimant alleges that a specific loss was caused by a specific event.

A claimant with a global claim can not therefore abandon proving his claim – he simply needs to adopt a different approach. For example, the claimant should consider bringing evidence to show that a global claim is appropriate and the claimant is not merely trying to evade proving cause and effect. Equally, the claimant may need to show that his own behaviour and conduct has not caused the need for a global claim. Finally, and most importantly, the claimant will still need to prove that it incurred the costs and losses that it is claiming and that these were caused by the other party.

(vi) The difficulty of proving actual loss

The underlying principle is, of course, that a party can only recover losses that it can prove it actually suffered. Courts and arbitrators tend not to let parties off lightly from doing this.

However, the law does recognise that there are some circumstances in which it is overly difficult or expensive to prove the amount of actual losses. In those circumstances the claimant can sometimes make use of general assessments or formulaic calculations as a starting point. However, where this is possible, it does not mean that the claimant can simply rely on the assessment or formula and need not worry about proving its claim. The claim must still be proved by evidence – but the evidence needed is to show that which shows that the assessment being made is both a realistic assessment of actual losses and also the best estimate that can reasonably be made in the circumstances.

For example, it is often difficult for a contractor to prove the actual amount of head office overhead losses it suffered by reason of prolongation. Where this is the case, courts and arbitrators are open to the loss being assessed or estimated by way of one of the established formulae (Hudson, Emden or Eichleay).

An arbitrator or judge should not, however, accept a simple straightforward claim calculated using one of these formulae.

First, the claimant must prove that the loss of overheads was caused by the prolongation (by showing that but for the prolongation, the Claimant would have funded the relevant overheads by other work).

Secondly, the amount of the overheads claimed must also be proved and not left to be a matter of speculation². In this regard, the starting point is that the claimant should show that ascertaining its actual losses is too difficult and that it is therefore reasonable to use a formula.

Evidence should also be brought to show that the most appropriate formula has been used. The assumptions behind each formula, of course, differ. So the claimant should show that the assumptions of the formula used represent the best fit with reality and bring evidence to support the figures inputted into the formula. The formula itself and/or the calculated figure should then be adjusted to try to reflect more closely the particular facts of the claim.

(vii) The nature of supporting records and evidence available

The level of proof that can be produced will be dictated, at least in part, by the nature of the records and information available. A claim may have to be presented at a very general or global level simply because detailed records do not exist. This often leads to a reduced recovery because the claimant can not bring enough proof. A simple presentation as a global claim may disguise the problems with proof during the commercial claims process and subsequent negotiations. It is unlikely to succeed if the claim is considered by an arbitrator or judge.

It is therefore important that detailed and accurate records are available. Equally, claimable items of expenditure should be separately identifiable. How is an arbitrator supposed to value a claim for acceleration costs if the records do not separately identifying what labour and plant costs were used for acceleration and what were ordinary project resources?

(viii) The challenges being put up by the other side

It, of course, goes with out saying that any known challenges being made by the other side need to be taken into account.

More generally, as I mentioned at the start of this article, consideration needs to be given to the way in which the *persuasive burden of proof* will swing between the parties as the claim develops.

So, for example, if an aspect of the claim has not yet being been challenged, this may point to producing less rather than more proof of that aspect. Equally, once a challenge has been made, the level of evidence needs to be at least sufficient to negate the challenge and shift the persuasive burden back to the other side affect the degree of proof presented.

In summary

The issue of how much proof should be given for a claim is something that needs to be considered at an early stage so as to ensure that the claim's submission stands the best chance of achieving its objectives whilst itself being flexible and cost efficient.

There is no universal answer to how much proof is enough. However, consideration of the sorts of issues that I have identified above should be a helpful starting platform point for making a decision on any particular claim.

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1 See for example J Crosby -v- Portland UDC 5 BLR 121, Wharf -v- Eric Cumine 52 BLR 1, British Airways Pension Trustee Ltd -v- Sir Robert McAlpine & Sons 72 BLR 26, Benhard's Rugby Landscapes -v- Stockley Park 82 BLR 39, John Holland Construction & Engineering -v- Kyaerner R J Brown [1997] BCL 262, Nauru Phosphate Royalties Trust -v- Matthew Hall Mechanical & Electrical [1994] BCL 179.

2 On overhead recovery claims and formulae see, for example J F Finnegan Ltd -v- Sheffield City Council 43 BLR 124, Alfred McAlpine Home North Ltd -v- Property and Land Contractors 76 BLR 65, Builders Co Ltd -v- Chester-le-Street District Council, AMEC Building Ltd -v- Camus Investments Co. Ltd (1997) 13 Const. U. 50, Beechwood Development Company (Scotland) Limited -v- Stuart Mitchell t/a Discovery Land Surveys Scottish Court of Sessions, 12 February 2001.

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Author : Christopher J Hoar
Title : Single Joint Experts: The way forward?

Previous contributors to the Trett Digest have considered the impact of the Woolf reforms on the use and misuse of expert evidence in civil litigation in England and Wales. With over two years having now elapsed since the introduction of the Civil Procedure Rules ("CPR") in April 1999, the writer wishes to consider one particular feature of the new regime insofar as it relates to experts, namely the use of single joint experts.

It will perhaps come as something of a surprise that appointment of single experts by the courts is not a new concept; the right of a court to effect such an appointment was codified as long ago as 1934 within Order 40 of the Rules of the Supreme Court (RSC) and there it remained (although seldom exercised) until the RSC were swept away by the CPR in 1999. Single tribunal appointed experts are of course also nothing new in arbitration; for example, Article 20(4) of the ICC Rules of Conciliation and Arbitration has for many years given arbitrators the power to make such appointments in arbitrations conducted under their auspices.

Albeit that in the final report of "Access to Justice" Lord Woolf recognised that there was considerable resistance to his proposals on single joint experts, which he described as an "*anathema*" to many members of the legal profession, Rule 35.7 of the CPR was included as one of the planks upon which the new regime for civil litigation in England and Wales was seemingly founded.

Despite the concerns expressed by lawyers and others, the simple reality is that (particularly insofar as construction and engineering disputes are concerned) the courts have to date used their power to appoint single joint experts sparingly. Appointments in the Technology and Construction Court (TCC) are not common and perhaps this reticence can be explained by the experience in *Abbey National Mortgages plc v Key Surveyors Nationwide (1995 75 BLR 124)*, which was one of the rare occasions when a single expert appointment was made in the TCC under the old RSC Order 40. The *Abbey National* Case (which related to allegations of negligence by a surveyor) took far longer to conclude than cases of a similar type where both parties retained their own experts.

Lord Woolf acknowledged in "Access to Justice" that:

"As a general principle, single experts should be used wherever the case or the issue is concerned with a substantially established area of knowledge and where it is not necessary for the court directly to sample a range of options"

It is fair to say that, generally, the Courts have taken heed of Lord Woolf's observations when appointing single experts. Large, complex and strongly contested cases are simply unsuitable for such appointments and (as Lord Woolf himself acknowledged) require the full "*adversarial treatment*" including the cross examination of opposing experts on particular issues. It is a fact that single joint experts are seldom (if ever) used in complicated or technical cases in either the TCC or the Commercial Court. Indeed, one Judge of the TCC (His Honour Judge Humphrey Lloyd QC) has gone so far as to say that it is most unlikely that a single expert will be instructed by the Court in a typical case involving a final account, or variations, or loss and expense claims or in a dilapidations case¹. The exception to this may however be when one party is presenting the case itself or had not appointed an expert in circumstances where an impartial view could be beneficial to the Court. Furthermore, a single expert may also be appropriate where one individual is the sole acknowledged authority in a particular area of

expertise and both parties are prepared, in effect, to let him or her come to a conclusion which would almost certainly be followed by the judge.

The reality has tended to be that even when "single" experts have been appointed, the courts have been inclined to allow parties to adduce additional expert evidence. In the case of *Daniels v Walker* [2001] 1 WLR 1382, Lord Woolf himself said that the Court should be prepared to exercise its discretion and permit a party to appoint a further expert where this would enable additional evidence to be obtained in order that a decision could be made as to whether the single expert's evidence should be challenged. The most important consideration though in any application to adduce further evidence would appear to be "*the overall justice to the parties in the context of the litigation*" (*per Neuberger J in Cosgrove v Pattison (ChD) unreported*). The cases seem to suggest that the court will also have regard to the amount at stake in the litigation, the timing of the application and the overall effect of the additional evidence which is to be adduced. Certainly, it will not be sufficient merely for one side to seek to rely on the evidence of a new expert because his opinion differs from that provided by the single expert.

One particular concern which many litigants and their advisers have in agreeing to the appointment of single joint experts is the fact that (under Part 35 of the CPR) any instructions to the expert will not attract privilege. As a result, there is a natural inclination for a party to be less open with the single joint expert than they would perhaps otherwise have been with a party appointed expert for fear that any weaknesses or limitations in their case will be seen by both the other side and the court.

It summary therefore it seems that, despite the widespread concerns expressed when "Access to Justice" first proposed the introduction of a regime of single experts, the reality, at least in the first two and a half years since the introduction of the CPR, is that in sizable construction and engineering disputes very few appointments have been made and that by and large a system of single, party appointed experts has been retained. Even where single appointments have been made, there has been a tendency thus far for parties to retain their own experts to advise them and, even in some cases, to seek to adduce evidence at trial which counters that of the single expert.

Whilst such an approach can perhaps be justified in the larger and more complex dispute, the ramifications in

smaller scale litigation would appear to be that the cost of expert evidence will be increased rather than decreased. This was certainly not what Lord Woolf had in mind in "Access to Justice".

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1 "Expert Evidence" by His Honour Judge Humphrey Lloyd- Paper to The Society of Construction Law Hong Kong- November 2000

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Author : Chris Wilcock
Title : Prime Contracting - What's all that about then?

The Ministry of Defence, through its agency 'Defence Estates', spends well over a billion pounds each year on estate maintenance and refurbishment. From now on it will spend a large chunk of that money through Prime Contracting, a new procurement strategy. As our firm was and is external adviser to Defence Estates I thought I would shed some light on these issues by taking a look at what Prime Contracting really is.

Prime Contracting – revolution or evolution?

The essence of Prime Contracting is single point responsibility. The consolidation and integration of work and services under longer-term contracts is intended to provide opportunities for improved efficiencies and savings throughout the contract period.

There is no universal form of Prime Contract. However, most have certain similarities; they will follow an output specification model; will frequently be priced on the basis of target cost and the Prime Contractor will provide the construction and services, with some degree of partnering within a supply chain.

The challenge will be in assessing the risks and determining a price given the size and diversity of work within the package. The relationship with, and management of, the supply chain will also be key to success.

All well and good but what does it comprise?

The principles are reflected in the Core Conditions¹, a template that will be used to produce the Conditions for each project. These will be adapted and supplemented by other documents to form bespoke arrangements.

One contractor will be appointed to have overall responsibility for the management and delivery of a project, including co-ordination and integration of the activities of a number of sub-contractors to meet the overall specification efficiently, economically and on time. The MoD does not play a direct role in the approval or appointment of the subcontractors.

Effective supply chain management and integration are key features. Partnering is encouraged at the supply chain level. The Conditions do not provide for a strategic alliance but opt for fostering greater collaboration and a less adversarial relationship. At the centre is a target cost pricing arrangement with a pain/gain sharing provision between the MoD and the Prime Contractor up to a maximum price target cost. Target profit is identified as a separate margin. The MoD has indicated that Prime Contractors should be entitled to a fair profit margin, which they would be able to pass down through the supply chain.

The Core Conditions provide for a Dispute Resolution Board throughout the duration of the contract. It comprises 3 experts, 2 of whom are nominated by either party, from lists provided at the outset. The Board can decide on the method of dispute resolution but only after representations from the parties. The clear intention is that the Board will comprise experienced lawyers and other specialists well versed in MoD contracting. They can bring that knowledge and experience to bear in the dispute process.

The emphasis is towards greater openness, shared development and improvement with concepts such as through life costs, continuous improvement, open book accounting, joint equality of information and innovation. Throughout the contract period there are opportunities

for collaboration and discussion between the Defence Estates Project Manager (DEPM) and the Prime Contractor.

The Prime Contracts fall into two categories. Under the Regional Prime Contract, the Prime Contractor will be required to carry out estate maintenance and operation across a number of sites within a region and a certain amount of new build. The contract period will be a minimum of five or seven years. Under the stand-alone works project, the Prime Contractor will be required to design and construct an asset to be fit for its intended purpose with a through life cost compliance period of probably three years.

The Conditions include options for the MoD to extend both contracts, bringing potential benefits to both parties. The terms of extension would be based on specific pricing parameters identified at tender. Contractors will have to give careful consideration to the identification of such parameters.

Criticisms

Disappointment has been expressed in some quarters that these contracts will be competitively tendered.

There has been comment that the Prime Contracts pass too much risk on to the Prime Contractor as Prime Contracting takes the view that risk should be carried by the party best able to bear it. However, there are special provisions for the costing of contingent risk. A provisional target cost is allocated to each risk and if a risk arises then the DEPM will consider whether an adjustment should be made to the maximum price target cost (MPTC) mechanism and there is a provision for the parties to agree on the adjustment.

Opportunity and challenge

The Core Conditions allow for strategic rather than tactical procurement. Prime Contracting represents a radical shift in the MoD's approach to procurement and raises particular challenges for contractors.

The advantage to contractors will be the security and benefit of long term contracts on their balance sheets. There are long-term commitments required on both sides and opportunities for shared learning and development

Conclusions

This procurement strategy has already been embraced by the private sector. Sainsbury's recently announced that Prime Contracting was to be its preferred form of procurement. With committed clients the strategy ought to succeed. The challenge is there – the benefits are obvious.

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1 Defence Estates website:

www.defenceestates.mod.uk/prime_contracting/core_conditions_and_summary_guide

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Author : Mervyn Raybold
Title : Delay Analysis - What the Courts have said

This paper looks specifically at methods of preparing delay analyses and not at issues such as the granting or otherwise of extensions of time, culpable and/or concurrent delay or interference.

THERE are a number of methods of preparing 'delay' claims which all involve, to a greater or lesser extent, an analysis and visual depiction (programme) of the causes of the delay to the project. Such programming methods include:

- **Dominant cause** – Involves identifying the cause(s) most likely to have resulted in delay.
- **But for** – Based on the premise that 'but for' the employer's interference, the contractor would have finished on time.
- **First past the post** – Where the employer's and contractor's delays assessed separately and offset against each other. Liability is limited to that period beyond the other party's cumulative delay.
- **Adjusted as-planned** – Where delays are input into the planned programme to provide a notional view of overall delay.
- **Collapsed as-built** – Events are analysed for responsibility and tagged on to the end of the affected activity.
- **Planned vs As-Built** – A comparison of planned and actual programmes involving a recreation of events based on what actually happened ("retrospective analysis").
- **Time impact analysis** – A detailed analysis of the planned intent, resources and actual events resulting in allocation of responsibility and detailing the effects of delays involving a more detailed retrospective analysis.

This paper is primarily concerned with what the courts have said relating to programming techniques in support of delay claims. The details of each technique and their relative merits are not considered here. The following cases provide some assistance in deciding the programme format for presentation of a delay claim.

Fairweather v. L.B of Wandsworth
(1987)

This case from the Official Referee's court (now the Technology and Construction Court) indicates that the dominant cause technique of delay claim presentation is incorrect.

South Australia v. York Montague
(1996)

In this House of Lords case, doubt was cast on the proposition that 'but for' the employer's interference, the contractor would have finished on time as an appropriate test for establishing liability.

Turner Page Music v. Torres Design
(1997)

The judge in this case expressed a preference for the dominant cause test for establishing liability over that of the 'but for' test.

McAlpine Humberoak Ltd v McDermott International Inc (1990) 24 Con LR 68, (1992) 58 BLR 1

In this case, the claim format was described as a "retrospective and dissectional re-creation" ("retrospective analysis") of the project. The judge at first instance described this method as unhelpful, artificial and ultimately of no particular use in deciding how delays had actually been caused. However, the case went to appeal and the court approved the programming technique as being just what the case required. This case therefore supports the use of retrospective analysis as a programming technique in the preparation of delay claims.

Briefly, the procedure involves the preparation and comparison of planned versus as-built programmes and tracing the critical path through the project from what was planned to what it became. It is important that the critical path logic is established and shown so that the effect of actual events can be tracked. This will involve the insertion into the planned programme of each event (variation, change in sequence, prolongation of activities etc.) at the time and in the sequence it occurred to produce the asbuilt programme. By analysis of the actual events, those that delayed the completion date of the project should become clear. This technique should allow the effect on the completion date to be shown and described for each delaying event. It would seem that this case supports both the Planned vs As-Built and Time Impact Analysis methods of programming.

Wharf Properties v Eric Cumine Associates (1991) 52 BLR 1

This case is often cited as the case that gives rise to the requirement to link cause and effect because the claimant's case was struck out on the basis that the case against the defendant was not clear and so no proper response could be given. However, the judgement that the statement of claim was "embarrassing" to the defendant was based on the facts of this particular case.

Bovis Construction Ltd (1992) 32 Con LR 90

Although this case was before the Civil Procedure Rules were enacted (Woolf reforms), it was stated that it is a requirement that a case is properly pleaded which is a question of degree in each case.

John Barker v London Portman Hotel

The conclusion in this case was that a logical and methodical approach is required when assessing a contractor's entitlement to an extension of time so that delays to the completion date caused by the employer could be identified. Any application of judgement in the formulation of the delay claim should be fair and reasonable. In this case, the Architect could not show a logical and methodical approach to his assessment of an extension of time and so his assessment was flawed.

Bernhards Rugby Landscapes v Stockley Park (1997) 82 BLR 39

Notwithstanding the Wharf case, it was stated in this case that the power to strike out a claim is limited. Three principles were formulated with respect to how claimants should present their claim. Those principles are:

1. A party is entitled to present his case as he sees fit (without interference from the court) provided the defendant knows the case against it.
2. The court must, in order to ensure the principles of natural justice are followed, require a party to spell out its case with sufficient particularity. Where the case is based on the interaction of events (cause and effect) then the claimant should clearly identify the nexus in an intelligible form.

3. What is sufficient particularity is a matter of fact and degree in each particular case. However, the factors involved include a balance between excessive particularity and portrayal of basic information, cost effectiveness and the contemporaneous information available.

In some respects, this case has clarified the requirements stated in the *Wharf* case by setting down a set of principles which confirm the requirement to show cause and effect within the new confines of the Civil Procedure Rules.

Other than the comments in the *McAlpine v McDermott* case, there is no real guidance from the higher courts into the degree of proof or particularity claims and in particular the programming method invariably required to support such claims. It could be said therefore that the law remains uncertain in this area.

Practicalities

Despite the limited guidance from the above cases, there are a number of practical considerations that can be discerned from these cases (and the wider debate on delay claim formulation) in the approach to and method of preparing programmes in support of delay claims.

The term given to the method outlined below is Time Impact Analysis (a term coined in America).

The planned intent and original order/sequence of activities should be demonstrated (Network Analysis).

The allocated resources should be assessed to ensure and show that the original planned intent was achievable.

The relative importance of different delaying events should be determined and these then inserted into the programme having regard to what had been planned and what in fact happened.

The programme should be rescheduled after each event has been inserted so that the effect of the next event interacts with the programme, as it then would have stood. The cumulative effect and interaction of events can then be determined.

All events should be shown whatever their perceived or alleged cause including any actions in respect of mitigation. This is the "warts and all" approach.

Events should be inserted in the order/sequence they occurred.

Milestones to be achieved before proceeding to the next activity should be determined and shown.

Concurrency of events should be shown (usually the events are not concurrent but effects of those events are concurrent).

The critical path and how it changed with time and events should be shown.

For delaying events, the delay to any section of the programme should be shown as well as its effect on the project completion date in isolation of other events.

Put simply, the objective of carrying out the above exercises is to show why the job took longer than planned. In the context of a court action, the word 'show' can be substituted for "prove, on the balance of probabilities".

Of course, the depth and extent of the delay claim analysis will be dependent on the level and detail of the contemporaneous records available. In the UK, this reconstruction of the contractor's original programme as there are few contracts entered into that require the contractor to produce a true network analysis and to keep it regularly updated. Standard form contracts are generally lacking in the UK in respect of requiring detailed programming techniques to be adopted in the management of progress.

Summary

The claimant is free to choose any format he wishes for presentation of his delay claim but should be aware that the courts have rejected some formats. It may be however, that the claimant has other reasons for selecting a particular format (e.g. as a negotiating tool or because their client has requested a particular type of presentation). Should the claimant proceed with a claim in a particular format for say negotiation purposes and then find that negotiations break down and a dispute ensues, then the claimant may be put to the task (and cost) of reworking the delay claim into a format more acceptable to the court.

Now that the Civil Procedure Rules ('CPR') are in place, it is important that the objectives of CPR are considered which basically means that issues of fairness, time and cost effectiveness are important. The Statement of Case (which replaced Pleadings) should clearly set out the case to be answered. Therefore the format of any claim for delay should also have the principles of CPR in mind.

The most detailed claims programming method is Time Impact Analysis and although not specifically mentioned in the above cases, it requires the application of retrospective analysis techniques (accepted in *McAlpine v McDermott*). However, like other programming methods, its application is dependent on the records available. The purpose and intended use of a delay claim is of relevance in that Time Impact Analysis is not necessarily a requirement if there is little likelihood that the claim will proceed to litigation/arbitration. Time Impact Analysis is very detailed and time consuming and the claimant may wish to proceed with a different technique in appropriate circumstances. As stated in the cases above, the claimant can proceed as he sees fit (subject in legal proceedings to ensuring that the other party knows the case against it).

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Issue No : 26
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Article No : 6
Author : Justyn Jagger
Title : Arbitration in Asia

In the third of three articles examining the arbitration process as it applies to disputes of an international nature in six Asian jurisdictions, Justyn Jagger, an international arbitration and litigation lawyer of the Singapore office of international law firm Herbert Smith, looks at the arbitration process in Thailand and Japan.

Thailand

International Arbitration Law

Arbitration in Thailand is governed by the Arbitration Act 1987 although that legislation is presently under review. The Arbitration Act does not distinguish between international and domestic arbitration and both ad hoc arbitrations and arbitrations proceeding under the auspices of an arbitration institution are permitted in Thailand.

It is generally accepted that foreign lawyers may represent parties to arbitrations proceeding in Thailand. However, as the position is not entirely clear, it is advisable to instruct law firms entitled to carry on business in Thailand with whom foreign lawyers or lawyers specialising in international arbitration are employed as consultants. In this way any issues arising under the Alien Occupation Act will be avoided.

International Arbitration Institutions

International arbitrations may be conducted in Thailand under the auspices of a foreign arbitration institution such as the International Chamber of Commerce International Court of Arbitration. Alternatively, the arbitration may be conducted through the Thai Arbitration Office that has developed its own arbitration rules. In proceeding through the Arbitration Office the parties may, however, adopt the rules of another arbitration institution with the consent of the Director of the Arbitration Office.

The Role of the Courts in International Arbitration

The Thai Courts will respect a valid arbitration agreement and strike out litigation in favour of

Arbitration provided the application to strike out the litigation is filed prior to the taking of evidence or judgement in the litigation proceedings.

Applications may be made to the Court by the arbitral tribunal for assistance in matters beyond the power of the tribunal such as the summoning of witnesses or the production of evidence. Similarly, the tribunal cannot grant interim or conservatory relief and must therefore apply to the Court for provisional measures protecting the interests of the parties to the arbitration.

Enforcement

Domestic and international arbitrations are not subject to appeal. Any objection to the award must therefore be raised upon enforcement.

An application for enforcement of an award made in Thailand must be made by filing a request for a judgement confirming the award within one year of the date when the award was

sent to the parties. Upon receipt of the request the Court allows the party against whom enforcement is sought to challenge the request for enforcement. If no challenge is made, the Court will give judgement confirming the award provided that the award is not contrary to the law governing the dispute, is not the result of any unjustified act or procedure or is not outside the scope of the arbitration agreement.

Enforcement of a foreign award made in a country that is a signatory to the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), to which Thailand acceded in December 1959, is by application to the local Court. The party against whom the award

is to be enforced may resist enforcement on the grounds set out in Article V of the New York Convention. Those grounds relate principally to the failure of due process in the arbitration procedure

Japan

International Arbitration Law

The law governing arbitration in Japan is contained within Part VIII of the Code of Civil Procedure. New legislation governing the conduct of arbitration is currently under consideration by the Japanese government.

International Arbitration Institutions

Both ad hoc and institutional arbitrations are permitted in Japan. The main commercial international arbitration institutions are the Japan Commercial Arbitration Association (the "JCAA") and the Japan Shipping Exchange Inc (the "JSE"). The JCAA is concerned with general commercial disputes and the JSA with maritime arbitration.

Parties to an international arbitration may be represented by overseas lawyers or registered foreign lawyers ("Gaikokuhu-Jimu-Bengoshi") practising in Japan. However, if the arbitration concerns issues of Japanese law the parties should consider instructing Japanese counsel at least to act jointly with overseas lawyers as it is arguable that it remains illegal for overseas lawyers who are not qualified in Japan to advise on Japanese law.

The Role of the Courts in International Arbitration

In the event of a valid arbitration agreement, the Japanese Court cannot refuse an application to stay proceedings commenced by way of litigation rather than arbitration. The Court does, however, retain the power to appoint an arbitrator if the parties cannot agree and to rule on challenges to the appointment of an arbitrator brought usually on grounds of bias, legal or physical incapacity or undue delay in the performance of his duties. The Court can also rule on the validity of the arbitration agreement and grant interim relief when an application is brought by one of the parties to the arbitration. Arbitrators do not possess the power to grant interim or conservatory relief under Japanese law.

The Courts also hear appeals against arbitration awards. An award may be set aside on five grounds: (1) the arbitration procedure was not permissible; (2) the award requires a party to commit an illegal act; (3) a party was not properly represented or heard during the arbitration proceeding; (4) the award is not substantiated by reasons and (5) other grounds upon which, if the matter were heard by way of civil litigation, would justify a re-trial.

Enforcement

A domestic award is treated in the same way as a judgement of the court and is enforced by means of an application for execution. That application may be challenged on the same grounds as an application seeking to set aside an award.

Japan acceded to the New York Convention in September 1961. A foreign award made in a country that is also a signatory to the New York Convention is enforced by way of an application to the local Court. The Court may only refuse that application if the grounds set out within Article 5 of the New York Convention are made out. Non-convention awards are not recognised by Japanese statute and require a fresh action on the award to be commenced.

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Article No : 7
Author : Michael Black QC
Title : Global Claims - 8 point checklist

In this final part of a three part series, Michael Black QC, summarises the general principles regarding global claims, in an 8-point checklist.

Do you comply?

In summary:

- (1) Rolled-up claims may be used both in relation to monetary and time claims. A total costs claim is not outlawed but is to be viewed with caution, if not suspicion.
- (2) The Contractor must first establish that events have actually occurred which entitle him to the reimbursement or extension sought, ie the factual basis of each claim must be identified separately.
- (3) He must then show that he has complied with the contractual machinery for making claims in respect of each such event.
- (4) Where elements of the claim can practicably be isolated the Contractor must present claims in respect of which. Individual awards may be made. A cause that could have been considered in isolation will be disregarded in assessing the global loss.
- (5) 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, ie that each head did cause some delay or disruption.
- (6) The global approach is strictly limited to assessing the amount of the claim in time or money, as opposed to determining the Contractor's entitlement. In other words it can only be applied to quantum not liability.
- (7) The global approach is only justified in cases where it is difficult or impossible to make an accurate apportionment between interactive causes. 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.
- (8) The Contractor must not have delayed in making his claim and thereby created the difficulty in apportioning the delay or loss or expense between causes.

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Issue No : 26
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Author : Jon Prudhoe
Title : Difficult Issues for Experts

Jon Prudhoe is an experienced expert and together with Clare Williams, he considers some of the problematic issues he has had to deal with in recent years

Scenario 1

The Expert reviews a pleaded claim and notices that the Claimant has not included, for example, profit or attendances and includes allowances for these in his report.

An Expert must always bear in mind the purpose of his appointment, that is, to provide opinion on the matters in dispute. From this starting point, the Expert considers the issues in order to develop his own opinion. Experts from both sides then meet to discuss their findings/opinions and attempt to narrow the issues in dispute. This process is designed to facilitate settlement of the dispute between the parties.

The function of the Expert is confined to the consideration of those issues which are actually in dispute between the parties. In this case, profit and attendances are not in dispute and therefore it would be wrong to add them in an Expert report.

In accordance with the principles set out in the *Ikarian Reefer* (1993), if the Expert did choose to deal with these issues then the evidence would be inadmissible on the grounds that the Expert is appointed to deal only with the evidence as placed before him. It is not part of the Expert's role to put forward claims in a report.

The only way that the Expert could include profit and attendance in a report would be if there was a replead of the claim to include these additional matters.

Scenario 2

The Claimant's pleading includes an allegation of an oral agreement, to value work using daywork rates. The party who appointed you as Expert pleads there was no agreement and the person who allegedly made the agreement submits a witness statement supporting the pleaded position i.e. that he made no agreement. You are valuing the appropriate work and going through the papers find an undisclosed memo from the witness that you interpret to mean he did make the alleged agreement.

Here, the Expert must bear in mind his duty to comply with his instructions. The question which must be determined is whether or not the Expert can omit this information from his report.

The *Ikarian Reefer* requires that the Expert should state those facts and assumptions upon which his opinion is based and, in addition he should include any material facts which could detract from that opinion. In other words, in order for the Expert's report to be given its proper weight the Expert must show that he has taken into account all facts including those which might weaken his stated conclusions.

In this scenario, the issue of whether or not there was or was not an oral agreement is not for the Expert to comment upon. Instead, it is for the Claimant who has alleged that there was such an oral agreement, to prove that this was the case. The Claimant had the opportunity to identify documents at the discovery stage and the fact that it did not seek disclosure of this particular memo means that the Expert cannot now introduce it as evidence.

If the Expert did address the issue and used this evidence then he would clearly be acting outside the scope of his instructions.

Scenario 3

There is a generalised allegation by the Claimant subcontractor that the main contractor failed to hand over areas of the works in a timely manner. Following an F&BP request, the Claimant admits he cannot particularise the allegation. You are appointed by the Respondent main contractor and during your investigations, identify specific examples of late hand overs.

As with the previous scenario, he who alleges must prove. In this case the Claimant Subcontractor has made the allegation that there were delays to hand over dates and therefore, it is the responsibility of the Claimant to particularise the allegation.

The difficult question, which needs to be addressed, is whether this information can actually be omitted from the Expert's report. The identification of examples of late hand overs could undoubtedly harm the case for the Respondent. The Ikarian Reefer requires the Expert to state the facts upon which opinion is based, together with all material facts, which could detract from the Expert's concluded opinion. Therefore, the conclusion can be drawn that, if the Expert's opinion is to attract the appropriate weight ALL material facts have to be considered including those which may have the effect of weakening his opinion.

A difficulty arising in this situation is that there is obviously evidence supporting the generalised allegation, which has not been made available to the Claimant. There is a potential problem for the Expert who is aware of the existence of documentation, which the Claimant is not aware perhaps because disclosure was limited.

The wise Expert, when faced with this scenario, would include the evidence in his report. Failure to include such a material fact could only be detrimental to the Respondent's case as the Expert could not deny the existence of these delays, if questioned. The Expert should always bear in mind that his duty is to deal with the matters in dispute in an impartial and unbiased manner – he is not appointed as a 'hired gun' to act for one party against the other.

Scenario 4

There is a specific allegation against the party who appointed you that there were 7 incidents amounting to breaches of contract e.g. defective cladding. During your investigations, you identify another 25 incidents.

As with all Expert appointments, the Expert is under a duty to comply with the instructions given to him at the commencement of his appointment. In this case, the Expert is therefore obliged to comment on the 7 incidents which allegedly amounted to breaches of contract.

As mentioned earlier, the Expert should limit his investigation, for the purposes of his Expert Report, to the issues which are actually pleaded. Failure to restrict the evidence to these issues will lead to unnecessary expense and quite possibly to confusion due to the inclusion of irrelevant material.

What if the other incidents wereraised in cross-examination?>

There is the possibility that during cross-examination, the other 25 incidents are also raised. In the case of *Derby v Wedlon*, Lord Justice Dillon said that "... it is not necessary for the expert to anticipate in his report all possible lines of cross-examination that might occur to him".

The key to successful cross examination for the Expert is being well prepared, therefore, the prudent Expert would undertake a preliminary investigation into these additional issues in order to prepare himself for such a possibility. However, it is not necessary for the Expert to produce a separate report on these issues. In accordance with the principles set down in the Ikarian Reefer, the Expert must bear in mind his actual instructions – in this case only the 7 incidents raised in the pleadings should be dealt with in the Expert's report.

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Article No : 9
Author : Roger Trett
Title : Letter from Dubai

MANY of our readers of the Trett Digest will have noticed that Trett Consulting have been progressively 'setting up shop' in the many corners of the world. The most recent of these outposts of the Trett organisation happens to be Dubai. To those of you who have not been to Dubai or are unaware of the pace of development of the Middle East, it might seem an unusual choice. But this is probably because the speed of the development in the Middle East and in particular Dubai has been so fast that out of nowhere, so it seems, this modern, efficient region with all the facilities one would expect in the most developed countries in the world has appeared. Dubai does not rely upon the export of oil and gas but has a mixed economy that includes manufacturing and services, both of which are growing strongly. Another surprise is Dubai has become a shopping and even a holiday destination!

When visiting Dubai you will not be long out of the modern Airport before you will notice the impressive buildings that have been constructed in the business area, also the irrigation schemes being implemented to make large areas of this arid country bloom. Consequently, it is quite clear that a significant part of the wealth that Dubai as well as the other Middle Eastern countries is famous for has been expended on construction. This rapid pace of development has led to a situation where the local market is now very sophisticated and projects as impressive as you will find in any part of the world are being constructed. And judging by the large number of infrastructure projects in progress, it would appear the development of Dubai has still a long way to go.

The growing sophistication of the Dubai economy is the very reason why Trett Consulting should be there because in this fast moving market place tender lists have become longer, margins tighter, the competition

fiercer, contract conditions tougher and projects more demanding. In short, there is a need and a market in Dubai for our services to developers and contractors at the very beginning, during and at the end of a project. In this respect, we are already working with several clients in the UAE and elsewhere in the Gulf, using the full range of our expertise, namely, preparing contractual claims, carrying out expert witness work and even project management on a number of important projects.

Relationships are important in the Middle East and in getting established in Dubai we have been ably represented locally by Shabib Ahmad Shabib, who, with his professional and business expertise, has spread the word on our behalf and enabled us to quickly meet the right people. In this respect, judging by what has been achieved in such a short period, we can expect to have a growing presence in this fast moving and exciting country and as Dubai is recognised as the leading regional trading hub, our operations there can only be the beginning of a greater involvement in the other Emirates and the Middle East generally.

Roger Trett