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Delay Analysis – Meth

– Part 2 by Tony Farrow

This second part of the article considers ‘actual based’ methods of delay analysis, contrasts the theoretical and actual based methods and discusses what factors affect the selection of the appropriate method.

Actual based methods

These methods are characterised by the fact that they focus on determining the delay periods and then assessing which event(s) caused that delay.

As-planned vs as-built method

This is probably the most common method and it compares the original programme intent and the as-built programme to enable an assessment of where delays occurred in any particular period of time. This method is ideal for those projects where it is easy to identify where the main delays arose, for example, from a high level barchart comparing as-planned v as-built activities. This methodology also lends itself to the analysis of relatively small

programmes (say up to 50 activities) which can be considered on one page and so viewed altogether. For most complex project disputes, however, this method is only useful for an initial pass.

Having identified delay periods, the next stage is to establish which delay events caused the particular delay periods, how these delay events competed with other concurrent events and whether the delay periods were critical at the time. This may require a more sophisticated methodology.

The main advantages of this method are its simplicity; the fact that it considers what changed in terms of planned intentions; and that it is a ‘visual’ methodology with no manipulation (in contrast with the as-built but for method). It is a relatively low cost methodology and is particularly useful in identifying where the main delay periods probably arose.

The main disadvantage is that for complex projects, with competing delay events and large numbers of activities, the method may not be rigorous enough.

Windows/snap-shot or update method

This method is a more rigorous version of the as-planned vs as-built method but follows the same basic philosophy, that is considering when and where actual delays were incurred. The main refinement is that critical path analysis is used to assess criticality, delay and indeed mitigation.

The as-planned and as-built programmes are first established, along with any revised programmes (each programme must be compatible with the others so that they may be readily compared i.e. they must have generally equivalent activities). These programmes (or the original as-planned programme at least) are then logically linked so that they become critical path programmes. The as-planned programme becomes the model. The overall project duration is then divided into periods in order to make the analysis more incremental. In practice, the increments coincide with the frequency of the progress reporting cycle, say monthly, or with major milestone events.

For each time period or ‘window’, the duration, progress and logic of the work actually carried out in that month (from the as-built programme and progress records) are imposed onto the as-planned model. If any major planned programme revisions were made in that period, these should also be introduced into the model. The model is then time analysed. The end date is the result of actually progress achieved to date (i.e. up to the end of the window) and planned durations and logic for the remaining work. The difference between the end date from this analysis, and the end date from the previous window or snap-shot, represents the period of delay or mitigation which arose in the current window. Having identified a period of delay or mitigation in the period in

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Methodology and Mythology

question, the remaining task is to assess the causative event or events. This can be done in a variety of ways; by detailed visual inspection (i.e. expert assessment), by creating, impacting and analysing sub-nets (e.g. small critical paths that model a single programme activity in greater detail).

The strength of this approach is that it forces the analyst to consider actual progress and revised programme intent in a logical manner. It produces a result which cannot be easily rejected as contrived because it is practical rather than theoretical. Issues such as mitigation, criticality, concurrency and dominance are all taken into account in a transparent manner, leading to better understanding of what occurred and the circumstances at the time.

Impact/update method

This method is an enhancement of the previous method, but is very similar to it. Whereas the window/update method establishes delay or mitigation in each window period and leaves the assessment of causation as a separate debate, the impact/update method introduces the causative event into the delay analysis. That is to say, this method applies events to the as-planned model on a month by month basis (the windows) to derive the monthly entitlement but then considers the actual monthly production, i.e. to contrast the contractor's actual performance, in terms of culpable delay or mitigation.

A delay schedule is drawn up before the analysis proceeds and this will list the delay events alleged to give rise to the contractual entitlement. For each of the window periods, the delay events that are alleged to have arisen in the period in question are impacted on the planned model and time analysed. The resultant project end date at the end

of the window will reflect the notional entitlement, at that time, to an extension of time. The contractor's culpable delay events that are alleged to have arisen in the period in question may also be impacted on the model and time analysed. The resultant project end date will reflect the additional delay, if any, caused by the contractor in that month.

Following analysis, the progress records are imposed on the planned model and the programme time analysed again. The resulting end date will represent the overall delay to completion actually occurring in that window period. This will allow for excusable delay events, compensable delay events, culpable delay events and contractor's mitigation due to changes in programme or faster progress.

From these two exercises (the planned model time analysed with delay events and the planned model analysed with actual progress), the analyst is provided with information on causation which can then be debated as to dominance, concurrency, mitigation and so on.

This is a comprehensive method of analysis based on critical path analysis. It considers actual progress and revised programmes, allows for matters of concurrency, dominance and mitigation to be debated, and limits the degree of initial subjectivity to the logic links within the model.

However, the weakness in the method is that it can be expensive to carry out and requires good as-built records. Furthermore, the courts have implied that the assessed time impact of early delays could diminish later on in the programme. This method is recommended by the Society of Construction Law for prospective delay analysis, i.e. for use during the live project.

The methods contrasted

Having described the various methods under the two headings of theoretical based and actual based, I suggest that the methods fall into four basic groups, identified by the approach:

1. The first approach applies to most of the theoretical methods. A model of what was planned is produced, ignoring how the project was actually constructed, and actual events are imposed on the model to see how they may have influenced the end date. Any extended completion date is said to give rise to an entitlement to an extension of time.
2. The second approach is the 'but for' methods, which create models of planned intentions or the as-built project and seek to address causation on the basis of assumption. If the employer had not imposed this event or constraint on the contractor's performance, when would the works have been completed? The fact is, the event or constraint was imposed and the standard forms of contract ask for the consequences of it.
3. The third approach, which historically has been the most widely used and from my experience, is what the lawyers prefer, is the as-planned vs as-built method. Two models of the project are overlaid on each other and the analyst seeks to explain the causes of the variance (possibly using another methodology).
4. The final approach is to re-live the life of the project by considering the programme in incremental stages, by using the window/update or impact/update methods. What these methods are attempting to do is consider events at the time they arose and consider what was the likely entitlement at

each month. This can be contrasted with the as-planned vs as-built method which seeks to justify the overall plan with the overall as-built in one step. These update methods are the most extensive analyses.

Choosing a method

What factors may affect the selection and approach adopted?

Firstly, the nature of the project or claim, or the case one is seeking to explain often influences the approach to be taken. Where the case is primarily concerned with justification of time, the more theoretical methods (particularly those relying on critical path analysis) are helpful. However, if the claim is for money as well, an approach based on what actually happened is warranted. This is because recovery of money suggests a positive assertion which the claimant then has the burden to prove in a positive way (and there is an appropriate standard for this). For example, the contractor will have to show what actual resources were on site during the actual delay period, not some theoretical resource level during some notional delay period. However, a more theoretical approach may be acceptable to support the negative of a loosely asserted fact, alternatively to demonstrate mitigation or acceleration.

Secondly, instead of analysing your case by one method, consider using two approaches. In fact, a sign of a potentially weak case is the adoption of a theoretical methodology that does not rely at all on a more factually based presentation.

Thirdly, methodology is often affected by the available software. For example, Microsoft Project, Power Project and Pertmaster are critical path analysis tools but require other software packages for processing data. Primavera is said to be a very good forward planning tool

and although it can be used for analytical purposes by itself, it is said to be cumbersome. Artemis is a powerful package with an integrated database for forensic analysis of project records. However, Microsoft Project only requires a few hours of hands-on learning before it can be used; Artemis requires specialist training courses and years of experience. In addition, one costs £250, the other £5,000. Note also that each software package has its own procedures, rules and methods of operation. Therefore, each delay analysis methodology may have to be applied in a different way. This is important to note if writing method statements for delay analysis. They should not be written around one specific package.

The fourth issue to note is that delay analysis, particularly when using critical path analysis, is fraught with manipulation. For example, a slight but unjustifiable adjustment to logic links can be difficult to identify but can produce the appropriate result for one party. Another typical manipulation is the manner in which events are analysed. A common one is the introduction of additional work by increasing the appropriate activities by a proportional amount equivalent to the extra work. Such approaches usually exaggerate the case.

Another example is the sequence in which delays are entered onto the programme.

Quite often, the approach taken in delay analysis is dependant on the status of the party's records, or lack of them. This is a governing factor,

not just of the methodology selection, but also of the depth of the investigation. An aspect of depth of investigation concerns the numbers of programme activities to be analysed. Although this issue is case specific, my experience is that ten activities are too few and many hundreds of activities too many. On a fairly large project, I would attempt

to analyse up to 100 activities. In fact, experience also indicates that programmes with many hundreds or thousands of activities are far too complex to sensibly analyse.

Another point to note is that there needs to be equality between the level of activities being analysed and the progress details available to measure progress. This certainly applies when one is considering the as-built situation which is, more often than not, advisable. There is no point in seeking to measure the progress of a thousand activities on a planned programme if records were only kept of a hundred. In these situations, the approach to take is to produce an as-planned vs as-built comparison which is to the highest level of available consistent detail. For example, consider a ten storey building with then planned activities per floor. Progress has been monitored per floor, but not by activity. In this case, the as-planned vs as-built comparison would be by floor, but where delay is apparent on any particular floor, this can be investigated by seeking to develop the events on the ten activities by reference to other records.

An alternative situation is where the planned programme provides insufficient detail to enable proper analysis of the actual circumstances. In this case, it is normal to develop sub-nets of the planned programme, which analyse in greater detail the manner in which certain aspects of the works would have been constructed and the sequence and timing. In this way, a more intensive analysis is only carried out during those periods where the high level analysis indicates that deeper investigation is warranted. It is not necessary to produce the entire plan or the entire as-built in greater detail.

I have noted above that the most common approach to delay analysis is to contrast the as-planned with the as-built programme and seek to explain the variance. However, it is still necessary to justify the reasonableness of the plan. Otherwise, an alleged delay can be challenged on the basis that there was no delay, only an optimistic plan! This is a point missed from many

“Quite often, the approach taken in delay analysis is dependant on the status of the records”

delay claims. Not only should the claim rely upon the planned intent, but detailed method statements should be used to justify it.

One of the most frustrating situations in delay analysis is having a project which has been delayed but where there is no clear cause. There are lots of potential events: instructions, variations, access problems, resequencing, drawing amendments etc. However, when analysed, each perhaps contributes to a frustration or disruption to progress but there is no major event delaying the project. I believe the Ascon case was of this type. In such situations, it is tempting to apply less robust methodologies, such as the global or net impact methods, in order to demonstrate entitlement (because, for example, changes were repeatedly made and the last instruction, contrasted with the plan, indicates a considerable delay). *Balfour Beatty v Chestermount* put paid to this type of approach. The *McAlpine Humberoak* and *Ascon* cases have both confirmed that wholly theoretical calculations are unlikely to succeed.

In such cases (that is, where there are many small issues) what is required is an analysis of the actual, realistic impact of each item. This can be a costly process as well as inconclusive, since the individual impacts to not justify the total overrun. With the inability of delay analysis to justify the period of delay, the contractor must argue that the combination of all events resulted in disruption or dislocation to the programme, which itself is measured by the difference between the derived entitlement and the actual. In the *Ascon* case, it appears that this approach was not successful.

Summing up

The first point to note is that there is often no certain answer to a given set of facts. This is partly because the theories and principles upon which we build our case are incompletely developed, as well as being inexact. Applying the same facts to the different methodologies results in different allocations between excusable and inexcusable delay.

Another point to recognise is that construction contracts frequently throw up the most complex set of related circumstances and to disentangle these into a clear chronology and logic can be difficult, if not impossible. Available records only tell part of the story and memory has to fill the gaps, but opposing parties have contrary recollections of

the facts. Hence it is the norm, rather than the exception, that one has to analyse project delays based on two sets of asserted facts. Each set of facts produce different conclusions.

“The first point to note is that there is often no certain answer to a given set of facts..”

A third point to note is that extension of time clauses in contracts are not prescriptive. They are drafted in a general way and it is not industry practice to pre-determine how delays should be analysed, either in terms of methodologies or in dealing with such factors as float and concurrency. Even if clauses were more prescriptive, the facts of the case would still be argued over.

Case law can be helpful in deciding how to approach delay analysis but often it is so case specific that the facts on your project never quite relate to the decided case. Of course, there are those who say that, given a set of circumstances and a particular contract, there is only one definite, certain answer and outcome, and the other side are clearly wrong! However, one of my colleagues often tells the story of an arbitration case where they lost the issue they knew they would win, but won the issue they considered they would lose. I am sure many

DELAY ANALYSIS EXERCISE: THE SWITCHROOM

The delays are as follows:-

- Delay 1** Subcontractor 'A' has labour problems and finishes **Activity 1** two weeks late
- Delay 2** Subcontractor 'B' advises that the switchgear for **Activity 3** will not be on-site until week 11
- Delay 3** On commencement of **Activity 2**, a design fault by the Employer is uncovered and this will prevent commencement of **Activity 4** by two weeks
- Delay 4** The 200T crane is delayed on another site of the Main Contractor until week 10

Question: Who is liable for the overrun in weeks 11, 12 and 13

Even a simple scenario is difficult to assess! There are many different answers depending on the approach taken. Which do you prefer?

<p>Answer 1 Week 11 - Subcontractor A Week 12 - Main Contractor Week 13 - Subcontractor B</p>	<p>Answer 2 Week 11 - Subcontractor A Week 12 - Subcontractor B Week 13 - Subcontractor B</p>
<p>Answer 3 Week 11 - Subcontractors A & B Week 12 - Subcontractor B Week 13 - Subcontractor B</p>	<p>Answer 4 Week 11 - Subcontractor B Week 12 - Subcontractor B Week 13 - Subcontractor B</p>
<p>Answer 5 Week 11 - Employer's Liability Week 12 - Subcontractor B Week 13 - Subcontractor B</p>	<p>Answer 6 Week 11 - Employer Week 12 - Employer Week 13 - Subcontractor B</p>

have similar experiences; I do not think my colleague's experience is unique. It is necessary to acknowledge, therefore, that in delay analysis there is often no clear solution, either in methodology or law. To allege otherwise is generating mythology.

So, how can we maintain a critical attitude towards the case, particularly when some members of the team hold clear and unambiguous views? There are a number of recommended measures.

Firstly, appreciate that the methodologies do have an order of merit. A delay analysis using the global or net methods will produce a result that is closer to mythology than fact, whereas the impacted/updated programme methods, if applied properly, are preferred as they seek to address what occurred/or should have occurred at the time.

A second important step is exemplified by the comment of a Technology and Construction Court judge in a recent case. He said to the delay expert: 'I hear what you say about the results of your analysis, but, standing back from the facts of this case, have you tested your methodology?' The point being made was that, if your analysis is built on a particular methodology, you must test its robustness. This can be carried out in several ways. For example, one technique is to employ what has been referred to as the extreme case rule. Apply extreme conditions or circumstances to the analysis. If the methodology holds good for both situations (i.e. it produces sensible, logical answers) it can be more confidently relied upon as being robust. This rule is used by some arbitrators when weighing up the parties' alternative approaches.

Another test is the small change rule. In this test, small changes are made to the methodology or the analysis to see what happens to the results of the delay impact. For example, if small changes are made to the programme logic, do you get significant changes in the results arising from minor changes to the methodology or the analysis. Such changes may demonstrate a weak methodology.

Finally on critical views, it is important to emphasise that the starting point of delay analysis is the parties' contract and the contract terms relating to programme, progress, delays and extensions of time. For example, is there an agreed programme; what are the obligations in regard to updated programmes; what is the base case programme; how are delays notified; were particulars provided; is there a condition precedent clause? Very simply, there may be a very strong case in fact, but if a contractor has failed to register its entitlements, will this affect the prosecution of its delay claim or its defence of the liquidated damages claim?

Conclusion

To conclude, methodology is defined as a body of practices, procedures or rules used to engage in an inquiry. Mythology means story telling. The delay analysis methodologies in use today each contain a set of rules which in themselves can be applied in a subjective way. It is not difficult to manipulate a methodology to arrive at the 'required' answer. There are many related issues that influence the analysis and these involve the application of personal experience and judgement. Hence, one analysts' view of a given set of facts will result in a different conclusion from another analyst.

There is no preferred delay analysis methodology suitable for all cases, although some methodologies are more robust than others. The more theoretical the methodology, the weaker the analysis. It is always better to demonstrate what actually occurred, although theoretical approaches can be helpful (particularly for the issues of mitigation and acceleration) but the results should be tested. The extreme case or small change rules are useful techniques for testing the methodology.

The methodologies do not tell you what the results mean, for example, in terms of contractual liability. It is necessary to interpret the meaning of the results. Remember also that delay analysis is only part of the evidential matrix.

Although I believe that delay analysis can be an extremely important aspect of many cases, it is not as precise a science as some suggest. In my view, it is as much an art as a clinical, analytical study. In order to demonstrate this point, I have included a small case study – the Switchroom. I have also included four potential answers, but these are not the only possibilities. I look forward to being told what the correct answer is.

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Suspension of Construction Works

Construction contracts often permit an employer to order the temporary suspension of work. In some cases the contract or general law may also allow the contractor to suspend performance. This article, the first of a two-part series, considers how rights of suspension arise and what consequences may follow for both parties.

Suspension By The Contractor

The issue of suspension often arises where a contractor wishes to suspend work due to the employer's failure to make progress payments, or for some other serious but remediable breach of contract. However, suspension is by no means universally allowed, and incorrect or unlawful suspension may amount to a repudiation of contract with potentially serious consequences. It is therefore vital for a contractor to consider the terms of the contract and the principles of law governing that contract.

Some contracts provide an express right to suspend works in case of non-payment, for example clause 16 of the FIDIC conditions of contract for construction. Many others, however, do not. The ICE conditions (7th edition) merely provide in clause 60(7) for a right to compound interest on overdue instalments.

If the contract is silent regarding the right to suspend, or if it appears to deny that right, contractors should look at the general principles of law governing the contract. Some civil law jurisdictions, such as France, provide a legal right for a contracting party to suspend where the other party is in breach of contract. However, this is not universal among civil law countries, for example Thailand has no equivalent provision (though more general legal principles may assist). In common law jurisdictions such as England and Hong Kong there is no generally recognised right for a contractor to suspend work for non-payment, although several jurisdictions (such as England and New South Wales) have introduced legislation to remedy this.

Suspension By The Employer

It is much more common for construction contracts to give the employer an express right to suspend the work. This may be exercisable on specified grounds or more widely at the employer's convenience and without any duty to give reasons. However, while contractual powers to suspend are often wide, use in practice

is often limited because of the likely delay to completion and the high costs that the employer may have to pay as a result.

In the case of employer-directed suspension, the difficult issue is typically not whether the right to suspend exists, but whether it has been properly exercised and what are the consequences.

Was Suspension Properly Ordered?

Most contracts require an employer directing suspension of work to give proper written notice to that effect. Because of the legal repercussions that follow from suspension, it is important for contractors to ensure before work is suspended that the employer has provided the required notice. If a verbal instruction is given (for example, during a site meeting), a written instruction should be obtained. Failure to obtain the required notices may create difficulties in claiming costs and/or extensions of time.

Extension Of Time

Where suspension results from something other than the default of the contractor, the contractor will usually be entitled to an extension of time. The contract will determine the precise extent of that entitlement, and contracts vary significantly in this respect. FIDIC provides a general right to extra time wherever the contractor is delayed by an instruction to suspend (clause 8.8), whereas ICE conditions exclude this right if suspension was ordered because of weather conditions or other contractor risks (clause 40(2)). The extent of the right to extra time is often a controversial issue between the parties.

Contractors should ensure that any application for an extension of time takes account of the time required for remobilisation as well as the period of suspension.

What Costs Can A Contractor Claim?

Some construction contracts spell out the types of losses to be compensated in case of suspension.

Others simply include an entitlement to "reasonable costs" or "costs reasonably incurred", with the interpretation of "reasonableness" being a matter for the governing law. Broadly, however, "reasonable costs" might include additional overheads (possibly with a profit component); costs of demobilisation and remobilisation; costs of insuring, protecting and securing the works during suspension; increases in the cost of materials over the period of suspension, and so on. Where costs result from a number of causes (such as variations and suspension), they may need to be apportioned accordingly.

Notice Requirements

Contract provisions regarding notification of claims will apply equally to claims resulting from suspension. It may be a precondition to any entitlement to extra time or money that a contractor gives written notice of his claim within a specified time and in adequate detail. Failure to comply with these requirements may bar any right to pursue claims. This issue will be discussed in the next article.

Termination

Suspension can have serious commercial and financial consequences for a contractor. Therefore, construction contracts often allow a contractor to terminate the contract if suspension continues beyond a stipulated period of time (typically measured in months rather than weeks). Normally, termination will require formal notice from the contractor and there may be a complex sequence involving a preliminary request to the employer for permission to proceed and then, if the request is not granted, a contractor's notice treating suspension either as an omission of part of the works or as grounds for termination.

Clearly, a contractor must carefully consider the effect this step will have upon his contractual entitlements, including entitlements to costs of suspension. Again, this will depend to a large degree upon the wording of the contract concerned, and in particular the provisions on termination.

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Assessing Extensions of Time.

'Are Dynamic Planning Models attractive?...'

The UK's Society of Construction Law has published a Protocol that it recommends be adopted on live projects to assist the parties in agreeing extensions of time on an on-going basis.

The Protocol offers a way forward in a difficult area and the basis of assessment is a baseline programme developed to "accurately predict the effects" of change.

In the following article, **Roger Smith** considers some of the practical issues.

TO start with, the requirement for accurate prediction means that the programme needs to be a dynamic model of the project that allows determination of any entitlement to EOT.

The question might arise as to how the make up of such a dynamic model aligns with the observations of Judge Hicks in *Ascon -v- McAlpine*, who felt that the effect of a delay diminishes with the passage of time. Taking this approach, the impact of an early (critical) delay of the same duration as a later delay will have less impact upon completion. Therefore, the dynamic model requires a degree of flexibility in its make up to allow this approach to be analysed. Or is the flexibility required in the approach to the analysis?

The SCL Protocol sets out that the programme should identify all relevant activities and the relationship between activities.

These relationships are physical connections between activities that are not flexible; they should really be considered as 'hard' links. Therefore, if a delay is added to the programme, the effects will flow through the

'hard' links in the programme, in essence giving a prediction of the project overrun and any entitlement to an EOT.

The very nature of the programme required by the SCL Protocol appears at odds with the position of Judge Hicks. A diminishing effect of an early delay can be accommodated within a computerised programming

"The SCL Protocol offers contractors the benefit of improved analysis of their entitlement to EOT."

tool, by using some form of mathematical modelling. This could apply some form of percentage reduction to the effect of early delays. However, does this fit with the principles of the SCL Protocol? Such flexibility (i.e. working around problems such as delays), is inherent in the approach adopted by contractors when planning the remaining part of the works, particularly if faced with what is perceived to be an inadequate award of additional time (or the recovery of culpable delay).

The point is that the construction process is inherently flexible, with activity durations and logic relationships being varied to suit actual requirements. The modelling

of this situation in a programme is invariably extremely difficult in a single programme.

So how is this flexibility reflected in the planning process? Initial programmes, such as a tender programme, will often be at a high level, with this high level being reflected in long duration activities. This should perhaps not be criticised as bad practice, but could be viewed as a practical representation of the factual information available. How else would a major element of the works be represented at time of tender (such as the mechanical services installation) if that part is not at the time designed or let to a sub-contractor?

It is at this early stage in the overall planning process that contingency may well be built into the activity durations. It will only be when such overall activities are broken down that the contingency (or perhaps the lack of it) will unfold.

The process of breaking down the high level planning generally occurs when the project is 'live' and detailed programmes are produced. This detailing then occurs in stages, with initially developed ideas also incorporating sub-contractor programmes.

The key point is that it is not possible or practical to include detailed information too early in the planning process. Providing the wrong information, based upon assumptions, may cause far more problems to a contractor than providing too little detail.

Practical assessment of entitlement throws up further problems. The SCL Protocol offers contractors the benefit of improved analysis of their entitlement to EOT. The 'hard' links in the programme may well determine an acceptable conclusion as to the effects of a delay event at the time. However, from the viewpoint of the Contract

Administrator/Engineers, the preferred approach may be to rely upon a 'flexible' link approach particularly in the early part of a project.

In addition, an award in the early part of a project may well be in advance of any built-in contingency becoming apparent. The Contract Administrator may wish to wait until this detail is revealed before issuing the award that appears due to the contractor. He may also wish to consider other alternatives that may reduce any possible delay. This is a difficult time for both the Contract Administrator and contractor.

If the contractor considers an award to be insufficient, he is faced with two decisions:

Proceed in line with the original plan and address the issue again later;

or

Introduce changes to the programme to recover any shortfall in the EOT awarded.

The first option requires some degree of confidence and nerve. It is often said that faced with a recoverable delay for which inadequate compensation has been given, a contractor should stand its ground. This is more easily said than done when faced with the commercial pressures of construction.

The second option is more easily accommodated, particularly in the early part of the project. Minor reductions in a number of activity durations can overcome the shortfall. However, is a contractor obliged in any case to do this? The SCL Protocol requires the contractor to do all it can to avoid financial consequences of delays for which the employers takes the risk, but it expressly states that this does not extend to a requirement for extra resources or work outside its planned working hours.

It therefore appears that the original activity durations (the same resources and same working calendar) will remain, and the only option will be to re-sequence the programme to recover the required

time. There may be financial consequences of re-sequencing caused possibly by trade stacking, and any action will not extend to increasing any loss suffered.

There are therefore practical problems to be resolved in applying the SCL Protocol to resolving EOT problems. However, there may be a solution to these problems in the SCL Protocol itself.

The Protocol requires clear agreement of the programme. If there is such an agreement, then uncertainty regarding future effects can be removed, as both parties know or should know the possible impact of a change. There would be a "transparent and unified approach to the understanding of the programme works". This may resolve the position put forward by Judge Hicks, of a diminishing effect of an early delay.

So, can a time-impact analysis, the delay analysis method preferred by the Protocol, work as a dynamic model? In the situation where a

programme is a contract document, and in this sense each activity detail is a term of the contract, it would be necessary to modify the programme to model changes to the contract (be it in terms of excusable or culpable delays). This process would be a major undertaking unless the works progressed as planned; but construction hardly ever follows such a path. Some industries approach project execution based upon major up-front exercises with respect to planning. Such a project plan is created to the same level of detail as the working programmes referred to above. Such an undertaking may leave an inflexible programme, but the level of planning input will have reduced risk associated with particular activities rendering the project plan more certain.

A high level of planning input is also required in monitoring such a plan during the life of the project, but because of the level of planning knowledge, the impact of any delay or change and be considered and the

project plan adjusted accordingly. The key is a high level of planning input into the project at initial tender stage through to contract and management of the project to completion. Such a level of planning expertise is often beyond the reach of many parties to construction projects.

So where does the SCL Protocol take us in regard to resolution of EOT related problems? It may be said that the Protocol requires a level of attention to planning matters that is beyond the capabilities of many construction organisations. In addition, the majority of projects do not actually 'go wrong'. Having a team of planners could therefore be an overhead cost that would not be reflected in improved recovery from contract works. The size, complexity, cost and risk of the project needs to be balanced, and the extent of planning input has to be proportional.

In any view, adoption of the SCL Protocol will inevitably lead to an enhancing of the planning practices within construction organisations. If such an approach is adopted, each party will better understand the position of the other and financial certainly may result in projects where now we see problems. This has to be of benefit to construction generally. However, it appears that the SCL Protocol will only work when both parties adopt a unified approach to the planning of a project. This is utilisation of a flexible dynamic model of the project. If there is not such an approach, then the dynamic model appears to offer more attractions to a Contractor.

The SCL Protocol sets out how greater input in the planning process can result in benefits to both parties to a construction project. Whether these benefits will tip the scales towards greater input in the planning processes remains to be seen.

Roger Smith is an Associate Director and is based at Trett Consulting's Manchester office

"Such a level of planning expertise is often beyond the reach of many parties to construction projects"

Concurrent Delay

One effect of an event on a project may be for it to produce concurrent delay. However, what do we mean by this term, as there is lack of industry or legal definition.

Mervyn Raybould discusses this topic

The Meaning of Concurrency?

At the present time within the construction industry (and arguably the courts) and notwithstanding the introduction of the SCL Protocol, there is a lack of definition relating to the term “concurrent” delay. It can be argued that concurrent delay [that is, the time effect of a causative event] will only occur when two or more delays are running simultaneously. These delays can be employer-caused delays, contractor-caused delays or a combination of both. The important point is that concurrent delays run simultaneously, irrespective of who caused them. Concurrent delay can also occur where the effects of several causative events occurring at different times (i.e. variation introduced in week 1, late drawing issued in week 2) produce delay at the same time (i.e. in week 5).

A consideration of concurrent delay is that the concurrent delays may have different weightings with regard to the significance of their impact on construction and therefore on the completion date i.e. different construction activities affect the completion date in different ways and by different amounts. Hence, concurrent delays may extend the completion date by different amounts even if the concurrent delays are the same length. This point is often referred to as the dominant cause approach, but it did not find favour in the case of *H Fairweather & Company Ltd v L B of Wandsworth (1987)*. However, it has been said that if concurrent delay is considered in

the context of the English law principle of causation, then the Fairweather decision is wrong.

Another term we need to be aware of is *culpable delay*, which is any delay for which the contractor is responsible, even where the effect of the culpable delay is running concurrently with an employer-caused delay. It is arguable and even likely that consideration of culpable delay will be case and/or contract specific. We need to consider in each case whether the *causative event* and the *effect* of the event (i.e. its delay) should be considered together or separately. This distinction between *cause* and *effect* is of increasing importance in delay analysis.

A further consideration is that in some standard form contracts, the Certifier has discretionary powers relating to the granting of an extension of time to the

completion date but the extent of such discretion in the context of concurrent delay remains largely unexplored.

As the subject of delay analysis becomes more sophisticated, judges and arbitrators may begin to consider these distinctions and provide clearer guidance on the issue of the concurrent effect of several competing causative events. It should be noted that the UK’s Society of Construction Law (SCL) Delay and Disruption Protocol partially recognises the problem of definition

of concurrency but accepts in Guidance Note (“GN”) 1.4.2 that “*Concurrency is a contentious issue both because there are differing views on the correct approach to concurrency when analysing entitlement to EOT and because there are differences about the meaning of concurrency itself.*”

Cases

In the following brief case summaries, the following conditions applied with respect to granting extensions of time:

- i. that an employer-caused event had occurred; and
- ii. the employer-caused event delayed completion of the works as a whole beyond the completion date then fixed under the contract.

These cases are not necessarily specifically related to concurrent delay nor do they all consider the effect of concurrent delay however, they are relevant to the methodology for establishing an extension of time and as such need to be considered in the context of concurrent delay.

Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993)

In this case, it was accepted that a contractor is entitled to an extension of time to the completion date for an employer-caused delay occurring after the date by which the contractor ought to have properly achieved completion. In effect the contractor is entitled to an extension of time to the completion date for employer-caused delays notwithstanding any concurrent contractor-caused [culpable] delay. The completion date is to be the total number of

“Court decisions and the SCL Protocol are helping to define the meaning of concurrent delay”

working days in which the contractor ought fairly and reasonably to have completed the works allowing for the employer-event starting from the date of possession/commencement. The practical effect if this is shown by example: if the work was to be completed in week 52 and a variation is issued in week 59, the extension of time for the variation is to start from week 52, not week 59.

Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Ltd (1999) TCC

The proposition (as stated in the Balfour Beatty case) that the contractor is entitled to an extension of time to the completion date for employer-caused delays notwithstanding any concurrent contractor-caused [culpable] delay was already agreed by the parties prior to the commencement of proceedings. Notwithstanding this pre-agreed position of the parties, the court said that the architect was entitled to consider the effect on the completion date of any contractor-caused [culpable] delays. This is arguably a contradiction of the pre-agreed position of the parties. This case should therefore be treated with some caution in the context of concurrent delay due to the effect on the decision of the pre-agreement of the parties and the arguably circular argument relating to the exercise of the architect's opinion.

The Judge in this case qualified his decision to the effect that the contractor was only entitled to an extension of time for causes of delay that were the employer's responsibility and which delayed the project as a whole (i.e. due to the delayed activities being on the project's critical path).

Ascon Contracting Limited v Alfred McAlpine Construction Isle of Man Limited (1999) TCC

Ascon, the sub-contractor making the claim, argued that its explanation with regard to the cause of the delay should prevail since the main contractor, McAlpine, had not established any other cause of delay. However, the court considered that this argument reversed the burden of

proof (i.e. Ascon saying McAlpine had to show what had caused delay) and hence Ascon's argument was rejected. The burden of proof remains with the contractor to establish that the employer was responsible for the claimed delay.

The Royal Brompton Hospital NHS Trust v Frederick Alexander Hammond and other (2000) TCC

The Judge in this case noted that in order to assess if a particular causative event affected the ultimate completion of the work, rather than just a particular operation, it is necessary to consider what operations, at the time when the causative event happens, are critical to the forward progress of the work as a whole. This will require the use of critical path analysis techniques and will equally apply to the effect (i.e. the delay) of the causative event. The judge considered two examples:

Example 1- Where there is an ongoing contractor-caused delay [effect] and an employer-caused delay occurs and the employer-caused delay has no effect on the completion date, then no extension of time to the completion date is due to the contractor.

Example 2- If two causative events occur, one employer-caused and the other contractor-caused [culpable event], the contractor is entitled to an extension of time to the completion date for the period of delay [the effect of the causative event] caused by the employer event, even if the other culpable event has a concurrent effect.

Applying the same principle, consider the situation where there is an ongoing contractor-caused delay [effect] and an employer-caused delay occurs and the employer-caused delay has the effect of extending the completion date beyond that which would have been the completion date had only the first contractor-caused delay occurred. In such circumstances, an extension of time to the completion date is due to the contractor for the net increased effect of the employer-caused delay over the contractor-caused delay.

Motherwell Bridge Construction Ltd v Micafil Vakuumtechnik (2000) TCC

A slight departure from the Henry Boot case arose when the Judge stated that in assessing extensions of time involving issues of concurrency, it is necessary to apply a test of common sense and fairness. The Judge considered that a full extension of time should be awarded where there is concurrent contractor-caused and employer-caused delay, if it is fair and reasonable to do so.

SCL Protocol [Which does not have any legal standing]

The UK's SCL Protocol concerns the recommended approach for assessing extensions of time during the currency of a project – unlike all the above court judgments which consider extensions of time long after the project has finished! Guidance Note 1.4.1 states "Where Contractor Delay to Completion occurs concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT [extension of time] due." A similar statement is made where the effect of sequentially occurring employer-caused and contractor-caused delays to completion occur (GN 1.4.7). The SCL Protocol generally follows the approach outlined in the above cases with the exception of the Motherwell Bridge case and with the aforementioned proviso that the differences reflect the principle of prevention underlying the SCL Protocol approach. However, the SCL Protocol's guidance is, as stated in GN 1.4.3, "a compromise, taking account of the different competing arguments, but represents what the Protocol considers to be the most appropriate solution."

Notwithstanding the introduction of the SCL Protocol, at the present time within the construction industry (and arguably the courts) there is a lack of consistency in the definition of "concurrent" delay. The result is an even greater inconsistency in the approach to delay analysis and the manner in which concurrency is treated.

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I.T. Procurement. Managing a Contract

1. *Appoint a Contract Manager*

This may be a full or part time role. It is a strategic role. Your Contract Manager should be able to provide you with precise details of the commercial and contractual implications of decisions you want to make, before you make them.

2. *Plan the project and Monitor*

Progress very closely

An up to date project plan is required to monitor progress. For every day that a project is late there is additional costs for both parties – and somebody has to pay. Monitoring progress gives you an early indication of overall delays and allows you to assess your commercial and contractual obligations as a result of the delay. But remember – a delay to a Contract is not a change to the contract, except where it is as a consequence of a change to requirements, delay by the Customer or some other event specified in the Contract. Delay is a failure to perform and the responsibility for the risk of delay lies with whomever is responsible as determined by the Contract type.

3. *Formally advise the other party of their failures to perform*

If your client or supplier has not met their obligations under the Contract – tell them formally. If you do not, they will simply carry on with the view that there is not a problem. A failure to serve notices can be fatal in some circumstances, and can greatly weaken your arguments in the event of a dispute.

4. *Ensure there is a change control procedure*

In any project it is inevitable that there will be changes. These have to be managed effectively, and the impact on the requirements, the price and the contract dates need to be included as part of the variation document. It is also essential that both parties understand who is empowered to authorise changes. Those who are empowered must clearly know the levels of their authority and must understand that

anything they agree is contractually binding.

All of this may sound as if it will create a very tense, very formal relationship between the customer and supplier. This need not be the case. What it does is provides a clear and business-like framework in which to manage the project.

Contract Disputes

So, your system is late and it looks as if it will never arrive, you've spent millions of pounds so far and got nothing to show for it or it simply just doesn't work. You've had enough and you just want to drop the whole thing and move on. What do you do – Terminate the Contract and sue for damages?

If you terminate a very robust contract as described above, and you have managed it effectively, how do you know you even have the right to terminate the Contract? If you terminate a contract without having the right to do so, you may be found to be in repudiation of the Contract.

So what do you do?

Well there are a number of things that you need to do.

1. *Determine what your contractual position is*

You will need to understand what your rights and obligations are under the Contract. Then you need to work out where your rights were not met and where you failed to meet your obligations. This requires a detailed knowledge of contracts and contract law and a thorough forensic analysis of the events that have led you to conclude that you are no longer prepared to continue with the Contract.

2. *Work out what your losses are*

You need to work out how much you have lost as a direct result of the failure to perform. Most contracts have limitations and exclusion on claims so it is important that you have a clear understanding of what is and isn't a loss.

3. *Notify the other party formally where they have failed to perform*
Even at this late stage, it is

important that you notify the other party that they have failed to meet their obligations under the Contract. It may be a term of your contract that you have to give them an opportunity to put this right before you can access any remedies that you may have.

4. *Consult*

It is important that you consult. You will need to determine a detailed summary of events with supporting evidence, which should be produced as part of the action to determine your contractual position (Trett Consulting's expertise is in producing a formal claim). They can then liaise with your lawyers for advice.

5. *Continue to talk with the other party and meet all of your contractual obligations*

It is essential that you continue to carry out the obligations required of you under the Contract or you may find yourself having to defend a breach of contract claim. Talk to the other party, on a Without Prejudice basis, and try to reach an amicable agreement to resolving the dispute.

6. *Only terminate the Contract when you are advised that you have the right to do so*

To do otherwise may prove costly.

Clearly, not all contractual disputes culminate in termination of a Contract. However, these principles equally apply in the event of a dispute over a single or multiple issues, and provide a framework for dispute avoidance.

Summary

These circumstances apply to hardware and software supply agreements and to support contracts. Before taking action, customers of the I.T. industry should take advice.

For advice on I.T. matters contact david.carrick@tret.com

Responding in Adjudication – What Falls within the Adjudicator’s Jurisdiction?

Richard Swan discusses a dilemma which is frequently faced by Responding Parties in UK adjudication proceedings. The dilemma is whether or not a Responding Party is able to raise issues in his Response to a Referral which may or may not be directly related to the dispute as defined by the Referring Party, and whether the Adjudicator has the jurisdiction to consider them.

This article considers what may or may not be examined by the Adjudicator and gives guidance on how to approach a Response to a Referral, where the Responding Party wishes to raise issues of set-off and/or counterclaim in its Response.

The Issue

A Sub-Contractor issues a Referral under the Scheme for Construction Contracts to a Main Contractor in respect of the value of an interim payment. It is well known by the Sub-Contractor that there are a number of issues and events which he considers may be a good case in defence by the Main Contractor, and he has deliberately drafted the Referral to exclude any reference to those issues and events. Indeed the Sub-Contractor has expressly placed a limitation on the Adjudicator’s jurisdiction by stating that his jurisdiction extends no further than making an appropriate valuation against a single interim payment. In effect, the Sub-Contractor is attempting to exclude the Adjudicator’s jurisdiction in respect of the Main Contractor’s set-off/counterclaim.

The Main Contractor is also well aware of the issues and events which it contends fall within the liability of the Sub-Contractor and claims that the Sub-Contractor is liable for defects. He wishes to include these issues as set-off and counterclaim in his defence to the adjudication.

Therefore the question is: What can the Responding Party do in order to have its set-off/counterclaim considered in the adjudication and how may the Adjudicator react?

Commentary

These tactics employed by the Referring Party are not uncommon. He is clearly keen to limit his exposure to issues which may threaten to reduce the value of any award that the Adjudicator may make in the Referring Party’s favour. Indeed, it is not uncommon for a Referring Party who is not financially secure to go to great lengths to prevent any set-off or counterclaim issues from being heard because a finding for the Responding Party in these issues may be sufficient to create Referring Party impecuniosity, and therefore the Responding Party may have a case for not paying out any sums found in the Referring Party’s favour. This is allowable in law as it places the Responding Party in a position where it would not be able to recover the monies paid in subsequent proceedings to arbitration and/or litigation due to the insolvency of the Referring Party.

It would be unusual for a Referring Party to draft the Notice of Adjudication widely enough to allow the Responding Party to include any set-off or counterclaim. The Responding Party, meanwhile, is naturally keen to have the Adjudicator consider everything that it is confident in winning without having to go to the

additional expense and further delay of a separate adjudication.

An Adjudicator’s jurisdiction is derived from the Notice of Adjudication and not from the subsequent Referral. A tactic by the Responding Party may be that if the Referral does not directly copy the issues raised in the Notice of Adjudication, he cries “foul” and contends that the Referring Party has submitted the ‘wrong’ Referral, which creates a jurisdictional issue. With experience of the Construction Act, it appears that Adjudicators are now not concerned with this, as long as the basis of the nature of the dispute is the same; Adjudicators appear to decide that they will continue if the detail is different, but the basis remains unchanged, taking their jurisdiction from the Referral.

It is important to distinguish the difference between set-off and counterclaim, as this has direct relevance to what is admissible in adjudication (and indeed arbitration) proceedings. The English distinction between set-off and counterclaim is whether or not the claim by the Responding Party is an integral part of the dispute between the parties. Set-off is a cross-claim which is directly linked to the original claim (a true defence), whilst a counterclaim is a cross-claim which is not necessarily linked to the original claim. Set-off therefore has a narrower meaning. Of significance, in litigation, the English courts can consider both, but in arbitration (and adjudication), arbitrators (and adjudicators) have not been given the same power. An Adjudicator’s jurisdiction is limited by the true nature of the dispute raised in the Referring Party’s claim, and therefore only set-off would fall within the jurisdiction of the Adjudicator, unless the parties agree to widen the scope of jurisdiction to include counterclaims.

Admissibility of issues is therefore complicated further by language, and Responding Parties would be well

advised to avoid the use of the term “counterclaim”, if it really means “set-off”. Despite the potential for jurisdictional challenges as a result of the incorrect use of terms, what is absolutely clear is that an Adjudicator will go to the root of the nature of the dispute in order to establish his jurisdiction. Regardless of the use of the term “counterclaim”, the Adjudicator would be unwise not to consider carefully whether the defence was indeed a true defence to the dispute referred.

Is the set-off a significant material issue which led to the dispute as referred in the first place? If so, then it is likely that the Adjudicator will admit these issues into the adjudication. An example may be where the quality of the work is the response to a claim of wrongful or inadequate payment for that work; this response would likely be a defence of Abatement.

However, if the issues in defence are merely related to the same contract, but are sufficiently divorced from the dispute as referred, it is likely that these issues will fall outside the Adjudicator’s jurisdiction. An example may be a contention by the Responding Party that liquidated damages are payable due to late completion by the Referring Party as a defence to the Referring Party’s claim for wrongful payment of an interim application.

Clause 20 of the Scheme is useful. The Adjudicator “*may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute*”. Note the difference. The former requires party consent - and it would be unusual for the Referring Party to agree when it would be advantageous for him not to. The latter allows the Adjudicator the ability to decide whether the matters are connected with the dispute. It does not require party consent and provides an alternative to stop a recalcitrant Referring Party from deliberately denying consent.

Another significant issue is whether the material facts of the set-off and/or counterclaim can be taken to be in dispute. This is likely to derive from any Notice of Withholding, as provided for within Clause 10 of Part 2 of the Scheme and Clause 111 of the Housing Grants, Construction and Regeneration Act 1996, due to the alleged set-off and/or counterclaim issues. It is generally held that adjudication will be premature unless there has been a breakdown in the negotiations on the subject being referred. Therefore, if the set-off and counterclaim issues have not similarly been through a process of failed negotiation prior to the Referral, they cannot be taken to be in dispute, and therefore an Adjudicator is likely to consider that these issues fall outside his jurisdiction.

A comparison can be drawn with the decision in *Edmund Nuttall Limited and R.G.Carter Limited*. It was held that in order for a dispute to arise “*there must have been an opportunity for the protagonists each to consider the position adopted by the other and formulate arguments of a reasoned kind*”. Note that this is a two-way negotiation and both parties must have had the opportunity to consider the position of each other. The judge concluded that the constituents of the dispute was wider than the claim itself (rejected by the other party), but included “*the whole package for arguments advanced and facts relied upon*”. A refining of the strong arguments and abandonment of weak points would likely be permissible, but advancement of totally new argument and facts would likely not be permissible. A similar line of argument would apply to the Responding Party’s defence.

Effectively, there is a strong probability that there will be no right to set-off or counterclaim unless an effective Notice of Withholding covering these issues has been issued by the Main Contractor against the Sub-Contractor. This would also need to have been issued in accordance with the periods set out in the contract or those of the Scheme, and prior to the commencement of Adjudication. This is supported by the judgment of HHJ Hicks QC in *VHE Construction plc v RBSTB Trust Co Ltd* where he said:

“The first subject of dispute as to the effect of section 111 is whether section 111(1) excludes the right to deduct money in exercise of a claim to set-off in the absence of an effective notice of intention to withhold payment. ... I am quite clear, not only that it does, but that that is one of its principal purposes. ... The words “may not withhold payment” are in my view ample in width to have the effect of excluding set-offs and there is no reason why they should not mean what they say.”

Consequently, in the absence of an effective notice, the right to deduct money by way of set-off is excluded.

If there has been an effective Notice of Withholding, the issues of set-off and/or counterclaim may be part of the dispute, and the Adjudicator will be mindful of the need to consider whether the issues in defence are closely linked to the root of the dispute as referred prior to deciding their incorporation within his jurisdiction.

In summary:

1. No Notice of Withholding on the defence issues indicates the likelihood that they are not yet formally in dispute and in all probability the Adjudicator will not consider them in his adjudication.
2. No mention of set-off and/or counterclaim issues in the Notice of Adjudication and/or Referral places the Adjudicator in the position of considering how closely linked the defence issues are to the root cause of the Referred Dispute and Section 20 of Scheme gives him wide powers to decide.
3. Should the Responding Party have doubt themselves whether there is a sufficiently close link of their defence issues to the matters being referred, they would be well advised to keep their powder dry and run a parallel or later adjudication on the set-off and/or counterclaim issues.

Set-off and/or Counterclaim against Adjudicator’s awards is another story and has different principles. This will be the subject of a future article.

Richard Swan is an Associate Director and is based at Trett Consulting’s London office

JCT Major Project Form

New form, same old problems?

Paul Taylor

The launch of the UK's new JCT Major Project Form (MPF) of contract in June 2003 was, so those who drafted it say, designed to fill a void in the market and allow major contractors and developers to move away from the ever-increasing raft of bespoke amendments that were being made to the JCT 98 form on high value major commercial developments. At face value therefore, the new form is a product of the marketplace's needs and requirements rather than a simply theoretical and commercial exercise. That should make the new form is a product of the marketplace's needs.

THE MPF comprises the following six parts: the Contract Conditions, the Appendix, the Third Party Rights Schedule, the Requirements, the Proposals and the Pricing Document. Helpfully, there is also a Guidance Note but be warned, this is not a contract for the inexperienced to work through. The MPF's promoters have been at pains to emphasise that sophisticated parties on contracts of at least £10 million are the target market and that those contractors using the form should fully understand and embrace "single point responsibility".

Design – all design beyond that contained in the Requirements will be produced by the Contractor with the Employer having the right to review and comment. Clear enough perhaps, but no doubt open to charges of the Employer either interfering or failing to do enough, depending which side of the fence you sit on. However, more fundamental is the option to introduce a fitness for purpose provision in addition to the usual requirements for skill and care. Overall, the MPF places increased risk on the Contractor and again experience is required to ensure the Contractor has adequately addressed this in his tender. There is a need for clear identification of the risks and demands of the project at tender stage to ensure pricing is accurate.

Time – the provisions for extension of time exclude adverse weather, industrial disputes, labour/material unavailability and delays caused by statutory authorities. This reflects current commercial reality on major projects. Again, provided this is taken on board early and understood, the contractor can price the risk. The familiar term "Relevant Event" will no longer be found. If a potential EOT situation does arise, concurrent delay is addressed in line with the approach adopted in the much heralded SCL Delay and Disruption Protocol and will lead to an adjustment to the completion date. A definition of Practical Completion is included and occurs "when the Project is complete for all practical purposes". Of course it is a good thing to try to define, but in those nine words alone no doubt the cynically minded could cause significant mischief.

Changes – the MPF includes a Change Procedure requiring the Contractor to give details of likely costs and impact on completion first of all. The intention is of course to promote agreement of cost up front prior to an instruction being issued. Given the design obligations and intentions of the new MPF, it is hoped that the incidences of old-style contractor claims for time and money will reduce significantly.

Incentives – in any business, it is of course widely recognised that "a stick without a carrot" is no incentive at all. The MPF has made laudable attempts to give the Contractor suitably enticing vegetable appetisers by use of bonus and cost saving clauses, as well as an acceleration provision. These are all part of the intention to try to move away from the old problems and divisions between employer and contractor, and move towards a scenario where the parties work for the benefit of the project knowing from the outset the risk/reward consequences that could be available.

Dispute mechanisms – unsurprisingly nothing quite so radical as removal of these on the basis that no disputes will occur, but the MPF does use a series of rising levels of mechanism including mediation, adjudication (under the Scheme) and ultimately litigation.

It is widely anticipated that the new MPF form will take over from the JCT 98 form on major projects but is it sufficiently fair to stop a whole new series of amendments being brought into play by those using the form? Probably, provided those using it are experienced and understand exactly what the pros and cons are for each party to the contract. The mechanisms and provision are there to enable both sides to enter the agreement with eyes wide open, knowing what risk they are taking on. The need for amendment should be minimised if the right mindset is present. The industry has asked for clarity and single point responsibility – it is just possible it might get it under this new form.

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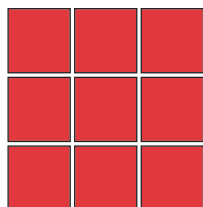
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