

The Use of Computers in Delay Analysis from *Skanska v Egger*

Computers are of great assistance in delay analysis but it is vital that the input (data) is based on the best available evidence. **Mervyn Raybould** considers some of the principles of delay analysis using computer programmes.

COMPUTER programmes for the planning of projects have developed over recent years and are increasingly used in the retrospective analysis of project delays. These programmes provide the delay analyst with a Pandora's box of possibilities from which to assess delay and consider entitlements for extensions of time. However, when using them, it is necessary to focus on the facts and evidence and not get lost amongst the potential numerous possible paths within the delay analysis. *Skanska Construction UK Limited v Egger (Barony) Limited* provides an insight into some of the pitfalls awaiting the expert using these computer programmes. This is a case relating to the design and construction by Skanska of a timber processing facility in Scotland for Egger. The issue was one of quantum of loss and

expense but, in considering the quantum, the court was presented with expert evidence relating to delays suffered by several of Skanska's subcontractors.

This judgement considers one methodology of delay analysis, which HH Judge Wilcox describes as an 'impact analysis'. This was based on a reconstruction of the original (bar chart) planned construction programme into a network form i.e. a logically linked critical path analysis. Within the (UK's) Society of Construction Law's Delay and Disruption Protocol there are two types of analysis that could apply to the description of the process described in the *Skanska* judgement. The first is Impacted As-Planned, which involves identifying the planned critical path of the works and impacting delaying events. The second technique is Time Impact Analysis, which allows the mapping of particular delays from the time a particular delay event starts to potentially affect the completion date. Time Impact Analysis is based on determining the effect of a delaying event on the contractor's intentions for the future conduct of the work in the light of progress actually achieved at the time of a delaying event becoming apparent. The Protocol recommends the use of this method for prospective delay analysis (i.e. on live projects), although it can be used for retrospective review of delay impacts.

In *Skanska*, a programme had been included in the tender documents that had, in the post-tender pre-commencement period, been adjusted by agreement between the parties to form the master

programme. In the subsequent use of an impact analysis method of delay demonstration, the reconstruction of the master programme to form a base line programme was necessary. The Judge noted that it was essential that this reconstruction was complete, accurate and supported by the evidence, otherwise the court might decide that the critical path analysis is "not reliable as a base line".

Shortly after the agreement of the master programme, however, a further three sub-zone programmes were issued by Skanska, as the construction programme had become "virtually redundant, almost from the outset". This was due to events on the project since the issue of the master programme. The court concluded that the sub-zone programmes "provided a more accurate basis for detailed delay analysis" providing a "compelling inference that other critical paths must exist" but which were not apparent or considered in the reconstruction of the master programme.

It is often the case that the inputting of actual progress or a delay event into the impact analysis programme will generate additional or alternative critical paths and it may then become necessary to track delays through each one. It is also necessary to consider such matters as late information and design changes (i.e. the evidence) that had already occurred when the master programme became effective. Further, if more detailed sub-programmes are available, they should be considered in any reconstruction of the master programme, in order to provide a

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Delay Analysis: Lessons Learnt

reliable base line programme for the assessment of delays. There may well be a balance to be struck between the master programme and any sub-programmes, particularly if the sub-programmes relate to specialist works or separate sections or if the sub-programmes do not correlate to the master programme. In such instances, it is necessary to determine which programme(s) reasonably reflect the contractor's intention at the outset of the works. When developing a reliable base line for subsequent analysis, the objective is to remove flaws in the original master programme.

Although no conclusion can be drawn from Skanska with regard to the use or effectiveness of impact analysis methodology, the judgement suggests that both experts' analyses identified inherent limitations, particularly interpretation of data being dependent upon the intuition of the user. In fact, this is a criticism that could be applied to most planning programmes and is, therefore, not a surprising observation. Many planning and programming tasks involve the "selection of facts and interpretive judgment" by the person using the software. What is important is the quality of approach and analysis. In everyday terms, this supports the adage 'garbage in, garbage out' which, in Skanska, was stated thus: "It is evident that the reliability of [the expert's] sophisticated impact analysis is only as good as the data put in."

How then should computer programmes be used in the analysis of delay where there are complex interactions between activities and incomplete records? The answer within Skanska can be determined from observations made by the Judge with regard to the approach of the experts. The first lesson is not to overwhelm the Court with information and numerous delay charts which are difficult to understand. Just because the software is capable of producing a variety of outputs in many diverse

formats, it does not follow that such output should always be incorporated in a report. Judge Wilcox was not impressed with the complexity of a report running to "some hundreds of pages supported by 240 charts". There is a lot to recommend the 'keep it simple' philosophy and make reports accessible to the reader and/or tribunal. Accessibility of a report will always be a problem with delay analysis on large and complex projects as criticism could equally be levelled if the report is lacking the detailed supporting programmes, hammocks, sub-nets and analysis of alternative critical paths that may be required at some point.

Whether impact analysis or other methods of delay analysis are employed, it is fundamental that the delay analyst is "objective, meticulous as to detail, and not hide bound by theory as when demonstrable fact collide with computer programme logic." In the example of the reconstruction of the master programme detailed above, if evidence contradicts or conflicts with the output of the computer programme, then adjustment of the input is required to ensure consistency with the facts i.e. follow the facts, not the computer output. Further, if there are more detailed programmes available for aspects of the project, then these should be considered in the development of the reconstructed base line programme. It will, however, be for the delay analyst to adopt "intellectual independence and objectivity" in applying his judgement to the weight he attaches to such programmes.

If there is new evidence or evidence not previously considered, the expert or analyst should possess "sufficient intellectual rigour to admit of the possibility of doubt" to any conclusion based on the computer output prior to the inputting of the new evidence. In essence, the expert should be open minded and willing to concede that output from the computer which contradicts the facts is likely to be unreliable evidence. Hence, the

results of any delay analysis derived from the computer software should be tested against the facts (i.e. the input) and discrepancies further investigated. This goes back to the earlier point that the output is only as good as the information put in and if the court cannot have confidence in that input then less weight will be attached to the opinion of the expert whose conclusions are based on the output.

If a report is to be presented to a tribunal, the expert must be fully conversant with his report. Although this seems self evident, it is common practice on large and complex projects for an expert to engage assistants to carry out aspects of the investigation. However, if this involves the use by an assistant of his judgement then it is incumbent on the expert to test the judgement of his or her assistant(s), otherwise "the extent of reliance upon the untested judgement of others in selecting and characterising the data for input into the computer programme however impeccable the logic of that programme, adversely affects the authority of the opinion based upon such an exercise." An expert's opinion becomes less compelling if the impression is created that the expert is not entirely familiar with the details of his own report.

The Skanska case is important as it confirms some general principles that ought to enhance the persuasive effect of a delay analysis report which has been prepared following those principles. When using computer software, these general principles include keeping reports as accessible as possible, basing the delay analysis on the evidence, considering all the evidence in detail, testing the computer-generated results against the evidence and ensuring that interpretive judgement is objective. In the case of an independent expert's report, the author should be familiar with the entire investigation and served report.

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The Management of Change in Engineering Contracts

In the first of a series of three articles, **Mark Castell** considers what 'change' is, how it affects the construction and engineering industries and discusses some general contractual issues concerning the management of change.

The subsequent two articles will discuss the types of systems and procedures firms should consider having in place in order to manage the changes to their contracts.

What is Change?

So what does the word 'change' mean? There are a number of uses of the word but by discounting 'an amount of small coins' and the 'act of putting different clothes on', we are left with:

- Making or becoming different
- New experience
- Substitution of one thing for another

It is these definitions that I want to address, but what does it mean in practice? Construction and engineering in Europe is going through radical change. For example, shipbuilding; apart from losing entire vessels to Yards in Asia, hull construction in Europe now takes place in Poland or Rumania and the Yards have to compete for the fit-out work. This means the focus is on the improved management of specialist sub-contractors.

Similarly, much of the oil and gas sector has also moved away from Europe and firms operating in this sector face greater international competition. They must look to overseas clients or new sectors, such as plant construction or structural engineering. International clients and new sectors operate their contracts differently and so project teams must learn new management procedures.

The creation of a single European market has meant each of the respective domestic civil and building industries now face increased competition from firms from other European countries. Public Authority clients are also under increased pressure to account for their actions, whether it is letting the projects according to complex EU directives, or in justifying why they are paying extra monies to contractors.

The consequence of these new circumstances is that everyone involved in construction and engineering, regardless of sector, have to manage their contracts in a more professional, compliant and business-like manner. One of the fundamental parts of this requires firms to deal with the changes that will surely occur on projects.

Types of Change in Construction and Engineering Projects

What types of change occur on construction and engineering projects? When we are talking about change, perhaps those areas which come readily to mind are "*additional, omitted, varied, modified or substituted work*". These tend to mean a change to the *scope of work* to be undertaken and include examples such as:

- Quantity increases or decreases such as those arising from the issue of further drawings.
- Preferential engineering, for example on the design of an electrical installation.
- The provision of furniture not being required within the refurbishment of an office block.
- A different paint specification for certain parts of a ship.
- A modification to pipework that has already been installed due to a clash with a cable tray.

Changes can also be categorised as affecting the *schedule*, in other words the programme, timing or sequence of undertaking the works. Examples include:

- Time of year work is carried out. The seeding of the football pitches for a new sports park is not undertaken at the planned time due to the amount of unseasonable heavy rain that has waterlogged the ground.
- Holds placed on drawings affect the time that a pipework prefabrication and installation contractor can actually carry out the work.
- Late access to site prevents a contractor from excavating the foundations for an extension to a hospital when it was envisaged.
- Late issue of material or prolonged drawing review / approval periods that inhibit the start of work.

There is a third category of change, it is *conditions* i.e. the location the work is carried out; or the physical or geological or marine conditions encountered. Examples include:

- Rock being found when excavating for a new tunnel under a canal in the Netherlands.
- The identity of the employer's representative or consultants being changed.

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- Different sub-contractors or vendors being used by other parties involved in the project.
- Overlapping of trades. The pipework, electrical and finishing contractors are all working at the same time rather than in a sequential fashion.
- Type of access to the site. All works traffic is only allowed onto the site of a new motorway from one end and not both ends as indicated to the contractor.

This categorisation is not always clear-cut. For example, an employer changing the type of equipment it wanted as part of the mechanical installation in a new industrial building or factory. The contractor responsible for the mechanical and electrical installation may initially view this as a scope of work change, since it has to provide additional or varied equipment. However, it transpires that the new equipment has a longer procurement period; in other words, it takes longer to purchase. As a result, installation and the electrical connections have to be done at a different time i.e. it is also a schedule change. Furthermore, the revised equipment is bigger, so there is less space available for the contractor to undertake the installation work and thus it is also a change in the conditions under which the contractor operates.

What relevance is this to the Management of Change? Well, its importance is twofold; firstly categorisation of the effects of change can aid the valuation process, and secondly, there are some contractual reasons. These three categories of change; *scope of work*, *schedule* and *conditions* comprise the types of changes that are generally allowable or foreseeable within most construction and engineering contracts. That is to say, that contracts generally provide for such changes to occur and set out a procedure for their implementation and valuation.

Originators of Change in Construction and Engineering Projects

In addition to categorisation by subject, changes can be made by the different parties involved in a project. The employer can make certain of the changes I have already described:

- Providing access to site for the contractor later than envisaged.
- Prolonging the drawing review or approval periods.
- Amending the identity of the Employer's representative or consultants.

A contractor is in a different position of course; it is on the receiving-end of changes made by the employer, but can also initiate changes that affect the employer. Examples include:

- Using a different project manager to the one it said it would use in contract negotiations. This may be an important issue for the employer.
- The standard and quality of the finished works is not as required by the specification.

In the same way as contractors, sub-contractors can be on the receiving-end to changes made by the employer and / or the contractor, but can also initiate changes that affect the employer and / or the contractor.

So summarising what I consider change within construction and engineering projects to be; it is something *different* from that agreed by the parties that can be *caused* by any of the parties involved, that *affects* the scope and/or schedule and/or conditions and has an *impact* on any of the parties involved.

The Baseline

So what is the baseline from which change is measured? Simply, it is that agreed by the parties, in other words the contractual agreement. There is no one common contract that is used in the construction and engineering industries. There is, therefore, no common baseline for ascertaining

change. The contract used will depend on certain variables:

- Each type of industry has its own specific circumstances and needs. The UAV form of contract in the Netherlands is meant for use for building works. It is not suitable for use for a ship conversion. Similarly, the ICE form of contract is not drafted for building works, it is meant for civil engineering.
- There are often many contracts in use on one project. The employer will have an agreement with the contractor; the contractor will have contracts with each of its sub-contractors. The contents of each should be different as there are different obligations placed on the parties.
- There are many different levels of responsibility for contracting. At one extreme is turnkey, where a contractor has virtually complete responsibility for constructing something and then at the end, 'hands the key to the employer'. Alternatively, the contractor may only be required to construct the works, the design being done by the employer or someone employed by him. Some projects have a combination of construct only and design and build within the various contracts.
- Lastly, different obligations and responsibilities arise from the method of payment. A contractor may be paid a fixed lump sum or may be reimbursed its costs plus a fee. Again, this may not be consistent throughout all the contracts on a project.

The important point is that the contract sets out the baseline by which change is measured albeit the baseline will be different for every project and every contract. Hence, firms must have procedures in place that can be applied to a wide range of contractual situations. In the second article, I will consider these.

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Rendering Evidence under

The following text is based upon a full article written by **Luc Demeyere**, member of the Antwerp Bar, Partner, Allen & Overy LLP and was previously published in SchiedsVZ 6/2003, Verlag C.H. Beck oHG, Munich, website: www.beck.de.

IN this article, European lawyer Luc Demeyere provides a brief review of the different approaches taken by common law (anglo-saxon) and civil law (continental Europe) jurisdictions in establishing the facts in a case.

AS soon as arbitration involves cross-border aspects, the gathering of evidence becomes a key element in preparing a case and conducting proceedings. The deductive reasoning in civil law compared to the inductive reasoning in common law, not only influences the way in which the factual and legal arguments are developed, but also impacts strongly on the gathering of evidence itself. Evidence will be structured so as to fit the legal reasoning. Although the general instruments for gathering evidence may be similar, the conditions under which they can be used and the way in which they can be applied differs widely between different countries and may have an unexpected influence on the way the case is conducted. The common law oral tradition is quite different from the civil law suspicion towards oral statements and one should not underestimate the effect cultural differences may have on peoples' attitudes towards 'the truth'.

Evidence under Civil Law and Common Law:

The globalisation of business relations have already given rise to increased multi-jurisdictional conflicts. This situation, together with the need to resolve these conflicts somehow, remains a problem.

In the USA and, to a certain extent, in the UK, the 'civil law' system for gathering evidence is commonly assumed to apply across the European continent and to all European countries alike. This is completely incorrect. Each state on the European continent has its own judicial laws and the differences amongst them are very important and far-reaching. The biggest mistake a practitioner can make is to assume that the conduct of judicial proceedings in a neighbouring European country will be similar to proceedings in his/her home jurisdiction.

There is an EU regulation regarding co-operation between the Courts of the Member States in the taking of evidence in civil or commercial matters. This is likely to make the parties in EU cross-border litigation even more aware of the differences in gathering evidence in the jurisdictions concerned. Moreover, when taking evidence in another jurisdiction, there is always a risk of conflicting with the sovereignty of that jurisdiction and with principles held to constitute the public policy of that jurisdiction. Therefore, the hearing of a witness in "another state" is sometimes organised in the embassy of the requesting state in that other state, so that the witness hearing takes place on the 'territory' of the requesting state.

Some common law practitioners suggest that the common law system of taking of evidence aims at discovering 'the ultimate truth' and that the civil law systems fail to

achieve this result. This is unjustified since the role of a judge in a (European) Continental role is to establish the truth, which is an active role.

Despite the differences between the various legal systems, we should remember that there is a principal common trend in both common law and civil law systems of evidence. That is, both systems tend to permit all rational means of obtaining evidence and only exclude unreliable evidence, unfairly obtained evidence or evidence that affects some protected privileges.

Without distinguishing between criminal cases and civil or commercial cases, as far as evidence is concerned, a distinction should be made between whether:

1. The type of evidence is in itself admissible, raising the question of whether exclusionary rules should be applied; and
2. The way in which the evidence was actually obtained by the party using it was harmful.

This distinction is equally relevant in civil law and common law proceedings given the jury trial system and the role of the judge in such proceedings. In the USA, the judge determines the admissibility of evidence and the jury decides on the value of that evidence; whereas in most civil law courts the same individual(s) is called on to decide both on the admissibility of evidence and the value attributed to it.

The differences between the inquisitorial (civil law) and adversarial (common law) approach relate to the different judicial roots and traditions and to the different role of statutes in the civil law and common law jurisdictions.

For various reasons the civil law judicial tradition pays more attention

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Common Law and Civil Law

to contemporaneous documents than to those written since the dispute arose. Witness testimony will be regarded with scepticism and only considered helpful for elements which cannot be adequately evidenced by contemporaneous documents.

Despite the oral tradition of common law proceedings, such proceedings tend to result in far more paperwork than civil law proceedings. Indeed, court reporting is a common practice in common law proceedings, whereas it is highly unusual in civil law proceedings.

The IBA Rules on the Taking of Evidence in International Commercial Arbitration represent a compromise between the two judicial traditions. Increasingly, practitioners are reverting to the IBA Rules as best practice in international commercial arbitration.

The rules established by arbitration institutions also contain rules of procedure (ICC Rules: article 15; LCIA Rules; articles 14, 22; Stockholm International Arbitration: articles 20, 25, 26; Cairo Centre: articles 24, 25; UNCITRAL Model Law: articles 19-24). However, Arbitrators do not have the authority of state judges and when the arbitrators order a party to produce a document or a category of documents in its possession and the party does not do so, or when they order the hearing of a witness of fact or an expert witness, who does not appear, the arbitrators cannot by their own authority compel the party to produce the document(s) requested or force the witness to appear and testify. Hence, the arbitrators' sanction for non-compliance is limited to the negative inference they can draw from a party's failure to comply with the tribunal's orders.

Alternatively, state laws of different countries will either provide that the courts can assist the arbitral

tribunal in gathering evidence, or restrict some forms of evidence to state courts.

The civil law tradition takes abstract rules as a starting point for decision-making and sees decision-making as deductive in the sense that the rules that structure it are posited prior to the practices that apply to it.

The common law tradition, by contrast, takes actual cases as its starting point. When an earlier case is referred to in deciding a new one, the earlier case is not abstracted into a general rule, but is rather taken integrally, that is with all its factual details in place.

These different approaches explain why practitioners will present the evidence to be gathered differently, depending on whether common law or civil law governs the merits of the case.

The different approaches in presenting the facts of the case also have an impact on the burden of proof. Under civil law, the general principle is that the claimant should evidence his allegations. The same is true for the defendant's counter allegations. Although civil law judicial systems may introduce an element of co-operation between the parties on the providing of evidence, control over this co-operation will rest with the court or the arbitral tribunal applying its system.

Initially at least, each party in civil law proceedings will choose from the documents in its possession those which actually support its claims, whereas the common law approach is for each party to be given an opportunity to consult all the documents of the case before deciding its arguments. This common law approach may allow claims to be filed where the plaintiff has no evidence as to the merits of a claim and is merely seeking to establish its initial allegations through pre-trial discovery of

documents and any other evidence provided by the defendant.

International arbitration therefore remains a delicate balancing exercise for the arbitrators, the parties and their counsel. Both in common law and in civil law proceedings, there is this basic approach and a number of instruments for rendering evidence.

Under common law, the law is what the court says it is. For example, civil law practitioners are sometimes surprised that the enforcement criteria are established by a Supreme Court decision rather than by a specific statute. Equally, in subsequent cases, the criteria may be systematically revised by that Court.

Under civil law, the courts should apply the statutes to the facts presented by the parties, and as established by the courts. A common law practitioner may be surprised that articles of a civil or commercial code appear to be straightforward, but are, nevertheless, interpreted in an unexpected manner.

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"Under civil law, the general principle is that the claimant should evidence his allegations."

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Rethinking Construction Risk: Single Project Insurance *by* Kirsteen MacLellan

IN October 2004, Trett Consulting hosted an evening seminar dedicated to the developing concept of single project insurance in the construction and engineering industry. The event was organised in association with Lawrence Graham, solicitors, and Tysers, insurance brokers. Martin Davis, a member of the Strategic Forum for Construction, and Daniel Goossens, who works for SECO, a Belgian company which develops neutral insurable solutions for construction projects, were guest speakers.

One of the key drivers behind the seminar was Martin Davis's work with the Strategic Forum, where he is 'Champion' of the Integration Agenda, which aims to bring together best practice in all areas of the industry for use on future projects. One of the cornerstones of this integrated approach is to develop the use of single project, multi-party insurance as a means of ensuring consistency, fairness and partnership throughout the project in question.

There are three main areas of construction insurance risk – Professional Indemnity, Product Liability and Contract All Risks / Third Party. Each of these types of risk is insured separately, by each of the parties involved, and when the project begins to falter, the consequences are inevitable: a war of warranties develops and creates a 'blame culture' where the parties can become overtly confrontational and work against each other, rather than with each other.

The idea of integration is that parties begin to work much more collaboratively, with a focus on collective performance, the integration of systems and procedures to achieve common ownership of the scheme, and, ultimately, allowing the parties the freedom to concentrate on the client and the project's priorities. This system of team integration allows issues regarding the risk management of the project to be shared openly with all parties, and to be effectively managed. One of the keys to effective risk management is effective insurance, and this is where

single project insurance comes to the fore. The Accelerating Change¹ document outlines the belief that the single project insurance policy should cover Professional Indemnity Insurance and Works Contracts Insurance and also some aspects of Product Liability Insurance.

There are many reasons why the construction industry needs a new approach to insuring new projects: the confrontational and adversarial culture of construction; the lack of trust; and the barriers which operate between the client, the consultants and the contractors. A single project insurance policy allows the client to take control over his project, and it protects the interests of all the parties to the contract. Moreover, it can provide the widest scope of insurance cover available, ensuring that loopholes and pitfalls can be avoided. There is less propensity to apportion blame or responsibility for the problems that arise on the project, as this is irrelevant. This change in attitude, in turn, helps to minimise conflict on the project and leads to far lower levels of dispute between the parties. The key point is that, with single project insurance, the parties are all covered equally, under the same policy, and that they enjoy the same protection as the other interested parties. In other words, the client, the contractors and the consultants are all 'managing the risk and securing the profit'; this goes a long way to providing a win-win situation.

Still not convinced? Maybe a story from Belgium can help... Daniel Goossens explained that this form of integrative and collaborative working can succeed, and that the positive outcomes that arise from this change in thinking are well worth striving for. SECO was established in Belgium in 1934, by a collection of University professors, designers and contractors. Their aim was to ensure quality control through implementing neutral technical controls on the design and execution of a project. Their ethos is one of consultative and neutral working practices, leading to high quality involvement from all

parties and to the development of 'insurable creative solutions' for the project as a whole.

The Belgian form of project insurance covers integrated teams for a ten year liability period. An independent review of the technical specifications of the project is undertaken by a specialised technical control team (SECO) and includes an assessment of drawings, calculations and submissions, as well as supervisory site visits and attendance at technical meetings. The insurance firm will then provide cover (to include all building and finishing works and technical installations and performance) on the basis of this technical review. The resulting cost of insuring the project is economic, as the insurer is confident that this aspect of technical control will have removed the foreseeable risks.

SECO has found that the direct consequences of this type of approach have included a far less adversarial damage settlement environment, a growing culture of consultation and a transfer of knowledge within the industry, an increase in creative thinking regarding the processes and procedures surrounding projects and, most interestingly, a financial guarantee for all parties involved, even after bankruptcy.

The financial and risk management benefits of collaborative working are clear and everyone who attended the seminar in October reacted positively to these developments in the construction industry. The issue of managing risk is at the heart of every project, and this approach tackles the problem head on. The concept has already been implemented on some high profile projects, including Heathrow Terminal 5, and more will surely follow as the industry continues in its trend for partnership and collaboration between clients, contractors and consultants.

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1. 'The Accelerating Change' document is published by the Strategic Forum and can be found on their website: http://www.strategicforum.org.uk/pdf/report_sept02.pdf

Good Faith in Construction Contracts

A previous edition of the Trett Digest (Autumn 2001) considered the issue of partnering in construction contracts. The article highlighted the requirement for a general acceptance of the principle of 'good faith' in construction contracts in order for partnering to be truly effective. So, almost four years on, is it the case that 'good faith' is now any more widely accepted by the courts, and if not why not?

HISTORICALLY, English law has not recognised a duty of good faith in construction contracts. The enshrined position has been that *'although the courts will imply a duty to do whatever was necessary in order to enable a contract to be carried out, the requirement of good faith has not been incorporated into English law'*.¹

However, construction law by its very nature cannot be static, and must embrace changes and developments in the construction industry as and when they arise. The concept of partnering is one such development which has led to the traditional procurement route of the construction industry shifting from being purely transaction focussed to one that views the relationships in the industry as long-term and ongoing.

English law has predominantly been concerned with the necessity for 'certainty' in contracts. However, this new focus encourages a wider view to be taken of the project. The partnering concept requires an examination of the whole supply chain from the outset of a project. An assessment must be made of how these supply chains can best be implemented so as to improve the efficiency and effectiveness (and therefore profitability) of the construction process as a whole.

In this way, the relationship between the parties to a construction project has become more important than ever before. The phrase that is frequently used in this context is that the parties have 'a duty to act in good faith' towards one another. But what exactly does this mean and, is it in fact a legally enforceable duty at all?

'Good faith' is defined in the Building Contract Dictionary² as *'[a] concept whereby a contracting party has imposed on him an implied obligation not to act*

intentionally in a manner likely to cause the other to be deprived of a benefit or benefits that the other party would otherwise have obtained under the contract'. The concept does not simply mean the avoidance of acting dishonestly or deceitfully, it places a more positive obligation on the parties. However, the real difficulty arises simply because the term 'good faith' is so imprecise – described by one American judge as a 'chameleon'³.

Some guidance can be found in the approach of the standard partnering forms of contract. These include: PPC (2000), the 'Be Collaborative' contract, the NEC/ECC option X12 and the JCT Partnering Charter.

PPC (2000) is a good starting point for a definition or at least a better understanding of good faith. It states that: *'...the partnering team members shall work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the project.'*

However, if we then look at the overriding principle of the 'Be Collaborative' contract (which of all the standard form partnering contracts is potentially the most radical attempt to expressly encapsulate the ethos of good faith in a partnering context) we see that this definition goes much further:

'The Overriding principle ...is that of collaboration: it is [the parties] intention to work together with each other and with all other Project Participants in a co-operative and collaborative manner in good faith and in the spirit of mutual trust and respect...They will support collaborative behaviour and confront behaviour that does not comply with the Overriding Objective.'

This envisages positive action to encourage the parties to act in good faith towards one another.

So what is the position in 2005 with regard to the general acceptance and enforcement of the concept of 'good faith'?

With the advent of the partnering approach to contractual relationships, particularly in the construction industry, there is potentially scope for the principle of good faith to be considered by the courts. Indeed, in *Birse Construction v St David Ltd* (1999)⁴ Judge Humphrey Lloyd suggested that, in appropriate circumstances, the provisions of a partnering agreement could be taken into account when interpreting terms in the underlying contract.

At the time, this appeared to be a step in the right direction for the recognition of the principle of good faith in construction contracts. However, the principle has not

been developed any further since. One reason for this might be that the traditionalists cannot bring themselves to embrace such a forward-thinking concept. However it is perhaps the potential undermining of the principle of 'certainty' of contract that troubles the lawyers and the courts more.

Those who support the concept of good faith use as examples European legal systems, in particular France (where the equivalent 'Bon sens' is a long established concept) and Germany. A further example is the Dutch Civil Code which places a great deal of emphasis on the principles of good faith and fair dealing, in particular Article 6 which states that there is an *'obligation of good faith which may entail that a party may not rely on an express provision in the contract, if, under the circumstances that would be unacceptable under the requirements of reasonableness and equity.'*

Other common law jurisdictions which have as their basis the English common law, appear to be more advanced in their recognition of the concept. In both New Zealand and Australia case law indicates that there is scope for recognition of a limited duty of good faith. However, this will depend on the actual facts of the case and will be viewed in the context of the contract as a whole.

The problem for the industry (and which no doubt will keep the lawyers busy) is that although phrases and principles of 'good faith' have become more commonplace, the concept is still treated with misunderstanding and mistrust in some sectors and is not, as yet, a binding duty under English Law. (However, the concept is accepted in specific sectors such as insurance contracts.)

Until further disputes and cases are heard that test the concept, it is difficult to predict whether the courts will be prepared to recognise a duty of good faith. This may take some time as, if the partnering arrangements currently being entered into proceed as the parties intended, such disputes should be few and far between!

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1. Vinelott J in *London Borough of Merton v Stanley Hugh Leach Ltd* (1986) 32 BLR 51

2. Building Contract Dictionary 3rd Edition, D Chappell, D Marshall, V Powell-Smith, S Cavender, p180

3. Judge Richard Posner, *Empire Gas Corp. v American Bakeries Co* (1998)

4. Judge Humphrey Lloyd QC, *Birse Construction Ltd v St David Ltd* (2000) 1 BLR 57

Filing Claims on Public Contracts: Mark your

AN absolute must on the standard checklist for filing a claim under virtually any national legislation is the issue of statutory limitation. Belgian law is no exception in this matter, but things tend to become considerably more complicated when the counterparty is none other than the government itself and the dispute originates from a public procurement contract. Most Belgian companies (and in a broader sense European-based companies if the invitation to tender relates to the entire EU territory) are familiar with the specific set of rules that govern this type of contract and which impose all sorts of obligations that need to be complied with in order to make a claim against the government stick. However, the formal and often unnecessarily complicated use of language which characterises the Belgian legislation on government contracts and, above all, the fact that these rules are scattered over a disorganised abundance of laws as well as royal and ministerial decrees means that even the most vigilant among us lose their grip from time to time.

The key distinction to be made concerns the general statute of limitations for the claim itself (1), the period within which the contractor has to give notice of his grievances (2) and the period within which the claim has to be filed before the competent courts (3).

Under Article 2 of the Law of 22 May 2003, any contractual claim against the Belgian government expires after a period of 10 years. If on the other hand the claim is tort-based, it will become statute-barred five years after the date on which the injured party became aware of the (aggravation of the) damage and the identity of the person responsible for inflicting the damage. Such a claim will in any case expire 20 years after the date on which the damaging incident occurred. These limitation periods are identical to those specified in the Belgian Civil Code and thus quite easy to remember for Belgium-based companies. Unfortunately, the Law of 22 May

2003 only applies to claims that predate its own entry into force on 1 January 2004.

All other claims fall within the scope of the more “obscure” Article 100 of the Royal Decree of 17 July 1991, which provides for three different limitation periods depending on the type of claim. If the existence of the claim has to be notified in a formal manner to the government, the contractor has five years within which to do so, starting from the 1st of January of the year of origin of the claim. If he fails to notify his claim in due time, the claim will expire irrevocably. On the other hand, if he meets the deadline, the competent minister has to acknowledge the validity of the claim and grant permission to the contractor to submit a corresponding invoice within another five-year period starting from the date of notification. A (deliberately?) negligent minister could also cause the contractor to miss out on his

chance in court. This rather unfortunate side effect of the required authorisation to invoice does not necessarily have to end in disaster. Contractors can request the government to formally acknowledge the existence of the debt in order to safeguard their interests. Since the government/property developer is seldom willing to grant such a favour, contractors usually resort to bailiff service of either a notice of capitalisation of outstanding interest or a writ of summons. Serving a notice of capitalisation on the government in order to prevent the debt from expiring is rightfully the most popular choice, given its “two for the price of one” nature: not only does the contractor avoid his claim becoming time-barred, but he also increases the size of the bill by adding all interest outstanding for over a year to the principal amount.

As aware as contractors may be of the limitation period for the claim, if they fail to inform the government of their demands in due time and fail to respect the standard procedure, they forfeit all rights to recover their losses. The General Procurement Conditions (“GPC”) as imposed on any company entering into a public procurement contract with the Belgian government contain a harsh and elaborate set of notification rules depending on the nature of the contractor’s request. A few Belgian scholars have combined forces to write an exhaustive study of all these clauses, and it would not do their work justice to try to summarise their commendable efforts within the limited scope of this article. A brief word on the most frequently occurring scenario as described in Article 16 GPC should suffice as a general introduction and give the reader a feel for the degree of formality that is so typical of these

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obligations. Contractors who feel (financially) harmed in any way by an act or decision for which the government acting as property developer is responsible may claim compensation on the basis of Article 16 GPC, provided that they inform the government in writing as soon as they become aware of this harmful act/decision, but at the latest within 30 days. This period is designed to give the government the opportunity to remedy any wrongdoing and thus to prevent a formal claim by the contractor. If the matter remains unresolved, the contractor is required to submit his documented claim for financial compensation in writing within 90 days following the preliminary acceptance of the works. Caution is again advisable, since failure to meet these deadlines is punished by irrevocable loss of any right to compensation, as is the case for the above-mentioned general statute of limitations.

Last, but certainly not least, there is the deadline for filing an action against the government before the competent courts. According to Article 18 GPC, any action against the government originating from the execution of a public procurement contract has to be filed no later than two years following the final acceptance of the works. The two-year limitation period is suspended as long as the parties are negotiating an amicable settlement. Once all attempts at negotiation have failed, the decision to actually sue the government is not always as obvious as one might suppose. The number of companies that meet the legal standards required for the execution

of a public procurement contract is extremely limited. Only a handful of large, highly-qualified and suitably equipped companies with years of experience are allowed to respond to the invitation to tender. Consequently, quite a large share of the turnover of these companies is the result of their virtually continuous contractual relationship with the government. It is never easy to enter into litigation with someone you still have to work with on a day-to-day basis, and contractors are certainly no exception. An escape route often used by contractors is to propose that the government voluntarily waive the benefit of the two-year limitation period. This certainly relieves some of the pressure on both parties, sometimes even to the extent that they feel comfortable (again) about entering into negotiations.

When you consider that all the above-mentioned deadlines have to be met in order to be able to validly file an action against the government regarding the execution of a public procurement contract, it becomes clear that any responsible contractor performs his tasks with his tools in one hand and his diary in the other. Time-consuming as this may sometimes be, it does not outweigh the massive losses that can result from a statute-barred claim.

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"...the decision to actually sue the government is not always as obvious as one might suppose."

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We are delighted to announce that we have opened offices in Montreal, Canada and Houston, Texas. This is in response to the continued growth of our operations in these areas and will further strengthen our presence and service to our existing and expanding client base in North and South America. The offices will be supported by Cameron Hill, our International Director. For further information on our North American operations, please contact:

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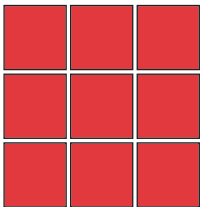
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