

TRETT CONSULTING

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SUMMARY JUDGMENT FOLLOWING

In the UK, Statutory Adjudication is now one of the most popular dispute resolution processes. An employer, contractor or sub contractor can often achieve a decision within 28 days of raising the dispute with the adjudicator. This important decision might concern the valuation of the works, liability for and the quantum of a variation account, an extension of time award or payment of loss and expense. Quick justice indeed, but is it easy to enforce the award of an adjudicator? **Mike Turgoose** discusses the ability of a successful party to receive summary (i.e. instant) judgment in the court.

An adjudicator's decision provides a binding decision, albeit a temporarily binding decision, until the parties agree it is final or the matter is finally resolved through more formal arbitration or litigation proceedings. Nevertheless, the adjudicator's decision is enforceable in the courts by way of summary (instant) judgment by a Judge, irrespective of any future proceedings between the parties.

Although the successful party in adjudication is generally in a strong position and the losing party will struggle to defend an application for

summary judgment against him, the Technology and Construction Court (TCC) has given clear guidance in the case of *Wimbledon Construction Company 2000 Ltd v Vago* as to what approach it will take in relation to the enforcement of an adjudicator's decision under such an application.

A number of issues were addressed by Judge Coulson in his judgment and the points listed below serve as a useful guide when considering that vital next step should the unsuccessful party refuse to pay the sums awarded by the adjudicator:

1. Where the validity of a decision is challenged in terms of procedural error or its factual or legal conclusion, the decision remains one which is enforceable. In other words, an adjudicator's decision is enforceable irrespective of whether the adjudicator has made an error in interpreting the law or the facts of the dispute.
2. A decision that is erroneous, even if the error is clear from the reasons, will not normally be capable of being challenged and should, ordinarily, still be enforced. For example, an adjudicator may mistakenly award one party a sum of £100,000.00 when, in fact, the other party ought to have been awarded the money. In these situations, the courts have agreed that mistakes in adjudication are bound to

occur, and this is no reason not to uphold an adjudicator's decisions i.e. the mistake stands.

3. The adjudication process is intended to provide a speedy and temporarily binding decision in which mistakes will inevitably occur. Thus, the court should guard against characterising a mistaken answer to an issue which is within an adjudicator's jurisdiction, as being in excess of his jurisdiction. In other words, a mistaken answer to an issue put before an adjudicator will be enforced whereas, a decision on an issue not put before an adjudicator will not be enforced in summary judgment. So, if an adjudicator decides that no extension of time is due and a payment of £100,000 liquidated damages should be made, the court will not enforce the payment of damages if the adjudicator was only asked to consider if an extension of time was due.
4. A decision may be successfully challenged on the grounds that the adjudicator was not empowered to make the decision because there was no underlying construction contract between the parties in accordance with and as required by Section 104 of the Housing Grants, Construction and Regeneration Act 1996, or because the adjudicator has

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ADJUDICATION PROCEEDINGS

ventured outside his terms of reference i.e. the adjudicator has provided a decision on an issue that he was not asked to address in the Notice of Adjudication (such as the liquidated damages).

5. In the event of a clear breach of natural justice giving rise to the real risk of bias, an application for summary judgment will, in the normal course of events be rejected by the courts. By way of example, adjudicators have quite rightly become particularly wary of making site visits without providing the opportunity for both parties to attend. Similarly, adjudicators should refrain from holding a telephone conversation with one party without relaying the information gleaned from the conversation to the other party. Such instances may provide a real risk of bias in the event that the adjudicator's decision is influenced by and ultimately reflects findings ascertained from events not communicated to both parties.

6. Adjudication proceedings are caught by the UK's Insolvency Act 1986 and by Rule 4.90 of the Insolvency Rules 1986, which requires that all claims and cross-claims should be resolved in the liquidation, so that a balance can be struck between the parties' positions. Therefore, an application for summary judgment may be resisted if one party is in liquidation.

The financial standing of the successful party in adjudication is also an issue that has recently been addressed in the courts. That is to say, what happens if the unsuccessful party in adjudication refuses to pay because the successful party is seen as being unable to repay the sum awarded because its financial position is uncertain?

Point 6 above played an important part in the case of *Wimbledon*

Construction Company 2000 Ltd v Vago. Mr Vago had work carried out by Wimbledon Construction and a dispute was decided at adjudication. Wimbledon won the adjudication but Mr Vago refused to pay a sum of approximately £120,000. Therefore, Wimbledon went off to court to enforce the adjudicator's decision by applying for summary judgment. Mr Vago, unhappy with the financial standing of the Contractor, argued that the enforcement of the adjudication should be stayed, since Wimbledon would be unable to repay the decided sum if it was later ordered to do so.

The court has the power to decide whether or not to enforce a decision using its discretion. In this instance, the court decided to enforce the adjudicator's decision and in the process, Judge Coulson helpfully laid down some principles to be applied when considering this sort of situation:

- Adjudication was always intended to be a speedy and inexpensive means of achieving a temporarily binding decision and the successful party should not be kept out of his money.
- In light of this, the probable inability of a successful party to repay the amount decided in adjudication could be taken into account and may provide special circumstances when deciding whether to grant a stay.
- If the successful party is clearly insolvent, then a stay of execution will normally be granted i.e. the unsuccessful party to the adjudication will not be required to pay up.
- Even where evidence suggests that the financial position of the successful party is such that it is probably unlikely to be able to repay the judgment sum, that would not usually justify the granting of a stay to summary

judgment if:-

- i) The successful party's financial position is the same or similar to its financial position at the time that the relevant construction contract was entered into; or
- ii) Where the successful party's financial position is due wholly, or in significant part, to the defendant's failure to pay the sums awarded by the adjudicator.

Ultimately, the unsuccessful party, in refusing to pay, must not take a short sighted view of the situation it currently finds itself in. A Judge must be persuaded to exercise his discretion in your favour. This may involve showing that the adjudicator's decision is wrong and that in litigation or arbitration, the decision would be different. It is not enough merely to find a technical reason why the monies awarded by the adjudicator should not be paid over, since it is possible that the unsuccessful party may be required to pay the sum awarded by the adjudicator into court until the matter is finally resolved.

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FORCE MAJEURE

The term Force Majeure is known to most of us but what does it mean and should we be concerned about its inclusion in our contracts?

Herbert Smith's **Peter Godwin** and **Dominic Roughton** explain that a Force Majeure clause is included in a contract to enable one (or both) parties to be excused from performance of their contractual obligations, or to suspend or delay performance, upon the happening of a specified event or events beyond the party's control.

The events listed in a Force Majeure clause will be a matter for negotiation between the parties and it is one of those clauses that parties do not usually have difficulty with. However, as our businesses are affected more and more by international factors, it is important to get it right. Some commonly listed events include Acts of God, war, belligerent action, hostilities (whether or not war has been declared), terrorist acts, acts of any civil or military authority, governmental or regulatory decisions, refusal of licences, riot, civil commotion, strike, acts of vandalism, fire, flood, earthquake, extreme weather conditions, epidemic, radioactive, chemical or biological contamination and aircraft crashes. There are many other possibilities.

Was the recent conflict in Iraq a Force Majeure event?

Most Force Majeure clauses will list war as a Force Majeure event allowing a party to rely on the clause if they have been prevented or hindered from performing the contract due to the outbreak of war. Many Force Majeure clauses will also include wording such as war or belligerent action, invasion,

hostilities (whether or not war has been declared).

While it seems clear that the recent US-led attacks in Iraq constitutes an invasion and belligerent action, there is ongoing debate in academic circles as to whether it was a war.

If a court held that it was not a war, then to rely on the conflict as a Force Majeure event, the particular Force Majeure clause must include wording such as belligerent action or invasion etc.

Is SARS or Bird Flu a Force Majeure Event?

The outbreak of atypical pneumonia, known as Severe Acute Respiratory Syndrome (SARS) or current outbreaks of bird flu has led to, and may lead to, many declarations of Force Majeure.

The simplest way for SARS or Bird Flu to come within a Force Majeure clause would be if the clause includes the wording epidemic. An epidemic is a temporary but widespread outbreak of a particular disease and the World Health Organisation's classification of SARS as an epidemic is good authority that SARS is such an outbreak.

If SARS or Bird Flu was not

considered to be an epidemic at the time that the party sought to rely on the Force Majeure clause, or if epidemic is not listed as a Force Majeure event, then it is likely that a party would have to try to rely on government decision or administrative action or other similar wording commonly included in Force Majeure clauses. An example of administrative action taken as a result of SARS is the closure of buildings or the cancellation of events in SARS-affected areas.

Assuming that the conflict in Iraq or the SARS epidemic was a Force Majeure event covered by a particular contractual Force Majeure clause, the party seeking to rely on the clause must then prove that they have been prevented or hindered (depending on the wording of the clause) from performing the contract as a result of that event. In other words, there must be a causal connection between the Force Majeure event and the non-performance. There is an ongoing debate as to whether the foreseeability of the Force Majeure event at the date the contract was entered into is relevant. Some argue that if it was foreseeable by the party seeking to rely upon the Force Majeure event, that party cannot so rely. Others argue that the only question should be whether the event was beyond the control of the party seeking to rely upon it. The details of this debate are beyond the scope of this article.

The party who wishes to rely on the Force Majeure clause must prove the facts bringing the case within the specific terms of the clause. They must prove that one of the events referred to in the clause has occurred **and** that they have been prevented, hindered or delayed (depending on the specific wording used) from performing the contract by reason of that event. Naturally, a party cannot rely upon any event which it has caused itself. Further, where possible, it must take reasonable steps to avoid or mitigate the consequence of the event.

Many Force Majeure provisions

will also require the party seeking to rely on the event of force majeure to give notice within a specified period. The consequence of such a notice being given late is often a matter of contention. There are a number of cases in which the notice of reliance on a Force Majeure clause was defective for being out of time. The question whether the contractual requirement as to the time of giving notice is a condition or a less important (intermediate) term depends on the following three factors.

- (i) the form of the Force Majeure clause itself;
- (ii) the relation of the clause to the whole contract; and
- (iii) general considerations of law.

Examples of both types of terms and the distinction between them were set out in the *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A. (HL) [1978] 2 Lloyd's Rep. 109 case*. A clause requiring the sellers to *advise buyers without delay* was held to be an intermediate term only, so that failure to give the required notice *without delay* did not prevent the sellers from relying on the clause. It would only have had this effect if the resulting delay had caused serious prejudice to the buyer. The term was not expressly drafted as a condition, unlike other terms in the contract, and the term *without delay* was inherently vague and did not enable the buyer to ascertain exactly when the seller was in default.

By contrast, a second stipulation contained in the same contract required notice of certain events delaying shipment to be given within seven days of the occurrence; and that further notice was to be given for an extension of time *not later than two business days after the last day of the contract period of shipment*. The clause went on to specify further time limits and to provide exactly when the contract was to be considered void. It was held that the stipulation as to the timing of the notice for an extension was a condition – it specified fixed

days for the giving of various notices and was a *complete regulatory code*.

Notice provisions should therefore be complied with to avoid future arguments.

By its very nature, a clause drafted to deal with unforeseen events cannot always cover all such events and it may yet be necessary to rely on the common law of frustration.

Frustration

The common law doctrine of frustration generally operates to discharge a contract where a supervening event occurs (without the default of the parties concerned and for which the contract does not make sufficient provision) which results in performance of the contract being physically or legally impossible, or the obligations under the contract being radically different to those originally undertaken.

The doctrine normally operates within relatively narrow confines. It cannot usually be invoked merely to relieve a party from an imprudent commercial bargain, nor where the parties have foreseen the relevant event and provided for it in the contract. Mere inconvenience, or hardship, or financial loss in performing the contract, or delay which is within the commercial risk undertaken by the parties, will usually be insufficient to frustrate a particular contract. Similarly, contrary to popular belief, a Force Majeure clause will not provide relief because something has become more expensive unless the Force Majeure clause specifically says that it will.

In addition, the purported supervening event should not be explicable by reason of the conduct of the party seeking to rely on it.

Some difficulties in drafting a Force Majeure clause

The uncertainty relating to the present approach of the courts to the

interpretation of Force Majeure clauses is worthy of note, as this uncertainty may complicate the task of drafting such a clause in a contract.

The first area of uncertainty relates to whether or not Force Majeure clauses are to be construed *contra proferentum*. This means any uncertainty in the clause will be interpreted against the person wishing to rely upon it. In English law this was the situation (see *Fairclough, Dodd & Jones Ltd v. JH Vantol Ltd [1957] 1 WLR 136*), but the trend of recent cases has been in favour of giving effect to the intention of the parties, without adopting any preconceived notions of what the contract should mean, even in relation to exclusion clauses. In any event, the draftsman of a Force Majeure clause should, as with any contractual clause, aim to draft with clarity and precision.

The second source of uncertainty relates to the potential applicability of statutory provisions that seek to protect a weaker party. For example in England, there is the Unfair Contract Terms Act 1977. Although they may not strictly be exclusion clauses, there is considerable weight in the proposition that Force Majeure clauses may be covered by the UCTA and more particularly section 3. Very broadly, it appears that the wider the scope of the events which fall within the Force Majeure clause, the more likely it is that the clause may be regulated by UCTA in England.

Given recent international events, a party is well advised to consider Force Majeure provisions in both domestic and international contracts.

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DO WE HAVE A DISPUTE?

Disputes. It is unfortunate that we all become involved in them at different times and for varying reasons but, if asked, are we able to identify when they arise?

Keith Elliott argues that it is important to be able to define a 'dispute' because under many contracts, it is not until this point has been reached that certain entitlements accrue to the parties.

Over the years, the English Courts have been asked to decide when a dispute has arisen. In *Monmouthshire County Council v Costelloe & Kemple Ltd* (1965), Lord Denning MR expressed the opinion that there must be both a claim and a rejection of it in order to constitute a dispute or difference. It would seem that Lord Denning MR was of the belief that, for a dispute to arise, there must have been an express rejection of a claim.

However, in *Tradax International v Cerrahogullaritas* (1981), the defendants to a claim did not admit liability; in fact, it would appear that they did nothing because they ignored all communications relating to it. It was held that these facts gave rise to a dispute. The absence of a response, within a reasonable time, may be taken as a non-admission of the claim, and hence the creation of a dispute. In *Ellerine Brothers (Pty) Ltd v Klinger* (1982), Templeman LJ was of the opinion that the absence of a reply may give rise to a dispute.

The judgements in *Tradax* and *Ellerine* found favour with the Courts in the case of *Cruden Construction Ltd v Commission for the New Towns* (1995), His Honour Judge Gilliland deciding that a dispute can exist when a claim is ignored or met with prevarication.

More recently, the UK's Housing Grants, Construction and Regeneration Act 1996 has led to judicial opinions being expressed on the meaning of the word dispute. In *Sindall v Solland* (2001), it was held that for the purposes of exercising the statutory right to an adjudication a point must have arisen from the discussions which needs to be decided.

These cases were reviewed by the Court in the recent case of *Amec Civil Engineering v Secretary of State for*

Transport; Seven propositions concerning the meaning of the word 'dispute' were identified, each wholly endorsed by the Court of Appeal in *Collins (Contractors) v Baltic Quay Management (1994) Ltd* (December 2004). The propositions can be summarised as:

1. The word 'dispute' which occurs in many arbitration clauses (and also in section 108 of the Housing Grants Act) should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

2. Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.

3. The mere fact that one party notifies the other party of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4. The circumstances from which it may emerge that a claim is not admitted are variable. For example, there may be an express rejection of the claim. There may be discussions between the parties from which, objectively, it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the defendant who has a legal duty to consider the claim independently and then given a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the Court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the defendant nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

These seven propositions are helpful guidance in deciding if we have reached the point of having a valid dispute on our hands. However, many contracts use the expression 'dispute or difference'. What's the distinction?

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ARBITRATION IN SINGAPORE

An effective dispute resolution system is one of the major factors that parties take into consideration when investing in or undertaking projects in foreign countries. There are several methods for the resolution of commercial disputes, including litigation, arbitration, mediation, adjudication and other ADR mechanisms. In this article, **Ganesh Chandru** discusses the issues involved in choosing where to hold an international arbitration and highlights the benefits of Singapore as a venue.

The use of arbitration as a dispute resolution mechanism is very common in cross-border investments and trade. One of the main reasons for this is the enforceability of arbitral awards under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958. This means that an award made in one of the Convention countries may be enforced in another Convention country. There are now more than 130 countries that are parties to this convention including Singapore. Hence, an award made in Singapore is enforceable in Singapore and in all the other 130 countries.

In considering the location for arbitration, parties should bear in mind the following key points.

A large portion of costs incurred in arbitration comprises the fees of legal representation. The cost and quality of this clearly varies from country to country and while parties will naturally be looking for the best possible legal support and technical experts, cost will also be an important factor in choosing location.

A credible, stable and professionally run arbitral institution is a vital consideration when one considers the potential costs of proceedings.

The costs of arbitration would normally include the fees of the arbitrators and the administrative charges of the arbitral institution, if one is involved. The costs of arbitration is usually in consonance with the quality of service provided by the institution and arbitrators. However, it must be kept within

reasonable limits.

The place of arbitration should also be chosen for its relative convenience to the parties, their witnesses and their lawyers.

The availability of good legal counsel, familiar with international construction arbitration practice and the relevant laws influencing the dispute is another factor. The location should offer a wide selection of major international law firms, well respected local/regional firms and strong counsel. It goes without saying that a wider choice of legal support with construction expertise fosters healthy competition which can only benefit the parties.

A clear and predictable system of arbitral law will assure parties that the process in which they will be involved is proper, legal and the decisions made by the tribunal will be fully respected.

In choosing arbitration instead of litigation in domestic courts, parties must also be assured that domestic courts will refrain from interfering in the arbitral process. It will be frustrating for parties to an arbitration to be constantly hauled to court in the course of the arbitral proceedings.

Why Singapore?

If arbitration is to take place in South East Asia, it may well be worth considering the benefits Singapore can offer.

Cost is a significant factor in selection and no-one wishes to pay over the odds for legal representation. Fee rates in Singapore naturally vary from firm to firm but on the whole, the average cost is relatively low compared to other major cities that are home to international construction law practices and well respected arbitration centres.

Singapore is a modern global city and has a strong rule of law tradition that is supported by an independent judiciary. With efficient airport and established telecommunication, transportation, financial and legal infrastructure, resolving cross-border disputes by arbitration in Singapore

should be a serious consideration for any company carrying out business in Asia.

Many of the major international law firms with construction arbitration experience have offices in Singapore or have an association with local firms. In addition, there are many reputable local law firms with substantial construction departments and are regionally recognised key lawyers in the construction dispute arena.

Singapore's courts also take a very supportive stance: maximum court support and minimal judicial interference, while foreign arbitrators can benefit from exemption of income tax on fees earned in Singapore.

The Singapore International Arbitration Centre

The Singapore International Arbitration Centre (SIAC) was established and began operating in 1991. As the only arbitral institution in Singapore, SIAC provides comprehensive support for the conduct of international arbitration proceedings in Singapore.

It offers international parties a neutral and independent forum to resolve disputes by arbitration and provides the necessary institutional support. To date, SIAC has managed more than 900 cases, involving parties from the Americas, Europe, Asia and other parts of the world. Two-thirds of these cases have involved non-Singaporean parties and approximately a quarter of its annual case load involves construction related disputes.

Singapore clearly has many advantages for conducting arbitrations in Asia – not to mention that, in this writer's view, it is one of the safest and most liveable cities in the region!

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ASSESSING EXTENSIONS OF

Contracts require the Works to be completed by a set date, subject to the Contractor's entitlement of extensions of time under the Conditions of Contract.

The Conditions of Contract usually recognise that if the Contractor is delayed in the completion of the Works by the defined risk items and had given notice and particulars of its claim, the Engineer should grant an extension of time as may be justified in the circumstances.

In the following notes, Trett Consulting's **Tony Farrow** summarises some pertinent points with respect to approaches for investigating project delays and the assessment of causation and entitlement to extensions of time.

Most Conditions of Contract do not define how delay is to be established, what detailed particulars the Contractor is to provide or how the Engineer is to justify and so fix the extension of time.

Hence, we need to carry out exercises in order to assist the investigation of why projects run late and to assess what delay may have been caused by particular events or the many situations and circumstances that frequently arise on construction projects. This work can then be of assistance in the review of causation of delay and entitlement under the terms of the particular contract.

SELECTING METHODS OF DELAY-ANALYSIS

Programming software is now regularly used to plan and manage building projects. Software packages vary, with price usually influencing the detail and sophistication of the package. At the cheapest level, packages provide an ability to produce bar (gant) charts with little or no data processing facilities and limited graphics output. At the top end, packages allow programmes of many thousands of activities to be developed, using complex critical path analysis techniques and providing database facilities which provides the basis for analysing labour, material and plant resources,

as well as drawings, procurement, quantities of work etc. They also provide comprehensive graphic facilities.

These software packages have been developed to assist organisations in the execution of projects. However, they are also increasingly used in the area of extension of time analysis, to such an extent that there is a growing body of knowledge on this topic. In November 2001, I wrote a paper for the Society of Construction Law which discussed some of the methods of analysis used in this field and how different methods produce different results. It also considered aspects of good and not so good practice. The paper is entitled 'Extension of Time Analysis: Methodology and Mythology'.

In this paper, I outline two broad approaches to delay analysis; theoretical and actual. The theoretical methods do not necessarily consider what delay actually arose but seek to demonstrate what might have been the delay arising from particular events. The actual-based methods focus on identifying where or when delay arose and identifying the events or circumstances giving rise to it.

Approaches to delay analysis can also be categorised as prospective methods and retrospective methods. When a project is in progress and the Contractor and Engineer forecast the impact of known events and their

impact on the future completion date, an estimate of the prospective situation is made and an extension of time is considered. On the other hand, if the project is complete and the events and their consequences have run their course, the analyst is able to retrospectively consider what has occurred and make assessments after-the-event.

The Society of Construction Law's 'Delay and Disruption' protocol (sometimes referred to as the Extension of Time protocol) recognises these points. Essentially, if the project is 'live' and one is making judgements about the future, then the analysis is based on the known facts to-date and assessments about the future i.e. one might call the future assessment a theoretical prediction of what might occur. However, if the project is complete, the parties should be able to consider the real facts in the case and seek to identify what did occur i.e. this is an assessment of what actually arose. Hence the SCL Protocol distinguishes between live projects and completed projects.

In practice, all methods of analysis have an element of theory or estimation and no analysis is solely a factual investigation because records are never as complete as one would like and the process demands the application of many assumptions, which are usually subjective and personal. However, the more

TIME

theoretical the method of analysis, the wider is the range of potential outcomes when applying the same set of facts or assumptions to different methods. Hence, from a methodological point of view, the analysis is less reliable. This is a fact of life if one is dealing with prospective situations, but in cases where the project is complete, the analysis can be more rigorous by the use of methods that focus on the actual situation, not theory.

AS-PLANNED PROGRAMME

A number of the methods of analysis involve the use of the as-planned programme. This is the representation of the project, in programming terms, at the start of the Works. It can be an important document since it acts as a reference point to explain what happens during the project and how the live project differed from the initial plan.

The contract may require the Contractor to submit a programme shortly after contract award. The Parties use this to monitor progress and events. It is normal to adopt this programme as a basis for the as-planned programme. However, at the commencement of the project, the Contractor is not aware of all matters and as progress is made, the initial programme is updated and revised, with new projections about the remaining works to completion. Hence, the as-planned programme should not be seen as a single programme and in delay-analysis, one should recognise and consider the Contractor's updated intentions and expectations. This point is emphasised in the SCL Protocol i.e. it recommends the use of updated programmes to analyse delay events, not to analyse all delay events using a single, original, baseline programme.

When undertaking a retrospective, forensic examination of delay on a project, the initial as-planned

programme may be deficient in certain respects, in terms of structure, activities, logic, criticality, detail and accuracy. For example, a particular element of the project which has been subject to delay-events, may not be shown on the as-planned programme, or is not identified in the necessary level of detail. In these situations, the analyst has to adjust the as-planned programme to make it possible to carry out an assessment of delay.

However, developing the as-planned programme in greater detail can produce arguments. Hindsight is a wonderful gift of the delay analyst and one can always come up with a sound argument to justify the sequence in which a particular element of unplanned work would have been carried out, as well as its duration. Consequently, the more hindsight that is applied to your methodology, the greater the opportunity for challenge on the grounds of bias or unreliability. If you do not have an as-planned programme in sufficient detail, think twice about developing a very complex plan.

From the methodological perspective, therefore, one should try and limit the modifications to contemporaneous documents.

AS-BUILT PROGRAMME

Given that the as-planned programme is used as a baseline for measuring variance, the as-built programme is used to establish what actually transpired and from this, one establishes the delta between the plan and the actual. The investigation continues with an exploration of the causes of the delta. Hence, the agreement of as-built records is an important task as it can remove a great deal of the factual debate regarding extensions of time.

The as-built programme can be derived from several sources. The most common are progress records,

where the Contractor or the Engineer, or both, assess the production achieved each month by reference to the programme of work. The assessment is usually based on a percentage of the work complete. An alternative source is the monthly valuation of the work completed, which ought to correlate with the progress records but does not always. The progress and valuation as-built records can be supplemented by other records such as subcontractor information, photographs, correspondence, diary records etc.

The difficulties in establishing as-built records include the use of inaccurate data. For example, a Contractor may overstate the amount of work complete or the QS may understate the amount earned. There is a general tendency for the early progress to be over optimistic and the completion of the final '10%' of an activity to take considerably longer than its straight-line prediction. However, there should be less debate about the as-built situation than the as-planned programme.

CRITICAL PATH ANALYSIS

Critical path analysis is a mathematical and logic tool that can be used to predict how long it will take to complete a series of activities. Many project management software packages use the technique to allow a planning model of a project to be developed which is then used as a management tool during project execution. A Contractor's programme created using critical path analysis allows the parties to identify which parts of the project, or which activities, are critical and those which are non-critical. A critical aspect of the project is one where the timescale is recognised as being 'tight' and that any problems or delays to tasks in that aspect of the works may likely delay the overall project. A non-critical aspect of the project, on the other hand, is one where there is

plenty of time available to carry out the various tasks (there is 'float') and that any delay to these is unlikely to effect the project-end date.

What is a critical and what is a non-critical aspect of the project is ultimately derived from the project management software but in reality, it is the input that dictates the output. By this I mean that the person preparing the programme defines the criticality of the elements of the project, not the software. For example, the structure of the programme, the activity durations and the logic links between activities is defined by the programmer and the software programme uses this information to establish criticality. Change the structure, durations and links and the software programme will change the criticality.

Criticality can also be dependant upon organisation structure and resources. A plan to utilise one earthwork subcontractor and three tower cranes is likely to have a different critical path than a plan to utilise three earthwork subcontractors and five tower cranes.

Criticality will change as the project develops. This is because the assumptions made in the original plan may not reflect what actually arose or because the programmer changes the assumptions in the on-going plan, based upon latest knowledge and revised actions or methods of working by the Contractor or Engineer. Hence, when undertaking retrospective extension of time analysis, one should not hold on to a single critical path programme for the project because this was never the case in practice.

From the methodological point of view, what is important to recognise is that critical path analysis involves a great deal of underlying assumptions which are not factual but are preferences and so subject to a range of opinion. Consequently, different analysts can produce wide-ranging results using the same factual data because they hold different views regarding methods

of working, sequences of building and resources for construction; all reasonable but each leading to different critical paths.

The more the number of activities in a programme, the greater will be the number of logic links between them and so greater will be the number of assumptions involved in completing the model. Hence, it is possible that when carrying out retrospective delay analysis using critical path analysis, large programmes with hundreds and thousands of activities will produce unreliable results. This is because the analyst has made hundreds of assumptions with respect to preparing the programme and when considering the impact of an event, he or she makes a single adjustment, whereas in practice, a programmer would likely make many adjustments to a programme if faced with a potential delay. This is project management.

Finally, it is important to recognise that it is easy to manipulate a critical path programme in order to derive the required end result. For example, if a programmer wishes to make a certain section of the work critical, he achieves this by fixing durations of activities or logic links between activities. Equally, if there has been variations issued in one part of the works, it is possible to make this element of the programme critical, so that the introduction of the variations will have a delaying effect on the overall project. This is another reason

why it is worth considering reducing the number of activities on very large programmes used in retrospective delay analysis.

OTHER ISSUES

In carrying out planning exercises to assess delay, it is sometimes necessary to deal with a number of other issues. These include ownership of programme float, concurrency of delay events and dominance theory.

CONCURRENCY

The SCL Protocol defines concurrency in the following way (Appendix A, page 53):

True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event and the effects of which are felt at the same time. The term 'concurrent delay' is often used to describe the situation where two or more delay events arise at different times, but the effects of them are felt (in whole or in part) at the same time. To avoid confusion, this is more correctly termed the 'concurrent effect' of sequential delay events.

Essentially, concurrency seeks to consider the situation where both the Employer and the Contractor are causing delay and the question is, does the Contractor get an extension of time? The proposition in the SCL Protocol is that the contractor does get the extension of time but he is only entitled to any extra costs (damages or loss and expense) incurred as a specific consequence of the employer-caused delay. This basically means that if the Contractor is able to identify extra costs at the activity or event level, he recovers these but not the general running costs of the project (refer to paragraph 1.10.4 of Guidance Section 1). On the other hand, the Employer foregoes recovery of liquidated damages.

Examples of the SCL Protocol's position on concurrency are set out

“what is important to recognise is that critical path analysis involves a great deal of underlying assumptions which are not factual but are preferences and so subject to a range of opinion”

in its Appendix D but there are a number of very important issues to consider:

- i. The Protocol is possibly at odds with English Law, which it recognises at paragraph 1.4.11 of Guidance Section 1. The alternative position on concurrency is that the most 'dominant' delay event (which might be considered the longest or most critical) decides liability and entitlement. Hence, to follow the Protocol could be to ignore the law (that is, unless the parties have signed-up to the Protocol).
- ii. It is argued that concurrency only occurs where two events are actually delaying the progress and completion of the project. For example, if a Contractor is digging out a basement on Monday but his plant breaks down and production stops, it is said that he cannot claim there was a concurrent delay on Monday because he still had not received the next set of drawings which would allow him to progress with the next stage of the basement. Only when the contractor had finished the digging of the basement and was ready to commence the next stage, would the works be delayed by outstanding drawings. Essentially, it is said that any event must be delaying or impeding current progress for it to be considered a 'delay event'; when there are two or more of these events occurring at the same time, then there is concurrency.
- iii. If the project is in delay for which there is no entitlement of extension of time and an Employer causes a further delay after the contractual date for completion by issuing a late variation or changed requirement, it is said that the Contractor's entitlement is assessed on the 'net' method not the 'gross' method. By this, I mean that the extension of time is calculated by reference to the period of time needed to deal with the Employer-caused event, and this period is added on to the

contract completion date; one does not consider the timing of the event and measure delay from that date.

OWNERSHIP OF PROGRAMME FLOAT

I mentioned earlier that there are critical and non-critical parts of a programme. Delays to critical parts cause the project's end date to overrun whereas delays to non-critical parts will only cause the project's end date to overrun when the entire available float on that part has been used up. A common question in delay analysis is, if an Employer causes delay and uses up the float, is a Contractor entitled to be compensated for the loss of it?

If the project owns the float, then the party using it first has the benefit. If the Contractor owns the float and the Employer uses it, the Contractor ought to be compensated, either by the return of the float or by payment of extra cost.

DOMINANCE THEORY

I have mentioned that where there are two or more events causing delay to the project at the same time, this is termed concurrency. Where there are concurrent Employer-caused and Contractor-caused delays, there is a legal argument which says that the delay is allocated to the more dominant of the concurrent events. Hence, if the dominant event is found to be an Employer risk event, then a Contractor is awarded an extension of time for the delay. However, if the dominant event is a Contractor risk event, no extension is allowed.

All these issues need to be considered against the facts of the case, the terms of the contract and the laws governing the contract.

Tony Farrow is an Executive Director of Trett Consulting responsible for operations in Continental Europe.

NEW OFFICE IN AUSTRALIA

We are pleased to announce the opening of Trett Consulting's Western Australia office based in Perth. This will enable us to enhance our service to our existing clients both in the region and nationally.

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THE MANAGEMENT OF CHANGE WITHIN CONSTRUCTION

In the second of a series of three articles, **Mark Castell** considers the types of systems and procedures firms must have in place in order to manage the changes within their contracts that will always occur. The series will be concluded in a third article, which will examine the valuation of both time and cost effects.

The Management of Change Process

In my first article, I defined what change is and how the categorisation of changes into *scope of work*, *schedule and conditions* assists in determining whether the contract actually allows such a change to be ordered i.e. the so-called allowable or foreseeable changes. Whilst these are important issues, they do not by themselves define how companies should manage the change that will surely occur on projects.

The management of change does not start when an employer wants to issue a variation order or when a contractor receives a change order; it commences at a project's conception and continues to its completion. A process is required to ensure that *each individual* and *their* organisations put themselves in the best position to cope with the changes that will occur.

The remainder of this and my next article sets out such a framework.

Step 1 - Understanding of the Baseline

At the core of the whole process is the contract agreement. It is imperative to gain a good understanding of its contents as it is the baseline to which changes are measured against. Apart from setting out the obligations or responsibilities placed on the parties, the contract should stipulate what can be changed, how the change process works (i.e. written or verbal instructions, are deletions allowable?), and whether it is limited in any way (i.e. Are there any financial limits? Are there any timing restrictions?)

The following steps can be put in place to assist the understanding the contract agreement. It starts from project conception:

Tender Stage

- A contractor should check the

contents of an enquiry to ensure that it is complete and request clarification if any documents are missing or have different references to those listed.

- A clean set of the tender documents should be kept in a master file available for future reference.
- The file should also include a copy of all correspondence requesting clarifications or further information. Provision should be made for storing e-mails, (i.e. an electronic storage folder that is accessible to all).

Pre-contract

- A schedule should be maintained that summarises all the changes resulting from negotiations. The schedule should state the date, the document (e.g. letter date and reference, or meeting date) and what the change was.
- Minutes of meetings should be issued in the form of a schedule of agreed changes at the end of any meetings. This should be signed by both parties at the time.

Contract Signature

- Both parties should ensure that all the agreed changes are clearly noted within the documents comprising the agreement.
- A list of all the contract documents with full references should be part of the agreement and copies of all documents within an Appendix.

Contract Commencement

- Contractors should have formal handover meetings from estimating departments to the project team.
- All the estimating files should be available to the project team.

- Time must be taken to read and understand the contract.

Compliance with these steps will not prevent all problems and obligations are sometimes found to be unclear during a project. This is often due to conflicting requirements in different parts of the contract.

In this event, reference should be made to the contract terms and whether they provide for an order of precedence and/or procedure to deal with anomalies. If not, a contractor should formally raise the matter and request clarification.

Step 2 - Monitor the Obligations of the Parties

Having understood the parties obligations, the second step is to ensure that they are constantly monitored so that changes can be identified when they occur. This can be achieved by using documents that should be produced as part of the management of the contract. Some examples include:

- Design programmes and updates
- Construction programmes and updates
- Progress reports - internal and external
- Material/equipment delivery schedules
- Drawings and schedules - received, holds and approvals
- Payment applications and certificates
- Notices/requests for change
- Cost/value reconciliations

These various documents will show different things; the programmes, progress reports and materials equipment schedules give information relative to time and sequence and thus can be used to monitor changes in schedule. The drawings, payment information, notices requests for change however, are useful for determining changes to the scope of work.

Cost/value reconciliations are different again. In comparing the value of an item or section of work (i.e. tender allowance or manhours) with the forecast and or actual cost (or manhours), they indicate where

CONSTRUCTION AND ENGINEERING CONTRACTS - PART 2

money is 'made' and where it is 'lost' on a project. This may either be a signal that a change may have occurred and that further investigation is required to be undertaken, or it may show the financial effect of a change.

A key question for an organisation at project start-up is therefore to determine which documents are to be maintained in addition to those required by the contract. It is not about keeping documents for the sake of it, but defining those that will satisfy the needs, and ensuring that they are produced.

Bear in mind that documentation needs may change throughout a project's life - flexibility is therefore also needed.

Step 3 - Document the Change and Give Notice

The third step is to invoke the contract and conform to the procedures and constraints contained within.

I have previously explained the different categories of change and that allowable or foreseeable changes can concern scope, schedule or conditions. There are two further terms, 'actual' and 'constructive' changes, that fit above the scope, schedule or conditions level of categorisation. In other words, an actual change may affect the scope, schedule or conditions, or a combination. Likewise, a constructive change can have similar affects.

Constructive changes are often a consequential effect of an actual change and may cause additional work or prevent work from being undertaken as planned. Some examples include:

- Untimely or defective employer furnished specifications or drawings.
- Failure of the employer to disclose technical information.
- Directive from the employer to others that affects a contractor's work.
- Orders from a government or other authority requiring work to

conform to different standards than that in the contract.

- Unreasonably strict contract interpretation by the employer.

There is a need to recognise both types as it will determine the contractual procedure that needs to be followed once the change has been identified. Actual changes are more easily identified, perhaps arising from a piece of paper with 'variation order' or 'change order' on top. Constructive changes however, are not so easily recognised or acknowledged, potentially creating the most problems for the parties.

If there is no specific procedure stipulated in the contract, the first objective should always be to notify the other party i.e. to submit a notice.

Notices are a requirement of most contracts in the event of a potential claim for additional time and or money and in certain cases, condition precedent to payment award of extra time. In the case of an objection being raised by the receiving party, it should also be remembered that notices are submitted for the benefit of the recipient. Their purpose is to inform the other party so that they can address the issue, pay appropriate attention to certain activities being carried out and maintain relevant records.

Step 4 - Maintain Records

Records must be kept albeit there may not be agreement as to whether a change has taken place and or liability for the change and the importance of records is something that is probably known to readers. However and notwithstanding that many contract clauses require them to be kept and or submitted, the quality and extent of record keeping is commonly found to be lacking. It is therefore worthwhile considering:

Why should they be kept?

I have already stated that they can aid the identification of change but in addition, it is good practice to keep records. Whilst their use is primarily in the preparation and defence of claims and for evidential purposes, they contain information on actual outputs, which is beneficial to the estimating department for use on

future works.

What type of records should be kept?

Good practice dictates the following requirements:

- The contract and paper correspondence between parties.
- E mails.
- Site diaries - a daily record of the job in progress.
- Labour allocation sheets.
- Design or engineering changes including superseded drawings and the reasons why changes were made.
- Programme and progress reports - the original basecase programme, preferably the agreed version, along with reports showing progress against this programme. It is important that programmes showing progress at a certain time should be saved rather than overwritten with the following period's progress.
- Budgeted and actual costs and manhours.

Should records be agreed?

If possible, get signed agreement at the time but it is not mandatory or necessary nor likely. It is more important to record what happens and the effects of something occurring together with the reasons 'why'.

How should records be maintained for the future?

Different methods should be used for different types of records, but generally electronic copies should be retained wherever possible. Analysis and interrogation is much easier with current computer software. Records should not be thrown away at the end of a project without very careful examination and then only if they are unmarked duplicates. Once all the final accounts have been finalised, a further review can be made.

The concluding article examines step 5, the evaluation of the time and money effects.

Mark Castell is based at Trett Consulting's office in the Netherlands.

THE CHANGING FACE OF THE FIDIC

Roger Trett considers the evolution of the FIDIC Conditions of Contract and how the increasing use of them in both international and domestic projects is being reflected within Trett Consulting's workload.

The 1999 Editions

The Switzerland based Fédération Internationale des Ingénieurs-Conseils (FIDIC) has been producing standard forms of contract for use on international construction and engineering projects for almost 50 years. In 1999, the various different forms for use on major projects were updated and produced in a more simple 'easy-to-read' language. The resulting documents, which make up part of the 'new' rainbow suite comprise:

- The Red Book (construction of building and engineering works)
- The Yellow Book (electrical or mechanical plant and buildings or engineering works)
- The Silver Book (EPC turnkey projects)

Although all are produced to a common format, the differences in the contents of each document generally reflect the divergent allocation of design responsibility rather than the type of work to be undertaken.

The **Red Book** applies for (most or all) design to be undertaken by (or on behalf of) the Employer. It therefore is used for a traditional building or engineering project in which a Contractor constructs works generally designed by others although it may contain a specific element of Contractor design. An Engineer is appointed by the Employer to administer the contract.

The **Yellow Book** is recommended for all types of projects where (most or all) of the design is carried out by (or on behalf of) the Contractor. An Engineer is again appointed by the Employer to administer the contract.

The **Silver Book** is suggested for projects where the Employer is looking for a higher degree of certainty of price and time and provides for the Contractor to take

total responsibility for both the design and execution of the Works. The Employer administers the contract itself or appoints an Employer's Representative.

As part of the obligations for design responsibility, both the Yellow and Silver Books also provide for the Contractor to be responsible for the Works being 'fit for the purposes for which they are intended'. This is an onerous obligation that encompasses the suitability of the end product and not just the use of skill and care during the design process. A Contractor taking on responsibility for fitness for purpose cannot rely on using leading designers or accepted methods; put simply, if the end product does not work, the Contractor is in breach. Contractors should also be aware that the risk of not meeting the fitness for purpose obligation cannot generally be insured against.

In addition to this same viewpoint on design responsibility, the Yellow and Silver Books both provide for valuation on a lump sum basis (rather than by re-measurement as under the Red Book). Adjustments are allowed for variations and certain other matters, although there is less provision for financial adjustments under the Silver Book.

The main differences between the Yellow and Silver Books occur in the allocation of risk for the design and for physical conditions. The Silver Book allocates the entire risk on the Contractor including the accuracy of the Employer's Requirements and available site data (subject to limited exceptions) and any unforeseen difficulties and costs. Despite the introductory note of the Silver Book stating that the conditions are not intended to be used for certain circumstances including where there is insufficient time or information for Tenderers to check the Employer's Requirements or to undertake risk assessment studies, its contents have

caused some commentators to suggest that the Silver Book takes the accepted turnkey approach that risk is transferred from the Employer to the Contractor, too far.

Some of the more significant changes introduced by the 1999 editions include that (under the Red and Yellow Books) the Engineer is now deemed to act in the interests of the Employer rather than being impartial. In all the Books, the time limits for submission of notices and supporting particulars of claims are stricter and the concept of value engineering has been introduced.

The final element of the 'new' rainbow suite produced in 1999 is the Green Book. It is a short form of contract for minor works designed by either Contractor or Employer.

Subsequent changes to the FIDIC Contracts

In 2001, FIDIC produced (in test edition) the Blue Book, a contract specifically for dredging and reclamation works.

FIDIC recently announced (September 2005) that it had reached agreement with a number of Multilateral Development Banks (MDBs) on a new form of contract based on the 1999 Red Book. The MDB Harmonised Edition incorporates revised General Conditions to suit the particular requirements of projects financed by MDBs.

Use of FIDIC Contracts

FIDIC contracts have been, and continue to be in common use around the world for projects that incorporate parties of differing international origin. The FIDIC forms are also a requirement of certain institutional funders; for example, the European Commission

FIDIC CONDITIONS OF CONTRACTS

Transport and Environmental Works Programme and some of the major MDBs (this requirement of the MDBs led to the recent harmonised edition as noted above).

Whilst the 1999 editions have not replaced their previous versions as quickly as it may have been expected, it is being reported that their use is on the increase. In addition, their use is becoming more frequent on domestic projects i.e. where the parties originate from the same country. These are trends that Trett Consulting is also experiencing; whilst we have undertaken commissions using the various FIDIC forms of contract since the 1977 third edition of the Red Book, the number has increased significantly in the last 2 years.

The following table summarises the broad experience within Trett Consulting of working with FIDIC forms:

As is shown in the table, our working experience of the various FIDIC conditions of contract has

involved most of our offices and not just those based outside of the UK. The services we have undertaken also reflect the major areas of our business. Some representative examples include:

- Provision of pre and post contract contractual advice on a number of projects located around the world for major EPC contractors based in Asia.
- Pre contract and commercial advice to a Japanese power company for projects in Asia and in Central America.
- Assisted a European contractor engaged in a domestic wind power project with its contract negotiations.
- Commercial advice to various large international contractors operating on projects throughout the world.
- Preparation of claims (for both extension of time and quantum) on projects in Asia, Africa and Europe (including the UK). Our

role has varied between acting as ‘mentors’ (i.e. establishing the strategy to be followed, setting out the format of the documents and then overseeing the analysis and preparation that is undertaken by the project team) to carrying out all the analysis and necessary work ourselves.

- Acting as Expert Witness for planning and quantum issues for disputes in international arbitration. These have included major disputes (i.e. delays in excess of 2 years and quantum claims of more than £50m) on projects in Africa, Europe and the Middle East.
- Speaking at seminars in across Europe and in the Middle East.
- Providing bespoke training to individual companies on several of the FIDIC forms.

Roger Trett is Chairman and Chief Executive of Trett Consulting

<p>Types of projects</p> <ul style="list-style-type: none"> ■ Commercial buildings ■ Dams ■ Infrastructure - metro ■ Infrastructure - railways ■ Infrastructure - roads, highways, bridges ■ Marine - dredging ■ Marine - jetties ■ Marine - ports ■ Power stations ■ Television studios ■ Water / waste water treatment 	<p>Trett offices involved</p> <ul style="list-style-type: none"> ■ Hong Kong ■ Japan ■ Malaysia ■ Netherlands ■ Singapore ■ UAE ■ UK - Coventry, London, Leeds, Manchester, Stirling
<p>FIDIC</p>	
<p>Locations of projects</p> <ul style="list-style-type: none"> ■ Africa - Egypt, Guinea, Kenya, Nigeria, Tanzania ■ Americas - Brazil, Canada, Peru, USA, Venezuela ■ Asia - China, India, Japan, Nepal, Sri Lanka, Thailand, Vietnam ■ Europe - Belgium, Cyprus, Denmark, Germany, Netherlands, Poland, Spain, UK ■ Middle East - Israel, Oman, Saudi Arabia, UAE 	<p>Type of work undertaken</p> <ul style="list-style-type: none"> ■ Commercial & contractual advice-pre & post tender ■ Contract Management on live projects ■ Claim preparation - extensions of time, disruption, acceleration, scope of work ■ Expert witness - investigation of project delays and quantum ■ Arbitration support ■ Training workshops / seminars ■ Support to insurers

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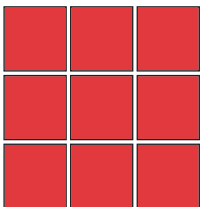
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