

TRETT CONSULTING

TRETT Digest

Issue 33



TRETT CONSULTING: 30 years in business

It is with great pride that I announce that 2007 marks the 30th anniversary of Trett Consulting.

By far the Company's most valuable asset is its people. I do not say this lightly, as I have been fortunate to have been surrounded, ever since the early days, by the highest calibre of people who have helped transform a small company into the international business we have today.

In 1977, while working for a contractor who systematically had to close down whole divisions, I made the decision to set up my own company in Great Yarmouth. Those early days were far from glamorous, as the office consisted of a couple of second-hand two drawer filing cabinets, an 8 x 4 sheet of ply and a chair. The ambiance was enhanced by the smell of fish and chips from the shop downstairs!

The first few years of the fledgling company saw me carrying out claims

commissions mainly for former employers. However, as the reputation spread and new enquiries began to come in, I saw the need to expand the company and hire additional people. In 1983, we opened a second office in Darlington to capitalise on the then thriving offshore industry as well as move into other markets.

During the 80s, we also began working on a number of arbitrations, both domestic and international, whilst also setting up our base in the Netherlands. Growth has been organic, and gradual. From the mid 80s to the mid 90s we were joined by the members of today's Executive Board, as well as many other long-serving members of staff. During this period we opened new offices around the UK and worldwide as the company became very much an international business.

The 21st century so far has seen the company moving into new areas with acquisitions in the project management and PFI markets, as well as renewed efforts in information technology contracts and in North America.

I have always tried to encourage a forward-thinking mentality and as such, since its establishment, I have never once considered halting growth in operations. Ever since the early days, the company has been run on the basis of a very simple plan - taking advantage of the many opportunities that have presented themselves, being open and honest with all clients and most importantly, providing an exemplary service.

The past 30 years have been very exciting and challenging, culminating in the company that we see today. We will continue to identify, target and establish operations in new areas, both

geographically and business-wise, always taking the business forward. I can foresee a strong and prosperous future.

I end by thanking our clients for their (often repeat) business and by acknowledging and thanking all members of staff and the directors, past and present, for the dedication, talent and effort shown by them over the years. I would like to encourage everyone to continue to grasp every opportunity and most of all, to enjoy meeting the challenges presented to our company.

Roger T. Trett
Executive Chairman



Roger Trett has joined the Resolex CCMG panel which provides specialist mediation services to the construction industry.

Further information can be found at
www.resolex.com

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INTERNATIONAL ARBITRATIONS IN MALAYSIA

The Malaysian Arbitration Act 2005 came into force on 15th March 2006. It incorporates the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration and is modelled upon the New Zealand Arbitration Act 1996, particularly in structuring domestic and international arbitration regimes. The UNCITRAL Model Law is designed to meet the need for improvement and harmonization between national laws which are often found inadequate in dealing with international cases. The Model Law also adopts the relevant provisions of the 1958 New York Convention on the recognition and enforcement of international awards. This article by **Teh Chin Huat** describes the salient points which are different from the UNCITRAL Model Law in the context of international arbitration.

The Malaysian Arbitration Act is in four parts:

Part I: Preliminary. This part contains five general sections which deal with commencement, interpretation, application to arbitration and awards in Malaysia, arbitrability of subject matter and the applicability of the Act to Government Departments.

Part II: Arbitration. This part contains 33 sections and generally follows Articles 3 to 36 of the UNCITRAL Model Law. This part deals with general provisions such as communications, waiver of court intervention, the arbitration agreement, composition and jurisdiction of arbitral tribunal; their conduct of arbitral proceedings, making and enforcement of awards.

Part III: Additional provisions relating to arbitration. This contains 7 sections which are not found in the UNCITRAL Model Law and only apply to domestic arbitrations unless the parties agree otherwise. It deals with additional powers to supervise and/or support arbitration proceedings, determination of preliminary points of law, appeals on

questions of law and costs and expenses of an arbitration.

Part IV: Miscellaneous. This has five sections which deal with various matters such as liability of the arbitrator and immunity of arbitral institutions.

The Act defines 'international arbitration' closely to Article 3 of the UNCITRAL Model Law and any arbitration which is not an international arbitration is deemed to be domestic arbitration.

Parts I, II and IV are applicable to international arbitration *with the seat in Malaysia* and Part III will only apply if the parties agree. For domestic arbitration, all four parts apply unless the parties agree that Part III is not applicable. The Act has thus structured neatly domestic and international arbitrations.

The Roles of Malaysian Courts

Adopting Article 5 of the UNCITRAL Model Law, the Malaysian Arbitration Act provides that no court shall intervene in any of the matters governed by the Act unless otherwise provided. The 'otherwise provided' matters include stay of proceeding, appointment of arbitrator(s), challenges to arbitrator(s), arbitrator's jurisdiction and scope of authority, assistance in the taking of evidence, setting aside of awards and recognition and enforcement of awards.

The Roles of Kuala Lumpur Regional Centre for Arbitration

In line with Article 6 of the UNCITRAL Model Law, the Arbitration Act provides that KLRCA is the appointing authority. In the event that the parties fail to agree on the appointment of an arbitrator or the presiding arbitrator in the case of three arbitrators, then a party can apply to KLRCA to make such appointment. The party 'may' also request KLRCA to take the necessary measure for securing an appointment when the agreed procedure of appointment is not adhered to by the other party or not

performed by the relevant institution in an administered arbitration.

Place of Arbitration

Article 1 (2) of UNCITRAL Model Law empowers the court to stay proceedings, grant interim measures, recognise and enforce or refuse to enforce international arbitration awards regardless of the place of arbitration. The Malaysian regime of international arbitration has created a vacuum for those arbitrations that take place outside Malaysia. This has occurred by virtue of section 3 of the Act, however, qualifying the application of the Act to international arbitration *with the seat in Malaysia* and making no provisions for those held *outside* Malaysia and having repealed the New York Convention Act 1985 in its entirety. This could not have been conceivably intended by the legislature having regards to the fact that Malaysia is the Contracting State. Otherwise, it is difficult to see how Malaysia is able discharge the treaty obligations.

The Act is a major effort in modernising Malaysian arbitration law and creating an international arbitration friendly environment while fulfilling the Convention obligations. Such a move is very much applauded although it appears that the Act is currently under amendment for improvement.

Teh Chin Huat is based at Trett Consulting's office in Kuala Lumpur

NEW AUSTRALIA OFFICES

Trett Australia is pleased to announce that continued expansion has necessitated a move to larger premises. Our new address and contact details in Western Australia are:

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In addition, due to sustained growth, we are pleased to announce the establishment of our new office in Queensland:

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National Managing Director, David Court, is actively seeking additional resources to expand our presence in the region.

THE JURISDICTION OF THE

London is a leading centre for arbitration and parties internationally often decide to have their disputes decided following the procedural law enacted by The Arbitration Act 1996 ('the Act'), which has been in force since 31 January 1997. **Richard Swan** considers a significant issue which too often arises in the arbitration process, namely whether the arbitrator actually has authority, or jurisdiction, to hear and make an award relating to a dispute.

This is the second in a two part article. In the first part, published in Digest Issue 33, the following issues were considered:

- The basis of the arbitrator's fundamental statutory duty
- The source of the arbitrator's jurisdiction
- The arbitrator ruling on his own jurisdiction

This second part will cover:

- Restrictions on challenges made to an arbitrator's ruling on substantive jurisdiction
- Rulings of the court and restrictions upon the court's jurisdiction
- Further challenges to substantive jurisdiction

Reminder of the Issues considered in Part One

The purpose of permitting the arbitrator to rule upon his own jurisdiction is foremost to permit the arbitrator to abide by his fundamental statutory duty, i.e. that of acting fairly and impartially and with a degree of control in avoiding unnecessary delay and expense. The Act therefore provides those powers and duties and these can be expanded on by the provision of institutional rules. Coupled with this, the arbitrator has extensive powers to rule upon his own jurisdiction under Clause 30 of the Act. Those powers include ruling on whether there is a valid arbitration, whether the arbitrator or tribunal has been

properly appointed and constituted and which of the submitted matters have been submitted in accordance with the arbitration agreement. Having considered the jurisdictional issues, the arbitrator will rule either as a separate award or within the award on the substantive issues. The arbitrator is free to choose which is the most appropriate, but he will be mindful of basing his decision on whichever is the most appropriate for minimising delay and costs.

Restrictions upon Challenging an Arbitrator's Ruling on Substantive Jurisdiction

The Act, under s.30(1)(a), wants the arbitrator, and not the court, to decide whether the arbitrator has substantive jurisdiction or not. However, certain restrictions are imposed upon a party's right to challenge the arbitrator's substantive jurisdiction.

The Act makes a distinction between an objection as to substantive jurisdiction which is raised at the start of proceedings and an objection raised during proceedings:

a) Objection at the Start

If it is alleged either that there is no applicable arbitration agreement or that the arbitrator has not been properly appointed, s.31(1) of the Act applies. This states that:

'An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.'

Section 31(1) continues:

'A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.'

Therefore, although a party may have appointed or participated in the appointment of an arbitrator, he can still allege that, for example, the

appointment was flawed because the dispute lies outside the terms of the arbitration agreement. Case precedence illustrating these issues of challenges to the arbitrator's substantive jurisdiction can be seen in *Athletic Union of Constantinople v National Basketball Association* [2002].

b) Objection During the Proceedings

Section 31(2) of the Act states:

'Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.'

Therefore, if a claimant amends his statement of case and the respondent objects that the amendment falls outside the terms of the arbitration agreement, the objection must be made *'as soon as possible'* with both the arbitrator and the other parties being informed of the objection. Note that this is a mandatory provision of the Act and cannot be varied by the parties.

Loss of Right to Object

These jurisdictional rules therefore specify a very clear timeframe over which an objection on jurisdictional grounds can be made, and one may draw the conclusion that there will be instances where parties lose their right to object. This is the general case, but there is a provision under s.31(3) which allows the arbitrator to admit an objection later than the time specified elsewhere within s.31. This provides a degree of flexibility on the arbitrator's part to perform his duty of 'managing' the arbitral process by admitting a later objection if he deems the delay to be justified. This is also complemented by s.73(1) which states that a delay in objecting is not permitted unless there is justifiable reason. Specifically, the party making the objection must:

'show that, at the time he took part or continued to take part in the proceeding, he did not know and could not with reasonable diligence have discovered the grounds for the objection.'

ARBITRATOR - PART 2

Ruling of the Court and Restrictions Upon the Court's Jurisdiction

Instead of the parties leaving the question to the arbitrator of whether he (the arbitrator) has substantive jurisdiction, they can, by agreement, apply to the court for the court to rule upon the arbitrator's substantive jurisdiction under provisions in s.32 of the Act. However, it should be noted that by s.32(4), unless otherwise agreed by the parties, the arbitrator may continue with proceedings and make an award while an application to the court is pending.

Applications under this section are considered to be exceptional as the intention of the Act is to give sufficient powers to the arbitrator to rule on his own jurisdiction rather than delaying proceedings. There are, therefore, some criteria which a court will need to be satisfied have been followed before it will consider an application. Section 32(1) of the Act states:

'The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.'

The criteria under Section 32(2) are:

- (a) *(the application) is made with the agreement in writing of all the other parties to the proceedings, or*
- (b) *(the application) is made with the permission of the tribunal and the court is satisfied:*
 - (i) *that the determination of the question is likely to produce substantial savings in costs,*
 - (ii) *that the application was made without delay, and*
 - (iii) *that there is good reason why the matter should be decided by the court.'*

The first of the three requirements imposed by the court is that there is likely to be a substantial saving in costs. The important word here is 'substantial', which implies that the

issues to be decided by the arbitrator are likely to be numerous and/or of a sufficiently complex nature so as to demand a lengthy process. The costs of this lengthy case, and then subsequently finding out that the arbitrator had no jurisdiction to hear it, are the substantial costs being referred to, rather than the costs of actual determining whether the arbitrator had jurisdiction or not. If the court holds that the arbitrator does not have jurisdiction following a s.32 application, there will clearly be huge saving in both time and costs as evidenced in *Azov Shipping Co v Baltic Shipping Co* [1999]. If the reverse is held, there will be no saving in costs, substantial or otherwise.

The second requirement i.e. that the application must be made without delay, repeats s.31(1) that the challenge of the arbitrator's jurisdiction must be made in 'the first step in contesting the merits of the case'.

The third requirement, that of "good reason", is perhaps the most difficult to justify. The parties may continue to believe that the arbitrator is still insufficiently skilled in the law to be able to determine the correct answer as to jurisdiction; the parties may have a greater degree of confidence in applying directly to the court. However, this strategy will be closely examined by the court and it will require some skilful explanation to persuade the court to accept a lack of confidence in the arbitrator's legal skills as a valid and 'good' reason!

If the above three requirements have not been satisfied, the court will not hear the application. The parties will then be left with no means of deciding the issue of the arbitrator's jurisdiction unless they revoke the agreement to remove from the arbitrator his statutory power to decide. One can easily see that removing an arbitrator's jurisdiction, then applying to court and being refused, and then reinstating the arbitrator's power to rule on his own jurisdiction is a costly and unnecessary process!

Further Challenges to Substantial Jurisdiction

The arbitrator's ruling on a challenge to his substantive jurisdiction is made in an award as to jurisdiction or in the arbitrator's award on the merits i.e., a partial award in the final award. Being awards, any of these can be challenged by an application made under s.66, s.67, or by an appeal to the court under s.68 alleging serious irregularity, or (but much less likely) under s.69 for an appeal on a point of law. Sections 66 and 67 are particularly relevant to substantive jurisdiction.

Challenge under s.66

Under s.66, an arbitrator's award, in order to be enforced, has to be turned into a judgment of the court (see s.66(1) and (2)). Section 66(3) goes on to say:

'Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.'

This is the last possible opportunity that a party possesses to challenge an award on the grounds that the arbitrator did not have substantive jurisdiction. However, the conditions under which an application to challenge an award for lack of substantial jurisdiction at this stage are considered onerous.

First, one must be mindful of s.31(1), that an objection at the outset must have been raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction. Second, if the challenging party did not make a request to the arbitrator for a ruling on his substantive jurisdiction under s.30(1), this will have to be explained by that party. Third, if the party did make such a request and the arbitrator made his ruling either in an award as to jurisdiction or in an award on the merits, the award must have been

challenged within 28 days (see s.70(3)). Finally, if the party obtained a ruling by the court under s.32, the court will not re-hear the application as the decision of the court as to jurisdiction is treated as a judgment of the court at the time of the application under s.32 (see s.32(6)).

Challenge under s.67

Section 67 governs the conditions for applying to the court to challenge an award as to jurisdiction, whether it be an award specifically on jurisdiction or an award on the merits. Specifically s.67(1) states:

'A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court-

- (a) *challenging any award of the arbitral tribunal as to its substantive jurisdiction; or*
- (b) *for an order declaring an award made by the tribunal on the merits to be of no effect in whole or in part, because the tribunal did not have substantive jurisdiction.'*

It should be noted that the arbitral proceedings may continue and that the arbitrator is able to make further awards pending a decision by the court on a challenge of the award as to jurisdiction (s.67(2)). This specifically allows the proceedings to proceed with due diligence and conforms with the general principle of arbitration continuing without unnecessary delay and prevents the occurrence of delaying tactics sometimes used by parties prior to the enactment of the Act.

The purpose of s.67 is to permit challenges to the arbitrator's ruling that he does have jurisdiction to deal with the matters referred. This is distinguished from a challenge as to the method the arbitrator undertakes in making his award (either on jurisdiction or on the merits). Therefore, any s.67 challenge can only arise after the arbitrator has made his ruling that he does or does not have jurisdiction, and where the applicant believes the arbitrator's ruling was wrong. The court has no powers to set aside a ruling based on the sole fact that the arbitrator could have drawn a better conclusion as to jurisdiction had he heard evidence at the hearing. The ruling is considered either right or wrong by the court; there is also no power to consider the

extent of whether it could have been a better award as to jurisdiction - See *Aoot Kalmneft v Glencore International AG* [2001].

Scope and Restrictions of the Challenge under s.67

The conditions for challenge under s.67 are also often considered onerous and are subject to provisions contained within s.70.

Amongst those provisions is an issue concerning the timing of the challenge. Where the arbitrator makes a ruling as to his jurisdiction, any challenge must be made within the time allowed by party agreement or, in default of this, within 28 days of the relevant award (see s.70(3)). If the party does not raise a challenge within the time allowed, he will lose the right to object (under s.73(2)) to the arbitrator's substantive jurisdiction on any ground which was the subject of the ruling. This is subject to an additional power of the court to extend time limits under s.79. This is a wide power which can be invoked at any time by the court, unless the parties agree otherwise, but the court will need to be satisfied that a substantial injustice would have occurred had it not extended time limits (s.79(3) refers).

In addition, all available arbitral processes of appeal must have been exhausted prior to any challenge application under ss. 67, 68 and 69 (see s.70(2)); this includes any available recourse under s.57 which covers the powers (by party agreement) given to the arbitrator to correct or supplement any award.

Despite the court taking full cognisance of these provisions, its powers are limited when dealing with an application concerning jurisdiction made in an arbitrator's award (see s.67(3)). The court is allowed to confirm the award, vary it or set it aside in whole or in part, but it does not have powers to remit the award back to the arbitrator for reconsideration, notwithstanding s.71(1)(3) which covers remission of the award for tribunal reconsideration. This reconsideration power applies to s.68 (Serious Irregularity) and not to challenging the award on grounds of substantive jurisdiction.

It is also important to note that a s.67 application will fail if the parties

agree that the arbitrator has the relevant jurisdiction or agree that the arbitrator has the power to make a final and binding decision as to his substantive jurisdiction.

Conclusion

It is, therefore, clear that the issues to be considered by both parties and the arbitrator are complex and that all parties need to be aware from where the arbitrator's jurisdiction stems and how it can be controlled and managed. Due to the change in the provisions of the Act, particularly with regards to the arbitrator having power to rule on his own jurisdiction, the due process of ensuring that delay and undue expense is avoided has been significantly improved. Arbitrators do, however, need to keep a very careful eye on what they can and cannot do in order to avoid challenges as to jurisdiction, and parties need to be mindful of the process and timeframes which they must follow in order to be successful with any challenge they may feel it is appropriate to make. What is certain is that the incidence of challenges on substantive jurisdiction issues in the court has fallen markedly under the Arbitration Act 1996 as compared with previous legislation, thus demonstrating that arbitrators are not afraid to rule on their own jurisdiction and parties are prepared to accept those arbitrator rulings.

Richard Swan is based at Trett Consulting's London office

Acknowledgement

This article is based on a number of established publications:

- a. Arbitration Workbook, produced by Donald Valentine MA, LLB (Cantab), Dr Jur (Utrecht), FCI Arb, Barrister, Chartered Arbitrator, and endorsed by the Chartered Institute of Arbitrators.
- b. Construction Arbitrations, 2nd Edition, Vincent Powell-Smith, John Sims and Christopher Lancaster.
- c. Chitty on Contracts, 28th Edition, Sweet and Maxwell.

PROJECT RISK MANAGEMENT - Part 1

Change is a natural occurrence on construction projects, which makes it inherently risky. It is never possible to have conditions of total certainty. Projects are often affected by conditions of uncertainty producing opportunities or threats on project objectives (time, cost, quality etc.). A risk event implies that there is a range of possibilities for that event which could be more and less favorable than the most possible outcome, and that each outcome within a range has a probability of occurrence. In this two part article **Mathew Joseph** points out that the accumulation of risks and their potential outcomes can be termed 'project risk'.

Traditionally, statistical theories have been used to model and quantify risk events. The following equation defines risk in statistical terms.

$$\text{Risk Expected Value} = (\text{event likelihood}) \times (\text{event consequence})$$

It is vital to recognise and identify the root causes of the risk and manage them before adverse consequences or the risk event occurs. Project managers and team members should undertake and propose actions which eliminate risks before they occur, or reduce the effects of risks or uncertainty and make provisions for them if they occur when this is possible and cost effective to do so. The team should be able to set realistic estimates for time and cost impacts for all risks and uncertainties which can be anticipated from experience, foresight and pro-activeness.

Risk management is not about predicting the future, but about understanding the project and making better decisions with regard to management of the project tomorrow. It is important that the project team endeavor to ask rational questions and look for answers to solve the unknowns, such as:

■ *What can go wrong ?*

- *How likely is it ?*
- *What are the potential consequences ?*

The success of a project primarily depends on how sensibly the team can find answers to the above questions. The requisites being management support, motivation, insight, openness, involvement of key personnel and willingness for constant learning.

Project risk management involves the process of identifying, analysing and responding to risks primarily during the planning and execution phases of a project. As project risks are dynamic and constantly mutate, risk management should be a continuous process throughout the entire life cycle of the project. For a typical construction project, the life cycle consists of phases involving feasibility study, planning and design, construction, testing-commissioning-startup. The type, nature and intensity of the risks can vary according to the phase and state of the project. Hence, it is imperative appropriate stakeholders are involved in identifying, analysing and managing the risks. The team should also undertake quality management to ensure that the design is constructed correctly without the need for costly rework and value management to improve the definition of the design objectives.

Project risk management techniques methodically undertaken provides a means for the project team to:

- Realistically set reasonable schedule and cost contingencies;
- Estimate the probability of schedule delays and cost overruns;
- Estimate the probability of completing the project on-time and on-budget;
- Understand the accuracy of a schedule and / or cost estimate;
- Ensure the project team identifies the risks and implements a plan to

mitigate them;

Risk Classification

Analysts generally classify risk events in to two categories based on cause, probability and impact:

Known Unknowns: The project team may be able to identify the risk, however unknown, when or if the event will occur. A contingency reserve is established at the activity level or each work package of the WBS (Work Breakdown Structure), inclement weather, price escalation, lower than anticipated productivity etc. The Project Manager is responsible for managing and allocating the contingency reserve.

Unknown Unknowns: These are events that cannot be predicted by the project team, yet must be planned for. A general management reserve is established to cover the mistakes made by the construction project management team in not identifying all the known project risks. A person above the level of the Project Manager is generally responsible for allocating the management reserve.

Risk Management Stages

According to PMI and PMBOK Guide, project risk management processes can be generally classified in to six stages;

- Risk management planning
- Risk identification
- Qualitative risk analysis
- Quantitative risk analysis
- Risk monitoring and control

Although each of these stages is distinct, involving unique processes and methods, they may also overlap and interact with each other. The remaining part of this article will focus on the analysis stage and simulation techniques used for schedule and cost risk analysis.

Risk Analysis

Project risk analysis is the identification and quantification of

the probability and impact of events that may affect the objectives of the project. Risk analysis creates an opportunity to help identify and solve problems and enhance team effort and communication within the project and involves two sub-processes; qualitative and quantitative risk analysis. Usually quantitative analysis follows the qualitative analysis.

Qualitative Risk Analysis

Qualitative risk analysis is the process of assessing the impact and likelihood of identified risks. This process prioritises risks according to their potential impact on project objectives. Here risk probability and impact are described in qualitative terms like severe, very high, high, moderate low etc. and measured against a risk impact scale constructed using ordinal (very high, high, low... etc) or cardinal scales (0.1, 0.2, 0.3 ... etc).

On completion of the qualitative risk analysis, the risk register formed during the risk identification stage will be fine tuned and the risk participants will have an ordered and ranked list of the various project risks. P-I Matrix/ Boston square are mechanisms generally used for ranking and classifying risks according to their probability and impact. The analysis helps to provide the project team good insight in to various risks that are likely to affect the project and the ones that requires further assessment and controlling.

Quantitative Risk Analysis

Quantitative risk analysis is the process of analysing numerically the probability of each risk event and its impact on the project objectives. The quantitative risk analysis can identify realistic and achievable schedule and cost targets and establish the contingency required for the total project as well as for each schedule and cost element and can form the basis of the risk mitigation plan. The analysis involves the use of simulation and statistical techniques and the commonly used ones are:

- Sensitivity analysis
- Decision tree analysis

- Scenario analysis
- Monte Carlo simulation/Latin hypercube simulation

Monte Carlo Simulation

Monte Carlo simulation is the most widely used technique for schedule and cost risk analysis. Software simulation systems based on the Monte Carlo algorithm are now commercially available. These systems are capable of reading an existing CPM schedule, allow the analyst to model schedule and/or cost uncertainty at an activity or resource level and then perform thousands of simulations to evaluate possible project occurrence scenarios.

Such simulation exercises using Monte Carlo techniques can point to the probability and confidence level of achieving a completion date or budget. The project team can gain considerable understanding of the risks and devise proper response mechanisms to eliminate or mitigate the risks before they impact the project objectives negatively.

(The Monte Carlo simulation technique will be covered in detail in the second part of this article)

Mathew Joseph is based at Trett Consulting's office in Dubai

HOUSTON OFFICE

Following several very successful years at the helm of Trett Consulting's Dutch office, we are delighted to announce that Tony Farrow, Executive Director of Trett Consulting and Managing Director of the firm's dispute resolution division, will be relocating to our Houston office to run the business there and to continue developing our American operations.

Tony will work closely with Bill Taylor, Managing Director of Trett PPP/PFI Operations, covering UK and North America from London and New York. Bill's extensive knowledge of the PPP / PFI markets coupled with Tony's experience in dispute management and resolution will ensure that we are able to provide a full range of service to our American clients.

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CDM - LET 'TH

Patricia Nathan-Amisshah explains that changes expected early in April 2007 enhance the client's role under CDM and remove a client's right to 'contract out' their responsibilities to a 'client's agent'.

The Construction (Design and Management) Regulations 1994

The UK's Construction (Design & Management) Regulations 1994 (amended 2000) (CDM 1994) came into force on 31 March 1995. One of their prime aims was to improve health and safety in the UK's construction industry, at a time when the construction industry had an appalling record for accidents and fatalities, many of which could have been avoided by early planning and proper management.

CDM 1994 imposed duties on all those involved in the construction process including contractors, designers, clients, and planning supervisors. Under the new regulations, the planning supervisor role will be removed and a project coordinator will be introduced instead.

The Construction (Design and Management) Regulations 2007

The revised detailed guidance notes which accompany CDM 2007 entitled 'managing health and safety in construction' published by the Health and Safety Commission (the Approved Code of Practice (ACoP)) was approved in February 2007.

CDM 2007 and ACoP came into force at the beginning of April 2007. This new legislation is an amalgamation of CDM 1994 and the Construction (Health, Safety and Welfare) Regulations 1996, following extensive consultation post CDM 2004 by the Health and Safety Executive. These new regulations enhance the client's duties on the basis that the client is in a unique position, in terms of resourcing a project and making appointments, to manage health and safety. The client is not expected to plan or manage the projects

THE CLIENT' BEWARE

themselves - merely to ensure that things are done. The emphasis is on the early management and planning of developments. CDM 2007 aims to clarify (with some changes outlined below) the roles of the principal dutyholders and to emphasise the need for dutyholders to work effectively together.

The ACoP is more detailed than before. The ACoP contains guidance for all dutyholders and has a special legal status. If a dutyholder is prosecuted for breach of CDM 2007 and it is proved that ACoP was not followed the onus is on the dutyholder to show compliance in some other way.

This article will focus on the duties of 'the client' under CDM 2007. One of the key changes to note is that the client's legal responsibilities can no longer be 'contracted out' to an agent. A client's agent can still be appointed by a client for convenience but the criminal liability under CDM 2007 will always remain with 'the client' for the project.

Who is the client for the project?

Domestic clients do not have duties under CDM. A domestic client is a person who has work done on their own home or that of a family member, that does not relate to trade or business, whether for profit or not. Local authorities, registered social landlords and other businesses who own property would not be domestic clients.

A client is a business or undertaking (including individuals) for whom the project is carried out. So if you are a developer and as part of your business you construct houses for subsequent sale to domestic clients, you have duties as the client under CDM 2007. This would be the case even if a purchaser buys before the work is completed, as it is the developer who has arranged the construction work.

The same principle applies where the construction work is planned and procured by a third party, for example, under a development

agreement. If you are in control of the project, are paying or will pay for the activities which comprise the project and initiated the project, then you will be the client under CDM. The important thing is that the client is identified and, if there is more than one possible client, the parties involved identify and agree who is the client. If this is not done, there is a risk that an unsuspecting party will be responsible for the 'client's duties' under CDM 2007.

As the above examples show, it is not always clear who is the client. If you are unsure whether you are the client under CDM you should contact your local HSE office as early as possible.

Client's duties under CDM

CDM 2007 distinguishes between:

- duties imposed for all construction work (including those which are non notifiable); and
- additional requirements for projects above the notification threshold (projects likely to last more than 30 working days or involving more than 500 person days of construction work)

As a client, your duties will depend on whether CDM 2007 applies and whether the project is notifiable or non-notifiable as defined under CDM 2007.

Duties for all construction projects

The client is responsible for:

- checking the competence and resources of appointed designers, contractors and other team members;
- ensuring suitable management arrangements are in place;
- providing adequate project resourcing and construction information to contractors and designers at all stages;
- providing pre-construction information to designers and contractors.

Client's duties for notifiable projects

Where the project is a notifiable project in addition to the above the client must:

- appoint a competent CDM co-ordinator in writing whom they can rely on for advice; and
- to assist with the client's duties and to co-ordinate the arrangements for health and safety during the planning phase
- appoint a principal contractor to manage the construction work; and
- ensure that the construction phase does not start until the principal contractor has prepared a suitable construction phase plan and there are suitable welfare facilities; and
- make sure the health and safety file is prepared, reviewed or updated ready for handover at the end of the construction work.

During the parliamentary debate on CDM 2007 on the 10 May 2007, the ultimate responsibility of the client for carrying out its duties (some of which are absolute obligations) was discussed. One view that was tabled was that the responsibility for the construction phase plan being in place was thought to be better managed by the contractor.

The important thing to note is that, as a client, whilst you can rely on advice and guidance from a CDM co-ordinator the legal responsibility cannot be passed on. Consequently, being clear who is the client, the choice of co-ordinator and the terms of their appointment will be very important. If the client fails to appoint a principal contractor or CDM co-ordinator, he will be treated as if he was himself responsible for those roles.

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PPP/ PFI IN THE UK - is there a

Risk and PPP/ PFI are inextricably linked. Risk identification, transfer and management present challenges to all contracting parties involved in PPP/ PFI. Against this background Stephen Woodward of Trett Consulting's recently established PFI division takes stock of PFI procurement in the UK and considers the outcomes for success.

Forthcoming articles will consider PPP/PFI in the USA and in international contracting.

PPP/ PFI is not a panacea. Nevertheless, within the framework of current UK Government policy, it is an important factor in public procurement. HM Treasury's principles of PFI remain constant; the private sector providing a long-term, fixed price, output-based facility with a single point of delivery and responsibility for the facility. The private sector commits capital which is at risk in relation to the performance of the facility being delivered. While the principle is constant the process is evolving.

Given the UK's history of infrastructure under-investment, the argument is put forward that there is no real alternative to PFI for catching up with neglected spending. However, a significant body of opinion searches for an alternative to PFI procurement.

With Departments scrambling for cash and Government initiatives experiencing delays from the inevitable time lag of policy implementation and the overcoming of delivery issues that take time to resolve, health and education projects are now picking up with waste, prisons and housing contributing to the projects in the making.

The short to medium term future is expected to see continued use of PFI procurement as the projects from the implementation of Government policy start to flow. The PFI market continues to evolve around Government Departmental structures as the main buyers of the operational service from completed projects.

Partnerships UK (PUK), formed out of HM Treasury as the Government's guiding hand in implementing major investment and service improvements, is working across the UK and with all parts of the public sector. Its mission is to accelerate the delivery of infrastructure renewal and high quality public services for efficient use of publicly owned assets. This is all set to be achieved through better and stronger partnerships between the public and private sectors.

Key objectives of PUK are expanding the areas for the delivery of public services in the form of new supply markets, commercialisation of public sector assets and businesses and standardisation of processes. Priority is being given to the introduction of a step change in delivery. This is being driven by a major Government initiative in the form of a taskforce to improve the quality of contract management and require public and private sectors to invest more time and resource in positively managing contracts to accommodate the inevitable changes that take place over time.

Achieving Value for Money (VfM)

PUK's 'Report on Operational PFI Projects' is an analysis of operational issues impacting on projects coming from a comprehensive review of the performance of PFI projects during their operational phase. It shows Government interest expanding from pure procurement to encompass the wider spectrum of all aspects of the operational stage. The analysis covers such issues as meeting delivery expectations, whether the contract structure adequately allows for change, the impact of a change in service provider and the continual need for benchmarking exercises.

PUK's report was followed by HM Treasury's policy statement on 'PFI Strengthening Long-Term Partnerships' underlining the Government's commitment to the appropriate use of PFI based on the

criteria forming its policy of VfM. Thus, VfM is firmly reinforced as being the key driver of the PFI procurement process.

VfM is seen as coming from long-term focus on whole-life cost, the private sector's risk management expertise, private finance at risk and certainty of specified outputs. Taken together, the report and the policy statement highlight the Government's support for PFI procurement and the improvements it wants to see in the areas of performance in the operational phase, PFI procurement professionalism and a better understanding of flexibility to give VfM. The need for better procurement is identified as being achieved through enhancing skills, increasing frequency of monitoring and ensuring that projects are better prepared before release to the market. Checking on the acceptability of risk transfer early in the process is placed as a key first requirement.

An important conclusion is the call for earlier involvement of the private sector in the procurement process and the importance of risk management through the OGC Gateway Process. This process is based on well-proven techniques that lead to more effective delivery of benefits, together with more predictable costs and outcomes. It is HM Treasury's preferred means of controlling risk for acquisition programmes and procurement projects. Commencing with the business justification stage, the process examines a programme or project at critical stages in its lifecycle, to give assurance that it can progress with the right degree of certainty of success to the next stage. The process concludes with a final stage of benefits evaluation. A particular attribute of the process is its focus on planning and preparation and the way it can be used to help reduce the time taken to take projects to financial close.

The Treasury updated its 'Value for

n alternative?

Money Assessment Guidance' with an emphasis on making a robust assessment of the business case based on detailed evidence and previous data, early option assessments using appraisals undertaken prior to engagement with the market and the fulfilment of the requirement for sufficient resourcing and planning. The aim is to identify and maximise the effectiveness of the factors that will drive the VfM process for a potential project. The requirement is for procurement to be well managed and executed and above all be transparent.

Commercialisation

PUK's mandate of assisting the implementation of Government PFI policy has also seen production of a policy guidance note for Government Departments, 'Wider Markets / Commercialisation Assessment of Potential'. The background to this guidance is the National Audit Office (NAO) recommendation that Government Departments regularly assess the potential for Wider Markets Activity (also referred to as 'Commercialisation'). The NAO identified the need for public bodies to demonstrate, as part of their asset management strategies, that they have rigorously examined their asset stocks to identify Wider Markets Opportunities. The Wider Markets Initiative is set to encourage the public sector to adopt a more entrepreneurial approach to making the most effective and efficient use of public assets by exploiting their commercial potential.

The incentive for public bodies to participate in the Commercialisation process is one of commercial benefit; as long as projects are funded from within existing spending limits or by a private partner with the public body taking responsibility for ensuring that proper procedures are followed to stay within the policy framework and the activity is undertaken to prescribed rules, the income generated can be kept retained by the body. The effects of this policy have

the potential to be significant for the generation of income streams for public bodies.

EU and Banking Regulation

There is an expectation that the 'Competitive Dialogue Procedure' for complex projects (a structured negotiating procedure similar to past PFI practice that now has explicit EU rules on post-tender discussion), will create the need for all stakeholder parties, particularly those funding projects, to be more proactive in the market from which opportunities arise.

There is new regulation too in the banking sector where 'The International Convergence of Capital Measurement and Capital Standards - A Revised Framework', known as Basel II or the New Accord has been created to promote greater consistency in the way banks and banking regulators approach risk management. Implementation of Basel II is expected to increase the focus on risk management in relation to projects.

Measuring Value

It is generally accepted that PFI projects are more expensive than in the private sector (on average 30% more than if the Government borrowed the money and did the work in the public sector) and the PFI schemes are being paid for out of budgets that are already under pressure. Consequently the Government is under continual pressure to strictly apply the criteria of VfM against Treasury guidelines as a means of benchmarking PFI schemes to demonstrate that PFI deals give best value. An undertaking has been given that PFI will only be used where the case for VfM can be proven and this is repeatedly restated as Government policy.

Additional controversy is caused by the off-balance sheet nature of many PFI contracts. Currently under UK accounting regulations, the building is not shown on the PFI Company's

balance sheet. However the main asset of the PFI Company is shown - that of finance debt, being the long term contractual obligation of the Government to pay for the building. For the Government's accounting, the fact that it pays a single Unitary Charge for both the building and its maintenance is sufficient for the PFI contract to be classified as a revenue item, so neither the building nor the long-term obligation to pay appear on the Government's balance sheet.

The alternative?

Recent policy is a response to the market and has the intention of linking up best practices across the public sector and improving communications and shared knowledge across public bodies. An example of such a programme is the national programme of NHS Local Improvement Finance Trust (LIFT) projects forming the PPP, Partnerships for Health. Opportunities for mixed use are being generated within the LIFT programme where projects cover buildings that are multi use public services such as primary healthcare, library, and local authority general office and police facilities all within the one PFI deal. The new companies delivering programmes of projects within LIFT schemes are now developers and have a mandate under their partnering agreements with the Department of Health to seek out and maximise development opportunities capable of delivering enhanced services for local communities.

While the process is evolving, any alternative to PFI should address what infrastructure is required in terms of output specification, how the chosen facility will perform and be funded under a payment mechanism and how risk will be shared through market acceptable risk transfer.

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ASSIGNMENT OF CONTRACTS -

Jonathan Hawkswell discusses how the recent English case of *Technotrade Ltd v Larkstore Ltd* demonstrates the risks arising out of assignment of contracts that may have been avoided.

A company advising on site investigations found itself being claimed against by a company it had no contract with and no prior relationship with. How could that be? The original site investigation contract had been assigned to the Claimant.

Background

A development company called Starglade Limited ('Starglade') purchased a site in Kent and employed Technotrade Limited ('Technotrade') to produce a site investigation report. Technotrade duly produced the report in December 1998, which found that the site was satisfactory for the proposed development. The issued report contained no prohibition against assignment. In June 1999, Starglade sold the site to Larkstore Limited ('Larkstore').

Larkstore bought the site with planning permission for 8 detached units. The planning consent contained a condition that a report from a specialist soil consultant be obtained to identify whether there was a need to stabilise the land and any adjoining properties. Starglade used the Technotrade report to satisfy the planning condition and sold the site to Larkstore with the benefit of full planning consent.

Larkstore then sought planning permission for phase 2 of their project and found that a similar condition had been placed upon them and so used the report produced by Technotrade as this confirmed that the ground was satisfactory to build a

number of two storey houses on. Larkstore failed to obtain Technotrade's permission to use the report but the report satisfied the planning condition regardless.

That October, Larkstore employed Bess Ltd ('Bess') to construct the houses. However, a landslip occurred whilst they were undertaking the groundworks. Neighbouring properties sustained significant damage and a vast amount of work had to be undertaken to stabilise the properties before the project itself could continue.

“a person who is assigned rights under a contract cannot recover more from the contract breaker than the assignor could have done”

Larkstore turned to Bess for the cost of the damage but Bess became insolvent and so Larkstore turned its attention to Technotrade. In the meantime, but more than two years after the land slide, Larkstore obtained a deed of assignment from Starglade which assigned the Technotrade report to Larkstore and stated “For the avoidance of doubt the assignment effectively hereby includes the right to sue in respect of breaches of Technotrade of its duties and obligations and to bring all such claims against Technotrade as are available at law” which gave Larkstore the right to sue Technotrade for breach of contract.

Larkstore also came to an agreement with Starglade that “in consideration of you making the assignment of even date, we undertake to pay you one half of the net monies received from Technotrade Limited”.

Larkstore, therefore, made an agreement to pay Starglade half of the

proceeds received from Technotrade.

The neighbours who suffered damage due to the landslide commenced proceedings against Larkstore and Bess for the damage caused to their properties. The case went to the Technology and Construction Court in England to determine liability for the substantial damage caused and the resulting financial loss. The case was heard by Judge Wilcox who made an order for the determination of specific preliminary issues including the status of the assignment which was the main issue in these proceedings.

The General Position

The position in law has always been that a person who is assigned rights under a contract cannot recover more from the contract breaker than the assignor could have done had there been no assignment but it appeared in this case that to apply this logic would create a “legal black hole” whereby the contract breakers position would be that no one could legally recover substantial damages from him so the right to damages disappears in the “legal black hole”.

The question asked was “*Is the assignee of the cause of action entitled to recover from the contract breaker damages for loss, which occurred after the transfer of the development by the assignor to the assignee, but before the assignment of the cause of action, in a larger sum than the assignor would have recovered?*”

General Principles

The assignment is affected by the order of events which were as follows:

- The breach occurred when the defective report was produced and at that time Starglade were the owners of the site. At that time, Starglade would only have been able to claim nominal damages as Starglade had not suffered a loss.
- At the time of the landslip,

BEWARE OF PITFALLS

Larkstore was the owner of the site and suffered substantial loss due to the landslip. Larkstore could not however, recover damages from Technotrade for breach of contract as there was no contract at that time between Larkstore and Technotrade.

- The assignment then took place. Technotrade argued that Starglade were not able to assign more rights than it had to Larkstore. Starglade did not have a claim for damages as it had sold the site before the assignment and before the landslip occurred.
- It was accepted that the report was assignable and that although the damages that Starglade could have recovered at the date of the cause of action was no more than nominal damages, if Starglade had remained the owner of the site, they would have been able to claim substantial damages for the landslip in 2001.

Decision

Judge Wilcox found in favour of Larkstore and held that they could sue Technotrade in contract. He also held that damages could be claimed stating that *"The actual cost of repair and stabilisation of the site by Larkstore would be evidentially relevant to what would be recoverable, as would the cost of reasonable repair to the neighbouring properties."*

Court of Appeal

Concurring with Judge Wilcox, the Court of Appeal held that if they had concurred with Technotrade, they would have escaped all potential contractual liability for the damage caused as its liability to Larkstore would be capped at Starglade's limit which was nominal damages.

The Court of Appeal stated:

"What was assigned by Starglade to Larkstore was a cause of action for breach

of contract against Technotrade and the legal remedies for it. It was not an assignment of loss... that the amount of the loss recoverable by Larkstore was limited by what loss had been suffered by Starglade, in this case nil."

And added:

"By a legal conjuring trick worthy of Houdini the assignment would free Technotrade from the fetters of contractual liability. The position would be that the contract-breaker would be liable to no one for the substantial loss suffered in consequence of the breach. As a matter of legal principle and good sense, this cannot possibly be the law."

The appeal was dismissed.

Although the Court found against Technotrade, there are steps which it could have considered to avoid the risk:

- Having a clause prohibiting assignment
- Excluding the Third Party Rights Act in England and Wales
- Limiting risk in the future by the wording of contracts

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MEDIATION

Aird v Prime Meridian Ltd (2006)

A joint statement was prepared by architectural experts for a use in a mediation between the two parties. Unfortunately, the mediation did not resolve the dispute, and it was taken to court. At this point, the claimant wanted to amend their pleadings but the defendant claimed that these pleadings, as amended, would be inconsistent with the experts' original joint statement. In response, the claimant argued that as the experts' joint

LETTERS OF INTENT

Skanska Rashleigh Weatherfoil v Somerfield Stores Ltd (2006) (CA)

Skanska began work for Somerfield on the basis of a Letter of Intent, attached to which was a draft Facilities Management Agreement, which had been drawn up by Somerfield Stores and sent to Skanska. The FMA had the caveat of 'subject to contract'. The letter also stated that whilst the terms of the agreement were being negotiated, Skanska were to provide the services under the terms of the contract from 28 August 2000 to 27 October 2000. Skanska agreed and began work. The October date, and a further date, passed without a final agreement being reached, but Skanska continued providing the services detailed. A pay dispute in 2002 reached the the English Courts, and Skanska were supported by the court in their contention that the terms of the FMA were only incorporated into the draft agreement in as much as they defined the essential "services" Skanska were being asked to provide under the Letter of Intent. In the appeal, however, it was held that while both parties had not necessarily agreed to be bound by the terms of the FMA for the full period, they had agreed to be bound by them on a temporary basis until the FMA was finally agreed.

statement had been prepared for mediation proceedings, it was inadmissible in litigation proceedings.

It was held that, due to the specific nature of the dispute and the process of dispute resolution which had already taken place (i.e. mediation), the joint statement could not be used in court. However, the judge also confirmed that, in normal circumstances, such a statement would normally be allowed to form part of the court-disclosed documents.

ARE COSTS ASSOCIATED WITH PRE-ACTION BEHAVIOUR RECOVERABLE? - PART 2

In the last issue of the Digest **David Moss** considered the potential for recovery of costs involved in complying with the UK's Pre-Action Protocol. This part of the article considers the extent to which one party may be denied costs on the basis that the other party alleges that the matters could have been dealt with by a form of alternative dispute resolution.

ADR techniques, such as a mediation process under which an independent person attempts to facilitate a settlement between parties in dispute, has become more commonplace in recent years, as it has been recognised as an effective method of dispute resolution. Reflecting this trend, the UK's Civil Procedure Rules impose a positive duty on courts to actively manage cases so as to further the overriding objective, which extends to 'saving expense'. Amongst the examples given as indicative of 'active case management' is "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate..." In response, the courts have given their wholehearted support to it.

Judges are taking a far more interventionist line than they have ever done before, often encouraging parties to suspend litigation in order to attempt mediation, with some instances where parties have been ordered to mediate.

This 'encouragement' by the courts towards mediation is however backed up by the threat or actual use of adverse costs orders against parties that refuse to mediate - even if they win - thus giving rise to an exception to the general rule that 'costs follow the event'. In *Dunnett v Railtrack* (2002),

Railtrack was deprived of its costs despite successfully defending an action brought by Mrs Dunnett. Railtrack had refused to mediate, believing (rightly as it turned out) that it had a strong defence. Despite this, the court held that Railtrack should have at least attempted mediation and so refused to award its costs of defending the action.

One of the adverse consequences of *Dunnett* was that parties have since felt compelled to mediate through fear of judicial criticism at a later stage (translated into an adverse costs order) if they refuse to do so.

"A party with a good defence should not be forced to settle an action if it does not wish to do so"

A welcome clarification was provided by The Court of Appeal in *Halsey v Milton Keynes General NHS Trust* (2004). In this case, the NHS Trust had successfully defended a clinical negligence action. The Claimant, facing a substantial adverse costs order, asked the court to rule that each side should bear their own costs because the Trust had refused to agree to mediation. The Claimant had suggested mediation several times in the course of the litigation. The Trust had refused, taking the view that it had a strong defence. In refusing the Claimant's application, the judge at first instance criticised his approach as tactical. A party with a good defence should not be forced to settle an action if it does not wish to do so.

The Court of Appeal agreed and went on to say that a court does not have

the right to compel parties to mediate - it can merely make an order giving its recommendation. The Court of Appeal set out the following factors that could be taken into account when courts are considering whether a party has acted unreasonably in refusing to agree to mediation:

- The nature of the dispute;
- The merits of the case: if one party felt that he had a very good chance of winning, then this may well justify the refusal to mediate;
- The extent to which other settlement offers had been made;
- The costs of mediation in proportion to the dispute;
- Whether any delay in setting up the mediation could cause prejudice;
- Whether the mediation had a reasonable prospect of success. The burden of proving this should rest with the unsuccessful party.

It may be that the Court of Appeal had in mind the position of substantial organisations such as the NHS, who might be vulnerable to claimants with weak cases seeking to force a settlement. Nevertheless, the case also represents a welcome recognition by the courts that mediation must be used only when it is appropriate to do so - the threat of a costs penalty should not be the determinative factor in deciding whether to proceed down this route.

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A COMPARISON BETWEEN THE ICC ARBITRATION RULES AND THE UNCITRAL ARBITRATION RULES - PART 2

INTRODUCTION

Following on from his article in Issue 32, **Eugene Lenehan** continues his comparison between:

- the UNCITRAL Arbitration Rules (1976) (Adopted by the United Nations General Assembly on December 15, 1976). ('UNCITRAL Rules'), and
- the Rules of Arbitration of the International Chamber of Commerce, effective as of 1 January 1998. ('ICC Rules')

The ICC Rules are used for institutional, or administered arbitrations, where the ICC acts in a supervisory role and may exert a high level of administrative control of the arbitral process. The intention being to achieve a suitable procedure and maintain quality control rather than to obstruct or intrude upon the dispute resolution by the arbitrator(s).

As UNCITRAL is not an arbitral institution, the UNCITRAL Rules are used in ad hoc arbitrations and were designed with international disputes in mind.

SECURITY FOR COSTS

Whilst the ICC Rules do not specifically refer to security for costs, Article 23 does state that the tribunal may '*order any interim or conservatory measure it deems appropriate*'. It is suggested that this broad power is sufficient to enable the tribunal to order a party to give security for the costs of the other party.

The current UNCITRAL Rules do not allow the tribunal to make any orders for security for costs. However, there may soon be a revision to these rules as it is reported that UNCITRAL are considering an

amendment which would allow the tribunal to order a party to '*provide security for the enforcement of an eventual award, including an award of costs*'. The requesting party would need to demonstrate (a) an urgent need, (b) irreparable harm will result if not ordered and (c) there is a substantial possibility that the requesting party would succeed on the merits of the dispute.

CONFIDENTIALITY

Although confidentiality is widely sold as one of the foremost advantages of arbitration, this is not always fully understood. The Australian case of *ESSO/BHO v Plowman* [1995] 128 A.L.R. 391 and the Swedish case of *Bulgarian Foreign Trade Bank Limited v A.I. Trade Finance Inc.* [2000] have helped to highlight this problem.

The UNCITRAL Rules provide solely for the confidentiality of the award and the privacy of the hearing. The hearings are held *in camera* i.e. in private, unless the parties agree otherwise and the award is made public only with the consent of the parties.

Under the ICC Rules the parties are not bound to keep the award confidential and it is also not clear if the institution is bound by confidentiality. While the tribunal under the ICC may take measures for protecting trade secrets and confidential information and the ICC Court is bound by an obligation of confidence the ICC Rules have no general provision for confidentiality.

The award is not made available by the Secretariat to anyone except the parties but there is no obligation on the parties to keep the award confidential. In this respect the UNCITRAL Rules are slightly better than the ICC Rules.

NON-PARTICIPATION

Under both sets of rules, if one of the parties refuses or fails to appear at a hearing without a valid excuse the tribunal has the power to proceed with the arbitration.

The UNCITRAL Rules deals with the event of a claimant failing, without showing sufficient cause, to communicate his statement of claim. In such cases, the tribunal may terminate the arbitration. If the respondent fails to communicate his statement of defence without showing sufficient cause, the tribunal will order the arbitration to continue. The ICC Rules are silent on such eventualities.

Under the UNCITRAL Rules, if one of the parties fails to produce documentary evidence the tribunal may make the award on the evidence before it. The ICC Rules are again silent on such an eventuality.

EVIDENCE

Both sets of rules are silent about how evidence should be gathered, presented and received. The International Bar Association (IBA) Working Party suggests that this gap is intentionally left in arbitration rules to allow the parties and the tribunal flexibility in formulating the most appropriate procedures for the arbitration.

This flexibility allows the incorporation of rules of evidence such as the IBA Rules of Evidence. Even if such rules are not specifically adopted, they can serve as a guide to arbitrators when conducting the arbitration. It is also possible for the parties and the tribunal to devise procedural rules that allow the admissibility of evidence by video tape, video conferencing or other tools of advanced technology.

If a party fails without satisfactory explanation to produce document(s) that the tribunal has requested, it is suggested that under both sets of rules the tribunal is entitled to draw an adverse inference.

MULTI-PARTY COSTS

The UNCITRAL Rules have no provision for multi-party disputes, whereas the ICC Rules provide for multiple parties whether as claimant or as respondent. However, there is no provision for more than two groups of parties to a dispute.

Where there are multiple parties and where the dispute is to be referred to three arbitrators, the multiple claimants jointly, and/or the multiple respondents jointly, should nominate an arbitrator. Where there is no nomination or the parties cannot agree, the ICC Court will appoint each member of the tribunal.

“Whilst the ICC Rules allow party autonomy when determining the timetable, the UNCITRAL rules provide greater control”

PAPER ARBITRATIONS

Under both the ICC Rules and the UNCITRAL Rules, unless any of the parties request a hearing, the tribunal may decide the case solely on the documents submitted.

HEARING

Both sets of rules require the arbitral tribunal to give the parties adequate/reasonable notice of when a hearing is to be held and if either of the parties fails to appear without a good reason, the tribunal can proceed with the hearing.

The ICC Rules allow the parties involved to appear in person or through their representatives. They may also bring their advisors into the hearing but persons not involved

with the arbitration are not allowed in. The UNCITRAL Rules do not specifically deal with who can appear.

At least 15 days prior to any hearing the UNCITRAL Rules requires each party to notify details of witnesses to be called including on what subject and the language(s) of the testimony and it is for the tribunal to make arrangements for the translation of oral statements.

AWARDS

The UNCITRAL Rules do not set any time limit but under the ICC Rules the tribunal is given a period of six months for the final award to be rendered. However, the ICC Court may extend this period.

Both the ICC Rules and the UNCITRAL Rules provide that where there are three arbitrators the decision can be made by the majority but under the ICC Rules, if there is no majority, the award shall be made by the chairman of the tribunal alone.

Under ICC Rules, the award must state reasons whereas under the UNCITRAL Rules the award has to state reasons unless the parties have agreed otherwise.

Under the ICC Rules, the tribunal has to submit its award to the institution for scrutiny before it is mailed to the parties but, under the UNCITRAL Rules, the award is to be communicated to the parties by the tribunal at the place of arbitration.

Under both the ICC Rules and the UNCITRAL Rules, the parties undertake to carry out the award without delay. The ICC Rules waives the right to object to the decision of the tribunal whilst the UNCITRAL Rules state that the award is '*final and binding on the parties*' and are otherwise silent on any rights to appeal. Nevertheless, it is considered that, in certain circumstances, overturning awards may be possible

Although the ICC Rules allow the tribunal to correct certain errors in their award, it has been observed that they do not expressly provide for

remedying an omission, whereas the UNCITRAL Rules allow the tribunal to '*make an additional award as to claims presented in the arbitral proceedings but omitted from the award*'.

ENFORCEMENT

Enforcement of arbitration awards is the same under both sets of rules. This is generally done by means of the 1958 New York Convention where arbitration awards are usually enforceable in nearly 100 countries. Countries that have signed up to this convention recognise arbitration clauses and enforce foreign arbitration awards in the same way as domestic court judgments.

This is important because if the assets of the losing party are in a country which it may be difficult to enforce the arbitration award the winning party may not be able to receive his award and, therefore, have no more than a hollow and very expensive victory.

COSTS

Although the fees in ICC arbitrations are often more expensive than in UNCITRAL arbitrations, they are generally also more predictable. Ad hoc arbitration has the apparent attraction of avoiding the payment of the administrative fees which institutions charge but parties considering arbitration should be mindful of the lack of control with ad hoc arbitration, especially with regard to arbitrators' fees.

The final act of the ICC Court is to fix the total cost of the proceedings, which include the fees and expenses of the arbitrators, as well as the administrative costs of the ICC. Whilst this is usually carried out in accordance with the Scales of Administrative Expenses and Arbitrator's Fees found at Appendix III of the ICC Rules, the Court may deviate from this scale under exceptional circumstances.

Under both the ICC Rules and the UNCITRAL Rules the tribunal must fix the arbitration costs in its award.

However, under both sets of rules, the parties may have been requested to deposit advances at the outset and these figures might have increased at any time during the proceedings.

In principle, the costs of the arbitration under the UNCITRAL Rules are to be borne by the unsuccessful party but are subject to the tribunal's discretion. Under the ICC Rules the parties' costs are at the discretion of the arbitral tribunal unless agreed otherwise by the parties.

PARTY AUTONOMY

The principle of the party autonomy rule is based on the parties to a dispute having the autonomy to control the arbitration. Both the ICC Rules and the UNCITRAL Rules seem to recognise this rule in relation to appointing the arbitrators, the choice of forum and the applicable law, paper arbitrations, appointing experts and choosing the language of the arbitration.

Whilst the ICC Rules also allow party autonomy when determining the timetable, the UNCITRAL Rules provide greater control in this respect. However, when it comes to the place of arbitration, the ICC Rules provide greater autonomy and one commentator believes that the application of the party autonomy rule is at its fullest when the parties determine the forum and the regime of institutional arbitration.

FREQUENCY OF USE

The Paris-based International Court of Arbitration of the ICC is probably the biggest dispute resolution institution in the world and construction and engineering disputes account for a large amount of these [c.20%]. Information from the ICC also indicates that the number of ICC arbitrations is increasing. This may be in part due to some standard forms of contract requiring arbitrations to be under the ICC rules.

As the UNCITRAL Rules do not involve an institution, there is no

official record of how frequently they are used. However, practitioners in international arbitration claim that, whilst UNCITRAL Rules are probably the most used of the ad hoc arbitration rules, they get used significantly less than the ICC Rules. Some have claimed that the ICC Rules are being used as much as ten times as often as the UNCITRAL Rules, although others claim that the UNCITRAL Rules appear more popular in the Eastern Bloc.

There is also some difference of opinion as to whether use of the UNCITRAL Rules could be declining. If their use is declining, it is suggested that it could be due to more contracts, such as those of FIDIC, including provisions for institutional arbitrations.

CONCLUSIONS

One of the ways in which international arbitrations can be classified is as either:

- ad hoc
- institutional

The most popular rules for ad hoc arbitrations are the UNCITRAL Rules and the most popular institutional rules are the ICC Rules.

The similarities between the ICC Rules and the UNCITRAL Rules are many and it is suggested that they outweigh the differences. Their substantial differences can often be traced to the fact that one relates to institutional arbitration and the other is used for ad hoc arbitration. It would also seem that ICC Rules and other institutional arbitration rules get used significantly more often than ad-hoc rules and one of the main reasons causing the ICC Rules to get used more frequently is their adoption by institutional forms of contract.

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LATE DECISIONS IN ADJUDICATIONS

Epping Electrical Co v Briggs & Forrester (Plumbing Services) Ltd (2007)

The Adjudicator in this case reached his decision out of time. Briggs & Forrester claimed that the time limits laid down in the UK's Housing Grants Construction and Regeneration Act (HGCRA) were mandatory, and that the decision was, therefore, unenforceable. This was confirmed to be the case by the Technology Court. In addition, the adjudication provisions of the contract referred to the CIC Model Adjudication Procedures and the Referring Party claimed that Paragraph 25 of those procedures allowed a decision reached out of time to be valid as long as it was reached before a Referral was made to a replacement Adjudicator. This paragraph was deemed to not be compliant with the HGCRA and, therefore, the Scheme for Construction Contracts applied. It, therefore, followed that the HGCRA clauses on timescales applied, and that the Adjudicator's decision was invalid as it was reached out of time.

REPUDIATION

Wembley National Stadium Ltd v Cleveland Bridge (2007)

Cleveland Bridge stopped work on Wembley stadium, and left site claiming repudiatory breach of contract by Wembley National Stadium Ltd (WNSL) arising from withheld payments and a lower valuation of interim certificates, amongst others. WNSL in turn claimed repudiatory breach by Cleveland Bridge for leaving the site. It was held that WNSL's actions were not sufficient to be considered a repudiatory breach and that for repudiatory breach allegations to be successful, the actions must deprive the aggrieved party of "substantially the whole of the benefit it was meant to receive under the contract."

ADJUDICATORS' DECISIONS A DIFFERENCE

A recent English Law decision of the Technology and Construction Court (23 May 2007) in the case of *Mott MacDonald Limited v London and Regional Properties Limited* has elevated the question of whether an Adjudicator's Decision that is provided to the parties after the 28 day or 42 day statutory period (set out in the Housing Grants, Construction and Regeneration Act 1996, ("the HGCR Act")) or indeed after any agreed period, is valid and therefore enforceable? **Hamish Lal** presents a gloss on this issue which concerns the validity of decisions ostensibly reached within time but provided late to the parties.

FACTS

In *Mott MacDonald* the Adjudicator, appointed under the HGCR Act, was required to reach his Decision on or before 13 December 2006. However, the Adjudicator issued to the parties a Decision dated 13 December 2006 but which the parties received by post on 14 December 2006.

The Adjudicator, by a letter dated 7 December 2006, that he faxed and sent by post to the parties, stated:

"I have reached my Decision in this adjudication which now requires to undergo final typing and editing.

I am, therefore, on schedule to fully complete my Decision by tomorrow. In accordance with my letter to the Parties dated 1 November 2006, the Referring Party is to pay my fees and expenses prior to

me releasing my Decision ..."

The Court held that the Decision had, in fact, been reached on 8 December 2006 but was not received by the parties until 14 December 2006. The error of late dispatch was compounded by the Decision not being faxed to the parties, but only being sent out by first class post.

ISSUE

Was the Decision valid and enforceable? Answer-NO

DECISION

The Judge, HHJ Anthony Thornton QC, held that the decision was not delivered to each of the parties as soon as it was reached. He held that there were three reasons why the decision was not delivered to the parties on the day it was reached (on Friday 8 December 2006) but was instead received on Thursday 14 December 2006.

- the Adjudicator imposed a pre-condition that the Decision would not be released until Mott MacDonald paid his fees;
- the Adjudicator implemented that condition and did not release the Decision for 5 days whilst awaiting payment;
- The Adjudicator failed to send the Decision by fax, despite his direction that all communications in the adjudication should be sent in this way, but only sent it by first class post so that it arrived one day after it had been sent.

It is especially noteworthy that the Judge decided that Section 19(3) of The Scheme for Construction Contracts which states "As soon as possible after he has

reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract" means getting the decision into the parties' hands rather than merely dispatching it to them. Indeed, *Mott MacDonald* supports the proposition that a decision that is not delivered promptly by the most rapid available means of delivery is invalid if provided outside of the relevant time period. The learned Judge, having considered all the relevant authorities, set out the following propositions:

" (1) Adjudication is intended to be a rapid and informal means of resolving disputes on a temporary basis.

(2) To that end, the scheme rules, and all other adjudication rules, provide that the adjudicator must deliver his decision promptly.

(3) Given the rationale for adjudication in its present rapid form, the rules are to be construed as being mandatory. They are rules which the adjudicator is obliged to comply with.

(4) So as to comply with this rationale, the adjudicator should use the most rapid means of delivery that are reasonably available. This will ordinarily involve use of email or facsimile facilities.

(5) Any delay after the end of the relevant adjudication period in delivering the decision must be minimal and, if the decision has been reached before the end of that period, it should be delivered within that period.

(6) Any failure to comply with the requirement of prompt and rapid delivery will render the decision unenforceable and, probably, a nullity."

It is clear that the Courts will enforce time limits strictly. This judicial approach is likely to continue and so it is clear that the 'adjudication world'

"Any	failure	to
comply	with	the
requirement	of	
prompt	and	rapid
delivery	will	render
the	decision	
unenforceable"		

JUST ONE DAY CAN MAKE

will need to adapt. The options for change are numerous. Given that payment of the adjudicator's fees appears to be the central problem causing late delivery it is here where change must be focused. The Referring Party *could* make payment on account. Another practical point is that adjudicators may need to consider working at risk and recover the fee subsequently from one or other of the parties.

LETTERS OF INTENT

Mott MacDonald has also raised very important points about reliance on statutory adjudication in letters of intent. It is and always has been common in the construction industry for a contractor to commence, carry out and be paid for work under a letter of intent, pending the conclusion of a formal contract. This is often a practical fix but what happens if the formal agreement takes a long time (many years) to finalise, or indeed is never concluded? What happens if a dispute arises before conclusion of the formal agreement? As is equally common, it is only when site-relationships break down that the parties consider their respective rights under the contract governing their relationship - namely the letter of intent.

In *Mott MacDonald* the learned Judge held that the letter of intent:

(a) Did not fully or clearly define the scope of the work to be undertaken as the scope specified in the letter was “incomplete, provisional and the subject of ongoing discussion and amendment”; and

(b) Stated that payment would be made on a quantum meruit basis. However, in actuality, payment was made in line with an agreed fee

profile which was either an oral agreement, one to be inferred by the parties' conduct, or one evidenced by documents which were not adduced in evidence or relied upon.

As such, the Judge held that the letter of intent was not an agreement in writing to which the provisions of Part II of the 1996 Act applied, but was “partly in writing, partly evidenced in writing, partly oral and partly formed by conduct” and therefore not adjudicable. Court of Appeal authority in this area is clear that only construction contracts where the whole of the contract is in writing, or evidenced in writing can be adjudicated upon (*RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland Ltd)* [2002] 1 WLR 2344). In practical terms it is clear that if there are “gaps” in the various terms, to the extent that the gaps are filled by the parties' conduct or orally, then the letter of intent is not adjudicable.

PRACTICAL POINTS TO CONSIDER

Given the above warnings in the case law, the first question for the parties is to consider whether the letter of intent is intended to be adjudicable? It is often the case that the parties want, or are only willing, to enter into a 'loose' commercial relationship such that statutory adjudication is not a priority.

If however adjudication is desired then the parties should consider the above cases and make sure that the letter of intent does not contain any “gaps”. This, naturally, requires the parties to consider that the letter specifies precisely what works are to be carried out, within what time frame, and what rates are to be applied. These provisions must then be adhered to in practice.

SUMMARY

- The HCGR Act requires that “As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract”;
- In *Mott MacDonald Limited v London and Regional Properties Limited* [2007] EWHC 1055 (TCC) the Judge held that in the context of the scheme rules, “delivery to each of the parties” means getting the decision into their hands rather than dispatching it to them”;
- Any delay after the end of the relevant adjudication period in delivering the decision must be minimal and, if the decision has been reached before the end of that period, it should be delivered within that period;
- The Courts will enforce strict time limits. Any failure to comply with the requirement of prompt and rapid delivery will render the decision unenforceable and, probably, a nullity; and
- Rapid means of delivery will ordinarily involve use of email or facsimile facilities.
- *Mott MacDonald* reveals that Courts will not allow adjudication where the letter contains “gaps” that are filled by the parties' conduct or by oral agreement;

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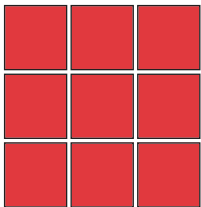
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