ADR | Partnership
Partners in Alternative Dispute Resolution

Digest

Issue 5 Autumn 2008

In this issue:

Welcome

Patrick O'Neill, director of ADR Partnership, leads this edition of the *ADR Digest* with a review of challenges that can be made to the deduction of liquidated damages. The best challenge is of course to extinguish any such right to deduct liquidated damages by the submission of properly particularised claims which give entitlement to full extensions of time.

We are delighted to have back construction law firm Lovells as our guest writers with Timothy Hill, Partner, and Damon So, Consultant, with the Projects (Engineering and Construction) Practice. Tim and Damon consider possible redress in inflationary environments, an issue which is of particular relevance given the current market conditions.

Kaymond Lam, consultant with ADR Partnership, provides an overview of some of the different methodologies available for evaluating disruption claims. This is a difficult area. Construction sites are not laboratories where different events and their effects can easily be isolated and evaluated. Nevertheless, Kaymond concludes that the risk of running and succeeding with such claims increases where contractors are able to adequately prove their case with proper records.

This article leads nicely into this months' *ADR Analysis*, which considers the burden and standard of proof that the courts or an arbitral tribunal require for a party to succeed in an action.

James B Longbottom
Managing Director

Challenges to Liquidated Damages

*By **Patrick J O'Neill** BSc(Hons) LLB(Hons) DIPArb FRICS MHKIS FCIArb FHKIArb MACostE HKIAC Accredited Mediator - Director, ADR Partnership Ltd*

Introduction

In commercial contracts, it is usual for the parties to enter into contract on the basis that the Works are to be completed by a particular date (or dates) that is (or are) agreed between them. This provides a degree of certainty of outcome for both of the parties, since the Employer knows in advance on what date, or dates, the project is to be delivered, and the contractor, likewise, knows how long he has in order to complete the Works and how long he is required to commit his resources to the project. It is also usual for the parties to agree to a liquidated damages clause that identifies the rate of liquidated damages that should apply in the event of a breach of contract and which results in the failure by the contractor to complete the Works by the above agreed date(s), or any extensions to those agreed dates.

A liquidated damages clause reflects the agreement made by the parties that damages should be assessed on a pre-determined basis. The essence of liquidated damages is that it represents a genuine pre-estimate of damage (notwithstanding the fact that it might, in certain instances, be almost impossible to predict the consequences of a breach, years in advance) and which is calculated at the time of making the contract, not at the time of the actual breach itself.

Liquidated damages are, in essence, beneficial to both parties, since both know at the time of entering into the contract exactly what rate at which damages will have to

A liquidated damages clause reflects the agreement made by the parties that damages should be assessed on a pre-determined basis.

be paid in the event of a breach. The non-defaulting party has the added advantage of being able to make a recovery without having to prove any actual damage. It is usual in large civil engineering projects for there to be an upper limit cap on the amount of damages that can be levied and which in turn provides the contractor with a degree of certainty as to the maximum amount of compensation that he may ultimately be liable for.

A well drafted liquidated damages clause can be an effective risk management tool for the Employer. However, the rate of liquidated damages needs to be considered carefully. From a practical perspective, if the liquidated damages rate is unreasonably high, then, notwithstanding the possibility of a challenge that the damage constitutes a penalty and is therefore likely to be unenforceable in any event, the tenderers may inflate their tenders in order to account for the increased financial risk that will be imposed on them in the event of a breach. Conversely, if the liquidated damages rate is set too low, the contractor may discover that the cheaper option is simply to overrun the project and incur the liquidated damages, rather than the more expensive acceleration costs associated with bringing the project to completion on time.

Liquidated damages are one of the Employer's best forms of leverage against a contractor to ensure timely delivery of the project. However, the Employer's entitlement to deduct liquidated damages from a contractor is not an automatic one and can be considered to be conditional in many respects. Notwithstanding the agreements reached between the parties as regards the liquidated damages rate, legitimate challenges can be brought by contractors so as to reduce the applicable rate of liquidated damages, or, indeed, to do away with them altogether, and contractors should be aware of this.

Penalties

A court will likely uphold a liquidated damages clause if it can be satisfied that the pre-determined sum was a reasonable estimate of the probable loss following the breach. However, the clause will not be enforced if a contractor can demonstrate that the liquidated damages amount was a penalty and not a genuine pre-estimate of damage assessed by the Employer.

The term 'penalty' signifies that the damages are penal in nature and are designed to punish the contractor rather than compensate the Employer. There is much in the way of judicial interpretation as to the extent to which the liquidated damages amount should reflect the 'genuine pre-estimate' concept. However, a clause is likely to constitute a penalty if the pre-determined sum is extravagant in comparison with the loss that could conceivably be proved to have flowed from the breach, although each situation would have to be considered on its own merits. 'Extravagance' and 'oppressiveness' in the stipulated sum are among the decisive factors upon which the decision would likely turn.

The reason for the non-enforcement of penalties is plain: if the courts were to guarantee a liquidated damages clause irrespective of the amount, then that would provide a further element of risk to the contract. The Employer, keen to exploit the situation and having spotted what might be a trivial breach, would have the luxury of claiming liquidated damages far in excess of any actual damage incurred. The contractor would consequently need to protect himself, presumably by over performance of the contract, and with the end result likely being both parties dispensing with the liquidated damages concept altogether.

Where the liquidated damages are held to be a penalty, the Employer will only be able to recover the loss he can actually prove and this might be very much less than the equivalent liquidated damages amount.

Condition Precedent

The Employer's right to deduct liquidated damages from a contractor may, depending on the terms and conditions of the particular contract adopted, be conditional on certain pre-requisites having been undertaken by the Employer and/or the Architect or Engineer. The consequence of this is that if the Employer has failed to comply with the requirements of the contract, and those requirements are deemed to be a condition precedent to the deduction of liquidated damages, then the Employer may forego his entitlement to levy liquidated damages against the contractor altogether. This scenario is an interesting reversal of the more usual condition precedent issues which typically occur on construction contracts - these being the alleged failure of the contractor to comply with the time and cost notice provisions of the contract and, thereby, the potential foregoing of any entitlement to additional payment. The onus on the Employer to comply with any condition precedent in respect of liquidated damages is an almost identical obligation to the above and should be viewed by the contractor, against the Employer, in a similar manner.

The contractual obligations imposed on the Employer prior to him being able to deduct liquidated damages could be stringent and might demand that one or more of the following be carried out in advance of any deduction:

- the Architect or Engineer having performed their duties and decided on the extensions of time, if any, that are due;
- the Architect or Engineer having issued the necessary Certificates of Completion to the effect that they confirm the Contractor having failed to complete by the due date(s);

- the Employer having advised, in writing, before the date of the Final Certificate (or such other date as specified in the contract) that he may deduct liquidated damages;
- any other express contractual requirements concerning the issue of withholding notices or any other condition precedent.

A failure by the Employer to comply with any condition precedent would result in the Employer being unable to deduct liquidated damages and the Employer would again be forced into having to prove the damage rather than simply rely on the agreed liquidated damages rate.

Time at Large

The prevention principle acts as a defence to liquidated damages on the basis that a person cannot benefit from his own breach. Thus, where a contract has no provision to extend time, or, where the contractual provisions do not cover the Employer's default, then the right to liquidated damages is lost. Standard forms of contract are drafted in such a way so as to include for the likely range of events for which the Employer is likely to be responsible. However, gaps can and do often exist and these should be investigated by the contractor. Time is said to be 'at large' when there is no specific date for the completion of the Works or when the specified time is lost, or is rendered inoperable. In such situations, the obligations on the contractor are to complete within a reasonable time. Given that there is no specific date for completion in such situations, it follows that the Employer forfeits any right to deduct liquidated damages and must therefore be content with general damages.

The prevention principle acts as a defence to liquidated damages on the basis that a person cannot benefit from his own breach.

The reason for forfeiting liquidated damages is simply that in the absence of an identifiable completion date, there is no fixed date from when liquidated damages can be calculated. Any failure of the contract to permit extensions of time to be granted for Employer's acts of prevention or interferences by the Employer and/or the Architect/ Engineer will therefore result in the Employer losing his entitlement to deduct liquidated damages altogether.

Partial Completion / Handover

In large scale building projects or civil engineering projects which often comprise multiple individual structures, rooms or floors, it is realistic to assume that the Employer might take possession of certain parts of the Works despite the Works as a whole remaining incomplete. Forms of contract often provide for this facility. However, in such instances, the fact that the Employer has gained access to the Site does not necessarily signify that that part of the Works is substantially complete. Completion is one thing but the Employer entering the Site and assuming possession of a part of the Works might be something wholly different. The Employer may argue that his entry on to the Site is under the auspices of access or limited occupation only and is in some way a lesser form of physical presence and so does not equate to partial possession, and therefore, does not stop liquidated damages running. The Employer may further argue that the Employer's presence has no effect on the contractor's exclusive possession of the Works, nor as regards the contractor's obligations with respect to liquidated damages, retention, defects, liability and insurance matters.

The basis on which the Employer takes possession of a part of the Works needs to be clearly understood by the contractor, as does the matter of whether practical completion for that part of the Works has actually been achieved or not. For the purposes of liquidated damages, contractors should argue that the Employer has entered onto the premises on the basis that that part of the Works has been substantially completed and, consequently, that a brake should therefore be applied to the liquidated damages for that part of the Works.

In such instances, it would be appropriate for the rate of liquidated damages to be reduced so as to reflect the value of the part that has achieved practical completion and which is being used by the Employer, provided that the contractual machinery supports the concept of adjusting the liquidated damages rate. In the absence of any machinery in the contract to facilitate the reduction in the liquidated damages rate or to facilitate partial possession or staged completion, a claim for liquidated damages for parts of the Works would likely fail. The Employer would once again be faced with proving what actual loss he has incurred as a result of the late completion and would therefore be unable to solely rely on the liquidated damages provisions in the contract.

Conclusion

The above challenges are not exhaustive by any means and it is always open to a contractor to advance legal challenges to liquidated damages on the basis of waiver, estoppel, void provisions on the grounds of uncertainty, as well as clauses which may be deemed to be contrary to the law itself and in breach of the *Control of Exemption Clauses Ordinance Cap 71*. Liquidated damages only become payable as a consequence of late completion, and, since the contractor is very likely to have submitted extensions of time claims in support of its alleged entitlement, those submissions must all be reviewed by the Architect/Engineer in order that all justifiable delays are recognised (or not, as the case may be) prior to any damages being levied. However, notwithstanding the contractor's late completion, the contractor still retains some rights to challenge the liquidated damages. Albeit there are inevitable hurdles to jump, it is not impossible for a contractor to successfully argue that the liquidated damages should be reduced in amount, or in extreme situations, to argue that the contractual machinery has itself broken down and that the liquidated damages clause should no longer apply. In either scenario, contractors do not have to accept that the deduction of liquidated damages is an Employer's automatic right, even in the event of late completion.

For further information contact:
patrick.oneill@adrpartnership.com

Redress in an Inflationary Environment

By **Timothy Hill**, *Partner and* **Damon So**, *Consultant, Lovells*

Construction projects are often of extended duration, but bid on fixed prices. In an increasingly inflationary environment, this leaves contractors exposed to the vagaries of international markets. This was recently felt with the very substantial increases in copper and steel prices around the world. Of course such pressures are not confined to material costs; labour can be similarly affected by the consequences of demand fluctuation.

Traditionally, construction contracts have sought to provide some risks-sharing mechanism in respect of this risk. These mechanisms have taken a number of forms but the most obvious is price fluctuation provision. A typical price fluctuation or cost adjustment provision uses an index or basket of items for the purpose of price comparison. Clause 89 of the Hong Kong Government's Standard Form provides for the use of the *Index Numbers of the Costs of Labour and Materials used in Public Sector Construction Projects*, which is an index maintained by the Census and Statistics Department. This is operated together with a *Schedule of Proportions* which allocates a weighting to different elements of the *Index*. The contractor's ability to weigh different elements of the *Index* is normally circumscribed.

Construction projects are often of extended duration, but bid on fixed prices. In an increasingly inflationary environment, this leaves contractors exposed to the vagaries of international markets. This was recently felt with the very substantial increases in copper and steel prices around the world.

Inevitably, such an approach will protect neither party to the contract from the real effects of price fluctuation. The weighting requires a prospective assessment of where fluctuation may occur, which judged in hindsight is unlikely to be correct. Parties are likely to resort to historical experience in seeking to assess areas where fluctuation will occur, but rapid inflationary pressure impacting on specific elements, for example the copper price, is unlikely to be adequately reflected. This problem is compounded by the fact that any index is likely to contain a limited number of items, for example in the case of the Government's *Index* a composite figure for wages for civil engineering projects, and as a result will fail to reflect or fully reflect fluctuation of elements within the composite item. Where there is no price fluctuation mechanism or the mechanism provided is inadequate, a contractor seeking to retrieve the situation must explore other approaches. If the impact is caused or contributed to by a variation, resort may be had to the valuation mechanisms. It may be suggested that work undertaken at a different time is not executed under the same or similar circumstances to the items of work priced in the contract (under Clause 61(c) of the Government Form).

In *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2000] BLR 247* LLoyd L.J. observed that the equivalent provision under the *ICE 6th Edition* applied;

> *"when the work covered by the variation order is a of a different character from the work priced in the Bill of Quantities, or is executed under different conditions. If the differences are relatively small, the Engineer is obliged to use the rates set out in the Bill of Quantities as the basis for his valuation, making such adjustment as may be necessary to take account of the differences".*

The learned judge continued to support the observation made by HH Humphrey LLoyd QC that the bill rates were *"sacrosanct"*. On the facts of the Alstom decision the Court was required to consider whether a rate inserted in a Bill of Quantities in error should be applied to a much larger quantity of work instructed by variation. The Court remitted the question of fact to the arbitrator to consider whether work was of a different character, observing that the arbitrator was entitled to further information. It was suggested this would include a breakdown of the price including provision for plant, materials, labour and overheads. In the event that such information was not available it was observed that the arbitrator might consider that he was unable to conclude that it was reasonable to apply the rate to dissimilar work. The reasoning in this case would suggest that the availability of a re-assessment of a rate through Clause 61(c) will depend upon whether as a matter of fact it can be established that the *"conditions and circumstances"* are changed.

Where there is no applicable rate Clause 61(c) requires the Engineer to determine a rate, which should be a fair and

reasonable rate. The judgement of HH Humphrey LLoyd QC in *Weldon Plant v Commission for the New Towns [2000] BLR 496* suggests that such rate should include cost, overhead and profit. A consequence of this is that the employer loses the benefit of any competitive bidding process and the contractor avoids any error in its original pricing.

An alternative approach might be to seek to recover the additional cost as a disruption or delay cost under any relevant contractual provision, in the case of the Government Form Clause 63. This provision is widely drafted, relating as it does to *"expenditure"*. Expenditure has been widely interpreted to mean the spending or payment of money: the act of expending, disbursing, or laying out of money. There would seem no reason why the increased costs of labour or materials on the basis that these costs were incurred at a later and more expensive time because of the employer's delay should not be claimed as expenditure which would not be reimbursed as payment under any other provision. Certainly this is a view supported by the authors of *Keating (8-055)*, although they state no authority for the proposition. In pursuing such a claim a contractor would still be faced with the need to establish that progress of the Works or the relevant part had been materially affected by one of the grounds giving rise to an entitlement. The authors of *Keating* suggest that such claim might be based upon the use of a published index. However, as we have already noted, such indices represent a broad and inaccurate assessment of the position. A contractor's ability to present a more exact assessment of such claim is likely to require the maintenance of detailed records demonstrating the impact of inflationary pressures on specific items.

Where there is no price fluctuation mechanism or the mechanism provided is inadequate, a contractor seeking to retrieve the situation must explore other approaches.

In some instances a widely drafted force majeure provision might provide a contractor with some relief in these circumstances. For example under Clause 60.1 of the *NEC Form* compensation events include an event which stops the contractor completing the works, where the effect of price increases is to place a contractor in a position where it is unable to complete the relevant works. In extreme circumstances contractors may place reliance on this provision to argue that increased costs amount to a compensation event. In these circumstances a factual question may arise as to whether the relevant cost increase placed the contractor in a position where the works are stopped. Clearly this will be confined to extreme situations. By contrast the Government Form (Clause 84) defines *"special risks"* under its form in a more confined manner.

In many instances reliance on these contractual remedies will be of limited assistance to the contractor, who at best will only be able to recover an element of the additional cost to complete. A contractor faced with this difficulty will need to consider alternative, more radical approaches. These approaches are likely to involve an attack on the contract itself; for example, arguments regarding frustration or impossibility, or reliance on non-contractual doctrines such as misrepresentation. In the majority of cases these approaches will be difficult to advance, particularly in the light of a desire to give effect to the parties' bargain rather than to strike it down.

For further information contact:
timothy.hill@lovells.com
damon.so@lovells.com

Evaluating Disruption

By ***Kaymond H C Lam*** *BEng(Hons) LLB(Hons) MSc DIC MHKIE MICE CEng PCLL - Consultant, ADR Partnership Ltd*

Introduction

Anyone involved in the construction industry will be aware of the effect of disruption and delay on a contract. The consequence is that substantial inefficiency is introduced to the performance of the work resulting in increases in the contractor's labour and plant costs. Notwithstanding this, most standard forms of contract give no detailed guidance for the evaluation of disruption. This article reviews and comments on the widely adopted methodologies by which contractors can claim additional payment for loss of productivity resulting from disruption.

Where a disruption claim can be apportioned to individual events and good records are kept, every attempt should be made to establish a causal relationship between the disruptive event and the resultant additional cost.

Disruption

The term 'disruption' essentially means that the contractor's intended sequence, or method, or efficiency of performance as envisaged at the time of tender has been prevented, wholly or in part, from actual performance on site. Disruption can result as a consequence of a variety of factors including out-of-sequence working, late receipt of information, piecemeal access, unforeseen conditions, extra work and the adverse effects of trade stacking.

In terms of analysing disruption claims, it is essential for the contractor to establish that the planned orderly timing and sequence of events has been affected by compensable events under the contract. In this regard, it is necessary to carry out a labour reconciliation in order to isolate those causes unrelated to the employer's liability such as inclement weather, plant breakdown and the like. In order to establish a nexus between the disruptive events and resultant loss suffered, record keeping, with respect to what and when the work was carried out and what resources were actually used, is vital in order to undertake any form of disruption analysis.

The author considers below the following possible methods that are available for the purposes of assessing loss of productivity:

- Measured mile approach;
- Global approach;
- Comparison of actual productivity with allowances in the tender;
- Comparison of actual productivity with other similar projects; and
- Industry studies.

Measured Mile Approach

The most appropriate way to establish disruption is to apply a technique known as 'the Measured Mile' (*Whittal Builders Company Ltd. v Chester-le-Street District Council*). This technique involves a comparison of the productivity in terms of man-hours expended on an un-impacted part of the contract with that achieved on an impacted part (see **Figure 1**). However, care must be exercised to compare like with like. For example, it would be incorrect to compare work carried out in the learning curve part of an operation with work executed after that period.

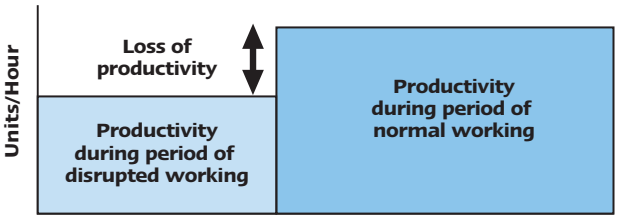

Figure 1: *The Measured Mile Approach*

'The measured mile' approach is nothing new to Hong Kong and has been used by the author in the preparation of a number of disruption claims for clients. It is an effective approach that can be used where the work is repetitive and isolated areas of disrupted and non-disrupted work can be identified, e.g. reclamation works, multi-storey offices and residential blocks or other similar projects that involve repetitive working arrangements.

Global Approach

There may be instances where competing causes of disruption to the works all occur at the same time, some of which are compensable and some of which are not compensable, thereby rendering it difficult, if not impossible, to link the cause and effect due to the complex interaction of events. The issue of a 'global claim' therefore arises within the context of a disruption claim. By the global method of calculation, a contractor may simply subtract the total estimated cost of performance from the actual cost of performance. In the case of *John Doyle Construction Limited v Laing Management (Scotland) Limited*, their lordships accepted in principle the use of a 'global claim' approach in order to evaluate a disruption claim on the basis that any material contribution to the causation of the global loss was not made by factors for which the innocent party had a legal liability.

This method is appropriate where the evidence of delay and disruption is overwhelming and where there is no significant default on the part of the contractor. However, if it can be shown that the contractor was partly culpable for any additional cost, the 'global claim' approach would likely fail entirely and in such situations it is recommended that other methods be adopted in order to quantify the disruption.

Comparison of Actual Productivity With Allowance in the Tender

In some cases, the use of 'the Measured Mile' approach may not be possible where, for example, an undisrupted 'test' section of work simply does not occur. For instance, the various trades and activities may be substantially different during the period of disruption when compared with the period of no disruption and/or the impact of the causes of disruption may affect all the relevant activities throughout the project duration; i.e. there may be no periods of normal working. In these circumstances, an alternative method of evaluating disruption is to compare the actual resources deployed on site with the manpower allowance in the tender. The disruption element being the difference between the two. However, this method is highly dependent on the adequacies of the provisions made in the tender and the question of reasonableness of the contractor's programme and original estimate also come into play.

Comparison of Actual Productivity With Other Similar Projects

Similar to the previous method, it may sometimes be difficult or impossible to identify a part or period of undisrupted working on some contracts. If this is the case, disruption can be evaluated by comparing the actual productivity with the productivity executed by the contractor on other similar projects. However, this method may not take into account the different (and sometimes unique) circumstances of an individual project or the difference in managerial, supervisory or organisational skills employed on the affected and unaffected projects. Nevertheless, it may be used in addition to the other methods described above in order to support other calculations or assessments.

Industry Studies

If the contractor fails to keep contemporary records to establish the causal connections, it might be acceptable to use model productivity curves and factors developed by a number of organisations from data collected on a range of projects (e.g. by the US Army Corps of Engineers, International Labour Organisation, or the Chartered Institute of Building etc).` These studies typically indicate, in graphical form, the loss of productivity that can be expected when a contractor encounters disruption such as out-of-sequence work, trade stacking, overtime working and the like.

Conclusion

The evaluation of loss of productivity claims is one of the most difficult subjects in the construction industry. Where a disruption claim can be apportioned to individual events and good records are kept, every attempt should be made to establish a causal relationship between the disruptive event and the resultant additional cost. The use of 'the Measured Mile' approach is the best method of assessment and is a technique favoured by the courts. If this cannot be done, a 'global claim' approach prepared in the manner of the *John Doyle* case and a comparison of actual productivity with allowances in the tender or other similar projects might also be permissible in quantifying disruption claims, but run a greater risk of failure. If all else fails, an assertion of some percentage of the total affected labour or plant costs based on industry studies may be possible. In such circumstances, the weight of such evidence is likely to be less than that associated with a method which supports the analysis of actual records and the contractor's failure to keep detailed contemporary records could prove to be very expensive.

For further information contact:
kaymond.lam@adrpartnership.com

ADR | *Diary*

Forthcoming Events

2008

3 Nov *Hong Kong Institute of Surveyors - Annual Dinner 2008, Grand Hyatt*

5 Nov *Lighthouse Club - Annual Dinner 2008, HKCEC*

6 Nov *Society of Construction Law – PRC Construction Law Issues, John Bishop*

7 Nov *Lighthouse Club – November Get Together, Delaney's 1st Floor, Wanchai*

17 Nov *Hong Kong Institute of Surveyors – Extensions of Time, Delay Analysis & Global Claims, Mr Nicholas Longley*

17 Nov *Hong Kong International Arbitration Centre – The Kaplan Lecture, HKIAC*

20 Nov *Chartered Institute of Arbitrators – Importance of Mediation in Arbitration in the Pursuit of Justice, Lord Woolf, Hong Kong Club*

27 Nov *Conference on Construction Law & Dispute Resolution for Construction Contracts (HKIAC, CIArb & SCLHK), Shangri La*

5 Dec *Lighthouse Club – December Get Together, Delaney's 1st Floor, Wanchai*

15 Dec *Society of Construction Law – Christmas Lawyers Libation*

19 Dec *Chartered Institute of Arbitrators – Part 6 of the 'Nuts and Bolts' series: "The Perfect Arbitration: An Encore"*

2009

9 Jan *Lighthouse Club – January Get Together, Delaney's 1st Floor, Wanchai*

ADR | Analysis

The Burden & Standard of Proof

Burden of Adducing Evidence

The first hurdle in any contested claim is to adduce sufficient evidence to persuade either the court or arbitral tribunal that there is a case to answer. If there is insufficient evidence, then there is no case to answer and the court or tribunal would likely dismiss the case. In a typical construction dispute sufficient evidence might include:

- oral evidence of statements made by the parties and their witnesses, including technical experts in quantum, programming and the like;
- documentary evidence produced for inspection by the court or arbitral tribunal such as correspondence, minutes of meetings, photographs, drawings, plans, instructions, labour returns, invoices and other contemporaneous records; and
- real evidence such as samples and other material objects produced for inspection by the court or arbitral tribunal.

The burden of adducing such evidence in a civil case is generally borne by the party making a statement or bearing the burden of proof.

Burden of Proof

The burden of proof in a civil case will normally lie with the party making the claim or defence to adduce sufficient evidence for the court or tribunal to find in their favour. Conversely, in a criminal trial, the burden of proof is borne by the prosecution.

If a party (or the prosecution) does not adduce sufficient evidence to support their case, then they will lose the issue. Success, therefore, depends on evidence or proof. What then, is an appropriate standard of proof that a party has to satisfy?

Standard of Proof

In criminal cases, the prosecution is required to satisfy the jury that the defendant's guilt is *"beyond reasonable doubt"*. However, in civil cases, the standard of proof is much lower and a court or tribunal makes its decision on a *"balance of probabilities"*. If the evidence is such that the tribunal can say, *"we think it more probable than not"*, then the burden is discharged, but if the probabilities are equal, it is not.

Construction Disputes

Applying these principles to construction disputes, a court or arbitral tribunal is left with having heard the evidence presented before them to weigh up, on a balance of probabilities, the rival arguments on the facts, or law, and decide which argument carries more weight. This is essentially a case of finding one version of the facts more likely than the other versions.

When deciding issues of fact, the outcome will likely be influenced by the probate value or weight attached by the court or arbitral tribunal to the evidence adduced by the parties. Some types of evidence will bear more weight than others, an obvious example being that first hand oral testimony is of higher weight than hearsay or second hand evidence.

For further information contact:
info@adrpartnership.com

ADR | News

End of Summer Sail

It has been the season of junk trips and ADR have participated in a number of very enjoyable jaunts to the far-flung reaches of Hong Kong with the site teams of Stonecutter's Bridge, Kowloon Southern Link and Eagle's Nest Tunnel. We trust that next year's junk season will be as action-packed!

Based in Hong Kong, ADR Partnership Limited is a dynamic practice of construction professionals providing specialist commercial and contractual services to the construction industry.

If you would like to discuss any of the articles published in this *Digest* or your project requirements, please contact James Longbottom, Patrick O'Neill or David Longbottom at ADR Partnership Limited on **(852) 2234 5228** or e-mail us at **info@adrpartnership.com**

ADR | Partnership
Partners in Alternative Dispute Resolution

ADR Partnership Limited
17A Seabright Plaza 9-23 Shell Street North Point Hong Kong
t: (852) 2234 5228 f: (852) 2234 6228
e: info@adrpartnership.com www.adrpartnership.com