

# Digest



Issue 7

Spring 2009

## In this issue:

- |   |   |
|---|---|
| 1 Welcome                                       | 7 ADR Review: Books                           |
| 1 Ascertaining the Cost of Termination          | 7 ADR Analysis: Adjudication Government Style |
| 4 Progress Reports                              | 8 ADR News                                    |
| 6 Principles of Cost Claims under GCC Clause 63 | 8 ADR Diary                                   |

## ➤ Welcome

In this edition of the *ADR Digest*, Patrick O'Neill considers the very topical subject of termination. Pat reviews the types of costs which might be considered in this highly complex and specialist area.

Our guest writer in this edition of the *ADR Digest* is Bryce Phillips, a specialist programming and delay analyst from his own firm BHP Planning Services Ltd. Bryce considers progress reporting and the factors which management should consider if they are to make the right decisions when planning ahead on projects.

David Longbottom reviews the basic principles that should be applied in the preparation of cost claims by considering the particular wording of the contract – in this case GCC Clause 63 of the Government of the Hong Kong Special Administrative Region's *General Conditions of Contract for Civil Engineering Works* (1999 Edition).

Our *ADR Analysis* series considers the Government of the Hong Kong Special Administrative Region's adjudication rules published in 2004. These rules are incorporated into some recently awarded Government contracts and provide the possibility for both interim and binding decisions on disputes without waiting until completion of the contract.

Finally, diverging somewhat from ADR, we have a short news section on the Department of Health's online Centralised Organ Donation Register which we urge you to spend a few moments of your time to visit at [www.organdonation.gov.hk](http://www.organdonation.gov.hk).

**James B Longbottom**  
Managing Director



## ➤ Ascertaining the Cost of Termination



By **Patrick O'Neill** BSc(Hons) DipArb FRICS MHKIS FCI Arb  
FHKIArb Accredited Mediator - Director, ADR Partnership Limited

### Introduction

Termination of a contractor's performance obligations and rights under a construction contract can occur for a variety of reasons and may arise as a consequence of the actions (or inactions) of one or other of the parties or as a result of events which are wholly outside the control of either party. However, irrespective of how and why the termination comes about, the financial consequences of termination can be a particularly difficult matter to resolve given the complexity of the commercial arrangements that are typically a common feature of the modern day construction contract. Whereas standard forms of contract can give the impression that the process of establishing the cost of termination is a relatively simplistic task, involving little more than ascertaining the value of works carried out to the date of the termination itself, the reality is that the matter of quantum is a very much more complex issue to resolve and the phraseology used in contract termination clauses often mask the considerable difficulties involved in ascertaining the true costs involved. This article considers some of the aspects of, and the difficulties involved in attempting to ascertain the cost of, a contractual termination.

### Contractual Versus Common Law Termination

Albeit we are concerned herein with the concept of contractual termination, and, in particular, instances of where the contract has been determined by the contractor himself for, say, failure to give possession of the Site by the

# Construction terminations are expensive and complicated matters to resolve and require the correct balance and interplay of both legal and quantum expertise ...

employer, common law determination is, nevertheless, a matter that needs to be kept in mind when considering quantum, since it is possible for both common law and contractual termination to co-exist at the same time and this principle has implications when considering the question of quantum.

Contractual termination can be restrictive from a quantum perspective in providing a party with no remedies beyond those that are expressly set out within the contract termination clause itself. The opportunities available to a contractor to recover payment under the contract are, therefore, limited by the drafting of the contract termination clause. Common law termination, on the other hand, does not depend on any express contractual provisions but relies on the guilty party having committed a serious or fundamental breach (termed a repudiatory breach), and which gives the innocent party the right to accept the repudiation, terminate the contract and be relieved from any further performance of that contract. Consequently, the quantum associated with common law termination is not restricted to what is stated in the contract and an entitlement to common law damages can therefore be maintained over and above any contractual entitlement. Examples of common law fundamental breaches might be matters such as a continued ongoing delay in granting the contractor possession of the Site or a continued refusal by the contractor to carry out works after the issuing of any requisite notices.

From a quantum perspective, a party's rights to the recovery of damages through common law is likely to be very much wider than that through the more restrictive contract clauses, and standard forms of contract often incorporate express provisions which have the effect of maintaining a contractor's common law rights. GCC Clause 88(3) of the *General Conditions of Contract for Civil Engineering Works*, 1999 Edition, is one such example and which provides:

*"Nothing contained in this Clause shall prejudice the rights of the Contractor to exercise, either in lieu of or in addition to the rights and remedies in this Clause specified, any other rights or remedies to which the Contractor may be entitled".*

In theory, however, contractual termination clauses may expressly exclude all common law remedies available to a party, by expressly stating that the contractual rights are to be the exclusive remedy for the breaches of contract in question. From a quantum perspective, therefore, a clear understanding of the extent to which the common law remedies have been excluded, if at all, is a vital starting point.

## The Importance of Procedure

It is normal to find contractual termination clauses encompassing stringent notification criteria for parties to submit notices, undertake actions or to comply with time

limits in accordance with what are often strict formal or procedural requirements that need to be complied with. To ensure that the contractor maintains his entitlement to any payment due under the contract, it is essential that the contractor complies fully with any and all contract notice requirements, since any failure to comply might have the effect of rendering the termination clause ineffective, from a quantum perspective.

Albeit contractual and common law termination can overlap with one another, then, given that the more serious examples of breach (employer's continued failure to make payment, failure to grant possession of the Site, etc.) would likely be serious enough to constitute a common law repudiatory breach in any event, it would be somewhat inconvenient for a contractor to fall foul of the contract notice provisions due to a mere technicality of an alleged non-compliance, and to then have to rely on his common law rights in an attempt to "resuscitate" a failed contractual termination. The important point to note, therefore, is that all of the formal requirements of the contractual termination clause need to be met by the contractor in order to ensure the maximum effective operation of the contractual clause from a quantum perspective.

## The Costs Involved

In the case of contractual termination, the contractor is likely to be entitled to, at the very least, any sums due to the contractor under the contract prior to the actual termination itself. Life is unlikely to be so straightforward, however, and the employer might well have counterclaims against the contractor, together with other alleged grounds for set-off, which the employer considers need to be taken into consideration.

In overall terms, however, consideration needs to be given to the following principle heads of cost as part of the quantum exercise of ascertaining the costs involved in termination.

## The Value of All Works Completed

The contractor would be entitled to payment for the value of all works properly completed under the contract up to the date of the termination (i.e. works completed in the absence of defects; etc.). For the as-built permanent works undertaken, this valuation exercise should not pose any particular problem since a re-measure of the as-built works would reveal the extent of contract and variation works actually completed prior to the date of termination. For preliminary items, however, the valuation exercise might not be so straightforward, since time related preliminary items may not have been evenly spread over the contract duration in the tender, meaning that a simple pro-rata valuation would generate an incorrect figure as at the cut-off date. Fixed price preliminary items would also require more detailed analysis as regards how such items should be valued for a project that has effectively been cut short.

Establishing the value of as-built temporary works as at the cut-off date would be more of a challenge, however, given the difficulties in valuing, say, a completed pipe pile cofferdam system as part of an excavation that was itself only 10% complete, and given that there is likely to be no identifiable rates and prices in the contract for the concerned temporary works.

Concerning the wider aspects of valuation, consideration would need to be given to the following:

- the valuation of all variations for additions, omissions and changes in quality, form, etc.;

- the valuation of variations to changes in sequence, methods and timing of works actually performed, etc.; and
- the value of work undertaken for all missing items that were not measured and valued in the pricing document.

### The Value of All Work Begun But Not Completed

Whereas the valuation of completed works might be relatively straightforward to value, significant difficulties can occur in valuing those aspects of both temporary and permanent works that remain incomplete as at the date of the termination. Whilst it might be a relatively simple task to value the works associated with, say, the reinforcement and formwork for R.C columns that were never actually cast, valuing the partly completed works associated with a fire alarm system, where both the software and hardware are still in a state of development, is likely to be a far more challenging matter from a valuation perspective, and particularly so where the contractor has a design obligation that is only part completed.

Further problems can then arise with regards determining the cost of materials, since the value of works begun but not completed must take into account those aspects of cost that the contractor has committed to spending, albeit the materials might not yet have been delivered to Site. Orders are likely to have been placed with both sub-contractors and suppliers for goods and services for works that may have just begun or that were programmed to commence in the near future and which need to be cancelled prematurely. There is an infinite number of permutations of cancellation charges, penalties, forfeited deposits and claims for damages from suppliers and sub-contractors that are likely to flow as the decision to terminate is gradually fed down the line to suppliers and sub-contractors. It is difficult to visualise any other way of establishing the eventual costs involved other than on a case-by-case basis. Valuation of this type of cost cannot be undertaken in accordance with any pre-set formula, but each supply contract or sub-contract would effectively need to be unwound and terminated one by one and with the final abortive and additional cost only gradually being established as the exercise progresses down the line. Claims for loss of profit are likely to be a recurring feature of such cancelled contracts and which would need to be resolved from both a legal and quantum perspective.



### Cost of Removal From Site

The costs associated with termination would necessarily include for the costs of removal from Site. Removal of resources from Site mid-way through a contract is clearly a far more complex logistical and expensive task than demobilising once a project is completed and consideration will need to be given to the legal question of ownership of items such as unfixed materials, goods in transit and half completed software that is still being developed offsite. The cost of removal from Site would likely include the removal of both plant and contractor's resources and with the increased cost of the whole logistics exercise effectively being an additional cost to the contractor that would otherwise not have been incurred.

### Direct Loss and/or Expense Caused by the Termination

A final head of cost that would need to be considered is the additional loss and/or expense caused by the termination itself. One can easily envisage termination mid-way through a contract leading to substantial amounts of additional work both as a result of the contractor physically demobilising from Site and as he unwinds his commercial positions. Additional effort would therefore be needed in respect of matters such as:

- additional work involved in making the Site safe prior to actually leaving Site;
- additional commercial involvement in resolving the commercial position of the whole project account; and
- additional project management and engineering involved in making arrangements for leaving Site prematurely.

This additional management of change involvement is likely to be substantial and is an additional management and head-office cost that would otherwise not have been incurred, but for the termination and would demand involvement from the contractor's commercial, project management, engineering, planning and programming, safety and off-site head-office teams.

### Summary

The above issues are just a sample of the considerations that might need to be given to the matter of termination of a construction contract. The unwinding of a commercial transaction which is as complex as a building or civil engineering contract can be a massive undertaking depending on the complexity of both the procurement methods adopted, and the complexity of the commercial arrangements that exist between the client and contractor, and, in turn, between the contractor and his sub-contractors and suppliers. Establishing the costs involved in termination can range from, at one end of the scale, the valuation of completed works performed under the contract, to, at the other end of the scale, the quantum of damages for loss of potential future business due to adverse negative publicity following the termination, and which therefore necessarily involve questions of both legal and commercial aspects to be considered. Construction terminations are expensive and complicated matters to resolve and require the correct balance and interplay of both legal and quantum expertise if the matter as a whole is to be resolved with commercial satisfaction. ⚡

For further information contact:

[patrick.oneill@adrpartnership.com](mailto:patrick.oneill@adrpartnership.com)

# Progress Reports



By **Bryce Phillips** - Director, BHP Planning Services Limited

## The Problems

Is sufficient progress being made on your project to achieve the contractual completion dates? This is not as straightforward a question as it may first appear. Different opinions may surface on how complete activities actually are. In addition, there are often cases where opinions vary on whether activities are on the planned or actual critical paths and debates can ensue on what all this uncertainty means in terms of the overall progress achieved and when completion might occur.

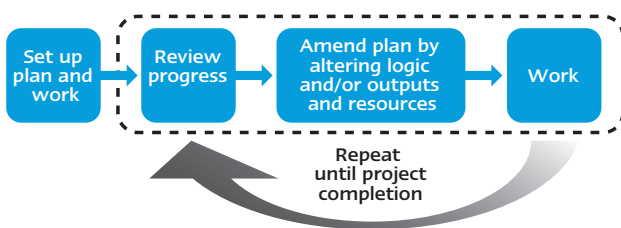
My experience tells me that many progress reports made in the early stages of projects suffer from over-estimates of the work completed and generally under-estimate the effect of progress shortfalls. Regularly, when progress positions are being reported, realism succumbs to optimistic completion targets.

Of course, the early optimism has to eventually give way to realism as the project nears completion and parties belatedly recognize that the likely end date will overrun the estimations made in the progress reports. But, by this stage, management effort maybe ineffective in trying to condense the outstanding work into the short period left. The early misplaced optimism may leave employers, contract administrators and contractors with egg on their faces as completion dates are missed. And then the blame game starts.

## How the Problems Arise in Practice

On many projects, the process of regularly reporting what progress has or hasn't been achieved is usually carried out by the contractor. This is undertaken as part of their normal planning cycle of: plan, work, review progress, amend plan, work; etc (see **Figure 1**). The resultant progress reports and updated programmes are usually included in the monthly project reports.

**Figure 1: Normal Planning Cycle**



This reviewing process requires the actual progress on each and every activity to be accurately recorded, usually, each month. This progress information, coupled with any changes to the remaining activities is then analyzed to show if the contractor is ahead, on, or behind programme and is used to calculate new start and finish dates for each remaining activity.

Most planning software will also generate an overall progress position of 'X' days ahead or behind programme. However, in many cases the calculated position is ignored and the contractor, for whatever reason, merely states a percentage complete and/or a progress position. Frequently this is inaccurate and underestimates the real position.

As an example, take a hypothetical project where the contractor is building four office tower buildings and where its programme only indicates on-site activities. The contractor might include separate schedules in each monthly report for off-site activities such as: statutory submissions, subcontractor's drawings and material submissions but these are usually not directly linked to the programme and so do not figure in the calculation of overall progress.

Let us assume the contractor has made good progress on the structure and that this situation has been reflected in the progress reports. **Figure 2** below might be the typical progress position as the structure nears completion.

**Figure 2: Progress Position of Structure**

Structure	Progress Position
<b>RC Frame</b>	
Tower A	+3 weeks
Tower B	+3 weeks
Tower C	+4 weeks
Tower D	+6 weeks
<b>Steel Frame</b>	
Tower A	+1 week
Tower B	+1 week
Tower C	+4 week
Tower D	+5 weeks
<b>Average</b>	+3½ weeks
<b>Worst</b>	+1 week

As the structure proceeds, however, the off-site activities such as ordering cables, approval of shop drawings for the building services, lift and escalator installations, together with approval for the cladding system before manufacture can proceed may all be steadily losing time.

For many months the contractor's stated progress position will have emphasized and reflected the good on-site work (and be reporting 3½ weeks ahead of programme) but the poor progress of the off-site activities will not have been incorporated into the calculation of overall progress achieved. The 'real' situation is shown in **Figure 3**.

**Figure 3: Overall Progress Position**

Structural Activities	Weather-tight Activities	Internal Trades & Building Services
Progress Position	Progress Position	Progress Position
<b>RC Frame</b>		
Tower A +3 wks	Curtain wall -4 wks	Lifts -2 wks
Tower B +3 wks	Arch features -6 wks	Escalator -2 wks
Tower C +4 wks	Window wall -8 wks	Electrical -6 wks
Tower D +6 wks	Cladding -12 wks	MVAC -10 wks
<b>Steel Frame</b>		
Tower A +1 wk	Louvres -8 wks	Fire services -8 wks
Tower B +1 wk	Roof coverings -8 wks	Plumbing & drainage -4 wks
Tower C +4 wks	Entrance Doors -6 wks	Brickwork -4 wks
Tower D +5 wks		Plaster & screeds -4 wks
		Painting -6 wks
<b>Average</b>	+3½ wks	-7 wks
<b>Worst</b>	+1 wk	-12 wks

In such situations, when the structure is completed, the contractor will be forced to take account of the trades that have been falling behind and so the progress position appears to 'jump' backwards (in our example from 3 weeks ahead to 5 or 7 weeks behind programme). In reality, time was already lost but just not properly reported.

In addition, the way progress is recorded each month as the project activities near completion will have an impact on management's effectiveness in dealing with problems.

This is usually done in one of two ways:

- to stick with the original set of activities and faithfully record percentages complete each month; or
- report the original activity as complete and to create new activities for the small areas of work left to be completed.

Both have their drawbacks.

The first method does not give management sufficient feedback about why these 'sticky' percentages are not progressing or by when these uncompleted activities need to be completed by in order to avoid impacting upon the completion date. The programme reports become clogged up with these unwieldy, lengthy, unchanging activities. Complacency creeps in when assessing whether these activities are getting nearer to being critical or continue to have float. When the second method is used and 'new' activities are created, it is often difficult to ascertain the logic of the timeframe for the completion of these small areas of work. In many cases, these activities are simply shown as being able to start immediately after the programme analysis data date. As the months pass, more of these small planned activities appear and merely get pushed later and later by the advancing analysis dates. This creates a 'bow-wave' effect of small activities being shown just after the analysis data date. In this scenario it is also hard to judge where the critical path for the remaining activities actually is, and management (contractors and employers) may not get clear messages from the updated programmes and progress reports.

### Progress Positions can be Manipulated - the Devil is in the Detail

When progress information is inputted and the original logic is maintained, the projected end date can indicate that the project will overrun.

For example, an employer delaying event or poor progress may adversely impact on progress and cause an overrun to the contract completion dates. However, the effects of poor progress can be artificially manipulated by reducing the duration of the remaining activities or altering the original logic to overlap trades more than previously allowed. The end result is that delays to the contract completion dates caused by poor progress are artificially hidden.

All parties involved with the project should take time to fully understand the amount of progress made, or not made each month. They should also appreciate how the shortfall in progress is going to affect the anticipated completion date(s).

### One Method to Avoid the Progress Reporting / End Date Assessment Problems

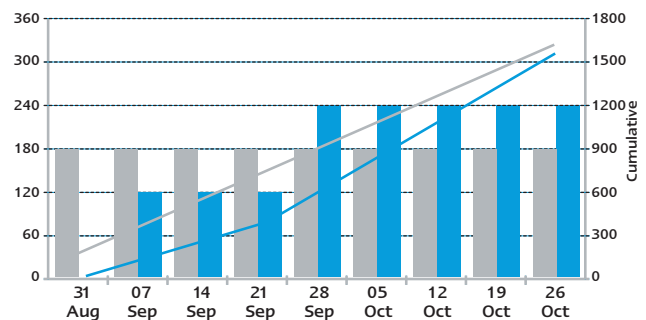
Napoleon Bonaparte once said "Un bon croquis vaut mieux qu'un long discours," or "A good sketch is better than a long speech".

Clear graphs generated from hard data are better than unwieldy progress reports and updated or revised programmes.

Generally, planners can produce graphs showing what was planned or expected for every aspect of the project: design, off-site manufacture, deliveries and on-site work. The actual progress can then be measured or compared against this plan. It is then an easy matter for management to determine if, where and when action is required to help keep the project on schedule.

Figure 4 shows a theoretical example of an Earned Value Analysis (EVA) chart. This chart shows at a glance that the subcontractor started a week late and due to having only one production line, did not produce sufficient output, falling further behind in each of the first four weeks.

Figure 4: Earned Value Analysis Chart - Production Increased



By acting on the projections made in the first 4 weeks, management realized that another production line was required to ensure the subcontract could be completed on time.

### Conclusions

In preparing and reviewing progress reports, management should consider the following factors:

- whether the number of days ahead or behind programme are being properly reported;
- whether the report considers the big picture; i.e. are all elements of the works including off-site activities properly accounted for in the overall progress report;
- how progress is being reported for nearly completed areas; i.e. the percentage complete or the addition of new activities for small uncompleted areas - both have drawbacks; and
- whether changes have made to activity durations and logic to manipulate progress.

The progress reports, once generated, need to highlight problem areas and assist management in taking decisions to rectify progress shortfalls.

Unless management decisions result, the report will have achieved little.

Finally, the important messages that management need to act on, should not be lost in a mass of detail - remember that a picture is worth a thousand words. 📌

For further information contact:  
[brycep@netvigator.com](mailto:brycep@netvigator.com)

# Principles of Cost Claims Under GCC Clause 63



By **David S Longbottom** BSc(Hons) PgD(Law) MRICS MCI Arb AMInstCES - Director, ADR Partnership Limited

## Introduction

This article establishes the importance of some fundamental principles in the formulation of Cost claims made pursuant to the Hong Kong Government General Conditions of Contract GCC Clause 63. Guidance in formulating a Cost claim is found in GCC Clause 63, which provides:

*"If upon written application by the Contractor to the Engineer the Engineer is of the opinion that the Contractor has been or is likely to be involved in expenditure for which the Contractor would not be reimbursed by a payment made under any other provision in the Contract by reason of the progress of the Works or any part thereof having been materially affected by: ... [there then follows a list of compensable events]... then the Engineer shall ascertain the Cost incurred and shall certify in accordance with Clause 79."*

## The Engineer's Duties

The Engineer's duty to "ascertain the Cost incurred", is a mandatory duty to determine the expenditure to which the contractor is entitled and the Engineer has no choice in the matter (i.e. pursuant to GCC Clause 63, the Engineer "**shall ascertain the Cost incurred**" [emphasis added]).

## Ascertain

However, the Engineer's duty to "ascertain" is not considered as straightforward as a cursory examination of the definition of "ascertain" would suggest. Dictionary definitions refer to, ascertain as, "finding out for certain" and to "make certain, exact or precise". This definition was followed in the case of *Alfred McAlpine Homes North Ltd v. Property & Land Contractors Ltd* (1995) (concerned with the JCT conditions of contract), in which Judge Humphrey Lloyd QC defined "to ascertain" by the much-quoted phrase "to find out for certain". As regards "to ascertain", His Honour continued:

*"... and it does not therefore connote as much use of judgment or the formation of an opinion had "assess" or "evaluate" been used. It thus appears to preclude making general assessments as have at times to be done in quantifying damages recoverable for breach of contract."*

Hence, following dictionary definitions and the above commentary often leads to the conclusion that if the contractor cannot prove every cent of his claim, then he is entitled to nothing as it is not possible under GCC clause 63 to make 'estimates'. However, upon further references to the Engineer's duty to "ascertain" this conclusion is considered wrong.

In the case of *Ascon Contracting Limited v. Alfred McAlpine Construction Isle of Man Limited* (1999), when the logic of a number of earlier court judgments was followed, it was determined that absolute certainty (the strict proof required in criminal courts) is not necessary in "substantial construction industry litigation". His Honour Judge Hicks QC observed:

*"Although he included it under this head Mr Darling also*

*raised what is conceptually the wholly distinct objection that there was no direct factual evidence of any of the expenditure. It is true that technically the entries in Ascon's accounting system, and even the invoices and wage records which Mr Kirkwood did inspect, are hearsay evidence. It is, however, unheard of in my experience for strict proof, of the kind required (apart from statutory exceptions) in criminal courts, to be regarded as necessary in substantial construction industry litigation."*

Therefore, following the strict definition of ascertain can be slightly misleading as regards the Engineer's duty to assessing a Cost claim, equally so can the requirement for "strict proof" for all aspects of a cost claim.

## Cost Incurred

As regards "Cost incurred", Cost is defined under GCC Clause 1(1) as:

*"'Cost' means expenditure reasonably incurred including overheads whether on or off Site and depreciation in value of Constructional Plant owned by the Contractor but excluding profit."*

"Expenditure" means:

*"the expenditure of funds ... paying out, outlay, disbursement, doing out".*

Following the definition of Cost, profit should be excluded from the cost claim and it is considered that an assessment of Cost would follow the principles of recovering damage under common law. To this end, Parke B in *Robinson v Harman* (1880) advised:

*"The rule of common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."*

In light of the above, following GCC Clause 63 and the definition of Cost, it is considered that the sometimes adopted practice by contractors of basing prolongation claims on the preliminaries priced in the Bills of Quantities is not compliant with the provisions of GCC Clause 63, as the rates in the Bills of Quantities are estimates and not "expenditure" or "Cost incurred".

## Expenditure Reasonably Incurred

In addition to the above, following the definition of Cost in GCC Clause 1(1), expenditure is limited to that "reasonably incurred". It is considered expenditure reasonably incurred would follow the principle of assessing damages, particularly the duty to mitigate losses, where the innocent party is not permitted to payment for "wasted" performance, as in the decision of *White and Carter (Councils) Ltd v. Mc Gregor* (1962). Hence, just because expenditure has been incurred by the contractor it does not necessarily follow that this Cost is automatically recoverable by the contractor under GCC Clause 63.

## Conclusion

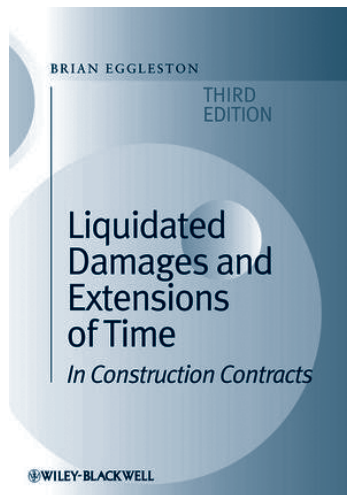
In summary, for a Cost claim to be valid due consideration to the method of calculating costs must to be given. To this end, the method adopted must be appropriate and take due recognition of the particular wording of the contract. ❖

For further information contact:  
[david.longbottom@adrpartnership.com](mailto:david.longbottom@adrpartnership.com)

## Books

### Liquidated Damages and Extensions of Time in Construction Contracts, Third Edition

By Brian Eggleston



This excellent and highly readable book was first published in 1992 and updated by a second edition in 1997. This third edition published in February 2009 provides an update on the case law that has taken place over the last ten years and includes extracts from important judgments. Expanded chapters are included for:

- penalty clauses and the developments that have taken place since the important Hong Kong case of *Phillips Hong Kong Ltd and Attorney General of Hong Kong* (1993);
- the effects of conditions precedent and time bars including the recent cases of *Gaymark Investments Pty Ltd and Walter Construction Group Ltd* (1999), *City Inn Ltd v Shepherd Construction Ltd* (2003) and *Steria Ltd and Sigma Wireless Communications Ltd* (2007); and
- the complexities of causation and the various approaches adopted.

A new chapter is also added on delay analysis which briefly reviews topics such as the critical path, float and methods of delay analysis.

This is a highly recommended and must have text for both construction professionals and lawyers alike. ❄️

**Publisher:** Wiley-Blackwell, February 2009  
**ISBN:** 978-1-4051-1815-6  
**Price:** US\$139.99

## Adjudication Government Style

Adjudication is when an impartial expert is appointed to decide on a dispute put before him at the time when the dispute arises. Adjudication is often sold as being simple, speedy and a more effective method of resolving disputes and one that can be carried out at any stage in the contract. In the UK the right to refer disputes to adjudication is provided for under statute in the Housing Grants Construction and Regeneration Act 1996.

In Hong Kong, the Government of the Hong Kong Special Administrative Region has recently introduced a contractual adjudication scheme into a number of its contracts. The provisions provide that the decision of the adjudicator is final and binding upon the parties and enforceable as such unless and until either the dispute:

- has been settled; or
- has been referred to arbitration and an arbitral award has been made or a settlement reached.

The process is governed by *The Government of the Hong Kong Special Administration Region's Construction Adjudication Rules, 2004* ('the Rules'). Key points of the Rules are:

- **Appointment of the adjudicator:** The parties agree in accordance with the Rules a mutually acceptable person willing and able to act as sole adjudicator. If agreement cannot be reached on the adjudicator, there are provisions for the HKIAC to appoint an adjudicator.
- **Procedure:** All procedures agreed by the parties are to be adopted by the adjudicator. Where procedures have not been agreed by the parties, the adjudicator has the widest discretion permitted by the Rules and law to determine the procedures of the adjudication and to ensure the just, expeditious and economical determination of the dispute (e.g. whether the process should be by documents only, the need for a hearing, provision of expert evidence, etc).
- **Decisions:** The procedure is fast track – a decision with reasons is to be made within 56 calendar days of the appointment of the adjudicator – any extension by the adjudicator to the process is limited to 28 calendar days unless both parties agree otherwise.
- **Costs:** Unless the parties have agreed otherwise, the decision will include the "proportions in which the parties shall pay [the adjudicator's] fees and expense" and the adjudicator may order that one party pay "all or part of the legal or other reasonable costs of one party reasonable in amount and reasonably incurred." ❄️

For further information contact:  
[info@adrpartnership.com](mailto:info@adrpartnership.com)

## ➤ Bowling Fun Day

In March 2009, the RICS (HK) Matrics Committee's 'Bowling Fun Day' was sponsored by ADR Partnership Limited.



## ➤ Organ Donation

It is now over a year since the four year old son of one of ADR's directors had a combined kidney and liver transplant. This operation has enabled this young man to now attend kindergarten and to enjoy a normal life.

Organ donation is the greatest gift for patients, their family and friends. However, in Hong Kong there remains a chronic shortage of deceased donors. As of the end of 2008, the number of patients awaiting transplantation was:

Kidney	1,568	Lung	4
Liver	106	Heart/lung combined	3
Kidney/liver combined	1	Cornea	400
Heart	13		

The longest wait for deceased kidney transplantation is 28 years.

To this end, the Department of Health has set up an online Centralised Organ Donation Register to make it more convenient for prospective donors to voluntarily register their wish to donate organs after death, and for such wishes to be more reliably recorded. This only takes a moment of your time and can be done quickly and easily by visiting: [www.organdonation.gov.hk](http://www.organdonation.gov.hk)

# ADR | Diary

## ➤ Forthcoming Events 2009

- 18 May** Society of Construction Law Hong Kong - 'NEC Contract Time Provisions' - Dr Chris Jackson, The Hong Kong Club
- 23 May** Lighthouse Club Annual Ball - Hong Kong Convention & Exhibition Centre, Wanchai
- 25-26 May** Lighthouse Club - Two Day Seminar and Exhibition, The Hong Kong Convention & Exhibition Centre, Wanchai
- 3 Jun** British Chamber of Commerce - Breakfast Briefing 'MTR's 5 Railway Extension Projects' - Russell Black, The Hong Kong Club

- 4 Jun** ADR Partnership Limited - Drinks - The Library, The China Club
- 5 Jun** Lighthouse Club June Get Together - Delaney's 1st Floor, Wanchai
- 16 Jun** Hong Kong Institute of Arbitrators - 3rd Regional Arbitral Institutes Forum Conference, JW Marriot Hotel
- 16 Jun** Chartered Institute of Arbitrators (East Asia Branch) - Fellow's Cocktail Party, The Hong Kong Club
- 3 Jul** Lighthouse Club July Get Together - Delaney's 1st Floor, Wanchai
- 3 Jul** Hong Kong International Arbitration Centre - ADR in Asia Conference 2009, The Four Seasons Hotel

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](mailto: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](mailto:info@adrpartnership.com) [www.adrpartnership.com](http://www.adrpartnership.com)

ADR Partnership Limited and the contributors to ADR Digest do not accept any liability for any views, opinions or advice given in this publication. Readers are strongly recommended to take legal and/or technical specialist advice for their own particular circumstances.