ADR | Partnership
Partners in Alternative Dispute Resolution

Digest

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Welcome

In this edition of the *ADR Digest*, Kaymond Lam briefly reviews the provisions of the Arbitration Ordinance relating to challenges for misconduct and discusses two recent decisions of the Hong Kong Courts that involved substantial judicial discussion about the principles of *"real likelihood of bias"* and *"duty to disclose."*

Our guest writer in this edition of the *ADR Digest* is Nicholas Longley, Partner of law firm JSM. Nick considers a series of recent cases relating to co-insurance and the dangers of relying upon project insurance policies, particularly when the policy has been purchased by other project participants.

In civil engineering contracts it is not unusual for the actual quantities of work to vary from those stated in the bills of quantities. James Longbottom considers circumstances which may give rise to a re-rate under the *General Conditions of Contract for Civil Engineering Works* (1999 Edition) and what the position is if the change in quantities results in the contractor making an excessive profit or loss.

Our *ADR Analysis* series considers without prejudice provisions in contracts and clarifies what this term actually means and under what circumstances it should be used.

As part of our continued growth within the region, we extend a warm welcome to David Steed to the ADR team - see our *News* section for further details.

Finally, we would like to wish you and your family a happy, healthy and prosperous New Year of the Ox.

Patrick J O'Neill
Director

Challenges in Arbitral Proceedings

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

Introduction

In arbitration proceedings, it is the duty of the arbitrator to act fairly, but also be seen to be acting fairly, to both parties and meet the required standards of equality, independence and impartiality throughout the reference. This *"non-waivable mandatory principle"* is enshrined in section 2GA(1)(a) of the Arbitration Ordinance which imposes a statutory duty on the domestic and international arbitral tribunals *"to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents".*

Where there are circumstances giving rise to justifiable doubts as to the impartiality or independence of the tribunal or that an arbitrator could not have fairly determined the issues on the evidence and arguments presented to him, a party can apply to the court to set aside an award or to remove the arbitrator.

In this article, the author briefly reviews the provisions of the Arbitration Ordinance relating to the challenge of arbitrators and discusses two recent decisions of the Hong Kong Courts in *Gingerbread Investments Ltd v Wing Hong Interior Contracting Ltd.* [2008] 2 HKLRD 436 and *June Science Information Technology Co Ltd. v ZTE Corp* [2008] 4 HKLRD 776 that involved substantial judicial discussion about the principles of *"real likelihood of bias"* and *"duty to disclose"*.

...the correct test was whether an objective, fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased.

Challenges for Misconduct, Impartiality and Independence

For domestic arbitral awards, section 25 of the Arbitration Ordinance empowers the court to remove an arbitrator or umpire for misconduct or where he has misconducted the proceedings, together with an order that the award be set aside. The notion of 'misconduct' here includes, but is not limited to, failure to decide all the matters referred by the parties to the arbitrator, behaviour contrary to public policy, unfair behaviour, acting in breach of the rules of natural justice and/or taking a bribe from either party. Removal of an arbitrator may also take place where an allegation of impartiality and fraud is alleged. Under section 26 of the Arbitration Ordinance, if any dispute involves such an allegation, the court itself is to determine the matter and may order that the arbitration agreement shall cease to have effect, even ordering the revocation of the authority of the arbitrator or umpire insofar as the substance of that allegation is concerned.

In international arbitration, if a party wishes to challenge an arbitrator, in the absence of an agreed procedure for challenging arbitrators, the party must send a written statement of the reasons for the challenge to the arbitral tribunal within 15 days of becoming aware of the constitution of the tribunal or of becoming aware of the existence of one of the stipulated grounds for challenge (article 13(2) of the Model Law). A challenge for misconduct arises only under the domestic regime. There is no equivalent provision in the Model Law, where the only ground for challenge is under article 12(2) of the Model Law on the basis that circumstances give rise to justifiable doubts as to impartiality and independence or if the arbitrator does not posses the requisite qualifications. The notion of 'independence' is subject to interpretation and clearly covers economic independence and close family relationship. Article 7(2) of the ICC Rules requires disclosure of:

> *"any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence* ***in the eyes of the parties****".*

Recent Cases

The case of *Gingerbread Investments Ltd v Wing Hong Interior Contracting Ltd.* [2008] 2 HKLRD 436 concerns an application to the Court of First Instance by an originating motion to set aside an Order for Directions and/or to remove the arbitrator for misconduct under section 25 of the Arbitration Ordinance. Following a contested discovery application at an interlocutory stage of the arbitration, the arbitrator ordered Gingerbread to give discovery of a number of documents and to demand such from its parent company Cheung Kong (Holdings) Ltd. and Citybase (another of Cheung Kong's subsidiaries). The arbitrator's reasoning was that he was entitled to order Gingerbread to produce the documents sought because these companies were agents for Gingerbread in relation to the development in issue.

Gingerbread's complaint was that the arbitrator had relied upon *"secret evidence"* of the alleged agency relationship and that error amounted to misconduct. Gingerbread considered that in light of a lengthy and detailed *"reasons"* for his decision, the Order for Directions should be treated as an award that was capable of being set aside by the Court pursuant to section 25(2) of the Arbitration Ordinance.

By drawing a distinction between procedural matters, which were not reviewable by the Court, and non-procedural matters, which were reviewable under section 25 of the Arbitration Ordinance, Burrell J concluded that, notwithstanding its length and detail, the best test was to consider the subject matter. In this case, the Order for Directions concerned discovery of documents, which was a pre-hearing interlocutory application and was not a determination of a substantive issue. Accordingly, the Court held that it had no power to set it aside.

The Court went on to consider the test for the removal of an arbitrator and referred to the High Court's decision in *Asia Construction v Crown Pacific* [1988] 44 BLR 135, which states:

> *"Do there exist grounds from which a reasonable person would think there was a real likelihood that the arbitrator could not, or, would not, fairly determine the issue in question on the evidence or arguments to be adduced before him?"*

A *"real likelihood"* necessitates cogent and persuasive evidence that a just and fair conclusion could not be reached if the arbitrator were not removed. On a misconduct application, it is insufficient to simply identify an error of law or fact. The Court held that this proportion extended to errors in the admissibility of evidence (*K/S A/S Bill Biakh & Others v Hyundai Corp* [1988] 1 Lloyd's Rep 187 at p.189). In other words, *"a mere error"* could not be misconduct, but relying on utterly irrelevant evidence might provide evidence of misconduct. When the Court looked at the material available to the arbitrator, it dismissed the applicant's originating motion on the ground that there was evidence in support of the inference that the arbitrator had drawn and that Gingerbread had not been able to identify errors which could merit the arbitrator's removal.

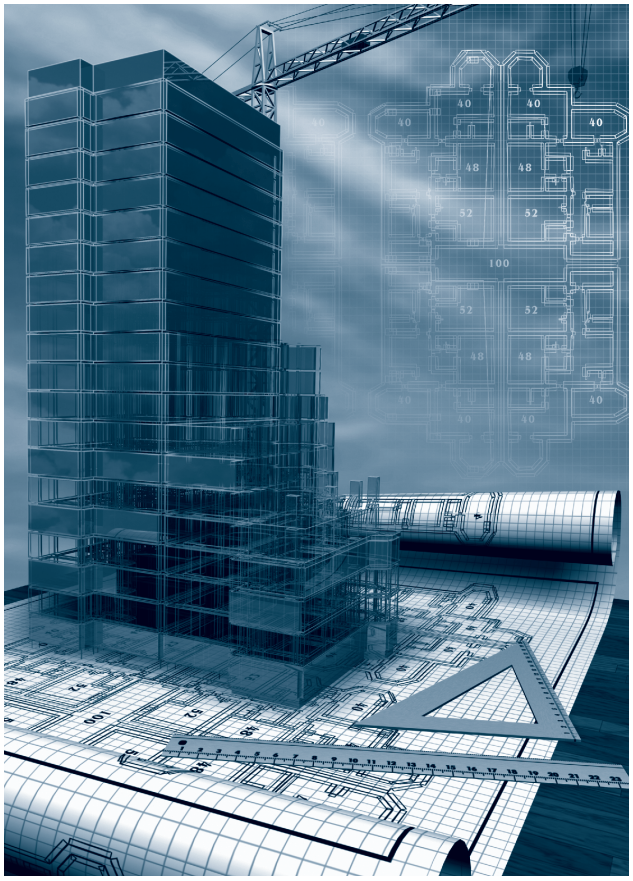
In the other case of *June Science Information Technology Co. Ltd. v ZTE Corp* [2008] 4 HKLRD 776, the Court was concerned with a challenge of the arbitrator's impartiality and independence under article 12 of the Model Law. The issue instigating the proceedings was an allegation that the arbitrator had failed to disclose his personal and professional relationship with the solicitor of one of the parties and had refused to answer enquires as to the nature of such relationship during the course of the arbitration. In these circumstances, the applicant had accused the arbitrator of actual bias, partiality and lack of independence.

In determining an issue of apparent bias on the part of the arbitrator, the parties agreed that the correct test was whether an objective fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased (*Director General of Fair Trading v Proprietary Association of*

Great Britain [2001] 1 WLR 700). The test was not whether the particular litigant thought or felt that the judge had been or might have been biased (*Tayor v Lawrence* [2002] 2 All ER 353).

As to the objections arising from an association between an arbitrator and a legal representative, the Court held that there must be a cogent and rational link between the association and its capacity to influence the arbitrator's decision before concluding that the arbitrator might not bring an impartial and unprejudiced mind to the resolution of the dispute. It was the capacity of the association to influence the decision rather than the association as such that was disqualifying (*Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd & Another* [1996] 135 ALR 753). In evaluating whether such an association had the capacity to influence, the objective onlooker would be expected to be aware that ordinary contacts between the judiciary, i.e. arbitrators, and parties' representatives should not be regarded as giving rise to a possibility of bias (*Taylor v Lawrence* [2002] 2 All ER 353). This is clearly the guideline adopted by the Court to deal with an inescapable reality that there are frequent social contacts of a would-be arbitrator and the legal profession within the small circle of international arbitration.

The Court went on to draw a distinction between circumstances which gave rise to a duty to disqualify and those which gave rise to a duty to disclose. A failure to disclose information may give rise to a reasonable apprehension of bias and undermine public confidence in the integrity of, and the administration of justice by, the tribunal concerned. Further, the facts to be disclosed were not confined to those warranting or perceiving to be warranting disqualification but those that might found or warrant a bona fide application for disqualification (*Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd & Another* [1996] 135 ALR 753). There being the case that the duty to disclose must again be assessed with reference to the fictitious fair-minded and informed observer the Court referred to the case of *Taylor v Lawrence* [2002] 2 All ER 353, wherein Lord Woolf CJ held that a judge was not required to raise his personal relations with the claimant's solicitors and it was a mistake to do so. It was unthinkable that an informed observer would regard it as conceivable that a judge would be influenced to favour a party with whom he had no relationship merely because that party happened to be represented by solicitors who were acting for the judge in a purely personal matter in connection with a will.



Applying these principles to the present case, the Hong Kong Court was of the view that it was equally unthinkable that an objective and fair-minded observer, informed as to the relevant facts and circumstances, would consider that the social relationship between the arbitrator and one party's solicitor would create a real danger of bias. Accordingly, the arbitrator was not obliged to answer questions or otherwise explain the relationship.

Comment

It can be seen from the two recent cases above that there is a high hurdle to overcome before the Court can be satisfied that the arbitrator is guilty of misconduct, impartiality or lack of independence. The attitude taken by the judiciary is to avoid interfering in arbitral proceedings so far as is reasonable and to only step in where there are clear breaches of natural justice or there has been a serious miscarriage of justice under the Model Law and/or the Hong Kong Arbitration Ordinance. This prevents parties using challenges as a 'backdoor' to circumvent the finality of the arbitral process.

If a party wishes to bring a challenge under this head, he must raise it at the earliest opportunity, if possible at the start of the proceedings. Otherwise, a challenge delayed until the proceedings are advanced will inevitably be seen as a tactical device to delay and disrupt proceedings.

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Are You Insured?

By **Nicholas Longley** - *Partner, JSM*

Introduction

We all know that Insurance Policies are often difficult to read and knowing what or even who is insured can all too often be unclear. These difficulties are compounded by the fact that often there is a mismatch between the wording of the insurance policy and the underlying construction documents.

A series of recent cases relating to co-insurance has highlighted this difficulty. This article will review those cases and will end with a warning to anyone who wishes to rely upon project insurance policies, particularly when the policy has been purchased by other project participants.

...Insurance Policies are often difficult to read and knowing what or even who is insured can all too often be unclear.

CAR Insurance Policies and Co-Insurance

Damage to the Works is usually insured under Contract Works or Contractor's All Risks (CAR) insurance policies. These policies are generally taken out either by the employer or the main contractor and often contain a wide definition of the Insured. A typical definition is as follows:

> 'Insured' means the Owner and/or all Contractors and/or all sub-contractors of every tier and/or consultants of every tier employed by the aforesaid Owners and Contractors for all their respective rights and interests.

The purpose of such a wide definition is to ensure that all the projects participants are insured under the same policy so as to prevent cross claims between the contractor and its sub-contractors. In principle, the risk of damage to the Works is transferred to the Insurer. Further, so the theory goes, in the event of a claim, the Insurer cannot exercise its normal rights of subrogation to use the Insured's name to sue other contractors who may have caused the loss. The loss stays with the Insurer.

The Insurable Interest Problem

So far, so good. Well, no. Insurance lawyers have struggled to understand how this might in fact work. The main difficulty is that a basic principle of insurance law states that a person can only insure something in which he has *"an insurable interest"*. In other words, generally, you are only able to insure something that you own or possess on behalf of others.

It is difficult to see how it could be said that one sub-contractor owns or has possession of works being carried out by another sub-contractor when in reality the only bond between the two is that they were employed by the same company and work on the same site.

The second difficulty is that if one sub-contractor causes damage to property belonging to a second sub-contractor, their insurance claims could be different. The first contractor's claim is for an indemnity for its liability for the damage. The second sub-contractor's claim is for property damage. Both might be insured under the same overall policy, but they are subject to different conditions.

Twenty years ago, the English courts circumvented these problems by stating that all sub-contractors have an *"insurable interest"* in the entire construction works purely on the basis of their role within the project.[1]

...it is not safe to assume that you are properly insured simply because you are involved with the project.

The Policy Runs Out...

However, as soon as these decisions are analysed in any detail, it becomes apparent that they are not built on strong legal foundations. In *Deepak Fertilisers v ICI Chemical* [2] for example, the English Court of Appeal attempted to identify the insurable interest. The court said the insurable interest was loss suffered as a result of the loss of opportunity to do work if the Site was destroyed by fire.

However, the claims in this case related to damage to the plant caused by an explosion which occurred after completion and of course, by that date, the contractor had completed its work and therefore had no further pecuniary interest in the construction works or the plant. It followed, therefore, that at the time of the loss, the contractor did not have an insurable interest and could not have been covered by the insurance policy.

Tyco v Rolls Royce (2008)

Last year, the English Court of Appeal reconsidered the issue of co-insurance in *Tyco v Rolls Royce*.[3] The facts of that case are that Tyco contracted with Rolls Royce to provide fire protection services including a sprinkler system at Rolls Royce's manufacturing plant. A pipe burst causing flood damage to the Works and *"existing premises"*. Tyco repaired the damaged Works but refused to indemnify Rolls Royce for the damage to the existing premises. Tyco argued that because the construction contract provided for joint names insurance, it was relieved of liability for its negligence. The relevant clause was clause 13.5 of the Construction Contract which began with this wording:

> *"The Employer shall maintain, in the joint names of the Employer, the Construction Manager and others including, but not limited to, contractors, insurance of existing structures..."*

Rolls-Royce had apparently not taken out this joint names

insurance but the parties agreed that the court should resolve the case as if it had. The issue was whether the first sentence of clause 13.5 made Tyco a joint insured in respect of the existing structures. Rolls Royce argued that clause 13.5 did not expressly and could not impliedly exclude liability, which would otherwise fall on Tyco under the terms of the Construction Contract.

The Court of Appeal found a number of things striking about contractual provisions relating to the insurance of the existing structures, including:

- The *"Contractor"* was not named, although the *"Contractor"* was named in connection with insurance of the Works and it would have been *"so easy"* to include the Contractor in the first part of the clause.

- The rest of clause 13.5 was about insurance of the Works and nothing further was said about how a joint names policy in respect of the existing structures was intended to work.

- What was the insurable interest in respect of which *"others"* were to be insured?

The Court held that the opening part of clause 13.5 was not intended to give Tyco the benefit of liability insurance in respect of the existing structures outside the area of its own Works and consequently it was held liable for the damage.

The Court of Appeal reviewed the cases on co-insurance and the subrogation rights of Insurers. It noted that different legal doctrines were used to explain why an Insurer should not be able to sue by subrogation in the name of one co-assured to recover, from another co-assured, monies paid out for the second co-insured's negligence. One doctrine is circuitry of action and another is an implied term in the insurance contract. The Court of Appeal identified that this theory has now been replaced by the doctrine of the true construction of the contract.

Dragages v RJ Wallace

The Hong Kong case of *Dragages v RJ Wallace* [4] concerned insurance claims following fatal injuries to six construction workers, who were employed by Dragages' subcontractors. The Employer had obtained a third party liability insurance for itself and all contractors with the Insurer, RJ Wallace. This policy included a cross liability clause which stated:

> *"Each of the parties comprising the Insured shall for the purposes of this Policy be considered as a separate and distinct party and the words* "the Insured" *shall be considered to apply to each party in the same manner as if a separate policy had been issued to each of the parties".*

Dragages also had an EC policy issued with another Insurer. Dragages claimed an indemnity for 50% of the compensation that it was required to pay in relation to the workers' deaths from the EC Insurer and the other 50% from RJ Wallace. RJ Wallace refused to pay because it said its third party liability policy contained an exclusion for claims for personal injuries to workers, which purported to exclude:

> *"Liability in respect of death of or bodily injury (including illness) to any person in a contract of employment or apprenticeship with the Insured Party, arising out of and in the course of such person's employment service with the Insured Party".*

At first sight, you might have sympathy for the Insurer's position. The wording does suggest that the clause is intended to exclude liability for personal injuries to workers.

However, the court held otherwise. The court decided that as it was Dragages who was making the claim, the exclusion would apply only to exclude claims for compensation paid to its own employees. This is because the clause excludes claims to any person *"in a contract of employment with the Insured Party."* 'The Insured Party' meant the party making the claim. As the injured persons were employed by sub-contractors, the exclusion did not apply.

Summary and Warning

A common thread between these and other recent cases on insurance law has been a re-statement that ultimately an insurance contract is simply that, a contract and the usual rules of contract interpretation apply to them. In coming to that conclusion, the courts have moved away from older insurance law notions and relied primarily on extracting the intentions of the parties from the wording of the insurance policy. The hope is that following a review of these cases, contractors and insurers alike will review their contracts and attempt to spell out their contractual intentions more clearly. However, it is not safe to assume that you are properly insured simply because you are involved with the project. All project participants need to ensure that they obtain a copy of the insurance policy and read it for themselves.

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Footnotes:

1 *Petrofina (UK) v Magnaload* [1983] 2 Lloyds Rep 91 and *Stone Vickers v Appledore Ferguson Shipbuilders Limited* [1991] 2 Lloyds Rep 288.
2 [1999] 1 Lloyds Rep 387.
3 [2008] BLR 285.
4 HCMP 6577 of 2001, unreported, 27 February 2004.

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Re-rating for Substantial Changes in Quantity

By ***James B Longbottom*** *BSc(Hons) LLB(Hons) PgD(Law) FRICS FHKIS FCIArb RPS - Managing Director, ADR Partnership Limited*

Introduction

The very nature of civil engineering works means that it is not unusual for the actual quantities of work to vary from those stated in the bills of quantities, even though the change is not the result of a variation. Where such changes adversely affects the economics of carrying out the works, *GCC Clause 59(4)(b)* of the *General Conditions of Contract for Civil Engineering Works* (1999 Edition) may provide some recompense. This clause originates from the ICE Conditions of Contract and provides:

> *"59(4)(b) - Should the actual quantity of work executed in respect of any item be **substantially greater or less** than that stated in the Bills of Quantities (other than an item included in the daywork schedule if any) and if in the opinion of the Engineer such increase or decrease **of itself** shall render the rate for such item **unreasonable or inapplicable**, the Engineer shall determine an appropriate increase or decrease of the rate for the item using the Bills of Quantities rate as the basis for such determination and shall notify the Contractor accordingly."*

The criteria for such a re-rate are, therefore, two-fold:

- the quantities must be **substantially greater or less** than stated in the Bills of Quantities; and

- such increase or decrease of **itself** should result in the rate being **unreasonable or inapplicable**.

...the contract rates and prices are *"sacrosanct"* and form the basis for valuing the works, whether varied or not.

"Substantially Greater or Less"

The operation of *GCC Clause 59(4)(b)* is triggered by the actual quantity being substantially greater or less than that stated in the bills of quantities. Interestingly, under the ICE Conditions of Contract the word 'substantially' is not included so any change in quantity will suffice. What is 'substantial' must be a question of fact applied to the circumstances in hand.

The Secretary for Works *Practice Note for GCC 61 and 63(d)* dated 13 January 1997 suggests that the *"officious bystander"* test may be usefully applied:

> *"This test is, had the Contractor known the final figure when pricing the tender, would a different rate have been used?*
>
> *If the answer is* "of course", *then the rate should be amended."*

"Of Itself"

The use of the phrase 'of itself' means that the quantity change on its own must lead to a different rate. Therefore, the fact that a rate contains a pricing error or is artificially weighted (i.e. priced high or low) such that the actual quantity creates an excessive profit or loss is immaterial.

This is now trite law confirmed by the English Court of Appeal in *Henry Boot Construction Limited and Alston Combined Cycles Limited* [2000] that rates that are artificially weighted or adjusted are deemed to cover the work described; i.e. the contract rates and prices are *"sacrosanct"* and form the basis for valuing the Works, whether varied or not.

Examples are:

- **Windfall profits** - if a high rate is priced against a low quantity which substantially increases and produces a windfall profit this *"of itself"* does not warrant a re-rate; and

- **Multiplication of a contractor's loss** - a high rate priced against a quantity which decreases or a low rate priced against a quantity which increases and multiplies a contractor's loss will not *"of itself"* warrant a re-rate.

The relative profitability in a rate is immaterial to the operation of GCC Clause 59(4)(b).

"Unreasonable or Inapplicable"

Circumstances where a rate may be rendered 'unreasonable or inapplicable' are if the quantities change the economies of scale or production of carrying out the work. Such circumstances might include:

- a change in the method of working;

- a difference in the nett purchase price of materials; and/or

- an under or over recovery in fixed overheads.

Such circumstances were considered by Justice Findlay in the case of the *Secretary for Justice and Sun Fook Kong (Civil) Limited (SFK)* (HCCT000094/1997). The case concerned an application for leave to appeal against certain decisions by an arbitrator.

SFK was engaged by the Drainage Services Department (DSD) to construct a sewage disposal scheme. Part of the work involved the excavation and removal of rock for which estimated quantities in the Bills of Quantities had been provided in the amounts of 70, 20 and 100 cubic metres. In this respect SFK gave rates of HK$5,000, HK$8,000 and

HK$5,000 per cubic metre, respectively (a subcontractor's market rate for rock excavation at the time was probably in the order of HK$2,500 per cubic metre excluding the contractor's mark-up).

The actual quantities removed amounted to 7,000 cubic metres and SFK sought to be paid for this work on the basis of the rates set out in the Bills of Quantities. However, the Engineer amended these rates downwards so that there was a difference between the parties of over HK$31 million. The arbitrator found, having seen and heard all the evidence in the arbitration, that:

- SFK's method of working had not changed in any material way from that contemplated at the time of tender;

- in order to justify a re-rate, the Engineer would have to be satisfied that, as a result of the changes in quantity, there was a change in the method of working which change in itself led to a saving in costs; and

- even if this was a case for a re-rate, it could never be right to alter *"the risk figure"*. The risk figure is the figure that SFK took into account in determining their rate to cover risk and contingency and adjustment to estimated direct costs (both parties had already agreed that it was not correct to alter a contractor's profit percentage on a re-rate, and considered that the risk figure was analogous to profit).

The arbitrator pointed out that a large part of the increase in the contract price was because the risk figure was multiplied by virtue of a much larger quantity of rock. The arbitrator said:

> *"I find it hard to see how it can be said that the increase in quantity* "of itself" *rendered that part of the rate unreasonable or inappropriate (sic)."*

Justice Findlay agreed with the arbitrator's approach and that the arbitrator had not committed any error in law.

Whilst DSD argued that the arbitrator was wrong to exclude topics such as economies of scale and the effects on overhead costs, Justice Findlay held that the arbitrator did not exclude such considerations:

> *"[SFK's] method of working was to use subcontractors. The arbitrator gave careful consideration to whether [SFK's] costs had decreased. He heard the evidence and concluded that they had not. This cannot be challenged by this court.".*

Conclusions

The relative profitability in a rate is immaterial to the operation of GCC *Clause 59(4)(b)*. A rate which is high or low because it contains a pricing error or has been artificially weighted is unreasonable *"of itself"* and not because of a substantial increase or decrease in quantities. Where the increase or decrease in the quantities *"of itself"* gives rise to a re-rate the adjusted rate should follow the pricing level in the original rates (i.e. the same level of profit or loss should be maintained in the re-rate).

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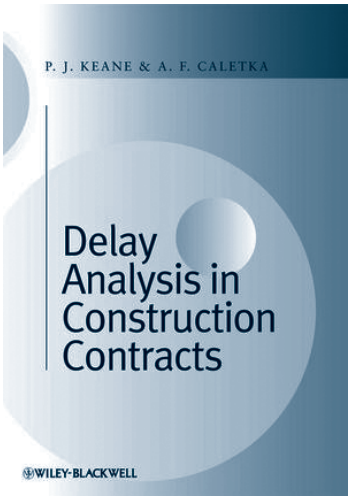
Books

Delay Analysis in Construction Contracts

by John Keane & Anthony Caletka



Assessing the impact of delay and disruption and establishing a causal link from each delay event to its effect, contractual liability and the resulting damages or loss can be difficult and complex.

This practical guide considers the process of delay analysis and includes an in-depth review of the primary methods of delay analysis, their appropriateness under given circumstances, and sheds some light on what many in the industry regard as a 'dark art'. ADR particularly found the chapter and case study on float mapping interesting, a technique used to analyze the critical path during the life of a project to demonstrate how it can change from one area of a project to another.

The authors consider problematic issues including 'who owns the float', concurrent delay, early completion programmes and pacing delays. Consideration is also given to *Recommended Practice No. 29R-03 Forensic Schedule Analysis* dated 1 July 2007 by the Advancement of Cost Engineering International (AACEI). This guide is the American equivalent of the Society of Construction Law's *Delay and Disruption Protocol* but is a much more technical document than the Protocol, primarily focused on the terminology and the application of delay analysis.

Publisher: Wiley-Blackwell, August 2008
ISBN: 978-1-4051-5654-7
Price: £65.00

ADR | Analysis

Without Prejudice

The term without prejudice is a statement included within a written document that provides protection to that statement such that the statement cannot be subsequently relied upon by the opposing party in litigation or arbitration.

Given that It is in all of the parties interests to resolve disputes amicably without the need to go through time consuming and expensive formal court or arbitral proceedings, the law recognizes that, as part of that negotiating process, the parties may need to make admissions or indeed suggest possible offers to settle, and which might later prove inconvenient to that party. The law therefore widens the cloak of opportunities available for parties to settle, and whereby admissions can be made and offers to settle can be advanced, without the fear of those concessions or offers being subsequently referred to in the court or arbitration proceedings. The without prejudice provisions result in the statement becoming privileged, however, it is increasingly open to misinterpretation and abuse with the sole aim of including the label for the purpose of adding a legal 'sting' to a document.

Albeit there is no strict requirement for the words without prejudice to appear on the document itself, given that it is the content and purpose of the document, not the documents title, that attracts the protection, for convenience sake, and, for the avoidance of doubt, the better approach is to head all such documents without prejudice. The application of the rule is therefore not dependant on a mere label but on the surrounding circumstances of whether the statement or document represents an attempt to compromise the court or arbitration action.

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ADR | Diary

Forthcoming Events 2009

13 Feb	*Lighthouse Annual Spring Dinner - Moon Koon Restaurant, Hong Kong Jockey Club, Happy Valley*
18 Feb	*Evolution of the Surveyor as Independent Expert Witness, Menachem Hasofer - Hong Kong Institute of Chartered Surveyors*
6 Mar	*Lighthouse Club March Get Together - Delaney's 1st Floor, Wanchai*
13 Mar	*Lighthouse Club Annual Safety Awards - Hong Kong Club*
18 Mar	*Hong Kong Institution of Engineers 34th Annual Dinner - Hong Kong Convention & Exhibition Centre, Wanchai*
3 Apr	*Lighthouse Club April Get Together - Delaney's 1st Floor, Wanchai*
22-23 Apr	*Conference on Commercial Contracts & Alternative Dispute Resolution - Renaissance Harbour View Hotel*
8 May	*Lighthouse Club May Get Together - Delaney's 1st Floor, Wanchai*
23 May	*Lighthouse Club Annual Ball - Hong Kong Convention & Exhibition Centre, Wanchai*

ADR | News

Expanding the ADR Team

David F Steed *BSc MRICS*
Managing Consultant

We are pleased to announce that David Steed has joined the ADR team. David is a Chartered Quantity Surveyor with over 20 years experience in commercial and contractual matters. David has previously held the position of Deputy Chief Quantity Surveyor with a prominent Hong Kong contractor, responsible for the trouble-shooting, management and resolution of problematic contracts, including a significant arbitration and mediation. He is also experienced in the preparation, defense and negotiation of contractual claims for extensions of time and additional payment.

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**

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