ADR | Partnership
Partners in Alternative Dispute Resolution

Digest

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In this issue:

Welcome

In this edition of the *ADR Digest*, Patrick O'Neill looks at the adoption of the single joint expert in construction disputes. Whilst the adoption of the single joint expert has been advocated as part of the Hong Kong Civil Justice Reforms, it is not widely adopted in construction disputes. Patrick examines some of the advantages and disadvantages of the single joint expert approach.

In our Summer edition of the *ADR Digest*, David Longbottom considered the Scottish case of *City Inn Limited v Shepherd Construction Ltd* and the assessment of extensions of time. The case has been the subject of much debate in the construction industry and at the time of David's article was the subject of an appeal. The Scottish Court of Appeal issued their long awaited decision on 22 July 2010 and we are pleased to have Pinsent Masons who acted for Shepherd Construction as our guest writer to review this decision which endorses the approach taken by Lord Drummond Young in the lower Court.

Our *ADR Analysis* series considers the difference between force majeure and frustration, both of which routinely appear in construction contracts.

Finally, we wish you a Happy and Prosperous Lunar New Year!

Kung Hei Fat Choy!

James B Longbottom
Managing Director

The Single Joint Expert in Construction Disputes

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

Introduction

Expert evidence is evidence provided by a witness who, by virtue of his education, training, skill and experience is believed to have expertise and specialised knowledge in a particular field beyond that of the average person. A Judge or Arbitrator may rely upon the expert opinion concerning an evidence or fact issue which is within the expert's specialist field of expertise. In this respect, the expert acts as an assistant to the fact-finder, be he Judge or Arbitrator.

In specific relation to construction matters, be they Court actions or private arbitrations, the expert evidence is typically capable of covering specialist areas such as quantum, planning and programming, geotechnical work and technical engineering issues to name but a few. The parties themselves each instruct their own expert witness (with the leave of the Court or with the agreement of the Arbitrator), albeit the expert's duty is to the Court or the Arbitrator, not to the instructing party.

The gradual increase in the use of expert testimony over the years has given rise to criticism of expert witness testimony over the last decade or so, not least in the UK, where Lord Woolf identified particular concerns with the use of expert evidence in his report titled Access to Justice (published in July 1996). Lord Woolf highlighted the principle difficulties with expert evidence as being:

- the excessive cost of expert evidence;

- a lack of impartiality by experts; and

Different expert witnesses come to the witness box bringing with them what can be very different experiences and backgrounds ...

- the unnecessary proliferation of expert evidence and the emergence of an "expert industry".

The above concerns were partly addressed in Part 35 of the UK Civil Procedure Rules 1998, albeit to a far more limited degree than the original report. The emergence of what was termed the "Single Joint Expert" was also formalised by virtue of Rule 35.7(1).

Provision for the appointment of a single joint expert now also exists in Hong Kong, whereby Order 38 Rule 4A of the Rules of the District Court provide for a single joint expert in lieu of two party appointed experts, as follows:

> *"(1) In any action in which any question for an expert witness arises, the Court may, at or before the trial of the action, Order 2 or more parties to the action to appoint a single joint expert witness to give evidence on that question."*

The Hong Kong Civil Justice Reforms (CJR) which came into effect on 2 April 2009 further reinforces the increased focus needed on cost effective litigation practice and procedure. Under the new procedures, parties are now required to consider whether appointment of a single joint expert is appropriate, and if not, why not.

The Single Joint Expert

The concept of the single joint expert is not unique to the UK or Hong Kong. Albeit the concept was strongly advocated as part of the Woolf reforms, it is adopted in Western Australia (as a consequence of the Law Reform Commission of Western Australia 1999), Canada and in the USA.

On the face of it, the concept of the single joint expert would appear to address many of the concerns that were raised by Lord Woolf over a decade ago and it is not difficult to visualise the time and cost savings that might be possible as a consequence of reducing the number of experts involved in litigation or arbitration from two to one. A single joint expert must surely be cheaper than the two party appointed expert approach and there is therefore likely to be very obvious theoretical savings in cost. One would also have thought that the single joint expert approach might assist in contributing to a less adversarial culture and might indeed assist in dispensing with any potential impartiality associated with using party appointed experts. Finally, with both parties giving instructions to the single joint expert, the proliferation of expert evidence might begin to be contained or even reduced. As Lord Woolf noted:

> *"A single expert is much more likely to be impartial than a party's expert can be. Appointing a single expert is likely to save time and money, and to increase the prospects of settlement. It may also be an effective way of levelling the playing field between parties of unequal resources. These are significant advantages, and there would need to be compelling reasons for not taking them up."* [1]

The case for a Court or party appointed single expert therefore seems fairly convincing at first glance:

- there is a potential for the expert evidence to become less expensive given the fewer experts involved and the avoidance of unnecessary competing expert reports;
- there is a potential for savings in time;
- there is a potential for eliminating the risk of bias and polarised expert opinions; and
- it can level the playing field between parties of unequal resources.

However, against these perceived benefits there are a number of potential problems which the Court or party appointed single expert brings to the dispute arena and which must be weighted against the perceived benefits outlined above.

Suppressing Alternative Argument

The obvious criticism that can be levied by adopting the single joint expert approach is that the Court or tribunal is presented with only one set of expert opinions concerning the matters in dispute. Different expert witnesses come to the witness box bringing with them what can be very different experiences and backgrounds, and it is to the benefit of the system that adopts the two party appointed expert approach, that different legitimate opinions on a matter can be fully explored by two individuals with what can often be legitimate differing conclusions. This is particularly so in construction disputes. One quantum expert, for example, may have his background and experience rooted in private practice, whereas the experience of the other may be in contracting. Both individuals are experienced in quantum issues. Both are experts in their own right. However, the two experts are capable of giving differing opinions and can arrive at different conclusions on a given set of facts. This is one of the strengths of adopting an approach that uses more than one expert. Both the Courts and Arbitration tribunals are well able to deal effectively with complicated technical issues and it is rare for cases to become bogged down in technical complexities. Different experts are, however, likely to have bona fide differences of opinion on a given set of facts and restricting the expert evidence to a single joint expert has the potential of suppressing that expert opinion evidence, given that one of the fundamental concepts of the role of the Judge or Arbitrator is to hear both sides of an argument. With only one expert involved, there is always a danger that the findings might be stifled somewhat. Expert evidence in adversarial proceedings requires the Court or tribunal to decide which evidence it prefers, and, therefore, there has to be both a winner and a loser. It is to the strength of using the two party appointed expert approach that the Court or Arbitral tribunal can prefer one expert opinion over another – and with the oral cross examination of each expert the best way of producing the most just result. The potential risk associated with adopting the single joint expert is that effective cross examination may not be capable of addressing the problem of an expert opinion that is perhaps too narrow and which might leave the Court or tribunal with a degree of uncertainty as regards whether the expert opinion has really considered all of the relevant issues.

The Emergence of the Shadow Expert

Adoption of the single joint expert in other jurisdictions has given rise to the concept of the "shadow expert" - an expert engaged to assist with the preparation of a party's case but not on the basis that the shadow expert will give evidence at the trial.

However, engaging shadow experts would seem at odds with the very intent of reducing excessive cost in litigation and arbitration. It is easy to visualise that in construction disputes, where large sums might be at stake and where much may depend on quantum expert or planning and programming expert evidence, that parties would insist on a shadow expert to advise them of the validity of the single joint expert's opinion and perhaps even assist with the cross examination of his evidence. Such an approach, and, in particular, the obvious additional costs likely to be incurred in employing shadow experts would seem to defeat the cost effective intent of the single joint expert concept, since three different views as to what is the correct outcome could hardly be justified as an effective cost saving approach.

The question then arises as to what happens if a party is unhappy with the expert report prepared by the single joint expert? In *Cosgrove & Anr v Pattison & Anr* (unreported, 27 November 2000), Mr. Justice Neuberger allowed an appeal by the Defendants that they be permitted to instruct an additional expert of their own given that they were dissatisfied with the report prepared by the single joint expert. Permission was given in view of the fact that the hearing was some way off but additional costs were expended on yet further expert evidence. Among the factors taken into account in allowing the additional expert was:

- the nature of the dispute;
- the amount in dispute;
- the number of disputes to which the expert evidence was relevant;
- the reason that the expert was needed;
- the effect on the conduct of the case of permitting the additional expert;
- the delay the appointment of a further expert might cause; and
- the overall justice to the parties in the context of the litigation.

The emergence of the shadow expert can therefore give rise to potential delay and additional cost.

The Potential for Delay

Notwithstanding the potential that exists for the adoption of the single joint expert to reduce the time and costs involved in the preparation of expert evidence, and the time taken and costs involved in cross examination, there is a risk that the reverse is possible and that the approach could lead to significant delays. Given the importance of the identity of the individual acting in the capacity of the single joint expert, the agreement and selection of the individual would be a critical activity not just in terms of timing but in terms of the identity of the individual himself. It is not difficult to conceive that the selection process of the expert could potentially be a long drawn-out process given the tendency for each party to attempt to secure the most suitable expert in order to maximise that parties chance of persuading the Court or tribunal to decide in its favour. Further, given the size and complexity of many construction disputes it is possible that the magnitude and extent of time and cost claims including counterclaims that might ultimately have to form part of the instructions to the single joint expert could give rise to difficulties in agreeing the scope and timeframe for the provision of the expert evidence which might therefore result in numerous court interventions, and with it delay.

Albeit protracted disagreements between experts would be avoided by adopting the single joint expert approach, delay could nevertheless arise both during the preparation of the expert report and in the giving of evidence as a consequence of:

- appeals by a party who might be unhappy with the report prepared by the single joint expert;
- the use of single joint experts in multi-disciplinary matters which might lead to conflicting opinion evidence or disagreements between the lead expert disagreeing with other expert opinions;
- delays caused by the introduction of shadow experts who might have different opinions to those of the single joint expert and which might then ultimately lead to supplementary expert reports being required and prolonged, drawn out cross examination;
- possible deferment or prolongation of the hearing as a consequence of a party amending its case to reflect the opinions given by the single joint expert.

Conclusion

Albeit the adoption of a single joint expert in lieu of two party appointed experts appears at first sight to bring with it some obvious advantages in terms of both time and cost, the approach can bring with it a number of potential problems. The likelihood is that a Court or Arbitrator would restrict the adoption of the single joint expert approach to instances where the sums at stake were relatively small and where the expert evidence that the Court or tribunal needs to have explained to it was not controversial or disputable.

Experience in the UK seems to suggest that the concept of the single joint expert witness works well and that Judges, Lawyers and parties to proceedings have displayed a willingness to use the approach albeit on matters that do not involve substantial amounts and where the issues are generally uncontroversial.[2] It is submitted that for the construction industry, the approach would likely be limited to the most simple of cases only.

Footnotes:

1. Lord Woolf, Access to Justice: Final Report 1996 [13.21].
2. Emergency Findings: An early evaluation of the Civil Justice Reforms (2001); and A continuing evaluation of the Civil Justice Reforms (2002).

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City Inn Ltd v Shepherd Construction – Appeal Court Decision: causation, concurrency & extension of time

By ***Pinsent Masons***

CITYINN contemporary hotels

Shepherd

Introduction

On a cursory reading, it may appear that the decision is a charter for contractors to advance ill prepared EoT claims, relying on the Appeal Court's endorsement of the application of judgement and common sense and the rejection of critical path analysis. Certainly, the decision will make it easier to advance claims where there is no critical path analysis. However, the court does not reject the critical path approach in all cases, stating that it is up to the decision maker to form his own view as to what evidence is relevant. On complex construction projects where there is a regularly updated electronic programme, critical path analysis will be possible and is likely to remain of value to those resolving EoT claims.

Importance of the Decision

Adjudication has contributed much to the construction industry since it was introduced by the Housing Grants (Construction and Regeneration) Act 1996. On the whole, disputes are resolved more quickly (if not more fairly) and after some initial scepticism, the industry as a whole has come to accept, if not love, this "new" form of dispute resolution. It is perhaps a measure of adjudication's success that very few disputes progress beyond the provisional but binding decision of the adjudicator. By and large, parties appear to live with the decision or use it as the platform for a negotiated settlement.

However, while adjudication has given much, it has also taken away. While there have been close on 400 cases concerning adjudication (relating to jurisdiction, natural justice, what is a "construction operation" etc), since its introduction, there have been relatively few "traditional" construction disputes going through the courts – extension of time, loss and expense type claims. The development of the law by the courts in England and Scotland has been the victim of adjudication's success.

The dearth of new case law on causation, concurrency, critical path analysis and similar issues may partially explain the level of interest and comment generated by Lord Drummond Young's decision in *City Inn Ltd v Shepherd Construction Ltd*; this was, after all, exactly the type of dispute adjudication effectively removed from the courts. However, what really provoked discussion about the case was Lord Drummond Young's apparent rejection of detailed critical path analysis in favour of a more practical assessment of the impact of delay events, together with an "apportionment" exercise where there was no "dominant cause" of delay.

The case is also significant in its analysis of a bespoke provision (clause 13.8) which City Inn argued barred Shepherd from obtaining any extension of time at all and Shepherd's argument that City Inn had waived their right to rely on 13.8.

Facts

City Inn employed Shepherd under an amended JCT 80 contract to construct a hotel in Bristol. The project was late in completion and after a series of adjudications, Shepherd were awarded a 4 week extension of time by the Architect and a further 5 weeks by an Adjudicator – 9 weeks in total. City Inn were unhappy with the decision of the Adjudicator (and indeed their architect) and raised proceedings in the Commercial Court of the Court of Session seeking various orders including reduction of the Architect's certificate awarding a 4 week EoT, a declaration that Shepherd were not entitled to single day of EoT, and payment of LADs.

After some initial legal skirmishes regarding whether clause 13.8 amounted to a penalty, the case proceeded to a proof (i.e. trial) before Lord Drummond Young.

Lord Drummond Young's Opinion

The evidence showed that neither party, nor the Architect, had made any reference to clause 13.8 during the contract, with applications for EoT being made and considered as if the clause did not exist. Indeed, it became clear that the first time City Inn ever sought to rely on clause 13.8 was during adjustment of its written claim, sometime after the court action had been raised and a number of years after the job was finished.

With regard to delay, it was clear that, particularly towards the end of the project, there were various events, some Relevant Events and some events which were attributable to Shepherd, which were all potentially causing delay to completion – concurrency in a broad sense. Questions of causation and the proper approach to concurrency were therefore in sharp focus.

Shepherd had been unable to locate an electronic, logic linked version of its original programme. All that was available was a fairly rudimentary programme showing activities and durations.

An as-built programme was agreed between the two experts. City Inn's expert then sought to retrospectively establish the critical path through the job – a critical path which avoided many of the matters upon which Shepherd relied (e.g. the hotel's roof) leading him to the conclusion that Shepherd were not entitled to a single day's EoT.

Shepherd's expert, on the other hand, gave evidence that he had tried to establish the critical path, but felt that it was impossible to do so reliably. Instead, he checked the original programme in order to ascertain whether or not it was reasonable and then looked to the as built programme to see where delay occurred with reference to the as planned programme. He then looked to what had caused delay at various points in time and used his experience and judgement to offer an opinion as to the effect on completion.

At the trial, numerous errors were identified in City Inn's critical path analysis, errors which were eventually conceded by their expert.

Clause 13.8 and Waiver

Lord Drummond Young agreed with views previously expressed by Lord Macfadyen that it would make no sense for clause 13.8 to apply to instructions/variations which caused delay not as a result of their content, but as a result of their timing i.e. if they were late.

He also found that City Inn had effectively waived their right to rely on clause 13.8 by their director's failure to mention the provision in face to face discussions with Shepherd and the fact that Shepherd had thereafter administered the contract as if clause 13.8 did not exist. There was evidence, which he accepted, to the effect that if City Inn/the Architect had refused an early EoT application on the basis of non-compliance with clause 13.8, Shepherd would thereafter have applied clause 13.8 to the latter.

Causation, Concurrency and Delay

In his opinion, Lord Drummond concluded that the task of the decision maker under clause 25 was to make a "judgment" and ultimately arrive at a "fair and reasonable" decision on an extension of time. Where there was concurrency, i.e. the Relevant Event and the contractor risk event existing at the same time, irrespective of when the events began (or ended), in the absence of one event being "dominant", achieving a fair and reasonable outcome may involve an apportionment exercise. In reaching this view, Lord Drummond Young also noted that the "but for" test of causation did not apply in the context of clause 25. Having set out these principles, Lord Drummond Young went on to consider the evidence and the competing approaches of the two experts.

Lord Drummond Young rejected City Inn's critical path analysis and preferred the evidence of Shepherd's expert and applying his approach to clause 25 found Shepherd entitled to a 9 week extension of time (the same as had been awarded by the adjudicator). City Inn appealed.

Court of Appeal Decision

All three appeal judges rejected City Inn's appeal (which ran to 17 grounds) although on the critical questions of causation and concurrency, two judges follow and elaborate on Lord Drummond Young's approach while the third judge takes a different approach. All three judges agreed with Lord Drummond Young on waiver and clause 13.8 (although one judge took a slightly different approach to the 13.8 issue)

The aspect of the decision, however, which is sure to attract most attention relates to the proper application of clause 25 and how to deal with issues of concurrency and causation.

The majority opinion was given by Lord Osborne with whom Lord Kingarth agreed. Having reviewed the authorities and Lord Drummond Young's analysis, Lord Osborne sets out 5 propositions relative to the proper approach to the application of clause 25.

Before any claim for an extension of time can succeed, it must be shown that the Relevant Event is likely to delay or has delayed the works.

Whether or not the Relevant Event actually causes delay is

> *"an issue of fact which is to be resolved, not by the application of philosophical principles of causation, but rather by the application of principles of common sense."*

The decision maker can decide the question of causation (i.e. whether the event has caused delay to completion) by the use of whatever evidence he considers appropriate. If demonstrated to be sound, this may take the form of a critical path analysis, but the absence of such an analysis does not mean the claim will necessarily fail.

> ...City Inn did not try to revive their delay analysis at the appeal, but they urged the court to hold that in the absence of a critical path analysis supportive of Shepherd's position, the Shepherd claim had to fail.

If a dominant cause can be identified in respect of the delay, effect will be given to that by leaving out of account any cause or causes that are not material. If the Dominant Cause is not a Relevant Event, the claim will fail.

Where there are two causes operating to cause delay, neither of which is dominant and only one of which is a Relevant Event, a contractor's claim for an extension of time will not necessarily fail. Rather, it is for the decision maker *"... approaching the issue in a fair and reasonable way, to apportion the delay in completion of the works...as between the relevant event and the other event."*

Lord Carloway concurred in the result, but rejected the concept of apportionment. On his approach, the Architect's sole task is to consider whether or not the Relevant Event, viewed in isolation is going to delay completion. If it is, then the next question is what award of EoT would be fair and

reasonable. Even for Lord Carloway, however, the matter is one of "common sense."

All three judges agreed that a critical path analysis was not essential to carry out the exercise (although it may be relevant). All three judges also disagreed with HHJ Seymour QC's comments in *Royal Brompton Hospital NHS Trust v Hammond* to the effect that a Relevant Event falls to be disregarded if a pre-existing contractor default would nonetheless have caused delay.

The case amounts to a statement that common sense, judgement and experience are to be preferred to an overly complicated analysis of causation.

What Does the Decision Mean in Practice?

In Scotland at least, the decision is now binding on lower courts. In England, it is not binding, but given that it is an appeal court decision, is very persuasive. So what is the likely impact of the decision?

City Inn had argued that the "but for test" of causation fell to be applied strictly such that even where there was "true concurrency" i.e. a Relevant Event commencing at the same time as a non relevant event, the contractor would not be entitled to an extension of time because it could not be said that "but for" the Relevant Event occurring, there would be delay. However, all the judges appear to place great weight on the need to reach a "fair and reasonable" decision on EoT. Lord Osborne appears to be unimpressed by the various attempts at classification of "concurrent delay" or "concurrent delaying events" stating that,

> *"...it may not be of importance to identify whether some delaying event or events was concurrent with another, in any of the possible narrow senses described, but rather to consider the effect upon the completion date of relevant events and events not relevant. For that reason, discussion of whether or not there is true concurrency, in my opinion, does not assist in the essential process to be followed under clause 25."*

Lord Carloway speaks about the Architect applying "professional judgement" and "using his and not a lawyer's common sense."

The decision is also a rejection of the argument that a critical path analysis is essential to demonstrate an EoT entitlement. City Inn did not try to revive their delay analysis at the appeal, but they urged the court to hold that in the absence of a critical path analysis supportive of Shepherd's position, the Shepherd claim had to fail. The court does not completely discount the value of critical path analysis – but it appears to be for the decision maker to decide if such evidence is of assistance to him or her. A claim will not necessarily fail in the absence of such evidence.
A majority of the court also support Lord Drummond Young's apportionment exercise in the event of concurrency where no cause is dominant, although Lord Osborne does emphasise that it is "open" to the architect to apportion as part of approaching the issue in a fair and reasonable way – he is not compelled to do so.

The case amounts to a statement that common sense, judgement and experience are to be preferred to an overly complicated analysis of causation. However, the case is most certainly not a charter to those who wish to cut corners in the presentation of EoT claims. Shepherd were successful because the judge found that it was not possible to accurately re-create the critical path through the job. If accurate electronic programming data is available, then a decision maker may take the view that it is relevant, albeit that issue of dominance will also need to be addressed where there is concurrency.

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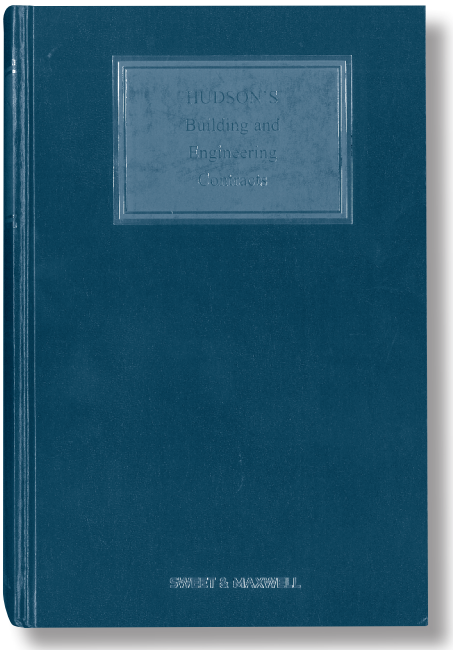
Books

Hudson's Building and Engineering Contracts 12th Edition

General editors: Nicholas Dennys, Mark Raeside & Robert Clay



The new edition of this major work has got to be one of the most anticipated books of the year. Hudson was originally published in 1891 and for many years was the only authoritative work on the law and interpretation of construction contracts. From 1959 to the supplement to the eleventh edition in 2003 the editorship fell at the hands of the late Ian Duncan Wallace QC. Such were the strength of Wallace's views that significant parts of the text were treated as authority and cited by judges around the world. The editorship has now passed to barristers practising at Atkin Chambers.

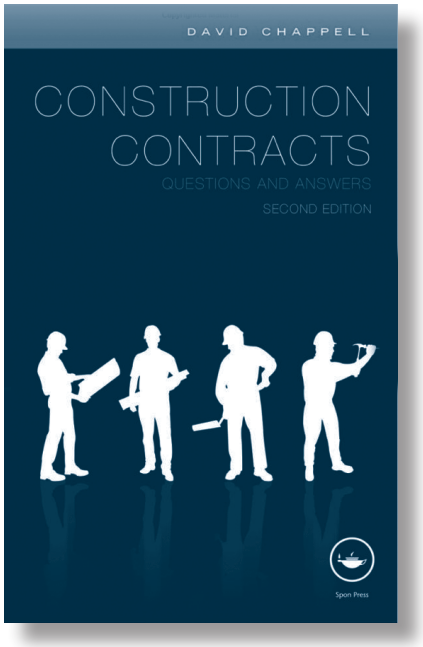
Rather than simply supplementing the eleventh edition with recent case law, the new edition has been completely re-modelled to reflect changes in contracting and procurement. The new restructured work is published in one streamlined volume which in the words of the editors has involved,

> *"pruning the existing text, adding a very substantial amount of wholly new text, and compiling sections which mix the new and old. We hope that the result has retained those features which made Hudson such an exceptional work."*

Publisher: Sweet & Maxwell Ltd, December 2010
ISBN: 978-1847032041
Price: £350.00

Construction Contracts Questions and Answers

By David Chappell



The book features 200 questions and answers based partly on queries posed by architects to the Royal Institute of British Architects' Information Line.

Questions are categorized under several headings including tendering, possession of the site, design, architect's instructions, extensions of time, etc to name but a few.

The book will no doubt be an invaluable reference for contract administrators and others involved in construction. However, whilst not detracting from the usefulness of the book, it does have some limitations. First, being drawn from telephone queries in the UK, many of the answers are naturally geared towards the JCT series of contracts. Second, the answers, as might be expected, are only a concise introductory summary. That said the book covers a broad range of interesting problems and some problems not normally found in other text books; e.g. *"Is a note in the minutes of a site meeting sufficient notice of delay from the Contractor?"*

Publisher: Spons Press; Second Edition 2011
ISBN: 978-0415566506
Price: £34.99

ADR | Analysis

Force Majeure Clauses & Frustration

Force majeure clauses are now considered as "boiler plate" clauses; i.e. clauses that are essential to the operation of commercial contracts. Such clauses are therefore routinely found in construction contracts and it is important to understand their precise definition, limitation and how the force majeure clause differs from the doctrine of frustration to which it closely relates.

Force majeure is a French term of law that although has a somewhat imprecise definition, was defined in the case of *Lebeaupin v Richard Crispin & Co* (1920) KB 714 as being *"all circumstances, independent of the will of man, and which it is not in his power to control ..."*. A force majeure clause effectively seeks to protect the parties if the contract cannot be performed because of an unexpected exceptional event which was outside the control of the parties. The clause effectively excludes liability performance of the contractual obligations in certain circumstances.

The doctrine of frustration, on the other hand, requires the entire subject matter of the contract to be destroyed, thereby relieving the parties from any further contractual obligation. The operation of the doctrine is therefore fairly drastic. In frustration, the pieces of the contract are essentially left where they fall. Force majeure clauses and the doctrine of frustration are therefore similar in the sense that they deal with occurrences that are beyond the control of the parties.

Force majeure, however, provides much more in the way of flexibility. The force majeure event might only be temporary and, therefore, once passed, the contract might well be able to continue as before. Further, the force majeure clause might be limited to very specific unpreventable occurrences whilst still maintaining the underlying contractual obligations. Thus, the temporary suspension of the delivery of equipment to Site, for example, might be the subject of a force majeure event, however, given that the contractual obligations may only be temporarily suspended or varied, the drafting of the force majeure clause is very important.

The principle difference between force majeure and frustration is the difference between impossibility of contract performance versus material and adverse effect. Whereas the doctrine of frustration brings the contract to an end it may nevertheless assist when a force majeure clause cannot be relied upon, either because of exclusion or because of too narrow a definition of what constitutes a force majeure. The weakness of the doctrine of frustration is its inability to expressly identify specific events that are likely to be an issue, whereas force majeure clauses offer parties the opportunity to spell out specifically in express terms those specific events (inclement weather, strikes, etc).

Given the obvious advantages of parties defining events which are impossible to predict, a sensibly drafted force majeure clause can therefore be of great benefit should the unthinkable actually occur.

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ADR | Diary

Forthcoming Events 2011

1 Feb	*Society of Construction Law Hong Kong – Hong Kong's DRA System*
11 Feb	*Lighthouse Club - February Get Together – Delaney's 1st Floor, Wanchai*
16 Feb	*HKIAC - Chinese New Year Cocktail Reception – Hong Kong Club*
17 Feb	*Pinsent Masons Hong Kong Annual Construction & Engineering Law Conference - Hong Kong Football Club*
19 Feb	*CIArb - One-Day Seminar on Contract Management – The Hong Kong Polytechnic University*
24 Feb	*Lighthouse Club - 2011 CNY Spring Dinner – Moon Koon Restaurant, Happy Valley Race Course*
4 Mar	*Lighthouse Club - March Get Together – Delaney's 1st Floor, Wanchai*
11 Mar	*Lighthouse Club - Annual Cocktail & Safety Leadership Awards 2011 – The Hong Kong Club*
15 Mar	*HKIE - The 36th Annual Dinner – Convention Hall, Hong Kong Convention and Exhibition Centre*
18-23 Mar	*Global Mediation Services Ltd - Five-Day Mediation Training Course – Hong Kong International Arbitration Centre*
24 Mar	*Lighthouse Club - 2011 International Gathering – Happy Valley Race Course*
1 Apr	*Lighthouse Club - April Get Together – Delaney's 1st Floor, Wanchai*
2-5 Apr	*Lighthouse Club - Mt Kinabalu Fund Rasing Trip / Trek – Kota Kinabalu*

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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