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Seeing the wood for the trees

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Welcome

to the Driver Trett Digest

The title of this edition struck a chord with me. Having become CEO in June, we have come through the difficulties of the last few months in a very positive way, and I am proud to say our staff have responded very impressively. Looking after each other and our clients with an exceptional level of professionalism.

I am particularly delighted to see our business growing, with a new office in New York, and Simon Braithwaite's Q & A in this edition giving an interesting insight into our approach in the USA. We have also renewed our focus in Africa, with a joint venture agreement with EVRA, which is already yielding interesting opportunities.

Mark Wheeler
Chief Executive Officer

Underlying our ability to cope with these difficult times, are our values and our culture. We put our people and our clients first. We strive to innovate, and we act with integrity. If ever a period in our history has proven the value of this approach, it has been 2020.

For our clients, the challenges of delivering major construction projects in these difficult times are immense. Great progress has been made, and across the world we are seeing construction and engineering activity adapting to a new way of working. We are assisting in live project support, our COVID 19 helpdesk has provided a source of information for those who need it, and where disputes have already arisen, our experts are getting used to working with clients and their lawyers by video link.

The world has felt very uncertain in recent months, but my faith in our people, our clients, and our business has never been more certain.

Negotiation v Mediation: Some key considerations

Laura Geary, Consultant, Driver Trett, London

One of the fundamental misconceptions relating to the various alternative dispute resolution (ADR) options available is that negotiation and mediation are the same.

However, they are in fact two very different ways of resolving a dispute, and it is key to know their differences when deciding what is the best route to facilitate discussions and reach an outcome which is acceptable to both parties.

Negotiation

Negotiation provides a forum where the parties rely on each other, rather than a third party, to reach a resolution.

It does not require a special skill, or particular expertise, although experience and an open mind will generally assist. Indeed, most parties will find themselves negotiating at various points during the course of a project, even if they are not specifically aware of it at the time. Negotiation can be the best way of resolving a dispute, as sometimes it is a matter of more open lines of communication which helps to secure an agreement.

However, in order to have a reasonable chance of success, negotiation requires the parties to engage with one another openly, and to organise the meeting in a way that allows their discussions to flow, as there is no neutral party to aid the meeting, and facilitate those interactions. On the positive side, the lack of a third person offers flexibility to the parties to manage the meeting on their terms and in line with their timescales. The process is often quicker as a result, as it requires only the parties and the meeting itself to be organised, avoiding the processes and procedures that are required to arrange a mediation, or other similar forms of alternative dispute resolution.

Another benefit of negotiation is that it is often a very cost-effective method of resolving disputes, as it disposes of the need for third party fees and for the resulting meeting room facilities, relying on just the two parties talking at a venue to suit their requirements.

However, for all its inherent advantages, it is important to remember that, with negotiation, personal feelings and emotional responses can often get in the way of making progress on the matters in dispute. The absence of an independent third party means that parties might find themselves arguing endlessly about one particular issue, without making progress, and without seeing the bigger picture and understanding what might be required to reach a resolution.

Another major problem with negotiation arises when there is an imbalance of power between the parties, with a smaller firm pitted against a larger or more powerful organisation, or where the revenue of one party is heavily dependent on continued workflow from the other party. In these kinds of circumstances, one party might find itself agreeing to unfavourable terms due to pressure or a lack of time and/or resources to take the discussions further.

In summary, the lack of a neutral person facilitating discussions between the parties can be seen as a disadvantage of negotiation. However, that same reason offers the parties the freedom to construct the discussions on their own terms. Furthermore, the parties are in control of these discussions, which can lead to an agreement and this means they make the choice to bind themselves at the end of the process, if an agreement has been reached.

Mediation

Mediation is facilitated through the guidance of an official mediator, who is trained and experienced in the art of helping the parties to reach an agreement (or compromise) and settle the dispute at hand.

Mediation can be a good next step if negotiations are unsuccessful, as a mediator can help guide previously stalled conversations in a positive way and limit the negative effects of personal emotions, with regards to the dispute. A mediator can prevent time being wasted and an unproductive meeting occurring, by helping both parties to establish their common ground and the workable solutions they can adopt.

Mediation is a good form of alternative dispute resolution if flexibility is required, as the process can be adapted to suit the needs of the parties as well as the matter(s) in dispute. It permits the parties to meet separately, with the mediator going back and forth between the two parties in order to, amongst other things, understand the wants and needs of each party together with the boundaries in which settlement can be made; or to meet in the same room with the mediator there to facilitate discussion. Before this process can start, the mediator will likely require a brief mediation statement from both parties, as a starting point to the discussions by understanding what each party would like to achieve from mediation. In some cases, there is assistance from lawyers, consultants and possibly experts. More often than not, a mediation involves a combination of the four processes listed above to reach an effective and agreeable solution.

One potential issue with mediation which the parties must consider, is that, whilst negotiation gives the parties the freedom to construct the discussion on their own terms, this is not the same for mediation. In this regard, the parties must agree to the core element of mediation, which gives the mediator the freedom to help them arrive at an agreed conclusion. One element that aligns with negotiation is that it is the parties, not the mediator, who have the power to make a final binding decision. Mediation further assists this element, by ensuring that both parties have in attendance someone with the power, to make a final binding decision. It is often the case therefore, that the parties elect to reach a contractual agreement to bind themselves to the outcome of the mediation, so that the efforts of the mediator and the parties is not lost through a subsequent change

of heart. Agreement and the conclusion of the settlement agreement is often achieved in one day; although this is typical in the UK, it can take much longer in other countries.

A further consideration in relation to mediation is the preparation which is required for a successful mediation to take place. Both parties need to have given due consideration to the substantive elements of their respective positions, as well as to have reached agreement internally as to what can, and cannot, be agreed during a mediation. Getting the parties to reach agreement as they edge closer to their respective "red lines" requires skill and experience, as well as an understanding by the parties as to the increasingly limited (and more expensive) options available to them should agreement not be achieved.

To summarise, in any form of alternative dispute resolution, which involves a neutral party, that neutral party helps to mitigate situations whereby two parties are trying to resolve a dispute, unsuccessfully, between themselves. However, that neutral third party comes at a financial cost, and with a timetable which may not suit the parties. It also moves control of the dispute away from the parties themselves, and towards an individual with no vested interest in the outcome, which some parties may find difficult to accept.

When considering whether negotiation or mediation (or indeed another form of alternative dispute resolution) is most appropriate, it is important to consider a number of different factors, including the time and cost involved, the status of any previous discussions which have taken place, commercial decisions as to matters such as business relationships and future workload, and the realistic opportunities for an agreement to be reached.

There is no "one size fits all" approach, and the parties must think carefully about how to achieve the most acceptable outcome in the circumstances.

Records, Why so shy?

Andrew Miller, Associate Director, Driver Trett, London

Employers and contractors alike produce records, but sometimes it seems as though they are reluctant to preserve them for future use - even when it means that valid claims go unsupported.

Why are they so shy?

Recently, we have come across both employer and contractor organisations who proudly insist that they have no *available* records.

Our clients are either pursuing or defending claims for some millions of pounds. All the advice they have paid for, or been given, including from the responding parties, makes it clear that there is a sound basis of claim if the time and cost can be substantiated with records.

The employer organisation, in one case, has a number of reasons why they are unable to produce substantiation:

1. The business unit responsible for the project has an internal conflict with the business unit responsible for pursuing the claim, resulting in a general lack of ownership and cooperation.

2. The financial system that captures internal personnel costs has been changed and the relevant records may be accessible in another country; but no-one is quite sure, or much inclined to find out.

3. A significant part of project costs are captured, in detail, by an outsourced service contractor who (potentially) was short staffed, abroad and has no skin in this game.

4. Other project costs are captured in the SAP system, but records are not complete. Some contracts could have been awarded by a partner organisation before the formal commencement of the project, and are thus, lost to sight.

5. The project kept detailed reports recording site activities and progress - daily reports, monthly reports, shift handover bullet reports, daily discipline reports, HSE reports – but, the shared folder containing 'all' the project info has massive voids in these records and includes only fragmentary records of the primary construction activities. This is because the group responsible for finishing and commissioning did not file their reports in the same folder. No one knows where the missing items are, but they are good, very good. Occasionally, an example shows up, attached to a supplier's invoice as supporting documentation. It contains an hour by hour record of site activities, contractor interactions, personnel in the discipline team - the lot.

As a result, this employer's claim against its contractor is woefully short of details and backup, yet our client, the employer, has kept good, even exemplary records. The employer knows it has issues with tracking down the records but is unable or unwilling to empower anyone within its organisation, or an external consultancy like ours, to go and find the missing material. All the evidence indicates that cost records were kept in detail and that progress and activity reports were made regularly and timely, as part of the management of the project. The foundations of a solid claim are there, but the claim will founder because the energy to find and analyse the material cannot be mustered up.

Another client, who is a contractor, has similar difficulties with its claim against a major blue-chip employer. Again, the story is that:

1. All the project managers involved have left; most of them under a cloud.
2. The site reports were not maintained regularly or have got lost.
3. Personnel and resources on site were not fully and regularly recorded.
4. The baseline schedule was not regularly updated and issued.
5. Site money was spent out of petty cash to local contractors, without detailed records.

The employer has said, in fairly straightforward language, that it expects the claim to be presented with detailed cost and planning analysis and with records supporting the items claimed. It has clearly intimated that there are some valid heads of claim but that no settlement can be reached without a properly substantiated statement of claim. This seems an entirely reasonable position taken by the employer, and is consistent with contractual requirements.

In practice, the site operations were closely scrutinised by the employer and its site representatives. Due to the technical nature of the work, employer representatives signed off completion and testing records for very small discrete pieces of work. These records are available to the contractor but have not been analysed to establish the dates and locations of particular activities, nor their connection to the baseline and actual programmes and critical paths.

The site operations required the workforce to be bussed to work locations, but the records from the bus company of how many trips were made, with how many passengers, to what locations, have not been analysed to support resource utilisation.

The major construction sub-contractor was paid on a time and cost basis and kept records of personnel and equipment deployed. These records have not been made available for analysis.

So, we have again a situation where the records required to support a claim have been kept but either cannot be found, or are not being provided, for analysis.

In the contractor's case, there is no doubt, an evaluation is to be done on the cost of carrying out records recovery and analysis. This work can be completed in whole, or in part, by the contractor's staff, or by external consultants, like Driver Trett. For a multi-million-pound project, the price of finding and analysing records is inevitably time consuming and costly. It is, however, a necessary precursor to establishing a cost and schedule claim, and winning the dispute.

> **A successful claim needs to be built on solid foundations. Don't go there [court] unless you have the time and cost records buttoned up and on your side.**

The contractor takes the view that the recognition by the employer of some entitlement means that the claim can be settled by horse trading, based on round-sum amounts, loosely based on the global cost overruns incurred. Reminiscent of Robert the Bruce and his spider (or possibly Einstein's alleged definition of insanity) this contractor has submitted substantially the same claim in substantially the same form three times, with exactly the same outcome.

Our proposals to re-build the claim on a sound footing were roundly rejected, probably because of the expectation that the exercise would be expensive and that further resubmissions of the same material would eventually work. Robert's spider managed it, but our contractor would be unwise to follow the same course.

From the outside, it seems glaringly obvious that a successful claim needs to be built on solid foundations. The courts are littered with claims that have fallen apart under cross examination in the most embarrassing circumstances for the delinquent party. Don't go there unless you have the time and cost records buttoned up and on your side. There may be complications and internal difficulties that make it hard to pull together the data but to proceed without either belt or braces carries a serious risk of exposure.

Take or pay: Does the law of penalties apply?

Dr Hamish Lal, Josephine Kaiding and Léa Defranchi

Partner and Associates of Akin Gump Strauss Hauer & Feld LLP

The second quarter of 2020 saw a tangible increase in the number of queries from clients asking about the enforceability of take or pay clauses common in supply agreements.

Intermingled with questions around force majeure, the key issue appears to be whether take or pay clauses can be an unenforceable penalty, thus opening up questions about the delta between the supplier's loss relative to the amount payable under the take or pay provision.

Take or pay agreements dealing with the supply of workers, project management, materials or gas (the paradigm) are all affected.

English law often governs international supply agreements, and so, one typically looks at the English case law on take or pay clauses. However, the question whether the law of penalties applies to such provisions also opens a wider generic debate in other jurisdictions, including whether the sums payable can be reduced commensurate with the actual harm to the supplier.

What is 'take or pay'?

Take or pay clauses operate to the benefit of both buyer and supplier.

There is a well-understood commercial justification for including such a provision in a supply contract: a buyer may require the flexibility to take delivery or not to take delivery of workers, materials or gas commensurate with needs; a seller could give the buyer an option on whether or not to take delivery or call-off the services, on condition that the seller would still require the buyer to make payment to the seller of a certain value for the quantities of gas, resource or services not delivered.

Such a payment is an option fee which is payable for the buyer's election not to take delivery. This take or pay payment creates an obligation in debt in the seller's favour. This is different to a liability in damages (typically found in a take and pay clause) because under a take and pay clause, the buyer's "non-off-take" is a breach of contract, whereas under a take or pay provision the buyer's "non-off-take" is an exercise of a contractual right to do so.

The distinction is an important pleading point. Whether the supplier runs a damages claim or a claim in debt affects not only procedure but can also open up wider debates about the enforceability of pre-agreed amounts and, in particular, if the law of penalties applies or if such amounts can be reduced.

Does the law of penalties apply?

M&J Polymers Ltd. v. Imerys Minerals Ltd.[1] and E-Nik Ltd. v. Department for Communities and Local Government[2] are two English High Court Judgements decided by Mr. Justice Burton. The same judge in a third case of Cavendish Square Holdings BV & Anor v. El Makdessi[3] made clear that he considered that "take or pay" clauses despite creating a debt claim could nevertheless qualify as a penalty clause.[4] This clarification was important. Mr. Justice Burton stated:
Thus I concluded in M&J Polymers Ltd. v. Imerys Minerals Ltd. [2008] 1 AER (Comm) 893 that a "take or pay clause" might qualify as a penalty clause, i.e., that the concept of penalty could apply to a debt claim as much as to a damages claim (contrary to the previous understanding in Jervis v. Harris [1996] Ch. 195).

The provenance of Mr. Justice Burton's "expansion" of the concept of penalty is open to exploration. The learned judge stated "...the way in which in more modern times the concept of penalty, while remaining a rara avis, has, at least in principle, moved outside the original province of a clause providing for an extravagant assessment of (liquidated) damages. One development, to which I have referred, was to expand its operation, although in the event unsuccessfully, into what was otherwise a claim in debt..."[5]

In M&J Polymers the learned judge considered that the House of Lords approach in White & Carter (Councils) Ltd. v. McGregor[6] and its citation in Chitty on Contracts – "The law on penalties ... is not relevant where the claimant claims an agreed sum (a debt) which is due from the defendant in return for the claimant's performance of his obligations" was "too simplistic".

Burton relied on Lord Roskill's speech in Export Credits Guarantee Dept. v. Universal Oil Products Co. where it was said "the clause was not a penalty clause because it provided for payment of money upon the happening of a specified event other than a breach of a contractual duty owed by the contemplated payor to the contemplated payee."[7] However, Lord Roskill was summarizing Slade LJ's judgment in the Court of Appeal which in turn relied on Diplock LJ's judgment in the Court of Appeal in Philip Bernstein (Successors) Ltd. v. Lydiate Textiles Ltd.[8]

In that case, Diplock LJ (as he then was) confirmed that the "penalty area" is restricted to the "narrow field" where there has been "a prior agreement by the parties to the contract as to an amount to be paid by a party in breach to the other party in respect of that breach." Such is the beauty of the common law and jurisprudence that a supplier could argue that the law of penalties does not apply and cite back to the House of Lords in White & Carter (Councils) Ltd. Should a tribunal find otherwise, then one needs to look at how liquidated damages are

Should a tribunal find that take or pay relates to breach and damages, then the international debate will focus on whether the sums claimed can be reduced.

Nature of penalties under English law

The Supreme Court reviewed comprehensively the nature of penalties in Cavendish Square Holdings BV v. Makdessi and ParkingEye Ltd. v. Beavis.[9] In their joint judgment, Lord Neuberger and Lord Sumption pointed to the distinction between a primary contractual obligation and a secondary obligation which arises only on breach of a primary obligation and made clear, "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation..."

The comments of Lord Mance add further weight to the proposition that the Courts are unlikely to set aside the pre-agreed or liquidated amounts. Supply agreements that invoke "take or pay" provisions are complex and negotiated at arm's length based on legal advice. Lord Mance said:[10] "In judging what is extravagant, exorbitant or unconscionable, I consider (despite contrary expressions of view) that the extent to which the parties were negotiating at arm's length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor."

Liquidated damages under civil codes

Should a tribunal find that take or pay relates to breach and damages, then the international debate will focus on whether the sums claimed can be reduced.

By way of example, pursuant to Article 390(2) of the UAE Civil Code the court holds a discretion to adjust the pre-agreed amount of compensation to ensure the damages are equal to the loss suffered. Similar provisions are found in the Civil Code of the Republic of Uzbekistan at Article 326 which may allow a penalty to be reduced in case where it is manifestly incommensurate to the consequences of breach of obligation. Article 1231-5 of the French Civil Code may also be relevant. It provides:

When an agreement provides that the party who fails to perform it will pay a certain sum as damages, the other party may not be awarded a greater or lesser amount.

Nevertheless, the judge may, even on his own motion, moderate or increase the penalty agreed upon when it is manifestly excessive or ridiculously low.

Where the obligation has been performed in part, the agreed penalty may be reduced by the judge, even ex officio, in proportion to the interest that the partial performance has provided the creditor, without prejudice to the application of the preceding paragraph.

Any stipulation contrary to the two preceding paragraphs shall be deemed unwritten.

Except in the case of final non-performance, the penalty shall only be incurred when the debtor is given notice.

Three key points

M&J Polymers Ltd. v. Imerys Minerals Ltd. and E-Nik Ltd v. Department for Communities tend to the conclusion that a failure by the buyer to "take or pay" is a breach giving rise to damages such that the law on penalties is activated.

However, English law authority also concludes that a failure to "take or pay" is a debt claim (not a claim in damages) and so not subject to the rule on penalties, for example White & Carter (Councils) Ltd. v. McGregor and Euro London Appointments v. Claessens International.

The jurisprudence indicates that take or pay clauses ought not fall into the law on penalties. If a Tribunal decides otherwise, the UK Supreme Court in Cavendish Square Holdings BV v. Makdessi has reinforced the point that English Courts will be reluctant to disturb the parties' agreement. Internationally, buyers keen to assert that the harm to the supplier is lower than that set in the agreement may attempt to seize upon Civil Codes.

Seeing the wood for the trees

Nicola Huxtable, Operations Director, Driver Trett, Bristol

"We've been working on the job for years", "we know everything there is to know about this job", "it's just been a nightmare from the start, but we've explored every angle".

Just a few of the phrases we hear thrown about when projects are not going entirely according to plan. These are the types of projects where knowing and understanding the intricate details of the project may over complicate the situation.

Part of the role of a consultant or expert is to familiarise themselves with a project very quickly. This will include talking to the people involved at both project and commercial levels, reviewing documents such as progress records and programmes. This review will inevitably result in several very high-level questions, the answers to which could potentially take days to explain in detail. But often, the detailed answers are not what we are looking for.

As a business, we are approached by contractors daily, asking our opinion on how to recover losses on a project when the project manager or contract administrator has rejected notices and claims. Often, the notices and claims are well drafted and supported by excellent records, but this will be of no use if the entitlement to recover does not exist.

A recent example of this relates to a contractor working on a large refurbishment project where the building had been occupied throughout the tender stage. The contract was for demolition of part of the building and refurbishment of the remainder, with a new extension.

As you would expect from an older building, which had been refurbished and repurposed on many occasions, there was a significant amount of change on the job, and the change was being instructed on a daily basis. With this being an NEC 3 contract, a large amount of small value change required enormous contract administration on the part of the contractor.

The contractor kept what can only be described as the most comprehensive records I have seen on a project of this type. They were all catalogued and filed on a document management system, which is only of any use if they are then used correctly, which unfortunately, they were not.

The project was losing money and there were approximately £100k of compensation events which had not been notified in time, or at all. On the basis that you snooze, you lose, the contractor was not going to get paid for these compensation events. The Employer was well-aware of the true situation but understood the compensation event mechanisms in the contract and was not going to pay.

The contractor's team had been going around in circles with this issue and debating how to recover the £100k. New 'constructed' compensation event notices had been issued, which were re-hashed versions of the originals and therefore did not stand up. Negotiations with the Employer had tried and failed. Updated programmes were being issued but not accepted. All avenues had been exhausted.

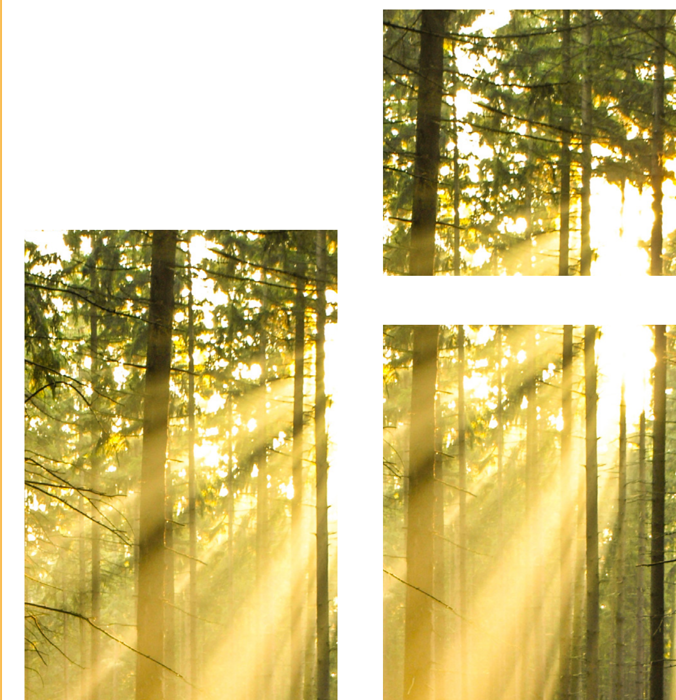
> **Often, the notices and claims are well drafted and supported by excellent records, but this will be of no use if the entitlement to recover does not exist.**

Eventually, the contractor picked up the phone to 'pick our brains' over the issue. It became clear very quickly that the contractor was not going to recover time or money against a compensation event that had been notified out of time, however, there may be another way...

A quick look at the list of instructions threw up a lifeline. Instruction number 1 – Omit all provisional sums. NEC 3 contracts do not recognise provisional sums. There were approximately £200k of provisional sums.

This instruction was not valid. Under an NEC 3 contract, you cannot instruct a change to the prices, it has to be a change to the scope. The Employer argued this, claiming that provisional sums are standard practice. Everybody uses them on every project. But, having sought independent legal advice on the point, the Employer was advised that if this matter was adjudicated, he would lose. Therefore, through gritted teeth and some choice language, the contractor was paid for the provisional sums.

The contractor was never going to be able to recover against the compensation events that had not been notified and was faced with losing over £100k. However, sometimes, not knowing the detail of the project and the strained relationships involved allows you to see the bigger picture and spot opportunities that had not been considered. **Sometimes, a fresh pair of eyes allows you to see the wood for the trees.**



Variations and Covid-19

Michael Sergeant, Partner, HFW

The starting point for contractors looking to claim relief and compensation for the impact of Covid-19 has been to look at their contract provisions for Force Majeure and Change in Law.

There will often be severe restrictions on a claim under those clauses and so a contractor should also consider the degree to which the variations clause may trigger entitlements.

The clause will normally be cited when there are changes to the permanent works. For example, where specified equipment is no longer available because a supplier has been affected by the pandemic. But the impact of Covid-19 has been more especially felt in the way that sites have changed how they operate. In particular, by being required to introduce changed methods of working.

Such a claim needs to consider three issues: (i) whether a valid instruction has been issued; (ii) the type of variation that may be instructed under the contract; and (iii) whether the change is outside the contractor's risk.

(i) Whether a valid instruction has been issued

Claims associated with changes to site procedures will often fall at this initial hurdle. Construction contracts almost always require the employer (or its agent) to issue an instruction to trigger a variation entitlement. During the pandemic, contractors will often have altered their working practices based on public health information rather than following the directions of their client. However, this will not always be the case and an email from the employer indicating such changes are required may be sufficient to qualify.

(ii) The type of variation that may be instructed under the contract

If the contractor can overcome the first hurdle, it needs to consider whether the change to its operating procedures qualifies as a variation under the contract. Variations are sometimes defined as amounting to only changes to the permanent works.

The issue is illustrated by the 1997 Court of Appeal case, Strachan & Henshaw v. Stein (1997) 87 BLR 52. S&H was employed to install and commission generators at a power station, being constructed at St Neots in Cambridgeshire within the UK. It initially based its site facilities camp immediately adjacent to where its operatives were working. But then, shortly into the project, S&H was instructed to move the camp. This meant its operatives ended up with a half-mile walk every time they wanted to use the facilities. The change led to a significant reduction in efficiency and S&H brought a large claim for the extra costs. For the purposes of the case, it was assumed the contract stipulated that the site camp should be based in the original location. But, despite this, the contractor lost the case. The court found that the variations clause did not bite in this situation. The clause stated that variations meant "any alteration to the Works whether by way of addition, modification or omission". Furthermore, the term "Works" was defined as "work to be done by the Contractor under the Contract". The Court of Appeal therefore concluded that this definition of "Works" did not encompass the arrangements for operatives to be transported to the workplace as it only covered the actual site construction work; i.e. the permanent work.

This case usefully illustrates the principles, although on this occasion, the wording of the variations clause was too narrow to establish entitlement.

Fortunately, for most contractors, the commonly used UK standard forms contain wider definitions of both the work-scope and variations, than provided for in the contract of the Strachan & Henshaw case. The FIDIC Yellow Book 1999, defines Variation as including any change to the Employer's Requirements or the Works, which is in turn defined as including both permanent works and temporary works. The JCT D&B 2016, defines "Change" to include various alterations to the way the work is organised on site, including changes to site access or limitations on working space or hours. Under NEC4, Compensation Events include an instruction changing the Scope, which is defined as information, which either specifies and describes the work or states any constraints on how the Contractor provides them.

In short, therefore, most UK contractors will be operating under contracts that allow instructed changes to site procedures to be categorised as variations.

(iii) Whether the change is outside the contractor's risk

The final challenge for this type of claim is to establishing that the contractor's new working arrangements amount to a change in its duties under its contract. Take as an example the CLC's Site Operating Procedures (SOP).[12]

It seems to be generally recognised that a contractor's duty to implement the SOPs arises as a consequence of the Construction (Design and Management) Regulations 2015 (CDM Regulations) which impose various duties; e.g., a duty to manage the works to ensure they are carried out as safely as reasonably practicable (Regulation 13). A contractor has an underlying duty to comply with the CDM Regulations and it takes the burden of both the risk (and cost) of doing so.[11]

A change to a contractor's scope (even if allowed for under the variations clause) will not qualify as contract variation if it involves something that is already part of its underlying risk allocation. This principle is worth considering in a different context. If, for example, it transpires that a specified item of equipment is inadequate then a design and build contractor cannot claim extra. This is because the contractor's design obligation means that this is its risk. It cannot amount to a variation even if the employer mistakenly directed it as one. The same issue may prevent a contractor claiming that compliance with SOPs is a variation. If compliance with the SOPs is an underlying duty under its contractual obligation via the CDM Regulations, then changes to working operations to comply with the SOPs cannot be a variation.

This is not to say that no changes to working operations will qualify as variations. Employers may well impose alterations to the way in which the contractor is required to carry out the work or organise its site, which go beyond the CDM Regulations.

Finally, it should be remembered that if a contractor can find a route to claiming as a variation this will give advantages over other claims. A right to both time and money will be triggered and compensation will be based on prices rather than cost, making entitlement easier to establish and potentially more lucrative.

ADR: Independent expert determination

Peter Banathy
Regional Director, Driver Trett
Middle East and Africa

Alternative dispute resolution (ADR) comes in a variety of forms and fundamentally means a process of resolving a dispute other than through litigation.

With specific regard to the engineering and construction industry, it commonly means a process alternative not only to litigation but also to arbitration.

Typical forms of ADR include conciliation, mediation, adjudication, and expert determination.

This article addresses expert determination, what it is, why it is seemingly becoming more popular, especially in the Middle East, and how in the right circumstances it can operate to the advantage of the parties to a dispute.

What is it?

In its simplest form, it is the parties to a dispute appointing an independent third party, "the expert", to exercise their professional expertise, experience and knowledge to decide upon issues that are the basis of the dispute.

The resulting determination can be binding or non-binding and can arise either from a process provided for in the contractual agreement between the parties, or from a separate agreement that the parties choose to enter into outside of the contract provisions (commonly described as an ad-hoc arrangement).

Expert determination is bound by the contractual framework surrounding it and is not subject to any specific legislation. As a consequence, it can be a very flexible process and the details of it are often open to the parties to negotiate and agree.

For example, the parties may agree that the process should be concluded on a "documents only" basis with a set timeline for exchanges of submissions. For large and/or complex issues, expert determination may provide for multiple rounds of document submissions, together with a hearing or hearings.

As well as ensuring that the expert has the relevant skills and experience to address the matters in dispute, there are various other considerations for the parties for the appointment and process to be effective.

The selection of the expert needs to be carefully considered such that the person appointed has the necessary skills and experience to understand and address the key issues of the dispute. As a dispute can often relate to a number of technical and legal matters, it is always worth considering allowing for the involvement of specialist support to the expert (for example on specific technical or legal matters).

Experts can be appointed by a nominating body, such as the RICS or the Chartered Institute of Arbitrators (CIArb) and nomination via such bodies is often prescribed where contracts contain provision for expert determination.

In other instances, especially under an ad hoc arrangement between the parties, it may simply be by agreement between the parties as to the relevant expert to appoint.

As well as ensuring that the expert has the relevant skills and experience to address the matters in dispute, there are various other considerations for the parties for the appointment and process to be effective.

For example, the expert should:

- Be free from any conflicts of interest;
- Act with impartiality and fairness;
- Have appropriate availability aligned with the timetable set out for the process;
- Agree procedure or terms of reference to allow the expert to make their own enquiries and where necessary use their experience to draw conclusions from the evidence they have been presented with;
- Manage the overall process within the framework of the agreed process.

The conclusion of the process is typically reached when the expert furnishes the determination to the parties. This should articulate the decisions of the expert clearly and provide reasoning so as to enable the parties to understand the full basis of the determination.

Why is expert determination increasing in popularity in the Middle East?

Across the Middle East, expert determination has become increasingly more common over the last eighteen months or so. In particular, I have seen a marked increase in the number of ad-hoc agreements entered into by parties in dispute.

So why is this the case?

Expert determination as described above can, subject to agreement between the parties, be a very flexible process tailored to suit the nature, size and complexity of the dispute(s).

Typically, the process is shorter in duration and much more cost effective than litigation or arbitration. In addition, the parties usually have an opportunity to influence the choice of the expert undertaking the determination, thus ensuring that the matters are reviewed and determined by an individual (possibly

with relevant support) who is appropriately qualified and experienced in the relevant subject matter. This can be very effective where the dispute centres around complex technical issues for example.

Furthermore, for disputes which could still be the subject of litigation or arbitration, engaging a prior process of expert determination may promote a settlement of the dispute. In my experience, this is the main reason that parties enter into an ad-hoc and non-binding process. This has added benefits in that it allows commercial relationships to continue without the normal fractures that often appear when parties are engaged in formal dispute proceedings with each other.

How can expert determination benefit the parties to a dispute(s)?

As already mentioned, expert determination is typically quicker and more cost effective than litigation or arbitration, which, in the very challenging economic climate the world is currently in, may be a particular attraction to parties to a dispute.

Also, when using an ad-hoc non-binding process in particular, it may facilitate a commercial settlement of a dispute, thus avoiding the costs associated with more formal proceedings.

In my experience, clients often question the usefulness of expert determination when it is non-binding. My typical answer to them is that it provides a basis for re-setting a party's expectations and thereafter can prompt settlement discussions which in turn can help the parties to avoid lengthy and costly proceedings. The rationale of a neutral third party with relevant expertise in the matters underpinning the dispute can allow the parties to sense check their own opinions on the matters against their original position.

Another benefit I have seen is that where a party or parties to a dispute are an entity with rigid accounting and financial reporting requirements (including shareholder or stakeholder considerations) expert determination can provide a clear measure for such accounting and reporting purposes relatively quickly.

Similarly, where circumstances allow and expert determination is used whilst a project is still ongoing, a dispute that is determined relatively quickly can allow the parties to focus on the completion of the project rather than becoming embroiled in a more lengthy and acrimonious dispute resolution process.

In conclusion, whilst expert determination may not always be the ideal or ultimate mechanism for resolving disputes in our industry, for the reasons described above, it clearly has some very real attractions, and therefore, a place in the market.

A word of warning; those seeking to include a clause within a contract citing expert determination as a form of dispute resolution must draft a clause that reflects the parties precise wants and needs. A recent case heard in the Technology and Construction Court found that such a clause was not clear and that the expert lacked jurisdiction; the determination/decision of the expert was rendered null and void and therefore not binding upon the parties.[13]

The Royal Institution of Chartered Surveyors (RICS) publishes a very comprehensive and useful guidance note on the subject of expert determination[14] for instances where surveyors may be asked to act in this role. Such guidance may be useful for any other professional who is acting in or considering taking that role. The guidance note also makes for useful reading for anyone considering submitting a dispute it is party to or maybe involved with, to expert determination.

A further sign perhaps that expert determination is set to increase in popularity in the Middle East and elsewhere is that the RICS recently delivered its first expert determination training programme. In anticipation of this increase I was a happy participant on the programme and have enhanced my skills to allow me to continue to deliver effective expert determinations across the region.

Simon Braithwaite
Senior Vice President

Q&A with Simon Braithwaite

Simon Braithwaite, Quantum Damages and Delay Expert, recently joined Driver Trett as one of the two, Senior Vice Presidents of our new office in New York City.

In this Q&A we ask how he has found starting a new role during a pandemic; what has been the greatest influence on his career; and what makes him tick.

Digest: Hi Simon, how are you? Thanks for taking the time to talk to the Digest. I bet the last couple of months have been rather busy for you.
Simon: Thanks for giving me the opportunity to speak to you. It has been a rather hectic time, but it is all good and a positive part of the challenge.

Digest: What is your role at Driver?
Simon: I'm one of the Senior Vice Presidents, based in the new office in New York. I am responsible for developing the practice here and providing clients with advice, along with services related to their problem projects.

Digest: How did you get into the industry and how did you get to where you are today?
Simon: I got in to disputes by accident really. After my degree, and some construction experience, I was interviewed by Steve Driver at BWSICC (now Driver Group). At the time, I really didn't know what I was getting in to, but it's 20 years later and I have come full circle.

Digest: Who has been the greatest influence on your career?
Simon: That is a tough question. There are many people I could mention, college lecturers, people I have worked with, clients and friends in the industry who I still take advice from. But, I would have to say my parents. They put me through university and remain a positive influence, and even though I live overseas, I still speak to them most days.

Digest: What has been the best moment of your career?
Simon: I think two moments need a mention.

1. Moving to the USA almost 20 years ago (which is a story of its own). My wife and I sold our possessions, house, got married and took a chance moving here. I remember the plane taking off and thinking "what the hell have I just done?"

2. This opportunity. It is a great opportunity to promote Diales and Driver Trett in the Americas region. Personally, I think the level of services provided will be well received. Guaranteed, I will do my best to make it successful.

Digest: How have you found starting a new job during lockdown?
Simon: It has been a bit of a challenge, there is no doubt about that. It would be beneficial if we could meet with the group and clients, etc., face to face, but, as with most things, you find a way around a situation. Thankfully, everyone has remained healthy, and hopefully it stays that way!

Digest: What makes you tick?
Simon: Work.
I enjoy meeting clients, being part of a team helping to resolve complex issues, and leaving clients happy.

In my free time I enjoy being with my family, and also playing football; although each season my recovery time is getting longer.

I really appreciate going back to UK each Christmas to see family, and I often take my son to watch Manchester City – he has a much more enjoyable experience than I did going to Maine Road!

Digest: Tell us a little-known fact about you.
Simon: I love to BBQ (you can't really do that so much in Manchester), and I do have some hair, which is apparently turning grey!

The claims process under FIDIC 2017

From a contractor's perspective

Phil Duggan, Head of Expert Services, Driver Trett, Middle East

I was recently asked by a client to offer my views as to whether they should propose adopting FIDIC 2017 Contract Conditions in respect of a large civil engineering project in the Middle East. The client in question is a contractor and very well versed in the 1999 Conditions. A prospective employer had invited them to propose "standard" terms of conditions and, due to the familiarity they had with the 1999 conditions, they initially felt compelled to propose these.

In answering, I asked the question as to what, in their experience, was "the worst part" of using the 1999 Conditions so we could consider if the 2017 version would provide something better. It was revealed that their biggest frustration was within the claims process. They felt that they (as the Contractor) were "kicked into the long grass" too often, and claims were not considered by the Engineer, either impartially or expediently. A commonplace complaint in my experience.

Below, I have considered the two forms, and their differences, in respect of dealing with Contractor's claims.

The 1999 Conditions

Within the 1999 Conditions, the procedure for claims and disputes is set out within Sub-Clause 20 ("Claim, Disputes and Arbitration"). In simple terms, this provides that:

1. Wherever the Contractor considers himself entitled to any extension of the Time for Completion and/or any additional payment, they are obliged to give notice to the Engineer describing the event and circumstances.

2. The requirement to give notice is further specified to be delivered within 28 days of the date upon which the Contractor became aware, or should have become aware, of the event and that this is a condition precedent to the Contractor securing their entitlement(s).

3. The Contractor is obliged to submit a fully detailed claim with supporting particulars within 42 days of the date upon which the Contractor became aware, or should have become aware, of the event (which will be interim if the effects of the event are ongoing).

4. The Engineer is obliged to provide a response within 42 days of receiving a claim from the Contractor with approval, or with disapproval and detailed comments. He may also request any necessary further particulars.

5. If the first claim is interim (i.e. the effects of the event are ongoing beyond 42 days), the contractor is obliged to send further interim claims at monthly intervals giving the accumulated delay and/or amount claimed.

6. The Contractor is entitled to have any such amounts for any claim that has been reasonably substantiated included within any Payment Certificate.

7. The Engineer is obliged to proceed in accordance with Sub-clause 3.5 [Determinations] to agree or determine the extension of the Time for Completion and/or any additional payment which the Contractor is entitled to.

Under the 1999 Conditions, determinations are described within Sub-clause 3.5. Therein, there is an obligation that whenever the Conditions require the Engineer to provide a determination (as in the case with a Contractor's claim in accordance with Sub-clause 20.1) the Engineer shall consult with each party in an endeavour to reach agreement. If agreement is not reached, the Engineer is required to make a fair determination.

Any agreement or determination must be complied with unless and/or until it is revised by reference to the dispute resolution procedures under the Contract (i.e. by reference to a decision of the Dispute Adjudication Board and/or further by either amicable settlement or arbitration).

The 2017 Conditions

Within the 2017 Conditions, "Claim" is a Defined Term and means "a request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works."

Further, the 2017 Conditions separates the provisions for Claims and Disputes, with Claims (both Employer's and Contractor's) dealt with under Clause 20. For the purposes of this article, I will only address the provisions in so far as they apply to a Contractor's Claim.

Sub-clause 20.1 identifies that a claim may arise:

(a) ...
(b) If the Contractor considers that he/she is entitled to any additional payment from the Employer and/or to EOT; or
(c) If either Party considers that he/she is entitled to another entitlement or relief against the other Party...

Sub-clause 20.2 sets out the key procedural requirements and in particular that:

i. The claiming Party shall give a Notice to the Engineer, describing the event or circumstance giving rise to the Claim as soon as practicable and no later than 28 days after they became aware or should have become aware of the event or circumstance.

ii. The requirement to give Notice is further specified to be a condition precedent to a Party securing their entitlement(s).

iii. If the Engineer considers that the claiming Party failed to give the requisite and timely Notice, the Engineer is obliged to notify the claiming Party accordingly within 14 days of the receipt of the Notice, setting out reasons. If the Engineer does not give such notification within 14 days, the Notice of Claim shall be deemed valid (although, the other Party can give notification of disagreement of such deemed valid Notice and the claiming Party can challenge a rejection

of the Notice by the Engineer).

iv. A fully detailed Claim, as stipulated by Sub-clause 20.2.4, must be submitted within 84 days after the Party became aware, or should have become aware, of the event or circumstance. Alhough, there is provision for this to be revised if proposed by the claiming Party and agreed by the Engineer. This document would also include the claiming Party's justification that its Notice was correct and should stand in the event that it had been rejected by the Engineer.

v. If the claiming Party does not submit, as a minimum, a statement of the contractual and/or legal basis of the Claim within the 84 day period (or as agreed to be amended by the Engineer) the Notice of Claim shall be deemed to have lapsed and no longer be valid and the Engineer shall, within 14 days of the time limit expiring, give notice to the claiming Party accordingly. Failure by the Engineer to issue such a Notice will mean that the Notice of Claim remains valid.

vi. In the event that the first claim is interim (i.e. the effects of the event are ongoing beyond 84 days), the claiming Party is obliged to send further interim Claims at monthly intervals. The Engineer is required to give his/her response on the contractual and/or legal basis of the Claim within 42 days of receipt of an interim Claim and in the event that the Engineer fails to do so, the Engineer is deemed to have rejected the Claim.

vii. A final Claim is required to be submitted within 28 days of the end of the effects resulting from the event.

viii. Upon receipt of the final Claim, the Engineer is obliged to consult with both Parties and encourage discussion between the Parties in an endeavour to reach an agreement. There is a stipulated period of 42 days for agreement to be achieved, though this can be amended if proposed by the Engineer and agreed by the Parties.

ix. If agreement is not reached within 42 days, the Engineer is obliged to issue a fair determination of the matter within 42 days after expiration of the period for reaching agreement.

x. Failure of the Engineer to adhere to these time limits means that the Engineer is deemed to have given a determination rejecting the Claim.

xi. The Engineer is expressly stated to carry out his duties of consultation and determination neutrally between the Parties and shall not be deemed to act for the Employer.

The contrast

As is evident from the analysis of the provisions for dealing with claims, as set out within the 1999 Conditions as compared to the 2017 Conditions, there appears to be more stringent and time-specific procedures within the latter.

In particular, it is noteworthy that:

- The 2017 Conditions allows significantly more time for a Contractor to provide a fully particularised Claim. This additional time ought to allow the Contractor to produce better quality Claims which hopefully will assist the Parties to understand and resolve matters.
- There is an emphasis upon the Contractor providing proper explanation of the contractual and/or legal basis of its Claim.
- The Engineer is obliged to consider the merits of the Claim at an earlier stage in the process (i.e. upon receipt of the Notice and not the first Claim submission).
- The deemed acceptance provisions ought to ensure that the Engineer issues a response timeously.
- The procedures for consultation and determination have fixed timescales and therefore cannot be open-ended. The deemed rejected provisions for failure to adhere to the time limits at least bring a closure to this part of the process to allow the Contractor to instigate the Dispute procedures.
- Unlike the 1999 Conditions, the 2017 edition expresses that the Engineer should act neutrally when determining Claims. This could make a big difference in allowing more objective analysis of Contractor's Claims.

In-keeping with the intention to make the 2017 Conditions more focused upon dispute avoidance, it is my opinion that the key differences outlined above will go some way towards achieving this aim, particularly in respect of Contractor's claims. The greater emphasis that is placed upon dealing with claims in a timeous manner should (hopefully) avoid the past feelings that often Contractor's Claims are not dealt with expediently. As with all matters of contract management and administration, the contract conditions can only provide the parties with the framework to deliver upon such objectives. The responsibility to make it work remains with those involved in the process.

Article byte

The Claim: Honesty is half the battle

Erald Kahmann, Senior Consultant, Driver Trett, Netherlands

In this article, originally published in Dutch by Cobouw, Erald Kahmann discusses some basic principles about the preparation and management of a claim.

"Unforeseen circumstances, disparities in the contract, a client changing their mind, a contractor who thinks they can execute the work more efficiently: almost no project is carried out exactly to the original plan - and that has not improved under the current coronavirus circumstances."

Scan the QR code to go straight to our website and read the article in full.

www.drivertrett.com/global/news/the-claim-honesty-is-half-the-battle

Article endnotes

1. [2008] EWHC 344 (Comm); [2008] 1 All E.R. (Comm) 893.
2. [2012] EWHC 3027 (Comm); [2013] 2 All E.R. (Comm) 868.
3. [2012] EWHC 3582 (Comm); [2013] 1 All E.R. (Comm) 787.
4. See also Lancore Services Ltd. v. Barclays Bank Plc [2008] EWHC 1264 (Ch) [2008] 1 CLC 1039 at para 98 per HHJ Hodge QC.
5. Cavendish Square Holdings BV & Anor v El Makdessi [2012] EWHC 3582 (Comm) at paragraph 29.
6. [1962] AC 413.
7. [1983] 1 W.L.R. 399.
8. Unreported, June 26, 1962; Court of Appeal (Civil Division).
9. [2015] UKSC 67; [2016] A.C. 1172.
10. [2016] A.C. 1172 at para. 152.
11. The Construction Leadership Council www.constructionleadershipcouncil.co.uk
12. Site Operating Procedures issued by the CLC
13. Empyreal Energy Ltd v Daylighting Power Ltd EWHC 1971 (TCC) (22 July 2020) https://www.bailii.org/ew/cases/EWHC/TCC/2020/1971.html
14. RICS guidance note – Independent expert determination – 1st edition, December 2016

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