

Deciding disrupted & prolonged Contract Additional Costs

By Tony Bingham*

“The difficulty experienced by Arbitrators and Adjudicators when parties fail to provide adequate/relevant detailed support and identify cause and effect with regard to disruption and prolongation and the subsequent quantum.”

Introduction

The construction industry in the UK provides very competitive building prices. The estimator, whether by Standard Form contract documents or by every day norms is not asked to include in his tender price for being “messed-about” by the employer or his team. A brief glimpse at say JCT98 (clause 25) and NEC has a list of non-contractor risk events, which set a machine in motion to extend the original Contract Completion Date to a new later date. Some of those events also carry money compensation for the prolonged stay. Similarly he is not asked to up his bid price to include for loss of productivity via disruption, (more risk) even if he finishes ultimately on the original Contract Completion Date. Clause 26 is the reminder. The customer does not want his price at the outset to be loaded for such eventualities. And yet the “eventualities” are ordinary. Then, when the contractor holds his hand out for a new later completion date and money, and more money for disrupted working a dispute is very ordinary.

Observers can be forgiven for suggesting that the industry is confrontational, claims minded, “extremely adversarial” (Latham 1994, page 94). They are right and wrong. The “system” in the UK is to price on the basis that all will go smoothly then be compensated *if* very ordinary events such as a change of mind by the customer occurs. The adversarial bit is all about people becoming at odds about the costs and consequences of what is permitted by the bargain. None of this is a breach of contract, nor is it about broken promises. It is about promising to cope with being messed-about and being paid for it.

So, if “losing productivity” and/or “obtaining a new later completion date with compensation” are expressly permitted by the contract between customer and contractor, for all sorts of reasons, why all these disputes?

*First presented by Tony Bingham as a paper at the Chartered Institute of Arbitrators North East Branch - Leeds on Tuesday 26th January 2010.

The author is a Barrister at Law (LLB (Hons), FCIArb, FCIOB, MRICS, MInstCES. Arbitrator. Adjudicator. Mediator.

Correspondence to: info@tonybingham.co.uk.

This paper is reproduced with permission of the author at tonybingham.co.uk, building-disputes.co.uk

Apart from the contractor being caused delays and being paid, the contractor takes a risk that his own productivity difficulties will happen. Difficulties with the (say) supply chain (suppliers and Sub-contractors), ‘thin’ management skills are the contractor’s own contractual problem. These “culpable events” become entangled and jumbled up with events, which can be claimed for. All this becomes dispute territory. See Box 1.

Dispute Apparatus

The dispute apparatus (the Arbitrator, Adjudicator or Judge) always, without fail, will be required to deal with a variety of arguments about insufficient ‘proof’, muddled facts, and wrongly processed claim under the machinery. See Box 2 & 3 for some common arguments run in claims against disrupted lost productivity working, alleged delay in programme events and against the dispute apparatus itself.

As such, this paper sets out to describe the major difficulties experienced by arbitrators and adjudicators when parties fail to provide adequate and relevant detailed support for their case and to identify cause and effect with regard to disruption and prolongation and the subsequent quantum. To adequately achieve this, the paper is split into two sections:

- Disruption and Loss of Productivity
- Extension of Time and Prolongation

Box 1: Risks and Costs

There will be quarrels about who took on what risks. Despite being with us for decades, the contractual apparatus:

- is open to interpretation;
- is an administrative burden;
- once operated has a tendency to sour relationships;
- is open to exploitation;
- meets “commercial” pressure to not charge more;
- meets partisanship (the architect/CA/Project Manager is supposed to be independent & impartial).
- Meets reprisal behaviour (trading punches).

Box 2: Common Arguments**In claims against disrupted lost productivity working**

- there is no evidence of disruption
- there is no evidence of being disrupted by events that carry money;
- this is evidence of the contractor causing delays because of his behaviour/ difficulties;
- this is evidence of a jumble of delays, *i.e.* both contractor *and* payable delays, which can't be safely untangled.

In claims against alleged delay in the programme events

- they did not happen;
- they were not likely to cause delay;
- they did happen but are not within the delay list that provides an extension of time ("Relevant Events"; "Compensation Events");
- they are Relevant Events but they did not actually delay the contract completion date;
- they are Relevant Events but were not *likely* to delay the contract completion date;
- they are Relevant Events but it is unfair to award extension of time;
- they are Relevant Events and did delay the contract completion date and = extension of time, but there are reasons why no money attaches.

Part 1: Disruption and Loss of Productivity**Problem: The "Global Claim"**

The Tribunal is sometimes faced with a complaint from the defendant that the claimant's claim is merely shopping list of delay events and a lump sum money claim. The defendant says he is entitled to a 'pleading', which shows each cause of loss/delay and cost. "There is no agenda for the trial" is the cry, all this is from a line of cases: Minter v. WHTSA (1980); J Crosby v. Portland (1987); Wharf v, Eric Cumine (1991); and GMTC Tools v. Yuasa (1994).

It is the author's view here that this pleading point is a waste of time. No Tribunal can order or "require" a party to establish causation and loss by a particular method. If 'X' wants to run a Global Claim he takes the risk by this method of putting his case.

Problem: The "Jumbled Claim" for loss of productivity

The position here is that the shopping list and £Claim arrives (the "Global Claim") and is eventually shown to be based on mixed grounds

i.e. some grounds are payable (the "Jumble" of heads has to be unravelled).

There is the helpful Scottish case of John Doyle Construction Ltd v. Laing Management (both at first instance (2002), then at Court of Appeal (2004)). Another case is London Underground v. City Link Telecoms (2007, Ramsey J in TCC).

What is this type of Claim?

In John Doyle v. Laing the following statement sets out a definition:

"In the Inner House Lord MacLean at paragraph 4 defined a global claim as "a claim in which the individual causal connections between the events giving rise to the claim and the items of loss making up the claim are not specified but the totality of the loss and expense is said to be a consequence of the totality of the events giving rise to the claim".

What is the difficulty? A jumbled claim is risky...

Lord Drummond Young cited paragraph 36 to 39 of the judgment of the Lord Ordinary Macfadyen where he said:

"[36] The logic of a global claim demands, however, that all the events which contribute to causing the global loss be events for which the defender is liable. If the causal events include events for which the defender bears no liability, the effect of upholding the global claim is to impose on the defender a liability, which, in part, is not legally his. That is unjustified. A global claim, as such, must therefore fail if any material contribution to the causation of the global loss is made by a factor or factors for which the defender bears no legal liability... The point has on occasion been expressed in terms of a requirement that the pursuer should not himself have been responsible for any factor contributing materially to the global

Box 3: Common issues raised against the Dispute Apparatus

- It may be said the tribunal has detected and decided issues, which are not in issue in the arbitration/adjudication ("the Pleadings point"), (*i.e.* gone outside its Jurisdiction).
- It may be that the Tribunal disagrees with both sides' arguments and evidence and puts a third point of view. Is that permissible?
- It may be said that the Tribunal reached a view when no evidence was advanced to support that view.
- It may be said that the Tribunal reached a view but has overlooked a piece of evidence.
- It may be said that the Tribunal has rejected the expert evidence and relied upon his own knowledge.

loss, but it is in my view clearly more accurate to say that there must be no material causative factor for which the defender is not liable.

“[37] Advancing a claim for loss and expense in global form is therefore a risky enterprise. Failure to prove that a particular event for which the defender was liable played a part in causing the global loss will not have any adverse effect on the claim, provided the remaining events for which the defender was liable are proved to have caused the global loss. On the other hand, proof that an event played a material part in causing the global loss, combined with failure to prove that that event was one for which the defender was responsible, will undermine the logic of the global claim. Moreover, the defender may set out to prove that, in addition to the factors for which he is liable founded on by the pursuer, a material contribution to the causation of the global loss has been made by another factor or other factors for which he has no liability. If he succeeds in proving that, again the global claim will be undermined.”

But now consider how such ‘jumbled claims’ might succeed. Lord MacFadyen continues:

“[38] The rigour of that analysis is in my view mitigated by two considerations. The first of these is that while, in the circumstances outlined, the global claim as such will fail, it does not follow that no claim will succeed. The fact that the pursuer has been driven (or chosen) to advance a global claim because of the difficulty of relating each causative event to an individual sum of loss or expense does not mean that after evidence has been led it will remain impossible to attribute individual sums of loss or expense to individual causative events. The point is illustrated in certain of the American cases. *The global claim may fail, but there may be in the evidence a sufficient basis to find causal connections between individual losses and individual events, or to make a ‘rational apportionment’ of part of the global loss to the causative events for which the defender has been held responsible.* (Emphasis added by TB)

“[39] The second factor mitigating the rigour of the logic of global claims is that causation must be treated as a common sense matter... That is particularly important, in my view, where averments are made attributing, for example, the same period of delay to more than one cause.”

Lord Drummond Young then went on to review the Australian decision by J. Byrne in *John Holland Construction & Engineering Pty Ltd v. Kvaerner RJ Brown Pty Ltd* (1996, 82 BLR 81) and the America Court of Claims decision in *Boyajian v. United States* (423 F 2d 1231) before concluding as follows:

“(In paragraph 14) It is accordingly clear that if a global claim is to succeed, whether it is a total cost claim or not, the contractor must eliminate from the causes of his loss and expense all matters that are not the responsibility of the employer. This requirement is, however, mitigated by the considerations discussed by the Lord Ordinary MacFadyen at paras 38 and 39 of his opinion. In the first place, it may be possible to identify causal link between particular events for which the employer is responsible and individual items of loss.”

“(In paragraph 15) In the second place, the question of causation must be treated by ‘the application of common sense to the logical principles of causation: *John Holland Construction & Engineering Pty Ltd v. Kvaerner RJ Brown Pty Ltd* (per Byrne J at p 841); *Alexander v. Cambridge Credit Corp Ltd*; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* (per Lord Dunedin at p 362).”

Last resort? ‘Apportionment’

In paragraphs 16 to 19 Lord Drummond Young dealt in more detail with the basis on which apportionment might be made...

“[16] In the third place, even if it cannot be said that events for which the employer is responsible are the dominant cause of the loss, it may be possible to apportion the loss between the causes for which the employer is responsible and other causes. In such a case it is obviously necessary that the event or events for which the employer is responsible should be a material cause of the loss. Provided that condition is met, however, we are of opinion that apportionment of loss between the different causes is possible in an appropriate case. Such a procedure may be appropriate in a case where the causes of the loss are truly concurrent, in the sense that both operate together at the same time to produce a single consequence. For example, work on a construction project might be held up for a period owing to the late provision of information by the architect, but during that period bad weather might have prevented work for part of the time. In such a case responsibility for the loss can be apportioned between the two causes, according to their relative significance. Where the consequence is delay as against disruption, that can be done fairly readily on the basis of the time during which each of the causes was operative. During the period when both operated, we are of opinion that each should normally be treated as contributing to the loss, with the result that the employer is responsible for only part of the delay during that period. Unless there are special reasons to the contrary, responsibility during that period should probably be divided on an equal basis, at least where the concurrent cause is not the contractor’s

responsibility. Where it is his responsibility, however, it may be appropriate to deny him any recovery for the period of delay during which he is in default.”

Apportionment: ‘A judgement call’

Lord Drummond Young continues:

“[17] Apportionment in this way, on a time basis, is relatively straightforward in cases that involve only delay. Where disruption to the contractor’s work is involved, matters become more complex. Nevertheless, we are of opinion that *apportionment will frequently be possible in such cases*, according to the relative importance of the various causative events in producing the loss. Whether it is possible will clearly depend on the assessment made by the judge or arbiter, who must of course approach it on a wholly objective basis. *It may be said that such an approach produces a somewhat rough and ready result*. This procedure does not, however, seem to us to be fundamentally different in nature from that used in relation to contributory negligence or contribution among joint wrongdoers. Moreover, the alternative to such an approach is the strict view that, if a contractor sustains a loss caused partly by events for which the employer is responsible and partly by other events, he cannot recover anything because he cannot demonstrate that the whole of the loss is the responsibility of the employer. That would deny him a remedy even if the conduct of the employer or the architect is plainly culpable, as where an architect fails to produce instructions despite repeated requests and indications that work is being delayed. It seems to us that in such cases the contractor should be able to recover for part of his loss and expense, and *we are not persuaded that the practical difficulties of carrying out the exercise should prevent him from doing so*.

“[18] An *apportionment procedure* of this nature has been used with apparent success in the United States in cases before the Court of Claims. Thus in *Lichter v Mellon-Stuart Company* (305 F 2d 216, 1962), the plaintiffs’ total cost claim on one contract was rejected on the ground that a substantial amount of their loss was the consequence of factors other than breaches of contract by the defendants. The court could find no basis for allocation of the plaintiff’s claim, which was for a lump sum, between those causes which were actionable and those which were not, with the result that the entire claim was rejected. Nevertheless, the Court of Claims allowed a claim based on another contract between the same parties to succeed in part, and its decision was upheld by the United States Court of Appeals for the Third Circuit. The Court of Claims had held that part of the plaintiff’s extra cost on this contract was attributable to the fault of the defendant and part

was attributable to other non-compensatable factors. The Court of Appeals stated the result of that finding as follows (at 305 F 2d 221):

“Once it had thus been established that only part of the...claim represented extra cost chargeable to Mellon, the one question remaining was *whether a reasonable allocation of part of the total sum was possible*. *The court undertook such an allocation, guided by evidence concerning the extra time required for the performance of the stone contract as the result of the improper shelf angles*. We cannot say that this was an arbitrary method of allocation. Indeed, [the plaintiff] is not in position to complain that the allocation was imprecise since it bore the burden of proving how much of the extra cost resulted from Mellon’s improper conduct. [The Plaintiff] risked the loss of its entire claim, as occurred with reference to the masonry contract, if the court should not have been able to make a reasonable allocation”.

“The important points that emerge from this decision are, first, that the Federal courts in the United States are willing to undertake an apportionment exercise and, secondly, *that any such apportionment must be based on the evidence and carried out on a basis that is reasonable in all the circumstances*. In our opinion a similar procedure should be available in Scots law. *We stress, however, that the allocation must be based on the evidence, and that under Scottish procedure the evidence must be based on a foundation in the pleadings*.

“[19] In *Phillips Construction Co Inc v. United States*, (394 F 2d 834, 1968), the plaintiff undertook the construction of a large housing project connected with an air force base. During construction, heavy rainfall and extensive flooding were encountered. Under the parties’ contract, the plaintiff assumed the risks incident to abnormal rainfall as such. Nevertheless, it claimed that its difficulties were greatly compounded by the inadequacy of the government-designed drainage system for the project, and it sued for the loss that it said resulted from the defective drainage system. The Armed Services Board of Contract Appeals, the body charged with determining the dispute at first instance, rejected a total cost claim by the plaintiff, because the plaintiff’s total loss was caused partly by matters for which the government were responsible and partly by the exceptional rainfall, for which neither party was responsible. Nevertheless, the Board agreed with the plaintiff’s contention about the inadequacy of the drainage system, and apportioned the plaintiff’s additional costs between flooding caused by defective drainage and other factors. That exercise was upheld by the Court of Claims, which observed that, *“It represented the best judgment of the fact*

trier on the record before it, and this 'is all that the parties have any right to expect'. In our opinion a broadly similar apportionment exercise is possible in a Scottish case, for the reasons discussed above."

Box 4: A "Jumbled Claim" may well provide for making a judgement call on the financial consequences. The Arbitrators/Adjudicator's pathway is to:

- First decide of the 'jumble' which delay events occurred in fact;
- Hive off those events which are 'down-to' the main contractor [category 1];
- List the events which are to be allocated for compensation [category 2];
- Of the Total £ claim and of the two categories, allocate the compensation on the evidence available, by way of apportionment based on the evidence and carried out on a basis that is reasonable in all the circumstances.

In all the disruption claims I have decided it is not at all a surprise that the Claimant proves liability... it shows he has been caused loss of productivity. The difficulty is being satisfied about what compensation sum is payable. There have been occasions when it is impossible to fairly land on a figure... the Award is then NIL. Sometimes the facts plainly give confidence to award perhaps a significant proportion of what is claimed. "Apportionment" is a judgement call, not a guess.

Disruption: Particular loss of productivity... Evidence

It is often the case that the productivity of (say) a subcontractor has been severely lost through various events. There is no better answer than the daily records of the ganger man. He shows what productivity is to be ordinarily expected... speed/amounts per day. He shows events, which have interfered with the work and amounts installed/fixed¹.

Disruption

"Can the Tribunal reach a figure which is different to that claimed by either party?"

The answer is either YES... provided it is within the scope of the "autonomous fact finding" which the Tribunal is entitled to carry out, or NO... if it arises out of the Arbitrator's own primary/entirely new point, which was not brought to the attention of the parties to be argued.

In the London Underground v. Citylink, Ramsey J explained this area and others. It begins with complaints about the Arbitrator's Award.

"[24] Although CTL's grounds do not refer to the precise subsections, it is apparent that the application is also made under the Arbitration Act 1996 sections 68(2)(a) and/or (c) on the basis that CTL states that "the Arbitrator reached a number of highly significant conclusions of fact and law in respect of matters not pleaded, not the subject of evidence and/or not raised or dealt with in the submissions to him". In addition, part of the application is, it seems, brought under section 68(2)(d) on the basis that "the Arbitrator did not deal with a significant issue raised before him."

"First, in *Societe Franco-Tunisien ne D'Armement-Tunis v. Government of Ceylon* (1959, 1 WLR 787), where Morris LJ said at 799-801:

"It seems to me that the point that occurred to the umpire was a point that would bring about a dramatic development of the case, and I am satisfied that the import of it was not communicated to Mr Ellis in such a way as enabled him to deal with it. I have no doubt that something was said; but it was essential, in view of the way in which the case had been presented and the way in which it had proceeded for very nearly two years, that if some 'entirely new point', not taken by the charterers, and running quite counter to their willingness to pay a sum, was being taken, it should be made quite clear."

And: "In my judgment, the umpire could not have made clear that he was proposing not to accept the starting time which both parties had accepted. Whether he was right in law is not for me to say in these proceedings. But the owners, in my judgment, ought to have had a real opportunity of dealing with the new point, and of putting forward reasons for submitting that it was wrong."

Arbitrator uses his own special knowledge

"Secondly, in *Fox v. Wellfair Ltd* (1981, 2 Lloyd's Rep.514), a case where an *expert arbitrator took advantage of his own special knowledge without putting that knowledge to a party* and so giving the party an opportunity of dealing with it Dunn LJ said at 529:

"If the expert arbitrator, as he may be entitled to do, forms a view of the facts different from that given in the evidence which might produce a contrary result to that which emerges from the evidence, then he should bring that view to the attention of the parties. This is especially so where there is only one party and the arbitrator is in effect the alternative case for the party not present at the arbitration.

"Similarly if an arbitrator as a result of a view of the premises reaches a conclusion contrary to or

¹ See Hamish Lal's book "Quantifying & Managing Disruption Claims" Thomas Telford [ISBN: 07277 31475].

inconsistent with the evidence given at the hearing, then before incorporating that conclusion in his award he should bring it to the attention of the parties so that they may have an opportunity of dealing with it.”

“...his views should have been clearly put to them. In failing to take that course, in my view the arbitrator was guilty of technical or legal misconduct in failing to observe the principles of natural justice.”

“Goff LJ then said this at 75: “In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue, which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. In my judgment, the arbitrators in the present case failed to give that opportunity to the charterers in respect of an issue not raised in the arbitration...”

“Ackner LJ added this at 76: “If an arbitrator considers that the parties or their experts *have missed the real point* – a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced Counsel and solicitors – then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it.”

In *Pacol Ltd v. Joint Stock Co Rossakhar* (2000, 1 Lloyd’s Rep 109, a decision under the 1996 Act), Colman J applied *Interbulk* and cited the following passages from textbooks.

From *Russell on Arbitration* (21st Edition) at paragraph 5-060 and 5-061 which stated:

“The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award and if the tribunal are minded to decide the dispute on some other point, the tribunal must give notice of it to the parties to enable them to address the point.”

“From *Mustill & Boyd on Commercial Arbitration* (2nd Edition) at p.312 was cited in the following terms:

“If the arbitrator decides the case *on a point he has invented for himself*, he creates surprise and deprives the parties of their right to address full arguments on the case which they have to answer.”

“[33] In *Pacol*, the arbitrators re-opened the question of liability when the only remaining matter was quantum. Colman J held that there had been a serious irregularity. He said at 115 after

analysing, in particular, questions put to the parties by the arbitrators that:

“In those circumstances, what has happened in this case is that an award has been made on a basis which the claimants never had a reasonable opportunity of making the subject of their submissions or the subject of evidence.”

Distinguish “Autonomous Fact Finding” from “Entirely New Point”

“[34] In *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd* (2002, 2 Lloyd’s Rep 681) Colman J said at 686 to 687:

“In the present case the charterers rely on s.68(2) (a) – failure by the tribunal to comply with s.33 of the Act. In substance, their complaint is that the arbitrators made findings of fact of which they did not forewarn the parties and for which there was no evidential basis. They thereby unfairly deprived the charterers of the opportunity of addressing them on those matters and therefore failed to provide a fair means for the resolution of the matters in dispute.

“The arbitrators’ duty was to give the parties a fair opportunity of addressing them on all factual issues material to their intended decision as to which there had been no reasonable opportunity to address them during the hearings: see *Interbulk Ltd v. Aiden Shipping Co. Ltd (The Vimeira)*, (1984, 2 Lloyds Ref 66, per Lord Justice Robert Goff at pp 74 to 75) and, in relation to s.33 of the 1996 Act, *Russell on Arbitration* (21st ed., pars. 5-060 to 061) approved in *Pacol v Rossakhar* (2000, 1 Lloyd’s Ref. 109 at p114).

“It has to be emphasised, however, that the duty to act fairly is quite distinct from the autonomous power of the arbitrators to make findings of fact. Thus, whereas it may normally be contrary to the arbitrator’s duty to fail to give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings, it will not usually be necessary to refer back to the parties for further submissions every single inference of fact from the primary facts which arbitrators intend to draw, even if such inferences may not have been previously anticipated in the course of the arbitration. Particularly where there are complex factual issues it may often be impossible to anticipate by the end of the hearing exactly what inferences of fact should be drawn from the findings of primary fact, which have been in issue. In such a case the tribunal does not have to refer back its evidential analysis for further submissions. A typical situation is where arbitrators arrive at a conclusion on an issue of expert evidence, which differs to some extent from that put forward by either opposing expert. In many cases, such as this, the arbitrators

have been appointed because of their professional legal, commercial or technical experience and the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning. It needs to be emphasised that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's power to make findings of fact relevant to the issues between the parties."

TB: This remark about arbitrators and their inherent expertise is at the heart of arbitration use.

[35] In *Checkpoint Ltd v. Strathclyde Pension Fund* (2003, EWCA Civ 84) a case which concerned the question of whether the arbitrator's use of personal knowledge in a rent review arbitration constituted a procedural irregularity, Ward LJ said at paragraphs 28 and 31 in respect of the test to be applied:

"(28) The easy answer is when a right-minded observer would conclude that the information ought to be disclosed to the affected parties in order to give them the opportunity to assess it, comment upon it and if appropriated call further evidence to deal with it. Yet that is an answer, which does not give much practical guidance. That it is not very helpful is perhaps unsurprising. As Lord Mustill observed in *R v. Secretary of State for the Home Department Ex p. Doody* (1994, 1 AC 531, 560) what fairness requires in any particular case is "essentially an intuitive judgement".

"(31) The best I can do to provide an acceptable test is to reformulate the question in this way: is the information upon which the arbitrator has relied information of the kind and within the range of knowledge one would reasonably expect the arbitrator to have acquired if, as required by the terms of this lease, he is experienced in the letting and/or valuation of property which is of a similar nature to the premises, is situate in the same region as the premises and used for purposes similar to those authorised under the lease."

TB: In other words you buy into this expertise via different "types" of arbitrator.

[36] Some assistance can be gained from the decision of Fisher J in *New Zealand High Court in Methanex Motunui v. Spellman* (2004, 1 NZLR 95) where he said at paragraph 161:

"To summarise, the scope of notice and response rights at common law can be stated in broad terms only, because each case must be tailored to the circumstances of the particular case. The overriding objective is to avoid surprise, and

therefore lack of opportunity to respond in the way that the parties had envisaged when setting up the arbitration. The following are illustrations of that principle...

"(b) In the absence of agreement to the contrary, *non-expert arbitrators must confine themselves to the evidence provided by the parties unless judicial notice would have been possible in conventional courts. The same applies to the observations and knowledge of expert arbitrators concerning facts specific to the particular dispute, any general matters that fall outside their area of expertise, and any reports or opinions obtained from others.*

"(c) *An expert arbitrator is entitled to draw on his or her knowledge and experience to supplement the facts drawn from party-sourced evidence, and without prior notice to the parties, provided that the additional facts are ones of general application as distinct from those specific to the particular dispute.*

"(d) *In general an arbitrator must provide notice of, and an opportunity to respond to, issues, ideas, methods, research, investigations and/or studies of the arbitrator that were not reasonably foreseeable in the light of the arguments traversed before the arbitrator.*"

London Underground v. City Link: Ramsey J referred to all above and said:

"[37] From these decisions I derive the following propositions relevant to grounds under section 68(2)(a):

(1) The underlying principle is that of fairness or, as it is sometimes described, natural justice.

(2) There must be a sensible balance between the finality of an award and the residual power of a court to protect parties against the unfair conduct of an arbitration.

(3) It will generally be the duty of a tribunal to determine an arbitration on the basis of the cases which have been advanced by each party, and of which each has notice. To decide a case on the basis of a point, which was not raised as an issue or argued, without giving the parties the opportunity to deal with it, will be a procedural irregularity.

(4) In relation to findings of fact:

(a) A tribunal should usually give the parties an opportunity to address them on proposed findings of major areas of material *primary facts*, which have not been raised during the hearing or earlier in the arbitral proceedings.

(b) A tribunal has an *autonomous power to make findings of fact*, which may differ from the facts, which either party contended for. This will often be related to inferences of fact, which are *to be drawn from the primary facts, which are in issue*. Such findings of fact will particularly occur where there are complex factual or expert issues where it may

be impossible to anticipate what inferences of fact might be drawn. *In such a case the tribunal does not have to give the parties an opportunity to address those findings of fact.*

(c) Where a tribunal has been appointed because of its professional legal, commercial or technical experience, the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning.

(5) In each case whether there is a procedural irregularity and whether it is serious is a matter of fact and degree which requires a judgment to be made taking into account all the relevant circumstances of the arbitration including an analysis of the substance of the arbitration and its conduct viewed as a whole.

TB: It appears that the Court in adjudication enforcement issues also applies the foregoing principles. A separate but connected topic: "What if the Arbitrator/Adjudicator fails to deal with a primary point as distinct from failing to deal with every argument?"

"[40] In Arbitration Section 68(2)(d) provides for situations where there has been a "failure by the tribunal to deal with all the issues that were put to it".

"[41] This ground was considered by Morrison J in *Fidelity Management SA v. Myriad International Holdings B* (2005, EWHC 1193 (Comm) at paragraph 9) where he summarised the following propositions which were extracted from the decision of Colman J in *World Trade Corp v. Czarnikow Sugar* (2005, 1 Lloyd's Rep 422):

"Section 68(2)(d) is "designed to cover those issues the determination of which is essential to a decision on the claims or specific defences raised in the course of the reference".

"HH Judge Humphrey Lloyd in *Weldon Plant Ltd v. The Commission for New Towns* (2001, 1 All ER (Comm) 264) to state that Section 68(2)(d) is not to be used as a means of launching a detailed enquiry into the manner in which the tribunal considered the various issues. *It is concerned with a failure, that is to say where the arbitral tribunal has not dealt at all with the case of a party so that substantial injustice has resulted, eg where a claim has been overlooked or where the decision cannot be justified as a particular key issue has not been decided that is crucial to the result. It is not concerned with a failure to arrive at the right answer to an issue.*

"Arbitrators do not have to deal with every argument on every point raised; they should deal with essential issues.

"Deficiency of reasoning in an award is... the subject of a specific remedy under the 1996 Act [section 70(4) of the Act]. It is accordingly self-evident that:

"(1) *failure to deal with an "issue" under section 68(2)(d) is not equivalent to failure to deal with an argument that had been advanced at the hearing and therefore to have omitted the reasons for rejecting it;*

"(2) Parliament cannot have intended to create co-extensive remedies for deficiencies of reasons one of which (section 68) was a general remedy which might involve setting aside or remitting the award in a case of serious injustice and one of which (section 70(4) was designed to provide a specific remedy for a specific problem;

"(3) The court's powers under section 68(2) being engaged only in a case where the serious irregularity has caused substantial injustice, the availability of the facility to apply for reasons or further reasons under section 70(4) would make it impossible to contend that any "Substantial injustice" has been caused by deficiency of reasons."

"Accordingly, section 68(2)(d) is confined in its application to essential issues, as distinct from the reasons for determining them.

"If one simply approaches that provision by asking whether that which has not been dealt with is capable of being formulated as an essential issue of the nature of what would be included in an agreed list of issues prepared for the purpose of a case management conference if instead of an arbitration the matters were to be determined in court, the answer should normally be obvious."

"I respectfully accept the summary as setting out the relevant considerations. In the context of this case, section 68(2)(d) is not to be used as a means of launching a detailed inquiry into the manner in which various issues were determined. Neither is it concerned with a failure to deal with every argument on every point, or with deficiency of reasoning. It is concerned with essential issues in the case, and not the reasons for their determination."

TB: So, drawing all these strands together, the Arbitrator/Adjudicator is only entitled to go so far. Ramsey J. is comfortable with being able to exercise an "autonomous fact finding" position. He gave an example where a *primary piece* of information was put to the Arbitrator and he gave it meaning without going back to the parties. It was acceptable to do that.

Part 2: Extension of Time and Prolongation

The norm in the UK Construction industry is to identify at the outset of the project the financial consequences about loss to the employer if his job is completed late... damages per day or week... Liquidated & Ascertained Damage ["LAD"] being a fair representative sum for being deprived of the completed Works. The amount cannot be a penalty. If it is it will be later struck down. The amount can be capped to not exceed a particular lump sum overall. The amount of risk in terms of money compensation is taken to be included in the Contractor's contract price.

Delays do occur. Some are at the risk of the Contractor, some at the risk of the Employer. The delay may be because of "change orders" or any other reason listed for extension of time in the contract. JCT Contracts call the reasons at the Employer's risk "Relevant Events"; the NEC contract calls them "Compensation Events". An "Award" of extension of time (of whatever time) revises/extends the Contract Completion Date to a new later date. It is busy dispute territory. A later date deprives the Employer of Liquidated Damages until the later date. Moreover there may be a claim from the main contractor for costs of the "Prolonged stay on site".

The extension of time ("EOT") machinery is in the (typical) JCT standard form contract (see Box 5). In simple terms the task is to decide whether a particular delay is within a list of delays that entitle the contractor to a longer period to Contract Completion Date.

Entitlement Clause

It is submitted here that once a Relevant Event occurs or is on the horizon, which only has to "likely" push out the end date there is a time entitlement, irrespective of any other delay events. This is not a "but-for" clause. Nor is it a "wait & see" clause. A relevant event only has to probably be *important to progress* to provide an extension of time. Some use the word critical or on the critical path. Those words tend to create a science out of asking what any experienced construction person will be able to appreciate from every day knowledge of building work.

The starting point in typical machinery for main contract (*e.g.* JCT) and circumstances of delay is to find facts. The tribunal opens up and reviews the opinions of the architect/ project manager and asks "What EOT ought to have been awarded":

Part 1: The Prospective Review

1. Look back and describe *chronologically* from possession date (a) every circumstance that arose whereby it became reasonably apparent that the

progress of the Works was "being" delayed (actual delay); and/or (b) every circumstance that arose whereby it became reasonably apparent that the Works was "likely" to be delayed; (consider the prospective consequences of the events as at the time of the event).

2. The tribunal has to decide which items are "made out" from No.1 (both heads).

3. The tribunal then decides which items made out in No.2 are Relevant Events/ Compensation Events (of actual and/or prospective delays).

4. Of Relevant/ Compensations Events made out, the tribunal has to decide the following: at the time of the Relevant Event was the completion of the Works likely to be delayed thereby beyond the Completion Date chronologically considered (assistance of experts?);

5. If so decide what EOT ought to have been awarded by the architect & therefore what later date becomes the Completion Date (*i.e.* what would be "fair and reasonable" at the time? (Assistance of experts?);

Part 2 – The Retrospective Review

6. Decide at review stage (as anticipated by clause 25.3.3) whether it is fair and reasonable to fix a later completion date having regard to Relevant Events and the domino effect of earlier EOT or fix an earlier Completion Date having regard to omitted work ('Assistance of experts'); and

7. Identify which Relevant Events carry money (*e.g.* Clause 26).

The item which creates significant interest is item 4 above. The task is to consider each Relevant Event as it occurred (or would merely likely to occur) and prospectively assess the EOT that the architect ought to have also prospectively assessed (the 'forward sweep'). Step into the shoes of the Architect and look forward as though you were there at the time, when the relevant event occurred or was known to be coming.

Consider this: what is to be done when the contractor is already in culpable delay; does an EOT still apply? (The "Concurrency" discussion). A further question: What is to be done when there is a multiple set of Relevant Events about the assessment of EOT?. You should also consider the Review; How does the Review (post Practical Completion) "sweep" in retrospect and effect an assessment? What if the tribunal is faced with computer aided critical path analysis by both experts, but he concludes that neither is suited to this EOT dispute? Ask is the tribunal entitled to reach a different view on EOT than that put to him via the parties or party's representatives? Is the issue of "Fair and Reasonable" estimate for EOT tied to a particular analysis; is the tribunal bound to follow the contentions of the parties?

Box 5: JCT Contract Rules on Extension of Time.

Describes the relief available to a contractor and how a new later date is set from which LADs can run.

25. Extension of Time

25.1 In clause 25 any reference to delay, notice or extension of time includes further delay, further notice or further extension of time.

25.2.1.1 If and whenever it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed the Contractors shall forthwith give written notice to the Architect of the material circumstances including the cause or causes of the delay and identify in such notice any event which in his opinion is a Relevant Event.

25.2.1.2 Where the material circumstances of which written notice has been given under clause 25.2.1.1 include reference to a Nominated Sub-Contractor, the Contractor shall forthwith send a copy of such written notice to the Nominated Sub-Contractor concerned.

25.2.2 In respect of each and every Relevant Event identified in the notice given in accordance with clause 25.2.1.1 the Contractor shall, if practicable in such notice, or otherwise in writing as soon as possible after such notice:

25.2.2.1 give particulars of the expected effects thereof; and

25.2.2.2 estimate the extent, if any, of the expected delay in the completion of the Works beyond the Completion Date resulting therefrom whether or not concurrently with delay resulting from any other Relevant Event

and shall give such particulars and estimate to any Nominated Sub-Contractor to whom a copy of any written notice has been given under clause 25.2.1.2.

25.2.3 The Contractor shall give such further written notices to the Architect, and send a copy to any Nominated Sub-Contractor to whom a copy of any written notice has been given under clause 25.2.1.2, as may be reasonably necessary or as the Architect may reasonably require for keeping up-to-date the particulars and estimate referred to in clauses 25.2.2.1 and 25.2.2.2 including any material change in such particulars or estimate.

25.3.1 If, in the opinion of the Architect, upon receipt of any notice, particulars and estimate under clauses 25.2.1.1, 25.2.2 and 25.2.3.

25.3.1.1 any of the event which are stated by the Contractor to be the cause of the delay *is a Relevant Event and*

25.3.1.2 *the completion of the Works is likely to be delayed thereby beyond the Completion Date* [Emphasis added]

the Architect shall in writing to the Contractor give an extension of time by fixing such later date as the Completion Date as he then *estimates to be fair and reasonable*. The Architect shall, in fixing such new Completion Date, state:

25.3.1.3 which of the Relevant Events he has taken into account and

25.3.1.4 the extent, if any, to which he has had regard to any instructions issued under clause 13.2 which require as a Variation the omission of any work or obligation and/or under clause 13.3 in regard to the expenditure of a provisional sum for defined work or for Performance Specified Work which results in the omission of any such work.

And shall, if reasonably practicable having regard to the sufficiency of the aforesaid notice, particulars and estimate, fix such new Completion Date not later than 12 weeks from receipt of the notice and of reasonably sufficient particulars and estimate, or, where the period between receipt thereof and the Completion Date is less than 12 weeks, not later than the Completion Date.

Concurrency

Much has been written about the contractor being in delay of his own making and culpability, and the concurrent or overlapping occurrence of a Relevant Event, which “but for” the contractors difficulties would push out the end date. Here are a few examples:

- *Henry Boot v. Malmaison Hotel* [2000]
- *City Inn v. Shepherd Construction* [2007]²
- *Royal Brompton Hospital v. FDK Hammond* [2000]
- *Balfour Beatty v. Lambeth* [2002]
- *Steria v Sigma* [2007]

Henry Boot v. Malmaison (Manchester) Ltd [2000]
Dyson J: -

“13 (I)t is agreed that if there are two concurrent causes of delay, one of which is a Relevant Event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the Relevant Event notwithstanding the concurrent effect of the other event. Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a Relevant Event), but also because the contractor has a shortage of labour (not a Relevant Event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour.”

City Inn v. Shepherd Construction [2007]³ Lord Drummond Young upon considering *Henry Boot*:

“[15] Two important points emerge from these remarks. In the first place, in the application of clause 25, a Relevant Event may still be taken into account even though it operates concurrently with another matter that is not a Relevant Event. In other words, the “but for” rule of causation, that an event A will only be a cause of a result B if B would not have occurred but for A, has no application. In the example given by Dyson J [in paragraph 13], the delay would have occurred as a result of the shortage of labour by itself, regardless of the bad weather. On the approach to causation found in the general law of contract and delict, it could not be said that the bad weather caused the delay because the delay would have occurred in any event. Under clause 25, however, the architect may take the bad weather into account to the extent that he considers it fair and reasonable to do so.”

² Coming on Appeal (March 2010?) ² Coming on Appeal (March 2010?)

Keating says: [8th Ed paragraph 8-021] and Judge Davies in *Steria*: *“It now appears to be accepted that a contractor is entitled to an extension of time notwithstanding the matter relied upon by the contractor is not the dominant cause of delay, provided only that it has equal ‘causative potency’ with all other matters causing delay [the footnote refers to Henry Boot Construction v Malmaison Hotel Manchester (1999, 70 Con LR 32). The rationale for such an approach is that where the parties have expressly provided in their contract for an extension of time caused by certain events, the parties must be taken to have contemplated that there could be more than one effective cause of delay (one of which would not qualify for an extension of time) but nevertheless by their express words agreed that in such circumstances the contractor is entitled to an extension of time for an effective cause of delay falling within the relevant contractual provision.”*

[131] It appears from the relevant part [13] of the judgement in *Henry Boot Construction v Malmaison Hotel Manchester* that Dyson J. (as he then was) was recording an agreement by counsel to the effect stated above, rather than deciding a point which was at issue between the parties. Nonetheless the fact that he, as a judge with such wide experience in the field, noted the agreement without adverse comment is a strong indication that he considered that it correctly stated the position. Furthermore, the rationale suggested by the editors of Keating appears to me, with respect, to be compelling, and to apply as much to this case as it does to the particular clause in the *Henry Boot* case and indeed to extension of time clauses generally. Accordingly, I propose to adopt that approach as correctly representing the proper approach to extensions of time under clause 6.1 of the sub-contract.”

The proper approach for the tribunal, it is submitted, is to sweep forward from job commencement date (begin at the beginning) to detect *all* the delay events. Then, of those, detect which are Relevant Events. At this point now consider what EOT ought to have been awarded for the actual Relevant Event delays *and* award EOT for prospective delays via Relevant Events... this EOT machinery is not a “wait & see” system.

Those rules have an important feature. The true intention is that the architect shall award extensions of time as the project goes along; fixing and re-fixing new completion dates. The architect shall then review at the end of the project the previously awarded EOT and make adjustments. In practical terms a turn of events such as a change order/variation in the ground works, which has all the likelihood of pushing out the future Completion Date has to have a “prospective” EOT estimated on a fair and reasonable basis there and then... and

regardless of any contractor risk delays now happening or some way off in the programme. It is a *must* that the architect awards a prospective EOT. This is repeated all the way through the on going contract.

Then comes the “Review” stage for the EOT task. It happens either after the Completion Date or after Practical Completion. It has a different application. But first note... the architect cannot reduce or remove the earlier extension of time awards... save for works that were omitted and likely provide some saving or impact on the latest EOT. Absent omitted work the review is all about whether the previous EOT was incorrect or less than ought to be awarded or if none was awarded the review reconsiders all that. In every day real life we know that the fair and reasonable *prospective* time estimate may be wrong because the delay event might cause a catastrophic knock-on effect on later works. The review can look at all this (unless the knock-on effect was efficiently dealt with during the works with more EOT). Essentially this is the time for a re-think by the architect. The tribunal then examines the ‘re-think’.

So, if those variations to the ground works above were “awarded” say 3 weeks EOT, the review can weigh up what mayhem those delays caused later. The difference in the review is that the reviewer can be (perhaps) a lot clearer about the cause and effect of that relevant event for which the 3-weeks was awarded many months ago. Lord Drummond Young in *City Inn* talks about being fair and reasonable in the review. He says that the discretion in the review can account for the main contractors own delays when deciding whether to further extend time (i.e. on top of the prospective EOT award). He discusses “Apportionment” of time. He would not apportion time for concurrent delays in a prospective EOT but seems willing to do so retrospectively... in the review when deciding whether to “give more EOT”. [Perhaps that is the writer’s misunderstanding of the case]. The appeal to the Inner House may clear this up. For the writer it seems the rules for the *review* of EOT post Practical Completion are the same as prospective EOT.

Variations

Often there is a global grouping of variations by value (“the job is up in value by 20% 50%”!!) and a plea for “more time”. All that can become an item for the judgemental skills of the tribunal. It only needs the experienced constructor to “know” what the impact is.

Computer Models

Very sophisticated modelling is frequently submitted by programming experts, to assist the tribunal. The idea is to detect, which Relevant

Events are important enough to likely push out the end date. Some programmes attempt also to disentangle Main Contractor's own delays (the "culpable delays") from the Relevant Events to "net-off" an EOT period. It is sometimes argued instead that all that is needed is to assess whether a Relevant Event is important to progress ("critical") and announce an entitlement to time because the Relevant Event has occurred. The correct approach is to interpret the EOT Rules. What is intended by those rules?

As to experts, it may well be that an expert carries out an investigation into delay events and concludes by fact what happened on site. Then the (computer) model calculates likely effect of those facts. All that is wasted if the tribunal later decides different facts. Better to put the experts to work after the tribunal decides facts and decides which delays were Relevant Events.

So, see Box 6 for an example. What would you Award an EOT for from the following list of events?

Box 6: What would you award an Extension of Time for from the following list of events?

- (1) Significant additional piling at the early weeks of the 18-month project ("Relevant Event"),
But
- (2) At the same time the piling contractor goes broke ("Culpable Event"),
Then
- (3) Significant costly variation to the roof design ("Relevant Event"),
But
- (4) At the same time the roofing contractor goes broke,
Then
- (5) Significant costly hold-up to the design of M&E ("Relevant Event"),
But
- (6) At the same time the M&E contractor goes bust.

Would you Award any Extension of Time for 1, 3 and 5, given events 2, 4, 6?

Circumscribing the EOT machinery

Sometimes the bargain will include a "GMP" Guaranteed Maximum Price. The aim is to limit the opportunity to claim more time... more money. The GMP is open to interpretation.

Money for Time

If the Relevant Events have resulted in more time and if those Relevant Events carry money the award of money does not always follow. The concurrent delays *i.e.* main contractors own delay may deprive him of a claim for money since he would be delayed anyway. But the principles of allocation can be applied with care... and on the evidence.

Main Contractor - Sub-contractor position

By and large the relief by way of EOT due to the Sub-contractor follows all the above machinery and principles. More difficult is those circumstances where the Main Contractor completes the main contract late and has failed to obtain or not yet pressed for EOT under the main contract. Instead he looks to his Sub-contractors to pass on/pass down not only the LAD under the main contract but also his costs of prolonged stay on site. In short the Main Contractor "blames" one subcontractor and adjudicates the complaint.

It is often difficult to show that one Sub-contractor is the cause of the main contract delay. A great deal of work has to be done to lay bare/expose/reveal the whole story of delays... and show why EOT under the main contract is not forthcoming from the architect and if that is right, then show that it is no other Sub-contractor nor the Main Contractor's own culpable delays that are possible causes of the main contract running late.

Delay and Disruption and Prolonged contract periods are very ordinary. Fathoming the Relief is a period of excitement. It's what comes of our procurement system.

Tony Bingham*
3 Paper Buildings
Temple, London EC4Y 7EU
Tel: +44 20 7583 8055

*First presented by Tony Bingham as a paper at the Chartered Institute of Arbitrators North East Branch - Leeds on Tuesday 26th January 2010.

The author is a Barrister at Law (LLB (Hons), FCI Arb, FCI OB, MRICS, MInstCES. Arbitrator. Adjudicator. Mediator.

Correspondence to: info@tonybingham.co.uk.
+442075838055

This paper is reproduced with permission of the author at tonybingham.co.uk, building-disputes.co.uk