

A brief review of commercial issues relevant to the construction, engineering and energy industries.

## Lawyers and Costs

Another crucial factor is the cost of the process. Most disputes are about money, and there is always a balance to be struck between the amount of money claimed and the cost involved in recovering it.

Most lawyers and experts charge by the hour, and so time literally is money. The billing arrangements should be agreed in advance with this in mind. However, flexibility is also essential. It is difficult to predict with certainty what will happen during the course of an arbitration or court action. The opponent's approach will directly affect the time and costs involved and it is not always possible to predict in advance what an opponent will do. A well-managed legal team will report fortnightly or monthly to the company with information on costs to date and their updated assessment of the anticipated costs going forward so that the company can budget accordingly.

Businesses often wait until the last minute before calling in the lawyers, whether in-house or external. In fact, the lawyers' most valuable contribution is generally at the outset of a case. It is often the immediate response to a crisis that dictates the ultimate path and outcome of the dispute resolution process. E-mails and letters sent by management in response to claims can

have the (often inadvertent) effect of creating an ad hoc agreement to arbitrate or waiving important defences or submitting to a foreign and undesirable jurisdiction. It is good practice, therefore, to set up thorough briefing meetings with the lawyers before any formal responses are made. Just because the lawyers have assisted in the drafting of a carefully considered initial letter does not mean, however, that they have to be hands-on for the whole process. The degree to which external lawyers become involved depends on the experience and resources of the in-house team.

If it is necessary to cut costs, the process needs to be managed carefully, keeping in mind the objectives of the case. It is often a mistake to try and do everything in-house in an effort to save on external legal fees since few in-house lawyers and business managers have the time, resources and experience to deal with the day-to-day running of a case or the co-ordination of evidence-gathering and fact analysis. Team members should stick to their areas of expertise but should be encouraged to find ways to do their work as cost-effectively as possible.

A company should always re-assess its dispute management objectives at regular intervals. What started out as a crusade in which the aim was to win at all costs may turn into a more limited campaign to improve bargaining strength in negotiations. A dispute may be overtaken by other events such as a change in market conditions or commercial priorities. The company managers should ensure that all members of the dispute resolution team

are kept up-to-date with any changes to objectives.

These are all basic principles but it is often on the basics that a dispute process can become derailed. Communication (or lack of it) is usually at the heart of all disputes and the cause of protracted and disruptive litigation. Finally, it is worth noting that it is good practice to have a thorough team debriefing session at the end of the case. Even after a successful result, there is always something to learn from every process so that the team works even more efficiently on the next crisis....

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If you have any comments on the issues raised in this edition or there are any subjects you would like to see addressed in future issues of this newsletter please contact Mark Stewart  
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**MARK DIXON** What factual records should a construction company keep to assist in proving excusable delay?

## THE FACTS of the matter!

Perhaps the most common cause of dispute on construction and engineering projects is delay.

The construction company blames the multitude of change orders that it says were issued on an almost daily basis as being the cause of delay and accordingly claims payment for the consequential prolongation costs. The owner rejects the construction company's claims, counter-claiming that the true cause of delay was a lack of resources, poor project management, late equipment and materials (and anything else it can think of that is not the owner's fault!), promptly levying liquidated damages against the next interim payment. Does this sound familiar?

I regularly carry out delay analyses on such projects for the purposes of claim preparation, claim defence or independent expert witness evidence in formal legal and arbitration proceedings.



Much has been written on the various forms of delay analysis - impacted as-planned programmes, collapsed as-built programmes, time-impact analyses, et al.

However, this type of dispute turns essentially on the facts - that is, what

did or did not happen. It goes without saying therefore that any retrospective delay analysis requires good contemporary documentary evidence to provide the factual basis for the exercise. Without evidence of the facts, any so-called delay analysis is not worth the paper it is printed on.

While it may not be economically viable to record everything that does or does not happen on a typical construction project, in my view there are four types of record that, if properly and regularly kept, will go a long way towards providing a relatively good factual account upon which to base a robust delay. These records are: (1) labour and equipment allocation returns, (2) daily measured record of actual progress, (3) daily reports from each of the site management staff and (4) photographs and/or video recordings.

## Labour & Equipment Allocation Returns

Most contractors maintain a labour return. However, these are often limited to a list of names and the hours worked. This is of little use for the present purpose.

Yes, the allocation return must include a list of names and the hours worked, but it must be structured in such a way that each of the operative's hours are allocated to either a base-schedule activity or variation/change order identity. Any delaying or disrupting events should also be given a unique identity, with time recorded against those identities.

Major plant and equipment should be dealt with on a similar basis.

Properly kept, these records are, in effect, the as-built schedule.

## Daily Progress Measurement

In addition to the allocation returns, we need to know the progress achieved by the recorded resources.

Again, most contractors do measure progress to a degree. Unfortunately, it is all too common to see that each site engineer/manager simply makes a visual 'assessment' of progress on site and from that 'determines' a percentage complete for a given activity or, more often, group of activities. These percentages are then

**"Without evidence of the facts, any so-called delay analysis is not worth the paper it is printed on"**

used to update the site schedule and write the monthly progress report narrative. It is very rare indeed to find good contemporaneously prepared documents recording specific, identifiable progress and the calculation leading to the percentage complete of given activities. In any event, progress is not usually measured regularly enough - sometimes only on a monthly basis to coincide with the progress report.

What is required is a formalisation of the process, with the progress properly measured - preferably daily, but certainly no less frequently than weekly - and recorded in a suitable format. The form the measurement record will take will vary depending upon the nature of the activity being measured. Whatever the work, however, it is vital that the measured progress is linked to the relevant site schedule activities (or where appropriate variation identities).



## Site Daily Report

We then need to supplement the above records with what I term "the story".

Most site engineers and managers maintain a daily diary. Unfortunately, it is common to find that all he or she is given is a blank WH Smiths desk-top diary with no guidance as to what should be written. It is therefore no surprise to learn that the quality of entries I find from project to project are highly variable!

What is required is a formal daily report

***"A modest sum establishing the administrative procedure and perhaps a few hours of paid overtime for the site team must be better, in my view, than the prospect of the alternative"***

pro-forma, with guidance notes explaining what should be written.

The pro-forma should be linked to the daily measured progress records and be in a structured form, which will assist the site engineer to include the right things, recognising that these forms are likely to be completed at the end of the shift when the individual may be tired and more interested in getting home to watch the football on the telly.

The daily report provides the story of the day's events. Apart from general statements as to achieved progress versus planned progress for the

day, weather conditions, material and equipment deliveries, accidents and the like, the report should focus on specific problems encountered that day including, but not limited to, interferences, delays, uneconomic working, instructions received from the owner, instructions given to sub-contractors, late information, late deliveries, and so on. Entries concerning potential or actual delay or disruption should identify the cause, the actual or likely impact in terms of time lost and productivity consequences and whether it was, or is, avoidable.

I have one final point concerning the drafting of daily reports. Most importantly, the report must give a balanced account, including any facts that may not, on the face of it, appear to be in the contractor's interests. The reason for this is simple - if any reports are seen to be biased, it will affect the credibility of the entire documentation - and the individual who wrote them - in any future legal proceedings.

### Photographs/Video Recordings

Last, but by no means least, photographs and videos. These are an

irrefutable factual record therefore you simply can't take too many. Be sure that the correct date is programmed into the camera though!

### Summary

So to sum up, the above four records, if co-ordinated and regularly maintained, will provide an excellent factual basis for determining the causes of delay and their consequential effect on the progress of the project.

There is no doubt, however, that it is not easy to properly complete all of the above, day-in, day-out, given the obvious pressures of site management. However, a modest sum establishing the administrative procedure and perhaps a few hours of paid overtime for the site team must be better, in my view, than the prospect of the alternative.

In a future article I will explain how to use these records to establish the causes of delay and their consequential effect on progress.

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## Managing disputes effectively

No company enjoys being embroiled in disputes but the process of dealing with disputes need not be an expensive and painful experience provided that it is managed effectively.

### Objectives

The starting point for the successful management of disputes - in common with all large scale projects - is to identify the company's objectives at the outset.

For example:

- Is the objective to take the dispute to a formal process or are there wider business interests that require

a faster, less confrontational method of resolution?

- Is the objective to win an arbitration or simply to "trade positions" in the hope of securing an advantageous settlement?

Depending upon the objective, the strategies for managing the process will be different and the constitution of the team responsible for managing the dispute should also be different. In disputes between regular business partners, it may be much better for all concerned to try to resolve the dispute

by way of mediation or some other method of alternative dispute resolution (ADR). Sometimes the contract will contain a provision that the parties should attempt to reach an "amicable solution" before they can proceed to arbitration or litigation. However, even if there is no such provision in the contract, there is nothing to stop one or more parties from suggesting ADR. It may save valuable time and money. Importantly, a company should consider all of the relevant factors before deciding on its course of action. There may be a temptation (with the encouragement of the lawyers) to rush straight into court if there is a strong case against the other party. A win in the courts, however, that causes irreparable damage to the companies' business relationships may result in a loss of future opportunities to make profits and hence may actually be a "loss" when measured against commercial objectives.

If there is no prospect of resolving the dispute by negotiation or by ADR, it will generally be necessary to move to a binding method of dispute resolution such as arbitration or litigation. These are alternative methods, one private, one public, in which the decision-maker imposes a binding decision. Sometimes, particularly in construction disputes, there may be an interim stage of adjudication or board review which is binding unless challenged at the next stage. Regardless of which method is applied, the process needs to be carefully planned and implemented. Just as a project needs to be managed, so too does any dispute which arises out of it.

### The Team

The key team players should be identified at the outset and will generally include:

- Those persons in the company who will be

responsible for management of the dispute (including in-house lawyers);

- The external lawyers who will conduct the case;
- Any technical experts;
- Any key factual witnesses, both within and outside the company.

All these should be identified as soon as possible and their respective roles clearly delineated.

The company's dispute managers should ensure that the team members are compatible and will respect each other's authority and ability. "Power games" within a team are counterproductive and expensive and distract team members from the task of achieving objectives. Choosing the right team is very important. Here are a few tips:

- Unless strictly necessary, a company should avoid instructing more than one law firm on a single case. The lawyers from the different firms will invariably disagree on the best strategy and may spend the company's legal budget on time-consuming internal meetings. If it is unavoidable, for example, where expertise in different jurisdictions is required, then it must be made clear which firm has overall responsibility for strategy.
- Small is generally beautiful so far as the legal team is concerned. Depending upon the complexity of the case, a team of between two

and five lawyers of varying degrees of seniority may be appropriate. If the team is any larger there is a risk of duplication, with rising costs as an inevitable result. Companies sometimes ask for only one external lawyer (usually a partner) to act on a case. This is not recommended since many legal tasks can be handled more cost effectively by a junior lawyer and there should always be a well-informed "vice-president" on hand in case the lead lawyer is ill or away;

- It is important that the person within the company with ultimate responsibility for managing the dispute has the right skills and resources. There will be a balance between appointing someone sufficiently senior with authority to take day-to-day decisions but not so senior that he or she does not have the time to stay abreast of the key issues. Instructions to the external legal counsel should be channelled through one person only to avoid duplication and avoid duplication and ensure consistency;
- Witnesses and experts should form part of a team where their knowledge of the issues is key to the case. Unless they are lawyers, however, their work product may not necessarily be privileged and communications within the team need to be carefully considered.