

# Construction Law Journal

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## Publication Review

### Delay Analysis in Construction Contracts

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**Subject:** Construction law. **Other related subjects:** Contracts

*\*Const. L.J. 260* " In delay there lies no plenty" , wrote Shakespeare. While this remains apt for those who build things, the opposite is true for the delay claims industry that has grown up around late construction projects--although its members (like me) are nevertheless interested in the Bard's underlying message of seizing the day, be it a calendar or working day.

John Keane and Tony Caletka have condensed a total of over 50 years' experience into their handy new book.

Despite having a similar title as Keith Pickavance's tome (which was last updated in 2005), it serves a different purpose. At just under a third of the length it is an easily digestible read from cover to cover (as much as a decent reference source).

It achieves in spades its stated aim of being a practical guide for contractors, contract administrators, programmers and delay analysts, as well as " construction lawyers who require a better understanding of the underlying assumptions on which many quantitative delay analyses are based" .

There is also useful material for construction lawyers who are longer in the tooth. The coverage of American approaches to familiar issues is helpful. Keane and Caletka observe that US terms (such as " compensable" and " excusable" events) have been introduced in the United Kingdom alongside and sometimes in preference to existing terminology. One might extrapolate this to the growing influence of American authorities on more substantive matters as seen in the Scots cases of *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* <sup>1</sup> and *City Inn Ltd v Shepherd Construction Ltd*. While the writers see fundamental differences in how US law deals with a contractor's right to early completion, as well as established US doctrines on " cardinal change" , " abandonment of contract" and " impossibility of performance" , they sensibly avoid becoming bogged down in law (that they admit they are not expert in) and go light on cases--recognising that most judgments in this area turn on their facts. Instead they prefer to focus on general principles.

Of further interest is the book's coverage of the American equivalent of the Society of Construction Law's (SCL) Delay and Disruption Protocol: The Association for the Advancement of Cost Engineering International's (AACEI) *\*Const. L.J. 261* Recommended Practice No.29R-03-Forensic Schedule Analysis of July 1, 2007, which has a narrower, more technical, scope than the SCL's opus. The AACEI, incidentally, has produced a number of useful Recommended Practices addressing various construction-related topics which can be found on its website.

The section of the book covering planning and programming should assist most lawyers. The authors recall when:

" ... a site planner's main function during construction was to calculate bonus payments [which] was seen by many as a clerical role at best" .

They say much has changed with:

1. " the growth of contract documents which place the emphasis on negotiating the time and cost of changes before the work is instructed" (such as the NEC3);
2. adjudication; and
3. the rise of Critical Path Method (CPM) programming. However, in my view, adjudication equally permits, more than full blown arbitration or litigation, claims without a proper CPM approach. No doubt in due course someone may see a gap in the market and produce a book on tips and tricks for advancing and defending tricky claims in adjudications.

Keane and Caletka believe that the importance of planning has partly arisen from an increased awareness and a better understanding of all the dimensions of delay and disruption claims due mainly to industry debates in public forums, the SCL Protocol and formal classes and seminars.

The book addresses identifying and analysing delays, including the competing methods for doing so and how to pick the right one (which may be unfamiliar to the main target readership). It also covers disruption and the not so well known approaches for proving such claims, which have yet to obtain the same currency as those for delay.

The book observes how:

" ... using CPM programmes to demonstrate delay has been a requirement in US courts for some years to the point where delay analysis in US courts almost exclusively relies on CPM methods" .

While the English courts have often stated the importance of proving criticality we have yet to reach such a point. This is perhaps another area where we might learn from the Americans. No doubt English case law will provide greater guidance in time on appropriate delay analysis methods; repaying the industry for its steady stream of business. Cases like *Steria Ltd v Sigma Wireless Communications Ltd*<sup>2</sup> (which sadly must have been published too late to be considered for inclusion in the book) are as important for their treatment of concurrent delay as showing the workings behind a court's detailed assessment of an extension of time claim.

**\*Const. L.J. 262** There are valuable bits in the book on how to spot when a programme has been manipulated and an entire chapter on problematic issues--although in the latter I would like to have seen less falling back on the SCL Protocol. Incidentally there is no mention of the PFE Change Management Supplement, perhaps because it is regarded as defunct (having provided amendments for the Joint Contracts Tribunal (JCT) 98 Standard Form of Building Contract, there is no sign of an update for the JCT 2005 suite).

The final chapter is on effective presentation of delay analysis and includes an instructive case study. In keeping with its law-lite approach, the book sensibly avoids confronting the Great Eastern Hotel case.

It takes a brave practising expert witness to go into print so fulsomely on his field but given the skill of the authors they have provided little in the way of valuable cross-examination material.

In this book there lies plenty and at a fair price too. It is a worthy purchase for anyone involved in the delay claims industry.

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Const. L.J. 2009, 25(3), 260-262

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<sup>1</sup>. *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] B.L.R. 295.

<sup>2</sup>. *Steria Ltd v Sigma Wireless Communications Ltd* [2008] B.L.R. 79.

