

# Surveying

news



CHAN Hak

## Message from the President

More than half of my term of office has been completed. Looking back, I note that the Institute has been running as usual and with no dramatic events. Locally, due to the uncertainty of the property market, some of our members and their companies are facing some hard time to work around and new areas of service have been explored. While in the Mainland China, more and closer contact is being established at ministerial and institutional levels with a view to fostering stronger ties and exchange of professional knowledge and experience.

To keep pace with the rapid development of the community, the surveying profession has to change to cope with and better still to lead the development. For example, what should be the stance of the Institute, remain passive or be proactive? How about taking up business oriented activities? Need to expand the number and class of membership? However, when planning for the way forward the first hurdle is to modernize the Constitution of the Institute so as to facilitate the changes. The Constitution was drawn up almost twenty years ago, though suitable at that time, yet inevitably requiring update by now in some areas.

Therefore, the General Council proposed two amendments to the Constitution that were considered urgent or fundamental and to be resolved at an EGM in May by postal vote. However, due to not having a quorum at the appointed time, the meeting was therefore adjourned to June. At the adjourned meeting the votes returned were less than two-thirds by a narrow margin of all voting members and that meant the supportive votes could not reach the required number of affirmative votes of two-thirds of all voting members.

It is rather disappointing, because a lot of effort had been put in by many members and some costs had been incurred, and more so because 86% of those returned votes were in support of the first proposal and 96% in support of the second proposal. It indicated that if more members returned their votes, the proposals could have been passed.

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## EDITORIAL CONTRIBUTIONS

Surveying encourages article queries and submissions. Article submissions should include both hard (printed) copy and a diskette in Word format. Contributions should reach the Hon. Editor at the office of the Institute before the 10th of each month.

## INFORMATION & CONTENTS

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There might be various reasons why some members did not cast their votes. As understood from some feedback it could be because the information provided was not clear enough; the reasons for the amendments were not convincing; there were fears that the Institute might be manipulated by a small group of members. All in all, it showed that not enough had been done to explain and publicize the rationale of these proposals and to put forward the pro and cons. At the EGM in June, there was general consensus that these proposals should be put to vote again soon but with a detailed strategy to be worked out first.

I would like to make an early appeal to you. When you receive the request for voting on the proposed amendments to the Constitution, please cast your votes without delay. We need to work together for the advancement of the Institute. **S**

# FIG 2002 GENERAL ASSEMBLY IN WASHINGTON DC. USA - 21 TO 26 April 2002

We are very excited to announce the following breakthroughs that were accomplished under the splendid leadership of the HKIS General Council headed by our President, Mr. Hak Chan:-

1. Mr. T. N. Wong was democratically elected as the Vice President of FIG;
2. Our Fellow Member, Mr. Stephen Yip, was proudly elected as Chairman of Commission 9 (Valuation and Management of Real Estate);
3. HKIS was successful in the bid to host the FIG Working Week 2007 in Hong Kong between 1-6 July 2007; and
4. As a result of HKIS' objection to HKIES' application for FIG membership, the voting has been deferred to 2003. During this interim period, HKIS will explore the formation of a FIG Forum in HKSAR with HKIES. The first meeting of the Forum shall be before the end of year 2002.

It is strongly believed that the HKIS would not have achieved so much without all members' ongoing support and participation.

Thank you.



(from left to right)  
HKIS President (Mr. Hak Chan),  
Chairman of International Committee (Mr. Thien Nyen Wong),  
Our Fellow Member (Mr. Gordon Andreassend) &  
FIG President (Mr. Robert Foster)



(from left to right)  
Mr. David Wan, Mr. Clement Lau,  
Ms. Tine Svendstorp (P. A. to FIG Director),  
Mr. Thien Nyen Wong & Mr. Kenneth Pang



"Our Great Team"  
(from left to right)  
Mr. Marvin Chau, Mr. Siu Wai Ching, Mr. Ng Tak Cheong,  
Mr. Thien Nyen Wong, Ms. Rina Tsoi, Mr. Hak Chan,  
Mr. David Wan, Mr. Kenneth Pang, Mr. Lam Hok Lam,  
Mr. Clement Lau & Mr. Alex Wong



# Building Surveying Division

Raymond Chan, Chairman

In the last issue of "Surveying", we informed that we would be visiting Beijing in June. A report of the visit now follows.

## Visit to Beijing

This visit was a follow up to a visit made in November 2001 (reported in the February issue of "Surveying"). We hoped to create some solid contact with our "counterparts" in Beijing.

With the accession into the WTO, the Mainland China has a transitional period of 5 years to fully open its construction consultancy market to competitors from the whole world. Five years is a very short period of time. Within these 5 years, the Mainland China has to develop related administration and regulations to meet WTO requirements.

I can foresee that the Mainland China is eager to develop its system so that it can link up with the rest of the world. The consultants working there are also eager to expand, improve and develop themselves in order to be ready to face the forthcoming competition in 5 years' time (counting from the end of 2001).

We, building surveyors, wish to see that our hierarchy, mode of working procedures, organisation of responsibility and strategy of development are accepted and adopted in the Mainland China. Although, we are confident that we have one of the best (and well-developed) systems in the world, I have doubt whether they will be totally accepted and adopted by the Mainland China. As a matter of fact, some things are already not going in the direction we want them to go. We need to liaise with our counterparts in the Mainland China, help them to understand our system (and other comparables from the rest of the world) and to work with them to develop a system which is functional and not deviating too much from ours. We need to work hard (really hard) on this if we want our profession to have ground for development after 5 years. So, we worked hard.

In our visit team, we had 5 persons (including myself). We had one from B.D., one from a property management company, two from a property developers (project managers) and one from a private consultancy. This team in fact represented quite a good spread of various positions occupied by building surveyors in Hong Kong. Maybe, we lacked a representative from H.D. or A.S.D. on maintenance.

We met the following organisations:-

### 1 Beijing Construction Project Management Association (BCPMA) 北京市建設監理協會



They are in fact one of the "targeted" counterparts for us (building surveyors). They expressed warm welcome. We had an in-depth discussion (and a lengthy one too) about their present situation, their expected development and possible areas of co-operation with us. We eventually agreed on the following:

#### (a) To maintain regular contact and visits

Visits are initially agreed to be not less than twice a year.

#### (b) To provide "link-up" services to members' firms

We wish to maintain lists of contacts. If any member of HKIS, BSD have a project (or potential project) in Beijing (or anywhere in the Mainland China) and wish to seek a mainland partner to form a joint venture, BCMPA can provide information of contacts and help. Vice versa, members of BCMPA can also request HKIS, BSD to provide a similar service for their projects in Hong Kong (and other parts of the world).

#### (c) To co-operate in the development of training, assessment and administration of members

We wish to jointly develop courses to train members of HKIS, BSD and BCMPA respectively to understand the rules and practice of the counterpart area. These courses may later be further developed with an aim to act as top-up courses leading to recognition of one another's qualification. Certainly, we have to work out details in order to maintain the proper entry standard.

We can also co-operate to develop the assessment and administration of members. If we can eventually develop something similar to each other, this should eventually benefit both sides.

For the above-proposed items, we wish to liaise with and work together with RICS. We know that the RICS are also very keen in entering the Mainland China.

### 2 Beijing Prospecting and Design Administration Department (BPDAD) 北京市勘察設計管理處



This department administers and monitors the operation of design institutes (設計院) in Beijing. They appear to be considering developing a new system to handle submission and vetting of building plans (including building, structure and building services design). They seem to be quite unaware of the expertise of building surveyors.

We tried to explain to them our system of building control, role and expertise of building surveyors and the advantages of having such a building control system.

This was only an initial contact. We will need to pursue on this.

### 3 Beijing Municipal Administrative Bureau of State Land, Resources and Housing (BMABSLRH) 北京市國土資源和房屋管理局



This department administers the land and housing in Beijing. What relates to us includes urban renewal, property management, building maintenance and building renovation.

We were delighted to find out that they were very interested in the way we carry out our building maintenance, building renovation and property management. They are starting to face the problems of split ownership in a building, difficulties in organizing building maintenance, etc.

We introduced to them how things work out in Hong Kong, the expertise and position of building surveyors.

Building maintenance is a fast developing market in the Mainland China following the privatisation of building ownership. Again, we need to follow up on this further.

## Report on the progress of joint research with Tongji University, Shanghai

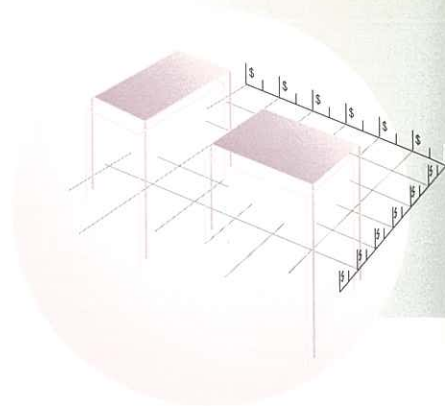
Bishop Chung, BSD council member

Last year, BSD started a discussion with Tongji University in Shanghai to explore the opportunity of having a joint research topic on the Building Surveying industry in PRC. Early this year, BSD obtained a research fund from the HKIS General Council to start the research. The topic is "The Development of Professional Building Surveyors in the PRC". Initially, the study area is limited to Shanghai only.

BSD Chairman, Mr. Raymond Chan and two council members visited Tongji University on 1 June 2002. We met Mr. Tang Ke-wei and Mr. Cao Jiming, who were responsible for the research, for exchange of opinions on the research. After Mr. Tang and Mr. Cao had presented a synopsis and a program for discussion, Mr. Raymond Chan stated the vision of BS as a Building Doctor, the skills that BS had acquired during professional training, and the services that BS were providing in Hong Kong so that colleagues of Tongji University might have more understanding on Building Surveying. During the meeting, ideas relating to the building rules and guides in both Hong Kong and Shanghai, policies on building control standards, and professionalism were exchanged. We also discussed the way forward on our joint research topic.

After all, it is our expectation that the research may help BS members to have a vision on the position of the building surveying profession in Shanghai. ■





## GENERAL PRACTICE DIVISION

*Alexander Lam, Chairman*

### Review on Independent Valuation Experts (IVE) List Guidelines

Admission into the IVE List based on the existing requirement has exposed a number of pitfalls. Years of experience, specialisation field, processing of nominations, rules to replace a nominated valuer and so on, are being looked into for the purposes of improving the system as well as mitigating administrative loads on HKIS.

The guidelines are being reviewed by the Professional and Practice Standard Committee. Mr. Simon Lai, the convenor, has set up a working group and we are pleased to have Mr. Gordon Moffoot as the working group's chairman. It is expected that the review will be completed within three months.

### MSA's Enquiry on Marketability of Outsourcing of Valuation Works of Village Type Houses in the New Territories

The Management Services Agency (MSA) has approached the Division to seek our opinion on the proposed Outsourcing of Interim Valuation Work for Village Type Houses in the New Territories from the Rating and Valuation Department. While we have provided the list of member firms for their own contact, meetings between MSA and the Council as well as with individual valuation firms were held to give opinion on the requirements, time frame, working procedures, and other associated issues.

### Shenzhen Visitors

Fifteen visitors from the Shenzhen Municipal Bureau of Urban Planning and Land Resources arrived on 10 April 2002 and our Council members, Mr. Francis Lam, Mr. Simon Cheng and Ms.



*from left to right  
Ms. Serena Lau, Mr. Zhang Quanjiang  
and Mr. Simon Cheng*

Serena Lau had a lunch meeting with them to introduce the background of our Institute.

### International Federation of Surveyors (FIG) General Assembly and Congress 2002

Mr. Kenneth Pang, Commissioner of Rating & Valuation Department, represented the GP Division in a delegation led by President Chan to Washington DC.

The utmost important mission on this occasion was to bid for the hosting of the FIG Working Week 2007 in Hong Kong. With an impressive power-point presentation of HKIS proposals we won unanimous support and immediate approval.



*from left to right  
Mr. Kenneth Pang, Mr. Hak Chan (President),  
Mr. Thien Nyen Wong (Chairman of International Committee)*

Of particular relevance and interest to our GP Division members are the current studies undertaken by the Working Groups of Commission 9 (Valuation and Management of Real Estate) covering topical issues, such as:-

- education and training of valuers and appraisers
- environmental and ecological influences affecting use, value and demand for real estate
- valuation for taxation and statutory compensation
- co-operation with sister organizations, etc.

The 2002-2006 Work Plan of Commission 9 will focus on expanding communications to valuers and appraisers worldwide through the internet, and using its web page as a clearing house for practical research, data base development, data searches and educational opportunities. The HKIS, GP Division in particular, as a Member Association, will render its support and assistance in this regard. ■

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- **BSc in Building Surveying** (University of Reading)  
(This is a purely distance learning course with no regulated course activity or examination conducted in HK)  
Both courses meet the academic requirements of the RICS
- **BSc in Construction Management** (University of Reading)  
(This is a purely distance learning course with no regulated course activity or examination conducted in HK)

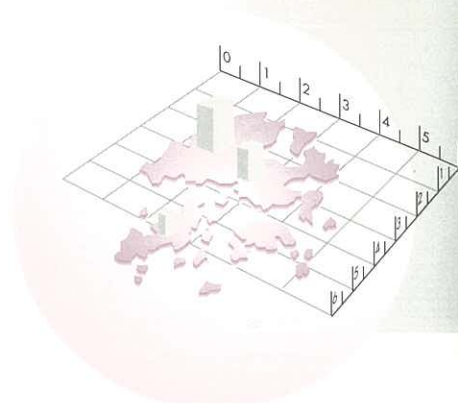
These courses start in December 2002. Applications should be received by 15 September 2002. Web based resources have now been developed to support our existing distance learning materials. Visit our website at [www.cem.ac.uk](http://www.cem.ac.uk)

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# LAND SURVEYING DIVISION

Wong Chung Hang, Chairman

## The LSD Website

The Institute is about to complete a major revamp of its website. A Working Group was formed a few months ago to collect and finalise all the materials to be put on the new LSD Website. The Working Group will also be responsible for looking after the continual maintenance of the LSD Website. Members of the Working Group are as follows:

Wong Chung Hang (WCH)	Chairman
Lam Li Wah (LLW)	Vice-chairman
Chu Fei Man (CFM)	Secretary
Chau Ming (CM)	Members
Kwok Chi Wo (KCW)	
Chan Yue Chun (CYC)	
Chan Siu Bun (CSB)	
Leung Kin Wah (LKW)	
Ng Wai Tak (NWT)	
Cheung Wai Man (CWM)	
Rina Tsoi (RC)	
Sarah Chan (SC)	
Cheung Yue Yan (CYC)	

The LSD Website gives an account of how LSD is functioning. It also contains for members' information some of the legislation and guidance notes as well as the technology being employed and developed by the profession in Hong Kong and other countries. It is our onus to provide laymen and professionals around the world with the most up-to-date information about the land surveyor's work in Hong Kong. Should you have any suggestion or feedback for the LSD Website, please do not hesitate to contact the members of the Working Group according to the following division of responsibilities:

### About LSD:

LSD History (WCH & CFM)  
LSD Council (WCH & CM)  
LSD Standing Committee (WCH & CM)  
Guide to LS Professional (CM & CFM)  
Members' List (CM & CFM)

### What's New: (CM & CFM)

#### Newsroom:

Message from LSD Chairman (WCH)  
CPD Events (LKW)  
Local Conferences (LKW)  
Overseas Conferences (CYC)  
Social Functions (RC)

### Area of Specialisation:

Geodetic Survey (SC)  
Photogrammetry & Remote Sensing (CWM)  
Engineering Survey (LKW)  
Hydrographic Survey (CYC)  
Cadastral Survey (LLW)  
Land Information Management (WCH)  
Topographic Survey and Digital Mapping (CWM)  
Cartography (CFM)

### Professional Development:

Assessment of Professional Competence (KCW)  
Continuing Professional Development (LKW)

### Publications:

CPD Presentation (LKW & CFM)  
HKS Journal - LS Articles (CM & CFM)  
Conference Papers (LKW & CFM)  
Other Technical Papers (CFM)  
Research (CYC)

### Legislation: (CSB)

### Technology:

Land Surveying (KCW)  
GIS and Spatial Data Development (NWT)  
IT News (NWT)

### Useful Information:

Land Survey Authority Circulars (CSB)  
Other Practice Notes (CSB)

### Useful Links: (CWM & CFM)

### Contact Us: (CFM)

### Q & A: (CYC & LLW)

There will be 3 more invaluable upcoming events in this series, with details as follows:

- 25 June 2002** Cadastral Surveying in Ontario, Canada  
- By Mr. Marvin CHAU
- Late August 2002** Land Boundary & Related Matters in Hong Kong  
- By Mr. Ronald CHAN
- Late October 2002** Recent Advancement of Boundary Systems Around the World  
- By Mr. Conrad TANG

All of you are welcome to attend the above events. For any enquiry, please do not hesitate to contact Miss LO Hon-yin, Maris, at 2683 9216. We are expecting your presence.

## LSD Golf Tournament 2002

The LSD Golf Tournament 2002 will be held on 9 July 2002 (Tuesday) at Palm Island Golf Club in China. New New Peoria will be used as the scoring system in the Tournament. All HKIS members and guests are welcome to join us. Details have already been mailed out.

## CPD Events 2002 - Cadastral Survey Series

Thank you for your ongoing support to the HKIS. We are honoured to present the **Cadastral Survey Series**.

The first event entitled **Cadastral Survey in New South Wales, Australia** with our chief speaker Mr. Ian Wootten, was successfully held on Thursday, 18 April 2002. Mr. Wootten (Managing Director, Wu Hill & Associates Limited) has worked for over 30 years in cadastral surveying in New South Wales, Australia and Hong Kong as well.



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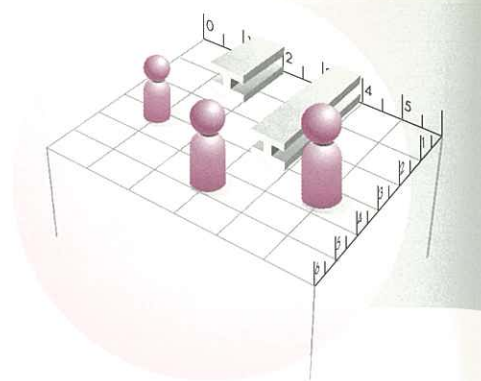
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## QUANTITY SURVEYING DIVISION

Nelson CHENG, Chairman

### CPD

CPD events include the following activities:-

25 June 2002	內地建設工程招標投標政策簡介 (張魯風司長, 建設部建築市場管理司)
29 & 30 June 2002 2-days in Shanghai	造價工程師 / 測量師持續進修講座
17 August 2002	Site Visit to IFC II
To be confirmed	Use of Mediation (in Chinese)
To be confirmed	Site Visit to Swire House Redevelopment
To be confirmed	Talk on Insurance
To be confirmed	Site Visit to the Legislative Council Building / another topic

### Invitation of Technical Papers for publishing in the Bi-monthly Journal “工程造價管理” of the China Engineering Cost Association (CECA), PRC

Our co-opted Council Member, Mr. Tommy Yim, has recently been appointed by the CECA to be the Honorary Editor of the newly introduced “overseas section” of its bi-monthly Journal entitled “工程造價管理”. The Journal is similar in nature to the HKIS Newsletter, and its Chief Editor is the President of CECA. The Journal is distributed nationwide in the Mainland China and was recognized in 2001 by the Ministry of Construction, PRC, as a good

journal. The “overseas section” will cover technical papers outside the Mainland China, including therefore Hong Kong and other countries.

Tommy would like to invite members’ contribution of technical papers on QS related subjects, for publishing in the Journal. The paper should be in Chinese with a maximum of 4 A4-size pages. It can be written either under a personal capacity or an organization, from all sectors of the industry.

This is a good opportunity for Hong Kong surveyors to promote their expert services in the Mainland China. Members who are interested in submitting a paper(s) or to obtain more information, should write and fax to the HKIS Office (Attn: Mr Tommy Yim) at 2868 4612.

### 武漢市建設工程造價管理協會 visited HKIS on 17 June 2002

武漢市建設工程造價管理協會 sent a delegation of 15 representatives to visit HKIS on 17 June 2002. A detailed report regarding the visit will be given in the next issue.

### The Quality Building Award 2002

The award was organised jointly by HKIE, HKIA, HKIS, HKICM, HKIHousing, HKQAA and the REDA.

The purpose of the award is to give public recognition of outstanding quality building and to promote the partnering effort in the building construction industry. This will be a biannual award which will honour the building project team that has displayed the highest quality of inter-disciplinary organization, communication and group dedication in achieving the highest levels of construction excellence.

Project teams qualifying for this award was judged on ten key criteria including:

- Quality
- Partnering
- Design
- Innovation
- Costs
- Safety
- Project Management
- Social and ethical
- Customer satisfaction
- Environmental friendliness/  
sustainability

There were a total of nineteen projects submitted for the competition. After detailed scrutinising by the judges, the following five projects were selected as the finalists:

One International Finance Center  
Chin Nin Nunnery  
Ma Hang Village Phase 3  
Sheung Shui Slaughter House  
Tung Chung Town Center

The winner was announced at a dinner on 28 June 2002. A detailed report will be given in the next issue

## CONGRATULATIONS

### TO THE 10TH ANNIVERSARY of DAVID C. LEE GROUP

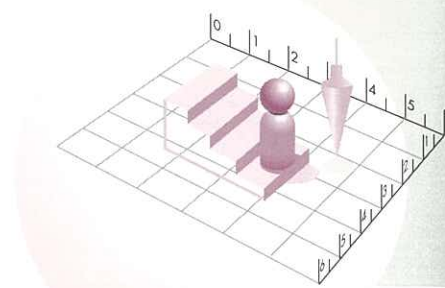
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LEUNG PUI CHU

ALLAN WONG  
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HARRY CHAN  
ANNIE CHUI  
MAGGIE TAM

AND OTHER FORMER COLLEAGUES OF DAVID C. LEE SURVEYORS LTD.





## JUNIOR ORGANIZATION

### Success from Afar 夢在異鄉尋!

Jim Yip, Hon. Secretary

For about 100 surveying students graduating this year, July is not a good month for them. The job market is still suffering and new openings for graduates are even fewer than the previous years.

Having studied for 3 years in the colleges for a surveying degree they now face an uncertain future. They may be disappointed to find that there are not many places to go. This is sad news for the profession as we will lose these well-trained talents, some of them may have to choose a different career.

Back in the early 90s, the UK property market had a recession possibly even more severe than our current one. Repossession rate was at record high and most of the homeowners suffered from negative equity. The once world's largest developer Olympic and York declared bankruptcy.

Many of my classmates became unemployed immediately after the graduation ceremony. But they did not give up their hopes to be a proud estate manager. Some of them decided to take a year off to travel to other European countries, to learn foreign languages and broaden their horizon. Some went afar to South East Asia countries and found employment in the real estate industry. Luckily back then, the economy and property market was booming all across Asia. Having overcome the cultural shock and language barrier, they are now very successful property professionals in some of the regional property players.

The message is clear: go where the grass is greener. Although real estate is an immovable asset, our property knowledge and skills are not. Blessed with a big and growing market right across our frontier, Hong Kong surveying graduates are in a right place and at a right time to tap this vast market opportunity.

Our Institute should do more to lend support for graduates working in the PRC property market. These days most of our employers value candidates' with PRC work experience with a premium. Ironically, this sought-after PRC experience is discounted under the existing APC guidelines. As a result new graduates who work in the PRC property market cannot qualify for the HKIS APC.

Reading from the recent various reports from all the divisions in this Newsletter, "Embracing China" is clearly the direction that all divisions seem to be working hard on. In JO we urge "Embrace PRC work experience" and encourage Hong Kong young surveyors to move big into the PRC market.

We have the following three proposals:

1. PRC experience should be counted as valid APC training;
2. Using the already well-established network, the Institute should set up a platform to help new graduates to locate property jobs in the PRC market; and
3. We urge Hong Kong property developers and investors to consider employing Hong Kong graduates in their local PRC project operations.

Lower pay is not the stumbling block for graduates who wish to pursue a property career in the PRC. Lacking access to the opportunity is.

### JO can only do a little to help our young members

Despite the fact that we have no power to make any change, we, as the elected representatives of the young members, owe a duty to pay heed to our members' concerns and speak for their interests. We strongly feel that the current APC system has its

drawbacks, putting many of our young members at a disadvantage. For one thing it has not reflected the situations the young surveyors are in these days at the workplace.

May I quote a recent posting from a BS student member in our JO website (<http://devoted.to/hkisjo>):

#### Worries on areas of professional training

Hi, I am a student A and a fresh graduate in BS. I have just read the rules and guide for APC(BS). I find that it is difficult to obtain the required working experience. For example, training areas in 'structural design and analysis' of area A, 'documentation for litigation or arbitration and preparation of proofs of evidence' of area B, 'design and specification of installations' of area D and 'drafting and administration of DMC' in area H, are difficult to be encountered in BS firm/architect firm/contractor/developer. So, how can I complete my diaries and log book? Would any member please advise me on what types of job I can apply for the purposes of APC? Thank you very much.

Student A (BS)

This letter clearly shows that not only GP students face difficulties in APC training, candidates from other divisions also have to struggle with similar problems.

On 12 July, the JO will organize a talk on APC guidelines for GP students with Mr. Rock Tsang, the APC panel chairman, as our speaker. Mr. Tsang will bring good news to students who are working in the estate management practice or who have no immediate GP surveyor as their supervisor.

### APC (GP) Kick-off!

How to compile my project report? What is the depth and breadth of information I should include in my report? How about written skills in the APC paper? What are the yardsticks that an APC panel would look for in a candidate's presentation? How to handle a situation if I have no clear answer for a question?.....

We know you have all sorts of concerns for the coming APC. You want a straight pass and move ahead in your professional career development. In JO we listen and deliver what you have requested. JO is to here to help you Journey Onward to become a full-fledged professional. In August and September we will have APC training sessions on four Saturday-afternoons, in the form of two lectures and two small workshop groups. We have invited APC panel members to speak about their APC experience, critically review the written and presentation techniques in APC. They will share with us what are the essential elements in passing the APC and how to make a good preparation.



Alnwick Chan speaks in a PQSL on Expert Witness. His excellent presentation material can be downloaded from the JO website (<http://devoted.to/hkisjo>)



The schedule and program are as follows:

17 Aug (Lecture)	APC introduction; Written APC skills and exam questions review; Q & A
24 Aug (Small-group workshop)	Written paper workshop with case study
7 Sept (Lecture)	<b>Part 1:</b> Project submission: content and areas for special attention and final project presentation and interview techniques review; Q & A <b>Part 2:</b> How to make your presentation powerful by an external training consultant
14 Sept (Small-group workshop)	APC interview workshop

Stay tuned for the event!

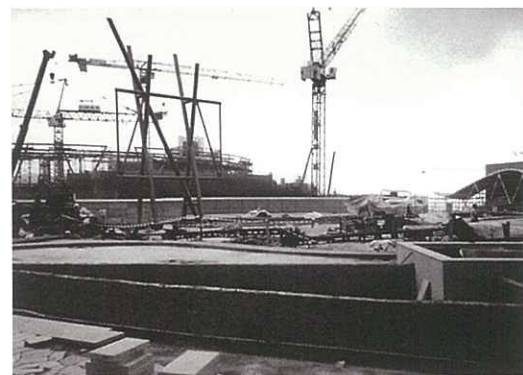
### The PQSL schedule for August

Date	Topic	Speaker
3 Aug	Arbitration and Mediation	Tony Leung, Chesterton Petty
10 Aug	Valuation Steeple Chase	C M Mo, CM Mo Surveyors
17 Aug	Environmental Impact Assessment Ordinance (EIAO)	Representative from Environmental Protection Dept
17 Aug	GP APC Lecture - Written APC Skills and Exam Questions Review	APC assessors
24 Aug	Environmental Friendly Painting System	SKK(Paint Supplier)
24 Aug	GP APC Small-group Workshop - Case Study on Written Paper	APC assessors
31 Aug	Water Pollution Control in Hong Kong	Representative from Environmental Protection Dept

## Imagine an outdoor dinner at Cyberport Phase 1 Garden Podium

### 測量師邁向新經濟時代的新勢力

After our monthly meeting in June, we decided to stage our JO annual dinner on 9 November 2002 at the Cyberport Phase 1 Garden Podium.



The Phase 1 Garden Podium will receive its first visitors in November this year

Upon our site inspection in May, the venue looked fantastic. The site is still currently under construction. Beyond the massive construction work and numerous cranks, we could see Lamma Island across the sparkling waters.

Even more fantastic, the ITBB (the Information Technology and Broadcasting Bureau), the Cyberport landlord, has agreed in principle to let the place to us for free. We will be the first organisation to use their garden podium for an outdoor party. Our party theme is the Virtual Catapult - the new force in the new economy.

Upon our initial contacts, ITTB and PCCW have all agreed to arrange guest talks and visits on the special features of the Cyberport facilities for us. The JO annual dinner will be a CPD-cum-social event. We hope we can achieve a record turnout rate for this event.

## Cool JO members in the Dragon Boat Race on 15 June 2002 in Stanley Bay



## News from the Secretariat

### FORTHCOMING EVENTS

#### HKIS CONFERENCE 2002

The HKIS Conference is one of the major CPD events for all divisions this year. This whole day event is scheduled on 14 September 2002 (Saturday) at the Conrad Hotel and the main theme is "Dispute Resolution". Guest speakers will be invited to share their experience in four key topics, namely Arbitration, Mediation, Expert Determination and Litigation. The CPD Panel is finalising the programme for the event, and hopefully the details and booking forms can be sent to members in July.

#### HKIS ANNUAL DINNER

Date : 22 November 2002

Venue : Grand Hyatt Hong Kong

Further details to be announced.

### The Hong Kong Surveyor CALL FOR CONTRIBUTIONS

Articles are being invited for the second issue of "The Hong Kong Surveyor", the journal of the Hong Kong Institute of Surveyors, which is expected to be published towards the end of the year.

You may either e-mail your article for the attention of the Hon Editor at [editor@hkis.org.hk](mailto:editor@hkis.org.hk) or send a hard copy of the article plus a diskette in Word format to The Hong Kong Institute of Surveyors, Suite 801, Jardine House, One Connaught Place, Central, Hong Kong. The articles should be submitted on or before 16 August 2002.

There will be a space allocated for "About the author". Please provide together with your submission a short description of yourself in not more than 50 words and a colour photograph of yourselves.

Please note that the Editorial Board reserves its right to reject and edit any submissions.





## CONSTRUCTIVE ACCELERATION - A Valid Claim?

John B Molloy, LLB(Hons), BSc(Hons), FHKIS, FRICS, FInstCES, MCI Arb, RPS(QS)  
Managing Director, James R Knowles (Hong Kong) Limited



I always find it particularly galling that there is so much disparity between the obligations of the Contractor and the Engineer/Architect in respect of the provisions of extension of time clauses.

The requirements for the Contractor to serve notice, and subsequently, very detailed particulars within a strict time frame continually get more and more onerous, and now in many contracts (e.g. the KCR Corporation West and East Rail Conditions) take the form of strict conditions precedent whereby the Contractor loses all rights to extensions of time if he fails to comply with such provisions. When one considers the level of liquidated damages on many contracts in Hong Kong then the seriousness of any failure by the Contractor becomes apparent.

Of course, requiring the Contractor to give early notice and particulars is well intentioned because it clearly assists the proper administration of a contract if delays are notified promptly. However, it assists the proper administration of a contract if they are also dealt with promptly - and here is the disparity.

In many forms of contract that put strict time limits and conditions precedent on the Contractor to serve notice and detailed particulars, the obligations on the Engineer/Architect are then (if mentioned at all) to assess the Contractor's entitlement and grant an extension of time within a reasonable time. It is true that the aforementioned KCR Corporation Conditions do try to encourage the Engineer to deal with matters promptly by requiring his action within 28 days, but the effect of this is largely lost by the following words "...or such further time as may be reasonable in the circumstances..."

Unfortunately, all too often Engineers and Architects do not assess the extension of time that the Contractor is entitled to at the time of the delay, but wait until the end of the project and then assess the extension of time that the Contractor actually needs.

The difference is significant. A Contractor may suffer a delay for which he considers himself entitled to an extension of time of six weeks. He serves his notice, submits his particulars, but the

Engineer enters into arguments about the principle and detail of the extension of time claimed. What is the Contractor to do, particularly when late completion carries very large liquidated damages with it?

It is a bold Contractor who decides that notwithstanding the high level of liquidated damages he will finish six weeks late because he is entirely confident that he is going to get the six week extension of time he is entitled to.

Nor will a Contractor generally accelerate to complete on time because the costs will be too high and in any event why should he if he believes himself entitled to an extension of time.

More likely the Contractor will accelerate a certain amount to reduce his potential risk to liquidated damages whilst still pushing the Engineer for any extension of time. In such a scenario the contractor will accelerate, finish one month late and the Engineer/Architect will grant him the one-month extension of time that he needs.

All of this is unfortunately an unsatisfactory, but all too common, state of affairs. Where such happens, the question that Contractors commonly ask is whether they can claim back the costs that they have incurred in acceleration, particularly if they can show that they were entitled to the full extension of time that they originally claimed?

Acceleration that is undertaken by the Contractor in such circumstances is known as 'constructive acceleration'. The term originated in the United States Court of Claims where there is legal doctrine of constructive acceleration relating to situations where an instruction to accelerate is implied from the actions of the Employer or the Contract Administrator.

Claims on this basis are common in the United States, but in Hong Kong (and generally under English legal systems) there is no such doctrine. Can such a claim be successfully pursued in Hong Kong under similar legal systems?

Authority is divided on the subject. At least one highly respected construction law writer suggests not. Mr. I. N. Duncan Wallace, in *Hudson's Building and Engineering Contracts* states:

*"...in those cases where an A/E has been shown to have wrongly rejected applications for extensions of time and called for completion to time a claim to have deliberately accelerated progress as a result of a typical owner's breach will usually be unlikely to satisfy the remoteness requirements of either branch of the Hadley v Baxendale rule..."*

Further in *Building Contract Claims* by Powell-Smith & Sims, the authors state:

*"Where the architect wrongfully fails to make an extension of time, either at all or of sufficient length, the contractor's clear remedy under the contract is arbitration ... If he increases his resources, that is not a direct result of the architect's breach, but of the contractor's decision."*

These authorities make the position look pretty bleak for a Contractor making such a claim, but the matter is not quite as clear cut as the above quotes suggest. Max Abrahamson in his book, *Engineering Law in the ICE Conditions* says:

*"But if the contractor is driven to expedite in order to avoid possible liability for damages ... because either the engineer has failed to consider the contractor's right to an extension in good faith at the times at which he is directed to do so ... then it seems that the contractor may have a claim. The claim is for damages of breach of contract by the employer by way of failure of the engineer as his agent to administer the contract in accordance with its terms."*

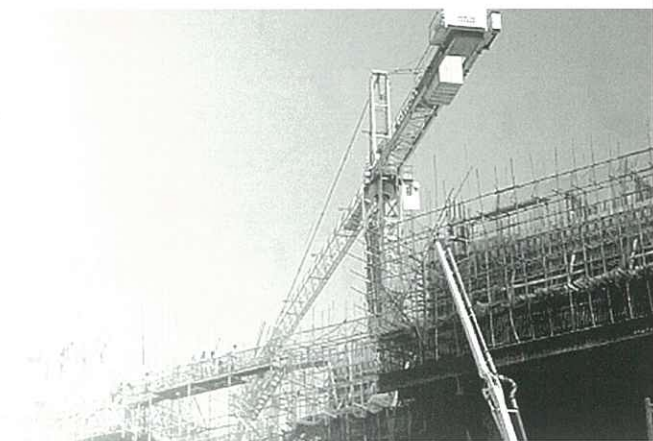
A further two decisions in the courts of common law jurisdictions provide some support for this view. The first is the Singaporean case of *Aoki v Lippoland (Singapore) Pte Ltd (1995) 2 SLR 609*. The contract required the Contract Administrator to notify the Contractor within one month of receipt of the Contractor's claim as to whether in principle he was entitled to an extension of time. It was held that where the Contract Administrator failed to comply with that requirement, this amounted to a breach entitling the Contractor to damages, which included the cost to the Contractor of increasing his labour force resulting from any initial uncertainty due to the Contract Administrator's omission to act.

The second decision arises from the earlier Australian case of *Perini Corporation v Commonwealth of Australia (1969) 12 BLR 82*. In that case, unlike Aoki above, no time limited was contained within the contract for assessing and adjudicating upon a Contractor's application for an extension of time. It was nevertheless held that a term should be implied that the Contract Administrator should give his decision within a reasonable time; failure to do so amounted to breach.

These two cases were decided with specific regard to their facts, so their universal application is doubtful. The Singapore case relied upon the contract provision that the Contract Administrator must act within a set period of time. No local form of contract contains such provisions, although the KCR Corporation Condition come close (but in my opinion not close enough). The Perini case appears wider, i.e. the Contract Administrator must act within a reasonable period of time but the facts were quite extreme in that case as the Contract Administrator had actually refused to grant extensions of time in certain circumstances where an extension was clearly due.

In the situation that is common in Hong Kong where the Engineer / Architect does not refuse to grant an extension of time, but simply spends months arguing the case backwards and forwards with the Contractor it may well be harder to show that he has not acted within a reasonable period of time.

Claims for constructive acceleration do therefore appear to be possible in Hong Kong, but it is suggested that it would only be in quite extreme cases where such a claim would be valid. For such a claim to stand any chance of success it is recommended that contractors need to have fully complied with the contract notice provisions relating to extension of time, have advised the Contract Administrator that failure to grant in accordance with the time requirements in the contract or, where no such requirements, within a reasonable time would leave them with no option but to accelerate, and as a consequence, to actually have incurred costs which are not reimbursable under any other provision of the contract. ■







# THE JOINT CONTRACTS COMMITTEE'S STANDARD FORM OF BUILDING CONTRACT

## PRIVATE EDITION - WITH QUANTITIES FOURTH DRAFT, 3RD SUB-DRAFT, MARCH 2002 CLAUSE 25: EXTENSION OF TIME - SOME PERSONAL OBSERVATIONS

Colin B. Lee, Senior Partner, Brian E. Rawling & Associates

The following article was written by Mr. Colin B. Lee, Senior Partner for Brian E. Rawling & Associates. The views expressed therein are Mr. Lee's. For those readers who have not had an opportunity to read the latest draft of the JCC's Standard Form of Building Contract, Mr. Lee provides relevant quotes.

### Notice

One of the reasons for introducing into contracts a requirement for the contractor to give a written notice of delay is to alert the architect (and the employer) at an early stage that a particular event has occurred which is likely to cause delay to the completion of the Works, thereby giving the architect the opportunity to instruct any further steps the architect considers necessary to minimise the effects of the event. This may include withdrawal or modification of a previous instruction.

These days, construction is quite a dynamic process with critical activities often changing weekly, unfortunately, the draft procedure for the contractor's notice set out in Clause 25 of this Fourth Draft clearly changes the emphasis from the initial objective of the early warning to an unnecessarily complicated procedure which effectively assumes the delay is inevitable.

To understand these procedures better, I have endeavoured to interpret Clause 25 using a flow diagram, refer to Figure A.

In Clause 25.1(1), the giving of a notice is in two stages. The contractor issues the First Notice (emphasis added) which is to be given:

*"as soon as practicable, but in any case within 42 days of the cause of any delay..."*

In the existing Standard Form, notice is to be given:

*"Upon it becoming reasonably apparent..."*

I do not see why there is a need to change from the existing Standard Form, particularly when it is proposed that the giving of a notice is to be within 42 days of the cause of delay. This is, in my opinion, too late to serve as an early warning and provides little opportunity for the architect to consider mitigation measures. Effectively, the draft moves straight into the process for demonstration of the delay.

In addition to giving the notice, which must be in writing, the contractor has to:

- " (a) state the likelihood and probable extent of the delay;
- (b) set out the material circumstances including the cause of the delay;
- (c) state whether the Contractor considers that he is or may become entitled to an extension of time due to the effects of an event listed in Clause 25.1(3); such events are known as "listed events", and, if so, identify which of the listed events he contends to be the cause of the delay."

The intention of these additional requirements is to minimise "frivolous" submissions by the contractor and to make the contractor pay due consideration to the giving of such notice in the first instance. The contractor should be well aware that failure to provide the information in time and in the detail required will inevitably lead the architect to dismiss the notice as non-compliant.

### The Listed Events

Clause 25.1(3) details the listed events. There are now 23 No. causes of delay, whereas the current Standard Form has 11 No. In particular, I note the introduction of:-

- " (u) unreasonable delay by the Buildings Department in giving an approval or a consent;

- (v) a special circumstance ordered by the Architect as sufficient grounds to fairly entitle the Contractor to an extension of time;

- (w) any other delay which the Employer is responsible for including an act of prevention or a breach of contract."

Whilst it is a positive step to include these additional causes, it is regrettably inevitable that Employers will likely strike out the majority. Even today's Standard Form is amended by supplementary conditions limiting the causes for delay.

Employers seem to ignore that the reason for having such provisions for granting extensions of time is to maintain the employer's entitlement to the recovery of liquidated and ascertained damages. Employers, however, treat such provisions as "excuses" for the contractor to claim extensions of time.

The risk to the employer in striking out many of these causes for delay is that it limits the architect's ability to give extensions of time for breaches of contract by an employer or by someone for whom an employer is liable, e.g. the architect. If there are no provisions to remedy such breaches, then the completion date becomes "at large". In such circumstances, the employer cannot recover liquidated and ascertained damages and the obligation on the contractor is to complete within a reasonable time.

Employers are not interested in giving a contractor more reasons to claim extensions of time and, as market conditions prevail, employers are making such conditions even more onerous on the contractor.

### Best Endeavours

Clause 25.1(4) requires that the contractor shall continuously use his best endeavours to prevent or mitigate delay, however caused (sub-clause (a) refers) and to do all that may reasonably be

required to the architect's satisfaction to proceed with the Works (sub-clause (b) refers).

What is meant by "best endeavours" and "to do all that may reasonably be required" is not clear, however, it is established case law that "best endeavours" means that a contractor need not incur additional expenditure other than minor costs and, therefore, other than resequencing activities, changing priorities or amending logic links, I am not sure how the contractor can meet such an obligation or how the architect can determine whether the contractor has taken such measures.

### The Second Notice

The second notice is to be issued by the Contractor "as soon as practicable, but in any case within 60 days of giving the first notice", Clause 25.2(1) refers. In addition, the second notice is to include:-

- " (a) comprehensive and detailed particulars of the cause, effect and actual extent of the delay;
- (b) sufficient substantiation of his contention that the event is the cause of the delay;
- (c) details of the measures which the Contractor has taken or proposes to take to prevent or mitigate the effects of the event."

It is not unreasonable to require the Contractor to submit the details requested, however, I have already expressed my reservations in respect of (c), but I fail to understand why such details have to be submitted within 60 days of giving the first notice. I appreciate that the employer will be concerned to establish whether the contractor has entitlement to an extension of time and, therefore, be in a position to negotiate commercially with the contractor at the earliest date.



However, under Clause 25.6(2), see later comments, the architect has a further 60 days to consider and award an extension of time following receipt of the second notice. This makes the overall time from the occurrence of the delaying event to establishing an entitlement to an extension of time some 162 days, i.e. over 5 months later. Further, Clause 25.2(1)(a) is presumptive that within 60 days of the first notice it is possible to determine the “actual extent of the delay”.

As will be inevitable by reference to current practice on contracts with similar provisions, there will be hundreds of such notices to deal with administratively by both the contractor and the architect.

### Interim Particulars

Where an event has a continuing effect, the contractor is required to give a written statement to that effect together with interim particulars. Such particulars are to contain similar information to the second notice, Clause 25.2(2) refers. Such interim particulars are to be submitted at 42-day intervals until the actual extent of the delay is assessable and then final particulars are to be submitted 42 days thereafter (Clause 25.2(3) refers). There, therefore, appears to be some timing discrepancy between the second notice and the interim particulars.

It will be interesting to see in practice, if this Standard Form is adopted, how many architects react to the first notice. Many architects will be too impatient to wait for the second notice some 60 days later (or interim particulars 42 days later) which contain detailed particulars and will inevitably respond to the first notice, as most do in practice today. Usually, an architect's initial response is to deny that there is any entitlement to an extension. Once such a position is taken, I find it difficult to see that an architect can then consider the detailed particulars fairly and reasonably.

One further point on the notice procedures - where an event is continuing, the contractor is to provide interim particulars at 42-day intervals until the extent of the delay is assessable. It is not clear who determines when such a delay is assessable. Further, according to Clause 25.3(2) and (3), the Architect is to respond within 60 days of receipt of the second notice, however, it is not clear what happens when such continuing effects extend beyond 60 days.

### The Architect's Decision

Clause 25.3(1) sets out the architect's obligations to give extensions of time provided that the architect is satisfied that:-

- “ (a) completion is being or is likely to be delayed by the listed event stated by the Contract;
- (b) the delay arising from the listed event actually affects Completion;
- (c) the Contractor has submitted the first notice and second notice required by Clauses 25.1 and 25.2.”

Under Clause 25.3(2), an architect shall give an extension of time and the reasons for his decision as soon as practicable, but in any case within 60 days of receipt of the second notice or such further time as may be reasonable subject to the sufficiency of the information submitted with the second notice. Having given the architect 60 days to respond, there is the fallback position “or such further time as may be reasonable”. It is pointless to specify a time frame and then nullify it in the same sentence.

Clause 25.3(3) provides for an architect to notify a contractor that he considers that it is not fair and reasonable to fix a later date for completion, again to be given within 60 days of receipt of the second notice and to give reasons for his decision. Interestingly, there is no reference to “or such further time as may be reasonable” in this clause.

It is not clear what will happen if an architect does not respond within 60 days of receipt of the second notice or does not give reasons for his decision. Presumably, the contractor will have to issue a notice of dispute pursuant to Clause 38.

Further, this clause does not specify when the Architect has to give a response, or assess the extension of time - upon receipt of the interim particulars, or after receipt of the final detailed particulars. This is presumably a drafting error which will be corrected.

### Time Savings

Clause 25.3(4) provides for the architect to consider possible savings in time as a result of an omission or reduction in the works, thereby allowing the architect to reduce an extension of time previously granted under Clause 25.3(1). However, such reduction cannot result in an earlier completion than the contract completion date.

Whilst it is intended that a reduction in a previously awarded extension of time shall only be effected if it is “fair and reasonable to do so”, I envisage this clause will be easily abused.

Even if work is omitted, or the Works are reduced in scope, it does not necessarily mean that there will be a saving in time. The work omitted, or reduced, may not be critical, however, there is no obligation on the architect to substantiate that such an omission or reduction is critical to the completion date.

Conversely, however, if there is an increase in the scope of the works, there is not an automatic entitlement to an extension of time. The contractor is effectively put to strict proof to demonstrate any such entitlement to an extension of time. In my opinion, the same obligations should apply to the architect under this Clause 25.3(4).

### Extensions After Culpable Delay

If an extension of time is given to the contractor under Clause 25(3) because of a listed event that occurs in a period of delay after the completion date, but before the date of substantial completion, Clause 25.3(5) makes it clear that the architect shall award an extension of time and fix a new completion date, even though the listed event may have occurred later than the date that the architect fixed as the new completion date. This is the principle adopted by the court in “*Balfour Beatty Building Ltd v. Chestermount Properties Ltd*”, whereby the court determined that the architect was correct to add the net extension to the completion date, notwithstanding that the architect's instruction was after the extended date. Effectively, the contractor remained culpable for that portion of delay for which he was held responsible.

The introduction of this Clause 25.3(5) is to prevent the contractor submitting “global” claims for extensions of time because of the issue of architect's instructions after a period of culpable delay.

### Revised Extensions of Time

Under Clause 25.3(6), the architect may fix a new completion date later than that previously fixed during the period of delay between the completion date and the date of substantial completion, if it is fair and reasonable to do so, whether by reviewing a prior decision or by taking into account any extension of time granted under Clause 25.3(5).

This Clause 25.3(6) gives the architect the power to revise the completion date, but only to a later date.

### Final Extension of Time

Clause 25.3(7) states that the architect shall finally decide the overall extension of time, if any, to which he considers the contractor is entitled, whether by reviewing any extension of time previously given or otherwise and shall fix a new completion date which may be the same as but not earlier than the completion date previously fixed, within 90 days of substantial completion or such later date as may be agreed by the parties.

I do not see the point of specifying 90 days, and then including the phrase “or such later date as may be agreed by the parties”. This clearly diminishes the obligation on the architect to “finally decide” the overall extension of time within the specified period.

Further, it is unlikely that the contractor will in practice claim breach of contract if the 90 day period is exceeded, particularly where it is inevitable that the contractor will still be preparing final submissions in respect of extensions of time.

I also suggest that the specified period of 90 days is inadequate based on the durations allowed under Clause 25.3. If an event has continuing effects, the Contractor has 42 days from the end of the effects of such continuing event to submit comprehensive and detailed final particulars (Clause 25.2(3) refers). The architect has at the minimum, 60 days from receipt of such final particulars to give a decision (Clause 25.3(2) refers). This totals at least 102 days. Assuming the end of the effect is the date of substantial completion, then the architect will be in breach of his obligations under Clause 25.3(7) if he complies with Clause 25.3(2).

Under Clause 25(8), the architect need only consider extensions of time to the extent that he is able to on the information available in the circumstance that the contractor has not submitted the second notice within the time required by Clause 25.2, or in sufficient detail.

This clause seems to be contrary to Clause 25.3(1), in particular sub-clause (c), which requires the contractor to submit the first and second notices as required by Clauses 25.1 and 25.2. There is also no reference to the interim and final particulars.

I suggest that not only is the architect to consider the information available from the Contractor, but also the information within his



knowledge. This will include the knowledge of further revisions to critical activities, or variations which have yet to be issued and may not be known to the contractor.

### Concurrent Delays

Clause 25.4 makes it clear that where the contractor has, in the opinion of the architect, contributed to or aggravated, by a breach of contract or other default, a delay to the completion of the works or a section beyond the completion date, then the architect shall take into consideration the effects of the contribution or aggravation in fixing the new completion date.

This clause is intended to deal with the situation of concurrent delays, however, it only requires an “*opinion*” of the architect; I suggest that there should be an obligation on the architect to demonstrate that such contribution or aggravation was critical and clearly affected the completion date, irrespective of the excusable delays. It is not sufficient to rely on an opinion, particularly where there are onerous requirements on the contractor to demonstrate entitlements to extensions of time. Where there are concurrent excusable and culpable causes of delay the contractor should be awarded an extension of time for the excusable delay and, thereby, relieved of the liability for liquidated and ascertained damages.

Clause 25.5 refers to rate of progress and, in sub-clause (1), the Architect may notify the Contractor that, in his opinion, the progress of the works is too slow for reasons which do not entitle the contractor to an extension of time. Following such notification, sub-clause (2) provides for the contractor, at his own discretion and with no entitlement to receive additional payment, to take the measures that he considers necessary to expedite progress.

Similar provisions exist in other types of contract and, in practice, are open to abuse. Often the architect notifies that the rate of progress is slow despite the contractor having submitted numerous notices of delay and being entitled to extensions of time. Again, the clause is based on “the opinion” of the architect. This opinion may well be prejudiced by the circumstances I have referred to above. I suggest that the clause should require more than “the opinion” of the architect.

### Nominated Sub-Contractors and Suppliers

Clause 25.6(1) refers to notices which make reference to works carried out by a nominated sub-contractor or materials or goods supplied by a nominated supplier. The contractor is required to copy such notices to the nominated sub-contractor or nominated supplier and, in sub-clause (2), the architect is to notify each nominated sub-contractor and nominated supplier of any new completion date fixed under Clause 25.3.

The idea of this clause is to ensure that each nominated sub-contractor or nominated supplier is fully aware of notices being given on its behalf and whether there are any revisions to the completion date. The clause is, therefore, not for the benefit of the contractor as the contractor would, in any event, be entitled to an extension of time under one of the 23 No. listed events.

Although not stated, it is presumed that the action under sub-clause (2) is not related to or consequent upon the notices given under sub-clause (1). Each should be independent of the other.

It is also surprising that there is no requirement for notification of the Architect’s determination made pursuant to either 25.3(2) or 25.3(3), particularly in respect of the notices referred to in 25.6(1).

### The Architect

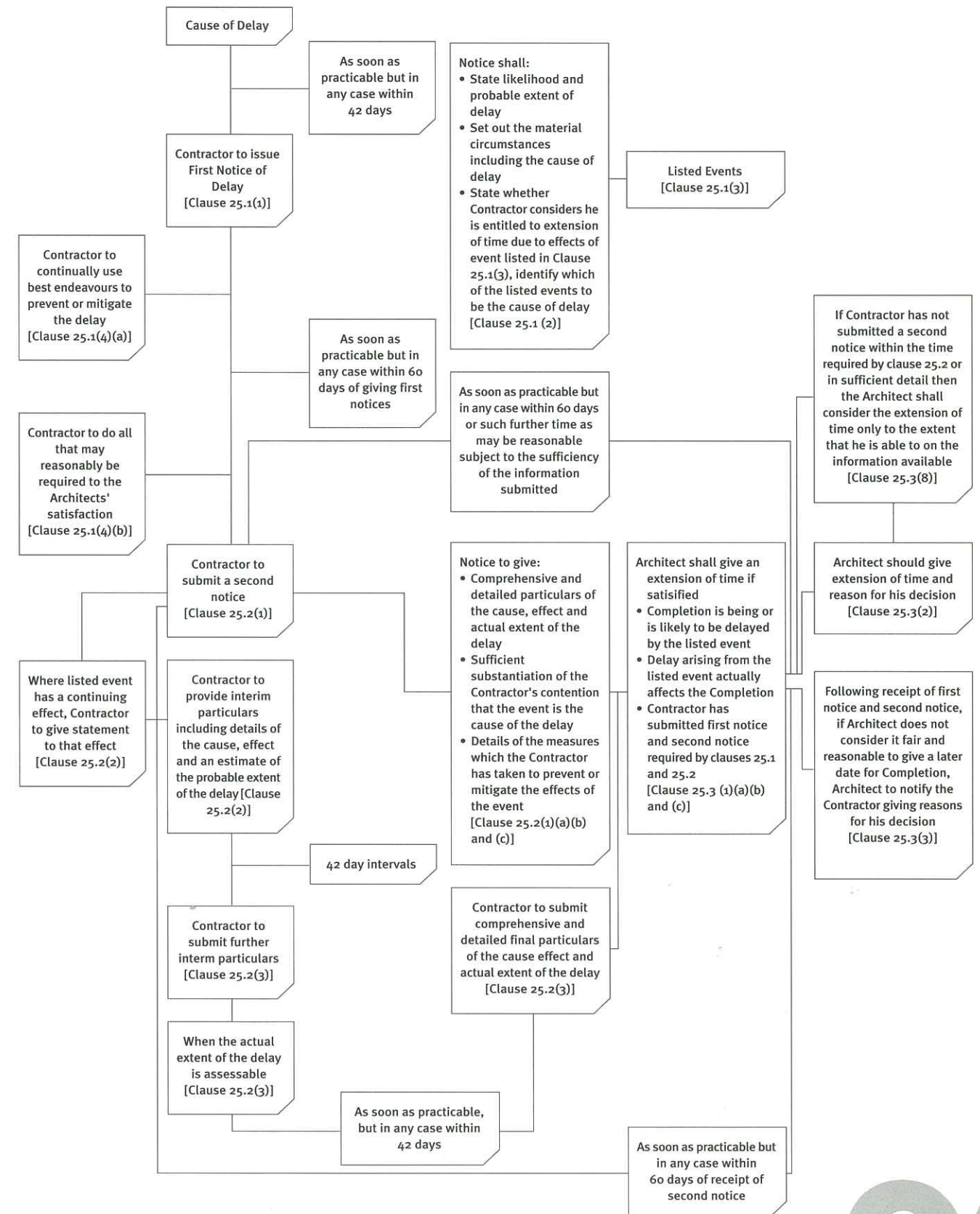
In the Fourth Draft, the architect is responsible for deciding extension of time issues, including listed events which are clearly the architect’s fault. I consider that it would be appropriate to introduce a “*contract administrator*” who does not have a vested interest to protect.

This concludes my observations on Clause 25, however, one final point. It is interesting that the authors of the Fourth Draft have resisted introducing a “*condition precedent*” within Clause 25. This is clearly an acknowledgement of the unnecessary volume of paperwork that is generated by such a provision and which, frankly, serves no effective purpose in the end. This, of course, does not mean that employers will not introduce such a condition precedent in the future, but it is the correct approach for a Standard Form.

For further information, contact [bera@netvigator.com](mailto:bera@netvigator.com)

## Clause 25: Extension of Time

FIGURE A







## PARALLEL DELAY - FACT OR FICTION?

Peter Berry, FCI Arb, FHKIS, MRICS, MIOB, OAP

I limit my thoughts to the Government's General Conditions of Contract for Building Works, the only published form upon which I can comment as I helped draft it. This does not mean I know the definitive answers, but I do know what I hoped to achieve. An arbitrator/judge will decide if I succeeded. And comments from experienced construction lawyers would be most welcome.

"Parallel delay" is short-hand for the situation where the Contractor has been granted extensions of time for reasons that would bring additional money for the prolongation of site overheads but for the fact that the Contractor is or was in wrongful delay and liable for liquidated damages. The theory is that the Contractor is therefore entitled to the additional time but no additional money under Clause 63, on the ground that the Contractor, because of the Contractor's own delay, would incur the expenditure anyway.

I am drawn to this subject by hearing more than one experienced consultant propound this as the correct legal position, whilst others oppose it. I therefore resolved to look further, particularly as I did not intend this outcome. I am conscious that what follows may be slanted towards this objective, but I will try to cover the subject from all angles.

First a few basics. The Contract is lump sum i.e. do the work as specified, in the agreed time, and get paid \$X. If nothing happens to change that, then that's the end of the matter. The Contract of course recognizes and anticipates human weakness and sets out what is to happen when certain things do change that would otherwise be breaches of contract, in particular the power to vary the work and the right to issue extensions of time.

There is an obvious linkage between Clause 50 (Extensions of time) and Clause 52 (Liquidated damages). There is no express

linkage between Clause 50 and Clauses 61 (Valuing Variations) and 63 (Disturbance to the progress of the Works) as neither refer to time. There is an express connection between Clauses 61 and 63.

Additional work ordered under Clause 60 may or may not affect the progress of the Works (though it usually does). Even if it does, the disturbance to the progress may not delay the date for completion. The disruptive effect (as opposed to the physical work) of an instruction given under Clause 60, whether or not the date for completion is affected, is generally dealt with under the rules set out in Clause 61 and added to the value of the physical work (changed circumstances etc).

This discussion is not concerned with parallel delays under Clause 50, which decides whether or not the Contractor is entitled to an extension of time. As noted, time is not mentioned in Clauses 61 and 63.

Where the Architect disrupts the original situation as set out in my fourth paragraph e.g. by ordering variations or the suspension of the Works, or by providing information late, the underlying concept is that the Contractor should not be out of pocket for an unpriceable risk. We are not concerned with BQ rates for additional work, this being a settled matter at law. What is in play are the sums of money allocated to the Contractor's risk items in the Preliminaries Bill. And whilst the Contractor is obliged to stand by the rates in the BQ, the Contract requires/allows the adjustment of the tender sum where Architect induced disruption has taken place.

It is at this point that Clause 63(b) becomes an issue. On the basic intended principle that the Contractor must not be out of pocket by reason of such disruption to the work, if the QS, when measuring and valuing variations under Clause 61, does not fully



reimburse the Contractor, the Contractor can turn to Clause 63(b). The Contractor has of course to show three things viz.

- That the progress of the Works has been materially affected by the Employer/Architect, and
- That sensible steps have been taken to control the Cost, and
- That the Cost is not paid elsewhere, i.e. by the extended Preliminaries or in the rates used for the extra work.

Having shown, on the balance of probability (not beyond all reasonable doubt) that expenditure has been incurred and not paid for elsewhere, the Contractor is entitled to the extra cash.

Note that Clause 63 is not a damages Clause. It is not even a loss and/or expense Clause. It only covers Cost. (QS's are not trained to assess damages; we only measure and value.)

Provided the wording of Clause 63 does reflect my intention, the principles to be applying are straight-forward. But there is a difficulty in the practical application - how does the E/S know how much is included in the individual rates for the additional work that is based on BQ rates? After all, the Contractor is at liberty to distribute overheads and profit where he likes and at whatever (different) levels he likes. What if the overheads margin in the rates plus the priced Preliminaries over retrieve? On the wording of Clause 63, I cannot see any implied basis for clawing-back any windfall profit gained by the Contractor, but to conform to the express wording, the answer is I believe for the Contractor to offer as claw-back whatever overhead has been agreed for new rates (although this may not always be the case, in which case some compromise needs to be reached).

Once the overhead content in individual rates has been settled and how it affects the Cost reimbursement for the prolongation of time on site, the priced items in Preliminaries Bill can be

adjusted, in so far as they are time related and therefore affected by the prolongation i.e. (at least) there will be some adjustment to the lump sum price for any start-up and removal costs included in each priced Preliminaries item. Some items may not be relevant to the specific subject matter being valued.

The remaining question for the E/S to decide is - Has Clause 63(b) cost valuation been satisfied? If the Contractor claims to be still out of pocket so far as any disruption or prolongation is concerned, then the E/S is bound to ask for the necessary details to determine the amount (Clause 64(3) is relevant).

In a perfect world the A/E would have identified the starting and finishing dates of any disturbance to progress and the Contractor's records checked to see what overhead activities were affected and the sums agreed. The total Cost is then adjusted for sums paid through the rates/Preliminaries, to provide the Cost referred to in Clause 63. This being a less than perfect world, the solution to valuing the Clause 63 Cost is usually by collecting all "prolongation" time together and averaging out the site overhead expenditure rather than valuing it variation by variation. This is commercially sensible.

Why do it this way? Why have Clause 63(b)? If Clause 63(b) was not included, the tendering strategy would be different, making the Preliminaries more important. The Contractor would have to weight them to ensure a profitable return in any changes made by the A/E that resulted in significant disturbance to progress. The underlying purpose is to see that the Contractor is not out of pocket.

To develop the theory set out in my second paragraph, the argument in support of parallel delay is, that since the Contractor



is late (i.e. liquidated damages could be or have been applied) the items making up the necessary site overheads, e.g. offices, security, plant, etc. would be held on site at the Contractor's own expense in any case for the period of delay. Should the Employer/ Architect cause the progress of the Works to be materially affected, any expenditure to be reimbursed under Clause 63(b) would not include the basic site overhead costs. These are included as the Contractor's risk under Clause 14 (Sufficiency of Tender) and not paid when the Contractor is late in finishing. The additional site overheads expenditure is not reimbursable on the ground that the Contractor cannot benefit from its own default (finishing late). The Contractor would though be paid for the extra running costs of e.g. plant that could not have been included in the Tender, which would include electricity, fuel and additional maintenance, or anything else the Contractor can show as being an extra cost, over and above the basic site running costs.

In the context of the original question, where are we? We have in play extensions of time and Cost, and liquidated damages. My understanding is that liquidated damages are the agreed pre-estimate of the damages that will be incurred as the result of any wrongful delay by the Contractor. They apply whether or not the actual damages turn out to be larger or smaller or zero, but most importantly, they are in full settlement of the wrongful delay unless some other obligation to pay can be shown. This, I believe, is a critical aspect of the parallel delay debate. Place this with the Contractor's express right to payment under Clause 61 and 63, any "setoff" from that right because of wrongful delay, becomes a double deduction for the wrongful delay.

The contractually stipulated process for assessing extensions of time and for valuing variations and Cost further "muddies the water".

When variations etc. are ordered that clearly will delay completion, how does the Architect know that the Contractor will fail to complete on time. Deliberately delaying action under Clause 50, "just in case the Contractor does not need the time" is breach of contract, and particularly dangerous if the Architect is concerned that the Contractor will wrongfully delay completion. It may no longer be a question of Clause 50. Time would be "at large".

Similarly, the QS has duties under Clauses 61 and 63 to value variations and assess Cost in a timely manner. This does not include keeping the Contractor out of the money until the Works are complete. Clause 79 requires the inclusion of an estimated value (not a wild guess) of such sums in interim payments. Failure to do so is breach of contract.

The implication that goes with the concept of parallel delay, seems to include the notion that if the Contractor looks like not completing by the due date, then it is in order for the Architect/ QS to not comply with Clauses 50, 61 and 63. Otherwise the Contractor would have received both time and at least a properly estimated sum to go towards the final entitlement, before the date for completion.

If the concept does not include that notion, and the Contractor has been appropriately paid on account, then in order to allow for the diminution in the Contractor's right to payment, there must be a common law right of set-off against the Contractor's right to payment. There are I believe problems with this viz-

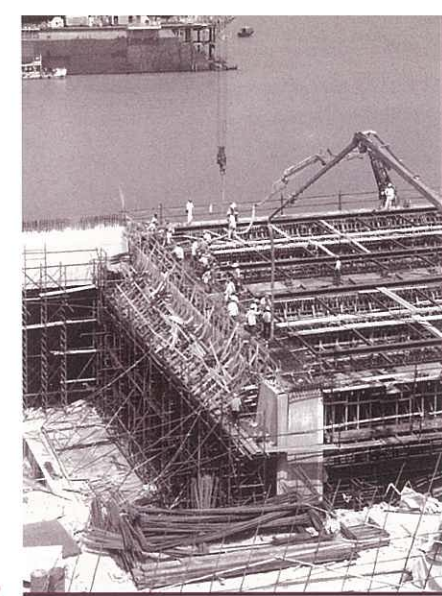
- Clause 63 payments are for "disruption" money not reimbursed elsewhere, and where the granting of an extension has justified the Contractor's delay, there is no express term referring to parallel delay, so any right of set-off requires an implied term.
- Implied terms have strict legal rules, one, of which is, for the term to be implied it must be commercially necessary, which

it is not in this case. The contract "works" without it, even if it means the Contractor gets a "windfall" profit.

- Common law set-off applies when the Employer has sustained loss or damage for some breach of contract and sets off the sum against a legitimate claim from the Contractor. The breach of contract in question is failing to complete on time. The Contract does not need common law set off for this, because as noted, Clause 52 (Liquidated damages) applies and expressly deals with it.
- What is the loss or damage to the Employer, in the circumstances where the Employer makes beneficial use of the Contractor's assets?
- It is also possible that the common law right of set off is compromised by the express inclusion and wording of Clauses 52 and 63 i.e. if you choose to delay, you have to pay.

The true position seems to be that if the Contractor is working too slowly and the Architect causes progress to be further affected and grants to the Contractor an extension of time, at the time of this disruption to progress the Contractor would be carrying additional unreimbursable overheads because of his own default. Why then should the Contractor be caused to stay on site even longer by reason of some (in) action of the Architect and not get fully paid for it? If there was no delay to completion, only disruption, (say) causing plant to be used even more inefficiently, the Contractor would be entitled to payment under Clause 61, so why time related costs under Clause 63?

Also, if the Contractor is behind programme and does not catch up, but is entitled to extensions of time for e.g. variations and late information, the extensions granted take into account the slow progress i.e. the Architect only grants the extra time to which the Contractor is fairly entitled. Clause 63 calculations broadly follow the event. The Contractor only gets the contractual entitlement and cannot "run up a bill" and be paid for being inefficient.



Notwithstanding my lengthy attempt to analyse the situation in contractual terms, what I cannot come to terms with is simply this - that there is support for the position that, even after many months of justified delay, for which EOT has been granted, the Contractor is entitled to no (or very little) additional priced Preliminaries and/or Clause 63 cash for "prolongation", should the Works be completed one day later than the revised date for completion. (Is the money allocated for prolongation under a Clause 61 valuation also to be taken back/not included?) The concept adds much injury to the above mentioned potential and often occurring breaches of contract by the Architect/QS and makes a nonsense of Clause 52 if common law set off cannot be applied.

I can only conclude that an adjustment for "parallel delay" to a Clause 63 valuation of Cost where an extension of time has been granted, is not contractually justified because:-

- Clause 63 makes no link to time for completion. Cost is to be calculated regardless of whether or not the disturbance affects the time for completion.
- There is no common law right of set-off or right of diminution. Liquidated damages alone deals with the effects of wrongful delay.
- The Employer has no right to keep the Contractor on site longer and make beneficial use of the Contractor's assets without appropriate payment.
- The application of the principle results in an absurdity i.e. if the Contractor finishes on time, Clause 63 applies, if the Contractor finishes one day late, Clause 63 is diminished to having little or no contractual effect. Where is this stated in the Contract? ❏





## SURVEYOR'S SURF

Stephen Chung, Zeppelin Real Estate Analysis Limited



Perhaps members who know Japanese can enlighten the author on this: Ever wonder why the Japanese characters for 'sashimi' (fresh raw food, fish usually) are "刺身"? Notwithstanding your humble author's ignorance of the Japanese language, and based on the fact that these two are also recognizable Chinese characters, if translated strictly in the Chinese context it will mean something like "piercing / stabbing a body", here's a hypothesis = When a body is pierced or stabbed, "OUCH!" is often one of the sounds made = "OUCH!" also applies when someone finds out he / she has a hefty restaurant bill to settle = Sashimi, being a delicacy, is generally an expensive food / restaurant item = Sashimi thus usually involves a hefty bill (if not so much now at least it was true 10 or more years ago) = "刺身" was thus used to equate sashimi with the (OUCH!) hefty restaurant bill experience = Incidentally, there is also a similar Chinese term for describing one's feeling of having to pay a hefty bill = "肉痛" that if translated literally means "pain in the flesh". Coincidence or is there a commonly shared denominator? The following websites are \$\$\$ valuable yet without causing any pain:

<http://www.chinahouse.gov.cn/>

This is the website of the Center for Housing Industrialization Promoting, presumably a part of the Ministry of Construction in China. It offers the latest news in building construction, in particular the latest rules and regulations. The website is written in simplified Chinese.

<http://www.todayoffice.com/>

This website, in simplified Chinese, is a commercial office portal and offers information on several major cities. Not only are individual projects introduced, there are sections linking to associated services too.

<http://www.millersamuel.com/charts/>

Wish to buy properties in the Big Apple thus looking for some good basic data? Try this site done by Miller Samuel, a real estate

appraisal company focused on New York City. Instead of very wordy descriptions, the site keeps you informed of the market via simple charts and tables.

<http://www.rebuz.com/>

Another good resource for seeking real estate properties and information on the North American markets. It also features links to other real estate related services such as property management, financing and the like.

<http://ideas.uqam.ca/EDIRC/index.html>

This site lists the economics departments and research institutes across the continents and should be a good source for research-orientated professionals and teams.

<http://www.n-net.com/>

Need to find out and understand a particular city in the States? Try this site! It lists the major newspapers, journals and publications in the States and their contact numbers and persons.

<http://vil.nai.com/VIL/newly-discovered-viruses.asp>

Tired of getting attacked every time there is a virus floating around. See this. This is a McAfee site listing the latest computer viruses and ranking their degree of impact and risk (possible damage). Handy for keeping your computer system intact and safe / secured.

[http://www.economist.com/markets/bigmac/displayStory.cfm?story\\_id=581914&CFID=1886824&CFTOKEN=71164360](http://www.economist.com/markets/bigmac/displayStory.cfm?story_id=581914&CFID=1886824&CFTOKEN=71164360)

Presumably many readers might have heard of the infamous McDonald Index created by the Economist. Well, here it is. While being a relatively rough tool, it gives you a sense of whether a particular currency is high or low compared to other currencies.

[http://www.economist.com/markets/bigmac/displayStory.cfm?story\\_id=456039&CFID=1886824&CFTOKEN=71164360](http://www.economist.com/markets/bigmac/displayStory.cfm?story_id=456039&CFID=1886824&CFTOKEN=71164360)

This is also a website of the Economist and this section gives you a rough index of how many bottles of Coke (Coca-Cola) a particular country consumes per person. While wealthier

countries generally consume more, a few relatively poor countries also top the mark, thus raising the speculation that Coke consumption may also be affected by lifestyles or even the food culture.

<http://users.erols.com/mwhite28/2ocentry.htm>

This site gives an overall record of the 20th Century, in particular statistics related to demographics and populations in the world. Should be of interest not only to researchers, but history nuts as well.

The answer to the puzzle in the last issue: In which James Bond movie did Bond really get married? = "On Her Majesty's Service", though the bride was killed on the day of marriage by remnants of the bad guy in that movie. Sad though this part might be, for Bond to survive as a fictional movie character, perhaps this was the only way out. Bond would not be Bond if he somehow became 'domesticated' and had to say in subsequent sequels something like "Oh, I'm sorry, I have to go home for dinner. My wife's waiting". Now that would really kill Bond.

Send suggestions and comments to [stephenchung@real-estate-tech.com](mailto:stephenchung@real-estate-tech.com)

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# THE QUICK AND EASY WAY TO EFFECTIVE SPEAKING

Written by Dale Carnegie

ISBN 0671724002

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Stage fright is almost typical for most of us in public speaking, unless you are a born public speaker. Possession of communication skills is important in the modern business world. Many examples illustrate the importance of mastering effective speaking skills to reach certain purposes. Students need to convey their findings to their professors to get good scores. Government officials need to "sell" their new policies to seek votes from legislators. CEOs need to convince stock analysts the companies' ever-brighter prospects to get better ratings.

You may find dozens of books on public speaking, but I always believe old rules from this book last. First published in 1962, this 273-page book is divided into the following five parts:

1. Fundamentals of effective speaking
2. Speech, speaker, and audience
3. The purpose of prepared and impromptu talks
4. The art of communicating
5. The challenge of effective speaking

I like Carnegie's books because the settings are always parted with a one-page review of each part for quick reference. Whenever you pick up this book, say one night before a presentation; you can immediately benefit from the thumbnail points in the five reviews. Here are some useful tips that you may practice one or two at a time before you get acquainted with all the skills in the book.

Talk about something that has aroused your interest; something that puts a sparkle in your eye and feeling in your voice; something that you have a deep desire to communicate to your listeners. Yet you earn the right to talk about the subjects you are eager to share or you are excited about, you are basically

getting the final seal of approval from the audience - complete attention in what you have to say. It is a very important concept that the audiences do want you to succeed on the stage. Show your listeners how eager you are to talk about your subject, and you will hold their attention.

Before you talk, prepare yourself. Never memorize a talk word-by-word. Fill your talk with illustrations and examples to enable the audience to visualize your points. Skip all technical jargons. If time permits, rehearse the talk to your friends or colleagues.

Restrict your topic to fit the time at your disposal. If your client allows you to present your proposal in 10 minutes, anything 5 minutes more than that is likely to be fatal. Arrange your subjects in sequence and, if possible, use visual aid to strengthen your ideas. Last but not least, talk in terms of your listeners' interests. If you deliver a talk on say property investment in 5 years' time, ask yourself how your knowledge in this subject will help the audience solve their problems and achieve their goals.

I sincerely recommend this book to all members when they want to deliver a talk or give a presentation with positive confidence. I have known many HKIS students who are as intelligent as qualified surveyors, but unfortunately they are unable to overcome the pressure of presenting their cases convincingly in front of the panel of 3 assessors. I think language barrier could be one possible reason of failure, but their fright on speaking out their reasoning is also part of the reasons.

Read this book now and practice more! Like swimming - when you are competent to swim well, it makes no difference if you swim in a small pool or in the sea. Similarly, when you manage to convey your messages clearly before a table of twelve, it would not be that difficult to speak before a crowd. ■

## UPDATE OF GOVERNMENT PRACTICE NOTES

Department	Practice Note/Reference#	Description	Date	Home Page
Works Bureau	Technical Circular No. 19/2002	Mass Transit Railway Protection.	22 May 2002	<a href="http://www.wb.gov.hk">www.wb.gov.hk</a>
	Technical Circular No. 18/2002	Projects Implemented in Phases.	17 May 2002	
	Technical Circular No. 32/2002	Electronic Dissemination of Tender Documents and Electronic Submission of Tender Returns on Removable Media.	13 May 2002	
	Technical Circular No. 14/2002	Management and Maintenance of Natural Vegetation and Landscape Works, and Tree Preservation.	10 May 2002	
Lands Dept.	Practice Note No. 6/2002	Premium Assessment for Exemption of Non-structural Prefabricated external walls and utility platforms from GFA and SC Calculation under Joint Practice Note No. 2.	6 June 2002	<a href="http://www.info.gov.hk/landsd">www.info.gov.hk/landsd</a>
	Practice Note No. 5/2002	Processing Time for Master Layout Plan, General Building Plan.	6 June 2002	
Fire Services Dept.	FSD Circular Letter No. 1/2002	Rules for Fire Detection and Alarm Systems for Buildings.	1 June 2002	—
Planning Dept.	Practice Note No. 1/2002	Streamlining the Processing of Planning Applications for Selected Developments/ Uses Covered by Town Planning Board Guidelines or that are Minor in Nature.	6 June 2002	<a href="http://www.info.gov.hk/planning">www.info.gov.hk/planning</a>
Civil Engineering Dept.	GEO Technical Guidance Note No. 9	Updating of GEO Report No. 56 - Application of Prescriptive Measures to Slopes and Retaining Walls.	27 May 2002	<a href="http://www.info.gov.hk/ced/eng/publications">www.info.gov.hk/ced/eng/publications</a>
Town Planning Board	TPB PG-No. 19B (Revised June 2002)	Guidelines for Minor Amendments to Approved Development Proposals.	17 June 2002	<a href="http://www.info.gov.hk/gpb">www.info.gov.hk/gpb</a>

### e-Statutory Plans System

A new system, e-Statutory Plans System from Technical Service Section of Planning Dept. has recently been launched. The system allows the public to view the Outline Zoning Plans and Development Permission Area Plans, the associated notes and explanatory statements via the Internet. Users can search a location by clicking on an electronic plan, or entering the name of a street, building or region. You may visit directly at <http://www.ozp.tpb.gov.hk> or via the "OZPs and DPA Plans" icon in Planning Dept. homepage <http://www.info.gov.hk/planning> or the Town Planning Board homepage <http://www.info.gov.hk/tpb>.

Please note that the above Practice Notes can be downloaded from the corresponding home page.



# FIG 2002 GENERAL ASSEMBLY in WASHINGTON DC. USA - 21 TO 26 April 2002

▼ HKIS President  
(Mr. Hak Chan)  
In Action



“At our Booth” ▼  
(from left to right)  
Mr. Marvin Chau, Mr. Alex Wong,  
Mr. Siu Wai Ching, Mr. Thien Nyen Wong,  
Ms Rina Tsoi, Mr. David Wan  
& Mr. Hak Chan



◀ Chairman of  
International Committee  
(Mr. Thien Nyen Wong)  
& FIG President  
(Mr. Robert Foster)



◀ Mr. Thien Nyen Wong  
became the first Vice  
President of FIG  
elected directly by the  
General Assembly



▼ FIG Prize Winner,  
Mr. George Oner Ogalo &  
Mr. Thien Nyen Wong

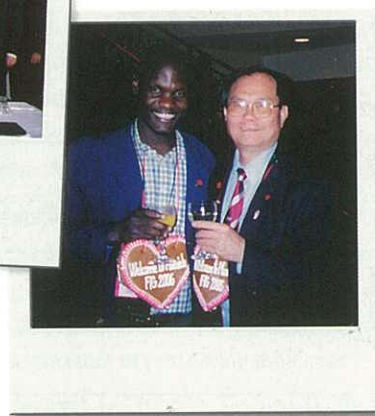


FIG Council Members 2003-2006 ▶  
(from left to right)

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T.N. Wong, Vice President  
Dipl.-Ing. Hagen Graeff, President, DVW  
Prof. Dr. -Ing. Hoger Magel, President  
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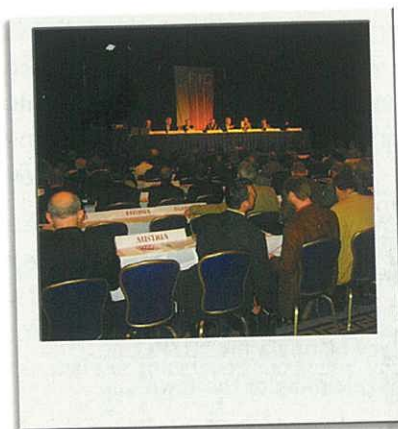
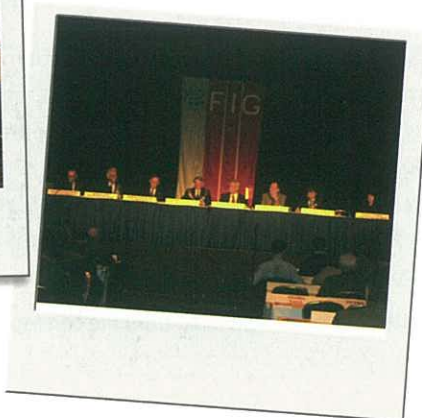


FIG Council in Action ▲



◀ FIG Council Members 2000-2003  
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