

New Guidance on Construction Delays and Disruption

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The SCL Protocol ('the Protocol') provides guidance for the management and determination of delay and disruption. Although it is advisory only (having no force of law unless by agreement) it is extremely useful for avoiding or managing delay claims.

Delay Analysis

The Protocol advocates the use of time-impact delay analysis both for prospective and retrospective analysis. This method involves introducing delay events into the most contemporaneous programme and updating the programme with the assumed most likely effect of the delay.

In the Draft it is now stated that the use of time-impact delay analysis *'can sometimes lead to unrealistic results if it subsequently transpires that the EOT [Extension of Time] is significantly more than the delay attributable to the Employer'*.

Determinations which awarded potentially inaccurate EOT entitlements would cause disputes, particularly in circumstances where it is arguable that other methods of delay analysis may be more appropriate.

In the Draft, the time-impact delay analysis method is still recommended for contemporaneous submission and assessment of an EOT claim. A contemporaneous evaluation has also been elevated to a core principle, rather than a 'wait and see approach' as this allows appropriate mitigation measures to be considered to limit the impact of the delay event.

However, where the analysis is carried out some time after the delay event, the Draft does not recommend one form of delay analysis but sets out a range of methods currently in use and the factors to be taken into account when selecting the right method to use.

The main emphasis is that the method to be used must be sound from a common sense perspective in light of the facts that actually transpired on the project. This approach is to encourage more reliable outcomes, and is an approach which has been endorsed by English courts.

Consideration of the Protocol's and the Draft's guidance on delay during contract negotiation, and inclusion of its principles when drafting, will minimize the prospect of dispute.

Disruption Analysis

A key new feature of the Draft is the separate categorization of disruption and extended guidance on its analysis.

Often the terms "delay" and "disruption" are mistakenly used as if they are the same thing. During disputes, a disruption claim may be used as an alternative and additional cause of action to a delay claim.

Most standard forms of contract, while addressing delay, do not expressly address disruption, and it is left to being a claim based on a breach of the contract. The Draft sets out guidance on the difference and how to advance and assess disruption claims.

The Draft states that *'The starting point of a disruption analysis is a review of productivity in carrying out the works over time in order to determine when lower productivity was achieved and what activities were impacted'*.

The Draft sets out two categories of disruption analysis. Productivity-based methods (being those based on actual or theoretical measurements of comparative productivity) and Cost-based methods (being those which rely on analysis of planned and actual expenditure of resources or costs).

The Draft allows parties to be better placed to address any eventualities relating to disruption.

Concurrent Delay

The treatment of concurrent delay is often a cause of dispute.

The Draft defines concurrent delay as a 'situation where two or more delay events arise at different times, but the effect of which are felt at the same time'. It also states that *'For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (not merely incidental to the Delay to Completion)'*.

A main issue with concurrent delay is whether an Employer delay is an effective cause of Delay to Completion where it occurs after the commencement of the Contractor Delay to Completion but continues in parallel with the Contractor Delay. The Draft notes the narrow approach to this issue taken by English courts, which is that that situation would not be considered as concurrent delay as *'The Employer Delay will not result in the works being completed later than would otherwise have been [where] the works were already going to be delayed by a greater period because of the Contractor Delay to Completion'*.

This standpoint has been criticized as giving employer's a 'blank check' on variations during a period of Contractor delay which amounts to a windfall that does not respond to any consideration of fairness or reasonableness.

A UAE Law perspective

Where concurrent delay has been established, the Draft recommends a position in line with UAE law being that *'the Contractor should be entitled to an EOT for the Employer Delay to Completion... The Contractor delay should not reduce the amount of EOT due to the Contractor as a result of the Employer Delay'*.

There is no express UAE law on the entitlement to an extension of time or the management of concurrent delay. It is likely however that the Courts would have regard to the intention of the parties in absence of a clear agreement. When dealing with concurrent delay there are principles of the UAE Civil Code which may also be applied. For example Article 246(1), which states that *'the Contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith'*.

In the case of concurrent delay UAE courts may also apportion liquidated damages under Article 290 of the Civil Code which considers if *'The person suffering harm participated by his own act in bringing about or aggravating the damage'*.

Conclusion

The Draft adds to the guidance given by the Protocol on the best way to maintain adequate and complete records, how to deal with global claims, mitigation measures and acceleration. Though controversial in some areas, the Draft is detailed and wide-ranging and its guidance will prove invaluable during contract negotiation, drafting and administration to minimize disputes.

Extension of time claims are the basis for the vast majority of construction disputes and many contracts, including the FIDIC templates, have no specific provisions to deal with the issue of concurrency.

A full understanding of the Drafts' guidance on how to prepare for and deal with concurrency and= including appropriate clauses in your contract allows for the protection of both Employers and Contractors and the minimization of disputes.

If you want assistance with your contracts, managing contract administration and record keeping or compliance with or use of the Draft or the Protocol please Scott Lambert on s.lambert@tamimi.com.