

## SCL's New Take on the Delay and Disruption Protocol

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In June 2016, the Society of Construction Law ('SCL') sent its members a draft of the second edition of its widely recognised Delay and Disruption Protocol.<sup>1</sup> It follows the publication of a Rider published late last year about which this author wrote a previous article. Although the '2016 Draft' is meant to be consultative, there are a number of improvements from the '2002 Edition' worth exploring before the final and definitive version is published sometime in the future. There have been many changes, not all of which will be covered in this article which, in any case, will only focus on changes other than those already included in the Rider.

### Structure

The first thing to notice is that the draft is organised differently from the 2002 Edition. The table below is a broad strokes cross-reference between the two versions. Please note that it is not a perfect cross-reference, since most topics have been amended, expanded, or moved.

2002 Edition	2016 Draft	Guidance
-	1	Meaning of delay, disruption, and acceleration
2	2	Records and programmes
1	3	Delay, disruption and acceleration
1.15; 1.16; 1.20	4	Other financial heads of claim
3	5	Extensions of time during the course of the project
4	6	Delay analyses time-distant from the delay event
1.19	7	Dealing with disruption claims

<sup>1</sup> SCL's 2016 Consultation Draft of the Delay and Disruption Protocol ("2016 Draft").



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### Records and Programmes

In general, the 2016 Draft is focused on providing "practical and principled guidance on proportionate measures [...] in relation to all projects, regardless of complexity or scale."<sup>2</sup> It offers the user options to respond to certain issues and makes specific recommendations wherever possible. This is especially prevalent in the robustness of the updated guidance on records and programming in Section 2.

### Clear Agreement

The first notable improvement in Section 2 is that it recommends, "clear agreement on the type of records that should be kept [...] prior to the time [the parties] enter into the contract (or at least at the outset of the works)."<sup>3</sup> It recommends a proportionate and adequate approach to this agreement and spells out several guidelines,<sup>4</sup> including, among others:

- (a) agreeing on responsibilities for production and checks;

<sup>2</sup> 2016 Draft at paragraph A of Introduction, page 1.

<sup>3</sup> 2016 Draft at Core Principle 1, page 5 and Section 2.5, page 12.

<sup>4</sup> 2016 Draft at Section 2.5, page 12.



- (b) agreeing on format;
- (c) agreeing on ownership;
- (d) establishing record keeping requirements prior to preparing the tender documents to allow accurate pricing from tenderers;
- (e) the contemporaneous generation of records relevant to delay and disruption events;
- (f) that certain types of records should contain facts only and offer no opinions;
- (g) the need to update records as necessary;
- (h) the need to maintain records for an appropriate amount of time; and
- (i) maintaining a collaborative document management system database.

These guidelines aim to deter disputes over the level of record-keeping and to reduce uncertainty when discussing an Extension of Time ('EoT'). Whereas it falls short of recommending the use of Building Information Modelling ('BIM') processes, it expressly recognises its growing use and recommends specific agreement regarding its content, use and ownership if such processes are adopted.

## Documentation

Regarding programmes, little has changed other than a re-organisation of the section to make it more straightforward. With that said, the drafters have added new guidelines such as<sup>5</sup>:

- (a) the use of supplemental tools when works are output driven;
- (b) the incorporation of narratives to link programmes with method statements;
- (c) the Contract Administrator to specify the contractual requirements a proposed programme or update does not meet before labelling it as inadequate (as opposed to just giving reasons);
- (d) saving updated programmes in native format as opposed to PDF; and

<sup>5</sup> 2016 Draft at Sections 2.51, 2.53, 2.58, 2.61 and 2.65 at pages 19 to 21.

- (e) that asking the Contractor to propose ways to mend delays is not the same as an instruction to accelerate at the Employer's cost.

In addition to programmes, there are also progress records, resource records, cost records, correspondence, and administration records (e.g., instructions, notices, variations, bonds, technical documents, milestone documents and claims, etc.) and contract and tender documents. Each one of these six categories and sub-categories of documents has its own description, requirements, and *raison d'être*.

Both Section 2 and Appendix C of the 2016 Draft enter into considerable detail in explaining each category of record. For example, Appendix B lists:

- 7 different types or stages of the programme (e.g., tender programme, proposed programme, accepted programme, etc.);
- 7 different supplemental detailed programmes (e.g., design, delivery, testing and commissioning, etc.); and
- 7 different types of explanatory records that "*explain in words, graphics, and spreadsheets key considerations and assumptions underpinning the programmes*,"<sup>6</sup> such as narratives, progress curves, marked-up drawings and sketches, BIM files, etc.

## Loss of Profits and Unabsorbed Overheads

Another notable improvement is the cost records guidance about loss of profits and unabsorbed head office overheads.<sup>7</sup> In general terms, cost records should have enough detail to be able to link costs with delay or disruption events. However, when considering loss of profits and unabsorbed head office overheads, even when the Contractor uses a formula, it still needs to disclose certain information (to substantiate his claim) that it may not want to disclose, such as company accounts, tendering history, business plans, etc. The 2016 Draft therefore proposes the agreement of "*relevant rates in the contract*," for example, "*staff rates to be charged in the event of an Employer Delay to Completion*".<sup>8</sup>

A clause setting such rates may be construed as a 'Brown clause' for liquidated prolongation costs. This is

<sup>6</sup> 2016 Draft at Appendix B, Section 1.4, page 71.

<sup>7</sup> 2016 Draft at Section 2.29, page 15.

<sup>8</sup> 2016 Draft at Section 2.30, page 16.



a clause that fixes a daily or weekly rate to compensate the Contractor for prolongation costs caused by Employer delays.<sup>9</sup> This concept is not new to the Protocol,<sup>10</sup> but its application to loss of profit and, arguably, head office overheads for Employer Delay to Completion, is.

When developing such a clause, drafters must have two thoughts in mind. The first is that the Contractor may not be able to obtain liquidated relief for loss of profit or unabsorbed head office overheads for mere Employer Delays to Progress.<sup>11</sup> Only when the Employer causes Delay to Completion would the Contractor be able to obtain relief on these heads of claim.<sup>12</sup> The second, applicable in England, is whether it complies with the most recent case on liquidated damages: *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis*.<sup>13</sup> To withstand the test in this case, drafters must ensure that the rates they set are not "out of all proportion" from the legitimate interest in enforcing the Employer's obligation not to prevent the Contractor from performing its obligations to get on with the work.

## Concurrent Delay

One of the most important changes in the Protocol's approach comes in its new treatment of concurrent delay at Section 3.10. In this author's opinion, however, the SCL's approach may be controversial for reasons of both form and substance.

## Ambiguity in the text and structure of the Section

The general rule was clear in the 2002 Edition. It recommended that, when met with concurrent delay, the Contractor should be entitled to an EoT for Employer Delays to Completion. The Protocol reiterated the rule when discussing the specific scenarios of "true concurrency" and what used to be called "concurrent effect".

<sup>9</sup> See Chappell, David, et al, Building Law Encyclopaedia (2009), page 330.

<sup>10</sup> 2002 Edition at Section 1.8.5, page 21.

<sup>11</sup> See Chappell, David, et al, Building Law Encyclopaedia (2009), page 330.

<sup>12</sup> See Pickavance, Keith, Delay and Disruption in Construction Contracts (2010) Fourth Edition, paragraph 21-017.

<sup>13</sup> [2015] UKSC 67. For further commentary on this case, see Mangan, Steve, The Highest UK Court Reviews The Law On Penalties (24/05/2016) [Reviewoflaw.com/news/2016/05/24/2016-05-24-uksc-67/](https://www.reviewoflaw.com/news/2016/05/24/2016-05-24-uksc-67/).

Whereas the general rule remains as a Core Principle in the 2016 Draft,<sup>14</sup> it also includes an exception to the general rule which starts with the example in Section 3.10.7:

"[...] a Contractor Risk Event will result in five weeks Delay to Completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in Delay to Completion from 6 February to 20 February."

At first instance, it is not clear whether the periods the example mentions relate to risk events, periods of delay or periods of project overrun. In this author's opinion, the way to interpret the example without running into incongruities is by assuming that the variation works performed in February also constitute the Employer's period of delay. In addition, the period of project overrun from 21 January to 25 February must also constitute the period of Contractor Delay. This means that both periods of delay happen after the original contract completion date, which gives the impression that, in this example, the SCL is referring only to concurrent delay that occurs after the contract completion date. Also, an Employer Delay that occurs during a period of project overrun caused by a previous Contractor Delay is not concurrency.

## Substance of the apparent recommendation

However, the most important aspect of the example in Section 3.10.7 is the recommendation that follows in Sections 3.10.9 and 3.10.10, which states that the Contractor should not obtain an EoT because, in the example, the Employer Delay occurs within a period of Contractor Delay. That is, if the Contractor Delay starts before the Employer Delay and finishes after, then the Contractor should not obtain an EoT for that period of Employer Delay. The 2016 Draft reasons that, in these circumstances, "the only effective cause of Delay to Completion is the Contractor Risk Event,"<sup>15</sup> so that "[c]oncurrent delay only arises where the Employer Risk Event is shown to have caused Delay to Completion or,

<sup>14</sup> 2016 Draft at Core Principle 9, page 6 and Section 3.10, page 26.

<sup>15</sup> 2016 Draft at Section 3.10.9, page 28.



*in other words, caused critical delay (i.e. it is on the longest path) to completion.*<sup>16</sup>

The first question that this reasoning raises is that, if there is only one effective cause of delay, would there be any concurrency? The straightforward answer, which is actually provided by the 2016 Draft itself,<sup>17</sup> is 'no'. However, this logic simply favours whichever delay comes first and takes no account of various concerns raised throughout the years such as "*causative potency*"<sup>18</sup> and the prevention principle discussed in further detail below.<sup>19</sup>

Leaving the discussion about "*effective cause*" aside, this reasoning can very easily be applied to situations both pre and post completion date. If that is indeed the case, the SCL is suggesting that concurrency can never happen if the Contractor Delay starts earlier and is longer than the Employer Delay. The Contractor would only obtain an EoT (1) when the Employer Delay ends after the end of the Contractor Delay, and (2) when the Employer Delay occurs within the Contractor Delay but adds to the already existing Contractor Delay, thereby extending the date of completion beyond the project overrun caused by the Contractor. However, neither of these describe a situation of concurrent delay anyway because the Employer Delay would be extra.

It may be that the SCL's new proposed recommendation is intended to assess whether it is fair and reasonable to grant an EoT to a Contractor for a post completion Employer Delay that could have been avoided had the Contractor finished on time. A useful example that helps illustrate this assessment is inclement weather (i.e., "*exceptionally adverse climatic conditions*" in FIDIC nomenclature) where the cause of delay is neutral. As a matter of FIDIC standard form interpretation, the Contractor would be due an EoT for this event under Sub-clause 8.4. In *obiter dictum*, Colman J asked in *Balfour Beatty v Chestermount*<sup>20</sup> this same question; whether it would be fair and reasonable to grant an EoT for a relevant event that would have been "*wholly avoided had the contractor completed the works*" on time. Coleman J uses the example of a storm during a period of project overrun.

Therefore, it appears that this exception would only apply in situations where the delay is a non-compensable Employer Risk Event.<sup>21</sup> This was the recommendation that the SCL gave in the 2002 Edition.<sup>22</sup>

However, the example in the 2016 Draft is a variation and, giving the Employer a 'blank cheque' to instruct variations during a period of Contractor Delay or, in any event, after the original contract completion date, amounts to a windfall that does not respond to any consideration of fairness or reasonableness.

Furthermore, it has been asked<sup>23</sup> how *Balfour Beatty v Chestermount* could survive if Colman J had started from the premise that no EoT would be granted in situations of an Employer Delay occurring during a period of Contractor Delay, because that was precisely the situation he was considering in deciding that an EoT would be calculated on a 'net' basis.

In addition, the 'but for' justification at the heart of the 2016 Draft's recommendation<sup>24</sup> only takes account of one side of the equation. It says:

"[...] the Employer Delay will not result in the works being completed later than would otherwise have been the case because the works were already going to be delayed by a greater period because of the Contractor Delay to Completion."<sup>25</sup>

In other words, 'but for' the Employer Delay, would the Contractor still be delayed? For the 2016 Draft, the answer is 'yes'. Therefore, there is no concurrency. However, if applied consistently to any situation of concurrent delay, including "*true concurrency*", this reasoning would result in the end of concurrency as we know it, because it is always the case in concurrency that without the Employer Delay, the works would already be delayed by the Contractor Delay to Completion. This is because both delays are considered critical hence why they are concurrent.

<sup>16</sup> 2016 Draft at Section 3.10.10, page 28.

<sup>17</sup> 2016 Draft at Section 3.10.10, page 28.

<sup>18</sup> See Marrin QC, John, Concurrent Delay (2002) 18 Const LJ No. 6 436.

<sup>19</sup> Walter Lilly v Mackay [2012] EWHC 1773 (TCC) at paragraph 370.

<sup>20</sup> 62 B.L.R. 1, at 34 and 35; 32 Con. L.R. 139; (1993) 9 Const. L.J. 117.

<sup>21</sup> See Sherman, Henry, The SCL Protocol and concurrent delay (23 July 2003) (<http://www.cms-lawnow.com/ealerts/2003/07/the-scl-protocol-and-concurrent-delay>).

<sup>22</sup> Section 1.4.8.

<sup>23</sup> See Sherman, *ibid*.

<sup>24</sup> Sections 3.10.9 and 3.10.10, page 28.

<sup>25</sup> 2016 Draft at Section 3.10.9, page 28.



The problem with this reasoning is that the opposite is also true: 'but for' the Contractor Delay, the project would still be delayed for the period of delay caused by the Employer. If, by this logic, each of the Employer and Contractor Delays are effective causes of delay on their own, so that each lies on the critical path, concurrency is undeniable. When both delay periods sit on the critical path, a project is delayed in the absence of either delay due to the existence of the other. For example, 'but for' lack of access to site, the works are still delayed due to slow mobilisation. The opposite is also true. Therefore, if the Employer Delay would extend the date of completion despite the Contractor Delay, even if it is by a shorter time, then the Employer cannot simply obtain a windfall for causing critical delay and effectively helping prevent the project from completing on time.

Finally, the recommendation does not hold its ground against the prevention principle. It would be against the principle to give the Employer a windfall in circumstances where he has effectively contributed to preventing the Contractor from completing the project on time. When holding that apportionment does not reflect English law, Akenhead J stated in *Walter Lilly v Mackay*<sup>26</sup> that:

"Part of the logic [...] is that many of the Relevant Events [i.e., Employer Risk Events] would otherwise amount to acts of prevention and that it would be wrong in principle to construe [the EoT clause] on the basis that the Contractor should be denied a full extension of time in those circumstances."

He then stated that nothing suggested that an EoT should be reduced in case of concurrent delay. Although he was referring to *City Inn*<sup>27</sup> type of apportionment, what the SCL is effectively suggesting is to ignore the prevention principle altogether and "apportion" all the risk to the Contractor just because the Employer's delay is shorter, even though it could very well be an effective cause of delay.

## Disruption

Finally, another area where the 2016 Draft has excelled is in Disruption Analysis, now with its own Section.<sup>28</sup> This special treatment reflects its status as a squarely separate, albeit related, concept in need of its own discussion and set of recommendations. The objective of disruption analysis is to demonstrate productivity loss in the execution of work activities in either labour or plant in order to claim the loss and expense caused by the Employer-triggered disruption.<sup>29</sup> The quantum is the "difference between realistic and achievable productivity and that which was actually achieved in carrying out the impacted work activities".<sup>30</sup>

However, the real upgrade comes with the list of disruption analysis methods, their straightforward explanations and how they are compared with each other. In addition, their preference is dictated by their order in the list from most recommended option to the least.

There are two groups of methods:

- (1) productivity-based methods measure loss of productivity in resources before the loss is priced; and
- (2) cost-based methods measure the difference in actual versus planned cost first.<sup>31</sup>

For productivity-based methods, the 2016 Draft explores:

- (1) project specific studies such as the measured mile – which keeps its title as the recommended method – earned value and programme analyses, work or trade sampling and system dynamics modelling;
- (2) project-comparison studies; and
- (3) industry studies.<sup>32</sup>

For cost-based methods, only estimated v incurred cost and estimated v used labour are mentioned.<sup>33</sup>

<sup>28</sup> 2016 Draft at Section 7, pages 50 to 56.

<sup>29</sup> 2016 Draft at Section 7.6, pages 50 and 51.

<sup>30</sup> 2016 Draft at Section 7.9, page 51.

<sup>31</sup> 2016 Draft at Section 7.12, page 52.

<sup>32</sup> 2016 Draft at Section 7.16 - 7.20, pages 53 to 55.

<sup>33</sup> 2016 Draft at Section 7.21 - 7.24, pages 55 and 56.

<sup>26</sup> [2012] EWHC 1773 (TCC) at paragraph 370.

<sup>27</sup> *City Inn Limited v Shepherd Construction Limited*, [2010] CSIH 68.



## Vocabulary

One of the most useful contributions of the 2002 Edition was that it provided the industry with vocabulary with which to precisely discuss these types of complex and divisive issues. It has already been mentioned how the 2016 Draft has discarded the use of the term "*concurrent effect*"<sup>34</sup> even though the existence of the concept is still acknowledged.<sup>35</sup> However, the use of an Appendix<sup>36</sup> to compile a list of definitions and glossary has not been abandoned.

There are six new terms in the Appendix:

- 2 relate to programming: "*level of effort*" and "*programme narrative*";
- 2 more relate to delay analysis: "*as-planned versus as-built windows*" and "*time slice analysis*"; and
- the last is "*disruption event*".

However, some new terms appear elsewhere such as those used to describe previously unrecognised types of delay analysis, e.g., "*time slice windows analysis*", "*longest path analysis*" and "*earned value analysis*". In addition, the enhancement of certain sections, such as the aforementioned records and programmes section and the disruption section, together with the section regarding delay analysis time-distant from the delay event discussed in this author's previous article on the Rider, will surely help frame the delay and disruption discussion for years to come.

## Conclusion

Whereas the *2016 Consultation Draft of the Second Edition of the SCL's Delay and Disruption Protocol* includes some very welcome enhancements, there are other areas in which there is still room for improvement.

**Please get in touch at [gabriel.muleroclas@howardkennedy.com](mailto:gabriel.muleroclas@howardkennedy.com) with your thoughts or to discuss any concerns.**

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<sup>34</sup> 2002 Edition at Section 1.4.6, page 16.

<sup>35</sup> 2016 Draft at Section 3.10.4, page 27.

<sup>36</sup> 2016 Draft at Appendix A, page 59.

