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Overview of Session
Society of Construction Law
Delay & Disruption Protocol
Update
Introduction – The Protocol

- The SCL Delay and Disruption Protocol was first published on 16 October 2002 and from the very start it created quite a stir and debate amongst the legal profession in England and the UK as a whole.

- The object of the Protocol was simple -- it was to provide a useful guide on some of the common issues that arise in construction contracts relating to extensions of time and loss and expense/compensation. Arbitration

- The purpose of the Protocol was to provide a means by which the parties can resolve these matters and avoid unnecessary disputes.

- The Second Edition has now been published in draft in this section we will look at the key changes.

- As is said at paragraph D of the Introduction to the Protocol “The aim is that, in time, most contracts will adopt the Protocol’s guidance as the best way to deal with delay and disruption issues.”

- The Genesis of the review.
Rider 1 looked at 8 issues as its terms of reference, these were as follows:

- Whether the expressed preference should remain for time impact analysis as a programming methodology where the effects of delay events are known;
- The menu and descriptions of delay methodologies for after the event analysis - including to incorporate additional commonly used methodologies;
- Whether the Protocol should identify case law (UK and International) that has reference the Protocol;
- Record keeping;
- Global claims and concurrent delay;
- Approach to consideration of claims (prolongation/disruption - time and money) during currency of project;
- Model clauses; and
- Disruption.
The Core Principles

Core principle 3 - Entitlement to extension of time

Core principle 9 - Concurrent delay - its effect on entitlement to extension of time

Core principle 11 - Identification of float and concurrency

Core principle 12 - After the event delay analysis

Core principle 13 - Mitigation of delay and mitigation of loss
- Treatment of burden of proof
- Methods of delay calculation
- Concurrency and the approach of the English Courts
EoT Obligations & Burdens
I. General Remarks

- Concept of EoT not expressly defined by statute
  ▶ but derived from German Civil Code (BGB)

- German Standard Contract VOB contains explicit EoT-provision in section 6

- German principles on EoT are similar to principles in SCL-Protocol
  ▶ however, two important differences:
    • no contract administrator
      ▶ EoT applies “automatically” without declaration of CA or of Employer
    • normally no situation of time at large

- EoT to be distinguished from entitlement to compensation for prolongation costs
II. Conditions for Extension of Time

- Employer Risk Event (Sec. 6 (2) VOB/B)
  - act or omission of employer
  - other events arising from employer's risk sphere
    - e.g. authority delays public permit
  - force majeure event

- Delay occurred, i.e. link of causation between disruptive event and delay

- Notice Requirement (Sec. 6 (1) VOB/B)
  - notice is pre-condition for EoT-claim
  - content: (i) disruptive event or obstructing circumstances, and (ii) anticipated delay
  - exception: hindrance/delay is obvious to employer
III. Effect if EoT applies

- Completion dates are extended automatically (Sec. 6 (2) VOB/B)
- Contractor’s duty to mitigate effect of Employer’s risk event
  (Sec. 6 (3) VOB/B)
  ▶ however, no obligation to add extra resources or to work outside planned working hours

- Secondary delays have to be taken into consideration
  (Sec. 6 (4) VOB/B), e.g.
  • time for resumption of works
  • works to be performed in less favorable season

- New completion dates are relevant for penalties/liquidated damages
  ▶ exception: severe disruption of construction process (case law)
Extension of Time in case of interference (I)

Interference

Critical path
Extension of Time in case of interference (II)

Rights of the contractor
Extension of time
  Short delays
  Significant delay
Additional costs

Thomas Frad - Austria
Burden of Proof in General

Person who claims a right: burden of proof

Person who denies a right: evidence for his assertions
Burden of proof in case of interference

Burden of proof contractor
- Reason for interference from employers sphere
- Consequences of interference (cause and effect)
  - Relieve concerning the amount of additional costs

Burden of proof employer
- No fault (in case of damages)
Extension of Time

- Impact on critical path
- For the risk and account of the employer
Extension of Time

- Notification obligations of Contractor
- Own initiative by employer
Who bears the burden of proof?

- Entitlement to EoT (critical path)
- Relevant circumstances
Methods of Delay Calculation
Rider 1 - A discussion

- Rider 1 looked at 8 issues as its terms of reference, these were as follows:

  - Whether the expressed preference should remain for time impact analysis as a programming methodology where the effects of delay events are known;
  - The menu and descriptions of delay methodologies for after the event analysis - including to incorporate additional commonly used methodologies;
  - Whether the Protocol should identify case law (UK and International) that has reference the Protocol;
  - Record keeping;
  - Global claims and concurrent delay;
  - Approach to consideration of claims (prolongation/disruption - time and money) during currency of project;
  - Model clauses; and
  - Disruption.

- In this section we discuss the key areas of debate during the debate on Rider 1.
As has been noted earlier, and in my paper, the SCL Protocol has met with little real enthusiasm so we will just take a moment to look at the adoption back door of the ideas of the principles in English standard form contracts:

- JCT forms - Introduction of programmes and regular amendments to the standard forms.
- NEC3 - The central role of the programme and the relevance of the principle of the Protocol to considerations of delays and compensation events.
The period following the publication of the protocol and its review of delay analysis there was a period of considerable debate of methods and the introduction of a number of new forms of after the event delay analysis.

These are illustrated in the Protocol:

The impacted as-planned analysis;

Time impact analysis;

Time slice analysis;

As-planned versus as-built windows;

Longest path analysis; and

Collapsed as-built
Method of Delay Analysis - 2

- The common sense approach

- The independence of the certify

- The role of the Architect/Contract Administrator/Engineer
I. General Remarks

- No clearly defined standard for calculation of critical delay comparable to the SCL-Protocol
- However, customary method widely used, provides general framework (Three-Step-Analysis/"Soll'-Methode")
- Case law requires "Specific construction related description"

"The contractor must prove the chain of causation which leads from the default on an obligation of performance via the circumstances giving rise to a damage (complications or obstruction) to the additional costs incurred thereby." (Kniffka)

Andreas J. Roquette - Germany
II. Three-Step-Analysis (1)

Step 1 – Determination of baseline programme
- preferably contract schedule
- if contract schedule not sufficiently detailed, baseline programme must be established
- baseline programme has to
  • contain basic elements of contract
  • describe a credible, meaningful, complete, calculable construction process with sufficient exactness
II. Three-Step-Analysis (2)

Step 2 - Determination, documentation and analysis of disruptive events
- factual analysis of employer’s risk events
- determination and review of
  • preparedness of performance
  • causing party, and
  • causality

Step 3 - Incorporation of specific effects
- effects determined in Step 2 are incorporated in baseline program
- activities are postponed, interrupted or extended
- consideration of critical path
III. Further Comments

- No detailed discussion whether delay analysis shall assess critical path prospectively, contemporaneously or rather retrospectively
  - wide discretion for expert to choose the "right" method
- More precise methods suggested in literature, but none of them has prevailed or become a recognized standard
Introduction

- No prescribed or preferred method used in the industry in Switzerland
- No document comparable to the SCL Protocol
- Unusual for Swiss construction contracts to dictate a delay analysis methodology
- Swiss law and construction professionals remain flexible when it comes to the methods to conduct a time impact analysis
The “Swiss way”

- Very few conflicts, if any, on large Swiss construction or infrastructure projects such as the CERN (1987) or the Lötschberg (2007) and Gotthard (2016) base tunnels.
The “Swiss way”

- Dialogue to find an amicable solution, at least on large projects
- Most appropriate method selected:
  - with common sense on a case-by-case basis
  - with regard to the type of demonstration to be achieved
- Choice depends in particular on:
  - nature of the projects and their flow
  - mutual risks taken by the parties
Best practices in international arbitration

- Analysis by forensic delay expert in arbitration proceedings governed by Swiss law:
  - review of the available project documentation
  - assessment of contract milestones and schedules utilized for contemporaneously planning and executing the work
  - identification of activities that formed the critical or driving paths for the completion of the works (“as-planned” vs. “as-built”)
  - analysis of causation and responsibility
Conclusion

- In Switzerland, what counts at the end of the day:
  - Meticulously keeping an accurate contemporaneous record of the events on site
  - Relying on a credible forensic delay analysis expert
  - Litigating before a competent judge or arbitral tribunal
Concurrent Delay
Other contractual considerations

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<thead>
<tr>
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<th>Governmental entity</th>
<th>Private Entity</th>
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<tbody>
<tr>
<td>Allocation of time and costs</td>
<td>Penalties expressed as percentage of total amount of contract</td>
<td>Liquidated damages or specific penalties</td>
</tr>
<tr>
<td>Burden of proof and notice obligations</td>
<td>Notification: strict time period</td>
<td>More flexible</td>
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<td></td>
<td>Certification issued by third party</td>
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<tr>
<td>Calculation of delay</td>
<td>Depends on event</td>
<td>Depends on event</td>
</tr>
<tr>
<td>Dispute resolution</td>
<td>Bolivia</td>
<td>As defined during contract negotiation</td>
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</table>
Concurrent delay is not specifically addressed
Art. 339: the damage must be redressed unless it can be proven that failure in performance of obligations is not attributable to the party in default
Art. 344: compensations shall correspond to loss suffered
Art. 345: compensation shall cover the intended or foreseeable damage
Art. 346: loss suffered shall be shown as immediate and direct consequence of breach
Art. 348: concurrent breach: compensation is reduced in proportion to the contributing act
Oil & Gas Sector: governmental entities

• Control of bidding and contract negotiation
  – Standard form of contract
    • Right to suspend performance at convenience due to interest of the State
    • Dispute/arbitration: Contractor must continue with performance of its obligations
  – Limited room for negotiation
  – Force Majeure
• Law N° 1178 - breach of contract can be considered a causing damage to the State
Oil & Gas Sector: governmental entities

- Applicable Law: Laws of England and Whales, France or Spain
- More flexible bidding process and contract negotiation
  - Company specific standard form of contract
  - Extensive Force Majeure definition
  - Specific mechanisms allowing to address the situation of the concurrent delay
Treatment of concurrency in England and Wales

- Concurrency has been an area of considerable debate in the UK and differing views have been expressed in Scotland than England and Wales.

- Leading case for many years on extensions of time was Henry Boot v Malmiason.

- Then came the Scottish Case of City Inn v Shepherd Construction.

- The question to many people's minds is what is concurrency. As the paper and this talk have been prompted by the SCL Protocol what does the Protocol say:

- The Protocol now defines concurrent delay as follows: “True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time...”

Richard Bailey - England
Treatment of concurrency in England and Wales - 2

- Standard Form contracts and concurrency.

- One of the most common amendments made to the JCT standard forms is to amend the extension of time clause to expressly deny a contractor an extension of time when it is in delay and there are concurrent delays.

- In the NEC3 form the programme is the key document and must be updated in accordance with the timeframe set out the Contract Data this way the Employer and the Contractor can see when delays occur to the works and can see where there is concurrency.

- Can you have concurrent delay when you have float in the programme before the float is used up and who owns the float.

Richard Bailey - England
To bring matters fully up to date we need to look at the judgment of Mr Justice Akenhead in the Technology and Construction Court case of Walter Lilley v McKay.

The Judge decided that where delays were concurrent this did not require and apportionment of the delay the contractor was entitled to an extension of time for the full period of the delay caused to the contractor.

Finally a note on recovery of loss and expense where delays are concurrent. It is generally accepted that where the delays are concurrent then the contractor should be entitled to their extension of time but that they should not be entitled to recovery of loss and expense for the period of concurrency.
“Concurrent delay” issue resolved based on general contract law principles applicable to the reduction of damages

Apportionment of liability based on Article 44(1) Swiss Code of Obligations:

“Where the injured party consented to the action which caused the loss or damage, or circumstances attributable to it helped give rise to or compound the loss of damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely.”
Swiss Supreme Court decision of 1966

- Decision 92 II 234: Emil Baumann AG vs. Cranag AG
  - dismantling of a tower crane by specialized company
  - mechanic acted negligently, causing crane to tip over and damage neighbouring buildings
  - Supreme Court found that dismantling company liable, but that contractor should have known that crane’s arm needed to be secured
  - Supreme Court reduced damages granted to contractor by 25% (Art. 44(1) CO)
Conclusion

- Treatment of concurrent delay under Swiss law:
  - analysis of each delay event separately and in sequence in which it arose
  - apportionment of damages according to the extent of each party’s fault
  - if equal fault, likely apportionment of liability at 50-50 (see also Article 97(1) of SIA Norm 118)

- Few court decisions given that international construction disputes mostly settled through arbitration
Wildcards
What have the parties agreed to?

Thabiso van den Bosch – The Netherlands
Open norms - mechanism to achieve individual justice

Principles of reasonableness and equity (Art. 6:2 and 6:248 Dutch Civil Code)

Thabiso van den Bosch – The Netherlands
Contracts:

- Filling of gaps
- Correcting specific provisions
- Derogating from provisions

Examples

Thabiso van den Bosch – The Netherlands
Types of Delay

Debtor’s delay

Creditor’s delay
Delay of the Contractor

= Debtors delay

- Risk
- Fault
Delay of the employer

= Debtor’s delay (payment)

or

= Creditor’s delay
Concurrence of delays

Debtor’s delay (contractor) - Debtor’s delay (employer)

Creditor’s delay (employer) - Debtor’s delay (contractor)
Typical Causes for delay: governmental entity contract Vs. private entity contract

<table>
<thead>
<tr>
<th>Govermental</th>
<th>Private</th>
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<tbody>
<tr>
<td>Limited room for negotiation</td>
<td>Custom clearance time</td>
</tr>
<tr>
<td>Some contractual conditions impossible to achieve</td>
<td>Environmental legislation</td>
</tr>
<tr>
<td>Limited options for recourse</td>
<td>Strikes by local communities</td>
</tr>
<tr>
<td>Limited qualified local resources available</td>
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<tr>
<td></td>
<td>Unclear procedures in the contracts regarding Change Orders</td>
</tr>
<tr>
<td></td>
<td>Technical errors in the design</td>
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Time related claims presented by contractors

• Unreliable data regarding rainfall
• Strikes by local communities/general population.
• General road/bridges conditions
• Environmental licensing
• Labour disputes
Contractors: Points for consideration

• Site surveys
• Historical weather data
• Consultants specializing in community relations
• Specialized lawyers
  – Labour law
  – Environmental law
Thank You! (USA, GBR)
Gracias! (BOL)
Danke! (SWI, GER, AUT)
Bedankt! (NED)