The SCL Delay and Disruption Protocol: Hunting Snarks

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Introduction

On October 16, 2002, after an extended period of consultation, the Society of Construction Law issued its "Delay and Disruption Protocol" ("the Protocol"). In this article, we present a resumé of the key recommendations made in the new Protocol, together with our initial thoughts thereon.[1]

Apart from providing recommendations and guidance to those involved with drafting contracts, the Protocol is intended to act as an aid to the interpretation of the delay and disruption provisions contained in standard form civil engineering and building contracts, and to act as a guide as to the manner in which contractors ought properly to prepare delay and disruption claims and how adjudicators, arbitrators and judges ought properly to determine them.

Whilst the Protocol does not fully reflect the provisions concerning delay and disruption contained in certain standard forms and is not intended to have contractual status, we believe that it is at least a useful guidance document.[2] Our cautious welcome must, however, be qualified by the observation that the Protocol is not, in fact, a protocol and some will feel that it should have been. The Protocol also suffers from the usual symptoms associated with products of drafting by committee.[3]

Improvements will need to be made in subsequent editions if the Protocol is to metamorphosise from a guidance document into a document that truly benefits the industry in this extremely problematic area.

The impact of the Protocol

The Protocol[4] appears, by and large, to be broadly in line with recent case law, particularly the approach of H.H. Judge Hicks Q.C. in *Ascon Contracting v*

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[1] With apologies to Lewis Carroll.

[2] "His form is ungainly—his intellect small—(So the Bellman would often remark)/But his courage is perfect! And that, after all,/Is the thing that one needs with a Snark."

[3] "I said it in Hebrew—I said it in Dutch—/I said it in German and Greek:/But I wholly forgot (and it vexes me much)/That English is what you speak."

[4] The Protocol is available on-line at *www.eotprotocol.com*.

Alfred McAlpine Construction Isle of Man[5] and that of the Court of Appeal in *McAlpine Humberoak v McDermott International*.[6] The biggest exceptions to this are in relation to the difficult issues of float and global claims.

Importantly, the Protocol expressly recognises that it cannot take precedence over the express terms of a contract.[7] The Protocol claims to represent "a scheme for dealing with delay and disruption issues that is balanced and viable". Whilst it may well provide useful guidance on delay and disruption, it is a large claim to make that it represents a viable and balanced scheme for actually dealing with those issues. Would it, for example, be viable for small sub-contractors to endeavour to follow the scheme of the Protocol? In our considered view, it certainly would not.

It remains to be seen the manner in which the judiciary will respond to the Protocol and whether they will follow it, rather than continue with their current somewhat incremental and individualistic approach to claims for delay and disruption.[8]

Summary of the recommendations made in the Protocol

Proper programme

The Protocol recommends that a proper programme should be submitted by the contractor and approved by the contract administrator. The programme should show the manner and sequence in which the contractor plans to carry out the works.[9] Whilst recognising that the form of the programme will depend upon the "type and complexity of the project", the Protocol recommends that it should be prepared in the form of a critical path network using commercially available planning software.[10]

The Protocol further recommends that, once accepted, the programme should be updated electronically at intervals of no longer than a month.[11] Each update should then be saved, the purpose being "to provide good contemporaneous evidence of what happened on the project". This makes a number of assumptions (such as, as to the accuracy and veracity of the updates) and we feel that, although updating programmes contemporaneously might well assist project management, in terms of actual evidence, it will still be open to challenge: there can be no substitute for accurate records of actual progress made on a daily, or weekly, basis. Indeed, as the Protocol states elsewhere, the starting point for any

[5] (1999) 66 Con. L.R. 119.

[6] (1992) 58 B.L.R. 1.

[7] Introduction B.

[8] "'But, oh beamish nephew, beware of the day,/If your Snark be a Boojum! For then/You will softly and suddenly vanish away,/And never be met with again!' "

[9] Guidance Section ("GS") 2.2. "Let us take them in order. The first is the taste,/Which is meagre and hollow, but crisp:/Like a coat that is rather too tight in the waist,/With a flavour of Will-o'-the-Wisp."

[10] GS 2.2.1.1. " 'That's exactly the method,' the Bellman bold/In a hasty parenthesis cried,/'That's exactly the way I have always been told/That the capture of Snarks should be tried!' "

[11] GS 2:2.1.5.

delay analysis is "to understand what work was carried out and when it was carried out".[12]

The Protocol envisages that the updated programme will be the main tool for determining the amount of the extension time.[13] It further envisages that the programme will be brought fully to date prior to the occurrence of a relevant employer event and thus enable an accurate assessment of the amount of further time required when such an event occurs.[14]

The Protocol states that one of its aims is to change the attitude of the industry to the use of critical path network programming in smaller projects, basing its aim upon the premise that, because programming a smaller project involves less work, it should not deter smaller outfits from adopting the approach set out in the Protocol. We feel that this might prove to be a mistake, because a relatively low value project can be rather complicated in terms of its sequences and activities and, if it is to be properly programmed, the programming costs will be proportionately higher than those on a larger value project, involving less complicated construction sequences and activities. Similarly, the costs of recording information in a manner sufficient to allow a meaningful critical path analysis to be performed on a retrospective basis might be prohibitive.[15] The closest the Protocol comes to determining who should bear the costs of programming and updating is in a bracketed suggestion made in relation to the Model Specification Clause,[16] which suggests that the Protocol was drafted on the assumption that employers should bear these costs. We think this may be unrealistic. What employer would agree to having these costs included in the bill of quantities without argument?

In short, we feel that, despite the Protocol's stated objective, if sub-contractors and small contractors are to be expected to programme their works along critical path lines, then their contracts will need to make express provision for this (at a cost). The Protocol might in fact distract the industry from this objective by not actually requiring contracts to make specific provision for the sort of scheme envisaged, or more appropriate schemes. Certainly, recommending electronic critical path programming for all projects large and small is a "one size fits all" solution, which is unlikely to achieve the stated objective.[17]

Extensions of time

The Protocol recommends that applications for extensions of time should be made and dealt with as close in time as possible to the delaying event.[18] It

[12] GS 2.4.1. The Protocol is not as helpful on record keeping as it is on programming. The recommendation that the parties reach agreement on the records to be kept is added as something of an afterthought notwithstanding the inclusion of a model records clause at Appendix C. "He had forty-two boxes, all carefully packed,/with his name painted clearly on each:/But, since he omitted to mention the fact,/They were all left behind on the beach."

[13] Core Principle ("CP") 1 and GS 3.2.6.

[14] GS 3.2.7. "The Bellman looked uffish, and wrinkled his brow./'If only you'd spoken before!/It's excessively awkward to mention it now,/With the Snark, so to speak, at the door.' "

[15] " 'We have sailed many weeks, we have sailed many days/(Seven days to the week I allow),/But a Snark, on which we might lovingly gaze,/We have never beheld till now.' "

[16] See cl.2.4, Appendix B.

[17] "The last of the crew needs special remark,/Though he looked an incredible dunce:/He had just one idea—but, that one being 'Snark',/The good Bellman engaged him at once."

[18] CP 3.

stipulates that the contractor will only be entitled to an extension of time for employer delay arising from employer risk events—namely those causes of delay in respect of which the employer has assumed risk and responsibility.

The Protocol recommends that an extension of time should only be granted to the extent that the employer delay is predicted at the time of the employer risk event to reduce below zero the total float on the activity paths affected by the employer delay, *i.e.* only to the extent that the activity paths are critical to completion on the prevailing contract completion date, as at the time the employer risk event occurs.[19]

Float

As to the ownership of float, the Protocol recommends that parties should expressly address the issue in their contract.[20] Given the difficult nature of this issue, this seems to us a very sensible recommendation. But while the Protocol recognises the apparent conflict with the authority found in the leading case on float for the proposition that there is no implied term in a building contract that an employer should perform the contract so as to enable the contractor to complete the works in accordance with a programme showing a completion date earlier than the contractual completion date,[21] the Protocol nevertheless considers that:

> "as a matter of policy, contractors ought not to be discouraged from planning to achieve early completion, because of the price advantage that being able to complete early is likely to have for the Employer."[22]

Accordingly, the Protocol recommends that, if an employer delay prevents the contractor from completing at an earlier date than the contractual completion date, the contractor should, in principle, be entitled to be paid the direct costs of the employer delay. This is made subject to the significant proviso that the employer was made aware of the intention of the contractor to complete early, prior to entering into the contract.[23] It remains to be seen how the courts will view this particular recommendation.[24]

Concurrent delay

In the construction industry, there are a number of conflicting arguments about the manner in which concurrent causes of delay should be addressed.[25] The Protocol also provides guidance on this issue.

The Protocol recommends that, where contractor delay to completion occurs concurrently with employer delay to completion, the contractor's concurrent delay ought not properly to reduce any extension of time due.[26] The Protocol

[19] CP 7.
[20] GS 1.12.2.
[21] *Glenlion Construction Ltd v The Guinness Trust* (1987) 39 B.L.R. 89.
[22] GS 1.12.4.
[23] CP 8.
[24] "The Witnesses proved, without error or flaw,/That the sty was deserted when found:/And the Judge kept explaining the state of the law/In a soft undercurrent of sound."
[25] For analysis of the arguments see Ch.14 of Keith Pickavance, *Delay and Disruption in Construction Contracts* (2nd ed., LLP Ltd, 2000). See also, John Marrin Q.C. "Concurrent Delay" (2002) 18 Const. L.J. 436.
[26] CP 9 and GS 1.4.1.

therefore appears to disfavour any moves towards attempts to apportion blame and/or to assess such blame in terms of percentage reductions in entitlement.

However, the Protocol suggests that, if the contractor incurs additional *costs* as a direct result of employer delay and/or contractor delay, then the contractor should only recover monetary compensation if it is able to separate the additional costs caused by the employer delay from those caused by the contractor delay.[27] The Protocol states:

> "Contractor Delay should not reduce the amount of the EOT due to the Contractor as a result of the Employer Delay . . . Analyses should be carried out for each event separately and strictly in the sequence in which they arose."[28]

Contractor's duty to mitigate losses caused by delay

The Protocol reiterates the case law in relation to the issue of mitigation. The Protocol stipulates that the contractor has a general duty to mitigate the effect on its works of employer risk events.[29] The Protocol adds, however, that this duty to mitigate does not extend to requiring the contractor to add extra resources, or to work outside its planned working hours, in order to reduce the effect of an employer risk event, unless the employer agrees to compensate the contractor for the costs of such mitigation.

Retrospective delay analysis: time impact analysis

The Protocol recommends that, wherever possible, an appropriate method should be agreed and adopted by the parties before retrospective delay analysis is carried out.[30] The Protocol gives guidance on the appropriateness, or otherwise, of different types of retrospective delay analysis to different evidential situations.[31] The Protocol suggests that, if the method is not agreed between the parties, then this failure to agree should be taken into consideration by the arbitrator, or judge, when awarding the costs of the dispute.[32]

The Protocol describes "time impact analysis" as the most thorough method of analysis and the "preferred technique to resolve complex disputes related to delay and compensation for that delay".[33] It is not clear precisely what importance is to be attached to this statement, because the Protocol also describes it as "the most time-consuming and costly when performed forensically".[34] The Protocol does not seem to recognise that time impact analysis may not always meet the requirements of the Civil Procedure Rules in terms of proportionality.[35] In fact

[27] CP 10. "It strongly advised that the Butcher should be/Conveyed in a separate ship:/But the Bellman declared that would never agree/With the plans he had made for the trip."

[28] GS 1.4.7.

[29] GS 1.5.1. " 'Leave him here to his fate—it is getting so late!'/The Bellman exclaimed in a fright./ 'We have lost half the day. Any further delay,/And we shan't catch a Snark before night!' "

[30] GS 4.17.

[31] See the table at GS 4.13.

[32] GS 4.17. We would suggest that this was also intended to relate to adjudicators.

[33] GS 4.8.

[34] GS 4.16.

[35] "'The Method employed I would gladly explain,/While I have it so clear in my head,/If I had but the time and you had but the brain—/But much yet remains to be said.' "

there is not a single reference to these requirements in the Protocol, which we find surprising.[36]

Will the grant of an extension of time automatically lead to monetary compensation?

Reflecting the current law, the Protocol suggests that the grant of, or entitlement to, an extension of time does not automatically lead to an entitlement to compensation.[37] The Protocol states:

> "There is thus no absolute linkage between entitlement to an EOT and the entitlement to compensation for the additional time spent on completing the contract."[38]

Agreement as to variations

The Protocol recommends that the parties should adopt, wherever possible, the practice of pre-agreeing the total likely effect of variations, so that there is a fixed price of the variation (to include the direct costs of labour, plant and materials and time related costs).[39] The Protocol states:

> "It is not good practice to leave to be compensated separately at the end of the contract the prolongation and disruption element of a number of different variations and/or changes. This is likely to result in the Contractor presenting a global claim, which is a practice that is to be discouraged. Where it is not practicable to agree in advance the amounts for prolongation and disruption to be included in variations and sums for changed circumstances, then it is recommended that the parties to the contract do their best to agree the total amount payable as the consequence of the variations and/or changes separately as soon as possible after the variations are completed."[40]

Calculation of compensation

The Protocol clearly stipulates that compensation for prolongation should not be paid for anything other than work actually done, time actually taken up, or loss and/or expense actually suffered. In other words, the compensation for prolongation caused other than by variations should be based upon the additional costs actually incurred by the contractor.[41]

The Protocol recognises that prolongation compensation is wholly dependent upon both the terms of the contract and the cause of the prolongation.[42] The Protocol further recognises that prolongation costs may be caused by any kind of employer risk event, such as a variation, a breach of contract and so on. The

[36] All the Protocol does is to say that, where the parties do not consult each other on the appropriate methodology or attempt to resolve their differences by applying to the Tribunal, the Tribunal might take these factors into account when awarding costs. GS 4.14–17.

[37] GS 1.6.2.

[38] GS 1.6.3.

[39] GS 1.7.1.

[40] GS' 1.7.7.

[41] CP 16 and GS 1.8.2. " 'The result we proceed to divide, as you see,/By Nine Hundred and Ninety Two:/Then subtract Seventeen, and the answer must be/Exactly and perfectly true.' "

[42] GS 1.8.1.

Protocol further recognises that the onus of proof in respect of the cause of the prolongation lies always upon the contractor. The Protocol states:

> "it is up to the Contractor to demonstrate that it has actually suffered loss and/or expense before it becomes entitled to compensation, unless the contract provides otherwise."[43]

Relevance of the tender

The Protocol stipulates that the tender allowance has limited relevance for the evaluation of prolongation and disruption caused by breach of contract, or any other cause, which requires the evaluation of additional costs.[44] However, the Protocol suggests that the tender allowance may be relevant as a base line for the evaluation of prolongation and disruption caused by variations.[45]

Period of evaluation of compensation

Once sufficient detail of the prolongation claim has been submitted and it is established that compensation for prolongation is due to the contractor, the evaluation of the sum due is calculated by reference to the period when the effect of the employer risk event was actually felt and not by reference to the extended period at the end of the contract.[46]

If the effect of the employer's delay were felt during the period when the delay actually occurred and when daily expenditure was high, then that should be taken as the period of assessment, rather than by reference to a period at the end of the contract, when the daily expenditure would probably be much lower.[47]

Global claims

The Protocol takes an extremely firm line in relation to global claims, firmer perhaps than the courts have even taken.[48] However, the approach of the Protocol is broadly in line with that of H.H. Judge Hicks Q.C. in *Ascon Contracting Ltd v Alfred McAlpine Construction*,[49] assuming that to represent the present state of the law in England and Wales.

It is clear from paras 1.14.2 and 1.14.3 of guidance section 1 that the Protocol disfavours global claims and strongly discourages them without substantiating the cause and effect of the delay. The Protocol states expressly that:

> "The not uncommon practice of contractors making composite or global claims without substantiating cause and effect is discouraged by the Protocol and rarely accepted by the courts."[50]

Further, the Protocol places a particularly heavy burden upon contractors in terms of the maintenance and presentation of documentation in support of any claim or

[43] GS 1.8.4.
[44] CP 17.
[45] GS 1.9.1.
[46] CP 18.
[47] GS 1.11.3. "Then the Butcher contrived an ingenious plan/For making a separate sally;/And he fixed on a spot unfrequented by man,/A dismal and desolate valley."
[48] "There was silence supreme! Not a shriek, not a scream,/Scarcely even a howl or a groan,/As the man they called 'Ho!' told his story of woe/In an antediluvian tone."
[49] (1999) 66 Con. L.R. 119.
[50] CP 19.

delay. The Protocol suggests that, so long as the contractor has "maintained accurate and complete records, the Contractor should be able to establish the causal link between the Employer Risk Event and the resultant loss and/or expense suffered, without the need to make a global claim."[51] The Protocol seems set against the idea of composite claims, except in very rare cases.

The Protocol's position is therefore clear:

> "The failure to maintain such records does not justify the Contractor in making a global claim."[52]

Disruption

The Protocol classifies delay and disruption as separate things. Delay is defined as "lateness" and disruption is defined as "disturbance, hindrance or interruption to a Contractor's normal working methods."[53]

For the Protocol, the defining feature of disruption is that it results in lower working efficiency. Although earlier drafts of the Protocol proposed that the contractor should be compensated for employer caused disruption, either under the contract, or as damages for breach of contract, the published Protocol merely recognises that disruption *may* give rise to compensation.[54]

Claim preparation costs

The Protocol briefly touches upon the issue of the cost of preparing delay and disruption claims. It recommends that, where it can be shown that the contractor, or employer, has been put to additional cost as a result of "unreasonable actions or inactions" in preparing or defending claims, then these costs should be recoverable.[55] In our view, this may well encroach upon the inherent discretion of the court as to the award of costs.[56]

Conclusion

The Protocol is welcome for the guidance it brings to the area of delay and disruption.[57] However, by the same token, there may be some concern over the hard line approach taken by the Protocol in relation to global claims, which might be argued to be contrary to the general approach taken by the courts in cases such as *Crosby v Portland*[58]; *Merton v Leach*[59]; *Wharf Properties v Eric Cumine*[60]; *Mid Glamorgan v Devonald Williams*[61] and *British Airways v Sir Robert*

[51] GS 1.14.2.
[52] GS 1.14.2.
[53] CP 19.
[54] GS 1.19.1.
[55] GS 1.20.1. " 'The fact of Desertion I will not dispute:/But its guilt, as I trust, is removed/(So far as relates to the costs of this suit)/By the Alibi which has been proved.' "
[56] " 'Transportation for life' was the sentence it gave,/'And then to be fined forty pound.'/The Jury all cheered, though the Judge said he feared/That the phrase was not legally sound."
[57] " 'It's a Snark!' was the sound that first came to their ears,/And seemed almost too good to be true./Then followed a torrent of laughter and cheers:/Then the ominous words, 'It's a Boo–' "
[58] (1967) 5 B.L.R. 121.
[59] (1985) 32 B.L.R. 51.
[60] (1991) 52 B.L.R. 1.
[61] (1992) 8 Const. L.J. 61.

McAlpine.[62] Indeed, 2002 saw two cases of persuasive authority in Scotland and Australia, where a cautious acceptance of global claims was adopted[63]: see *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*[64] and *John Holland Pty Ltd v Hunter Valley Earthmoving Co Pty Ltd*.[65]

[62] (1994) 72 B.L.R. 102.
[63] "For the Snark *was* a Boojum, you see."
[64] (2002) C.I.L.L. 1870.
[65] [2002] NSWSC 131, with acknowledgement to John Sharkey at Deacons for his helpful note on the case.