

**Time-related obligations in key jurisdictions: an update
England and Wales**

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About the Author

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Introduction

In this paper we will look in some detail at the SCL Delay and Disruption Protocol (the "Protocol") quite possibly one of the most contentious documents ever produced, certainly if you read the articles that continue to be written on it and have taken any part in the discussions to revise it over the last 3 or 4 years. We look at some of the major changes being made to the Protocol and the substantial effect, both direct and indirect, that the Protocol has had on the issue of time related obligation in England and Wales¹. This paper also looks at the development of time related obligation in English Case Law.

Also, in this paper we will touch on the issues of the treatment of concurrent delay, both by the Courts and by recent revisions to standard forms of contract, including regularly used amendments to standard form contract. We will also review the issue of burden of proof and notice of obligations for extension of time and accepted methods of calculating delay. These of course, as will be illustrated by the review of the changes to the Protocol, are still in flux.

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. The purpose of the Protocol was to provide a means by which the parties can resolve these matters and avoid unnecessary disputes. These were of course the aims and indeed it is made very clear in the Protocol that it is only intended to be used in the UK. This, however, has not been the case for both positive and negative reasons.

¹ Not Scotland as they have a wholly separate legal system.

The purpose of the Protocol was not to be used as a tool for dispute resolution and for retrospectively reviewing claims; it was always intended as a day to day tool for the good management of projects. There are, sadly, very few examples of this actually happening in the UK, although anecdotally it is being used, and attracting a lot of interest, from other parts of the world most notably the Far East, Australasia and South America. The week before this paper was given the Protocol was the subject of a session at the SCL International Conference in Sao Paulo. 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."* As will be illustrated in this paper despite some, near, 14 years having passed since the Protocol was published and it is not directly incorporated into all but a very small number of construction contracts in England.

The core principles of the Protocol are as follows:

1. Programme and records
2. Purpose of extension of time
3. Entitlement to extension of time
4. Procedure for granting extension of time
5. Effect of delay
6. Incremental review of extension of time
7. Float as it relates to time
8. Float as it relates to compensation
9. Concurrent delay - its effect on entitlement to extension of time
10. Concurrent delay - its effect on entitlement to compensation for prolongation
11. Identification of float and concurrency
12. After the event delay analysis
13. Mitigation of delay and mitigation of loss
14. Link between extension of time and compensation
15. Valuation of variations
16. Basis of calculation of compensation for prolongation
17. Relevance of tender allowances
18. Period for evaluation of compensation
19. Global claims
20. Acceleration
21. Disruption

As can be seen there are 21 core principles but for the purpose of this paper and talk only core principles, 3, 9, 10, 11, 12 and 13 will be looked at in some detail.

Before looking at these core principles and fleshing them out in a bit more detail, some more on the Protocol and the revisions to it. At the lecture to record the 10th anniversary of the Protocol Lord Justice Jackson President of the UK SCL challenged those in attendance and in particular the Council of the SCL and the members of the original drafting committee to review the Protocol and bring it up to date. As part of this review a Rider 1 was published in July 2015. This Rider 1 looked at 8 issues as its terms of reference, these are as follows:

- a. Whether the expressed preference should remain for time impact analysis as a programming methodology where the effects of delay events are known;
- b. The menu and descriptions of delay methodologies for after the event analysis - including to incorporate additional commonly used methodologies;
- c. Whether the Protocol should identify case law (UK and International) that has reference the Protocol;

- d. Record keeping;
- e. Global claims and concurrent delay;
- f. Approach to consideration of claims (prolongation/disruption - time and money) during currency of project;
- g. Model clauses; and
- h. Disruption.

Of these items e is of most relevance to this paper and will be reviewed. The key point to note though is that it was decided that the Protocol was not broken and therefore did not require rewriting and neither the Rider nor Edition 2 were wholesale reviews of the 1st edition. The Second Edition was published for comment just before this paper was completed. The Second Edition will have been formally published after the consultation is completed which should be prior to the giving of this paper at the IBA and the talk will take account of the main changes.

Core principle

Turning now to the core principles listed above.

Core principle 3 - Entitlement to extension of time

This principle boils down to making an application for an extension of time in a timely manner and essentially at the time the contractor becomes aware of the cause of delay. This way of course it is easier to work out whether the event is in fact a delay event, under the terms of the contract, and the extent of the delay can be more easily quantified both in terms of time and money.

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

The principle set out here is that a contractor delay which is concurrent with an employer delay should not reduce the extent of the extension of time granted. This is not to say it should not have an effect on the compensation paid for the employer delay. This is a topic that some time is spent on below as it has been the subject of some judicial disagreement, but, as matter presently stand the English Court has drawn a line under this issue.

Core principle 11 - Identification of float and concurrency

The principle is very short, accurate identification of float and related concurrency of delay is only possible when you have the benefit of a programme throughout the project which is properly updated. It should be noted that at the time that the Protocol was drafted this was a very rare occurrence, and indeed depending on the contract form being used still is in England.

Core principle 12 - After the event delay analysis

Perhaps one of the more ironic of the core principles given the way in which the Protocol has been used over the time since it was published. In any event the basis of the principle is that the adjudicator, judge or arbitrator should put himself in the position of the CA when determining the cause of delay.

Core principle 13 - Mitigation of delay and mitigation of loss

This core principle very much reflected the common law position and the duty of any party who has suffered a loss to mitigate its losses within reason. As the principle sets out the duty to mitigate does not extend to requiring the contractor to add extra resources or to work outside its normal working hours. As the Protocol records the contractors duty is in two parts, to take reasonable steps to minimise its loss and to not take unreasonable steps that would increase its loss.

Standard Form Contracts

Now that we have in mind the core principles and the Protocol as a whole we will turn to standard form contracts and look at how the standard forms themselves have changed to take account of the Protocol or possibly the arrival of a new kid on the contract block the New Engineering Contract. For the purposes of this section of the paper we will look at the standard form contracts used in England the JCT form, in particular the Design and Build Form and the New Engineering Contract 3rd edition, the NEC3.

The JCT (Joint Contracts Tribunal) prior to the publication of the Protocol had a suite of contracts referred to as the 1998 Editions -- for the purposes of this paper I will be referring to the Standard Form of Building Contract With Contractors Design 1998 Edition. This Edition has in it provisions for extensions of time in clause 25 there is no provision in the standard form for a programme, the contract itself simply states the start and end date of the works. Clause 25 makes no reference to a programme simply requiring the contractor to give notice of delay and in that notice to give particulars of the expected effect and to estimate the extent of the delay. The key point for this paper is that the contract goes on to state *"...in the completion of the Works beyond the Completion Date resulting therefrom whether or not concurrent with delay resulting from any other Relevant Event"*.

Following the publication of the Protocol and following revisions to the Housing Grants Construction and Regeneration Act 1996 (Otherwise referred to as the Construction Act) a decision to revise the JCT generally a new suite of JCT contracts which were first published in 2005 and then republished in 2011. For the purposes of this paper I will be referring to the JCT Design and Build Contract 2011. The relevant clause for giving notice of delay is clause 2.24 and while the wording of the clause is almost identical to the wording used in the 1998 form the one difference is the lack of a reference to concurrency. Equally there is no reference to a programme or any form of programme analysis as is required by the Protocol Clause 2.24.1 of the contract does provide that the contractor shall *"forthwith give notice to the Employer of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event"*, this is in line with core principle 3 of the Protocol.

Further in clause 2.25.6.1 the contractor is required to *"constantly use his best endeavours to prevent delay and the progress of the Works or any Section, however caused, and to prevent the completion of the Works or Section being delayed or further delayed beyond the relevant Completion Date....."* which is in line with core principle 13. There is no requirement, however, to address core principal 9 concurrent delay, core principal 11 identification of float and concurrency but there is an apparent prohibition on core principal 12 after the event delay analysis. It is often argued in English legal cases that the reference to *"forthwith"* in clause 2.24 is a condition precedent to the entitlement to an extension of time. The contractor bears the burden for proving they are entitled to an extension of time. There is no provision placing an obligation on the employer or any agent of the employer to identify an entitlement to an extension of time and to grant an extension of time.

NEC3

The NEC form of contract which reached revisions three in June 2005 has always been at the forefront of programming and active management of contracts. In the 2005 form the contract expressly provides for a programme in the identified and defined terms of the contract there is the Accepted Programme which is described as “... *the programme identified in the Contract Data or is the latest programme accepted by the Project Manager. The latest programme accepted by the Project Manager supersedes previous Accepted Programme*”.

The NEC3 also provides for early warning where there will be a delay to completion. Core clause 3 of the NEC goes into great detail regarding the programme and provides specific details at core clause 31 point 2 of what must be included in the programme, what is included within that list is float. The programme requirements are very detailed and in line with the Protocol.

The programme is then updated on a regular basis with live data so that you essentially create an as-built programme throughout the process of the Works. This allows both the *Project Manager* and the contractor to be fully aware of what is going on to identify the float and any issues of concurrency as required by core principle 11 of the Protocol. When an entitlement to extension of time, referred to as a compensation event arises under the NEC3 then this complies fully with core principle 3 and 9. There is an obligation under the NEC3 to mitigate delays.

Core clause 6 of the NEC3 deals with compensation events and one of the matters that must be addressed when dealing with compensation events is the notification of the compensation event in accordance with core principle 3 of the Protocol that they are made in a timely matter. Core clause 61.3 provides “*if the Contractor does not notify a compensation event within 8 weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not*”. This is a very different approach from the JCT approach because firstly there is a condition precedent of notifying within 8 weeks to obtain a compensation event. But the Core Clause also deals with the burden of proof and notice obligations - something the JCT does not address. The notice obligation falls upon the *Project Manager* if it is a matter that they should have been aware of and should have given notification to. The employer cannot rely upon an event which the *Project Manager* should have notified in order to obtain compensation and then a change to the Completion Date.

Treatment of Concurrency in England and Wales

Concurrency has been an area of considerable debate over a number of years and a number of very learned articles have been written on the issue of concurrency. The court's position in the UK has moved around considerably but for the last 3 years has been fairly stable. There have, however, been a separation of the position in Scottish law and English law. The leading cases for many years on extension of time was the *Henry Boot v Malmaison* case, however, there was a Scottish case called *City Inn v Shepherd Construction* in 2010 which the Scottish Appeal Court rejected a detailed critical analysis in favour of a more practical common sense approach. This practical common sense approach was to apportion the delay between the different delay events. For approximately 2 years this was the dominant argument for treatment of concurrency.

All of this changed after the Technology and Construction Court decision in *Walter Lilley v McKay*. This was a contract under the JCT form of contract and was a decision of the then head of the Technology and Construction Court Sir Robert Akenhead. In this case which runs for some 400 or so pages Sir Robert Akenhead reviewed the issue of concurrency under the JCT form. The Judge decided that where delays were concurrent this did not require an apportionment of the delay the contractor was entitled to an extension of time for the full period of the delay caused to the contractor.

There is a separation issue, however, where there is concurrent delay and loss and expense. It is now fairly settled in England that where there is concurrent delay the contractor is entitled to an extension of time for the entire period for which they were delayed. The Contractor will not be entitled to recover its loss and expense for the extended period when there is concurrent delay but will not have to pay damages to the Employer. This, however, is a case under the standard form and one of the features of English construction law or recent time is that lawyers have been repeatedly rewriting or amending the construction contracts and one of the largest areas for amendment is in the obligations and time related obligations.

One of the most frequently seen amendments to the JCT form is an express exclusion of a contractor's right to an extension of time when the delays are concurrent with those of the employer. Under English law the terms of the contract are binding so irrespective of the Judge's decision in *Walter Lilley* with such a contractual provision the contractor will not obtain an extension of time for the period for which they are in concurrent delay. The effect of this is to expose the contractor to a significant potential liability for liquidated damages.

Following the revision of the SCL Protocol there is more extensive and updated guidance in the 2nd edition of concurrent delay. 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...*"²

Accepted Methods for Calculation of Delay

The period following the protocol with delay analysis has led to many different forms of after the event 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-built³. These are all very different forms, however, they have really fallen out of vogue in England and Wales due to cases such as *City Inn* and *Walter Lilley* where the Scottish and English courts have all taken the view that the approach should be a common sense approach applying the JCT contract method. The JCT, generally, still does not require a programme or for a contractor to report on that programme and does not require immediate notification of delays as the works are generally simpler in form and therefore considered easier to calculate the effect of delays for. Where there are programmes these programmes are really just being used to show where the delays and the cause of the delay are not really to try and reconstruct a case. One of the main criticisms of programme analysis is that programme analysis can essentially achieve whatever the programmer intended for them to do and without careful looking at what actually happened on site you can create programmes that show many months of delay far beyond the date on which the Works are actually completed and therefore has led to much of the judicial criticism.

² SCL Protocol 2nd edition paragraph 3.10.3

³ SCL Protocol 2nd edition paragraph 6.6 a to f

Conclusion

One of the great ironies of the Protocol is that it expressly states that it is for use in the UK and that is the place where it has been least used. The Second Edition is unlikely to change that position as it is in most ways an evolution rather than a revolution on the First Edition. It does, however, accurately reflect the complex art of delay analysis as practised in the UK and in many other common law jurisdictions. English law has taken a very sophisticated approach to delay analysis and has reached a point of stability.