Delay and Disruption Claims…
Is the Road No Longer Blurred?

Ahmad Al Mansoury
LLM Construction Law, FCIArb, B.Sc Eng.
AL MANSOURY (Egypt) – Managing Partner
InShield (UAE) – Managing Partner
Chairman, SCL-Egypt

SCL-Egypt Conference, 22 October 2014, The American University in Cairo
Delay and disruption is not unusual in construction projects. Reasons for the delay may vary, but the fact that delay is a major concern in construction industry remains unchallengeable.
There is an increasing emphasis on using tight contracts with heavy liquidated damages (LDs).

Thus, it is becoming important for Contractors to claim for “Extension of Time” (EOT) for delays caused by Employers.
Definition of Delay and Disruption

The SCL Protocol defines delay and disruption as follows:

**Delay to Completion** as “...either delay to the date when the contractor planned to complete its works, or a delay to the contract completion date...”

The delay discussed in this presentation is the delay occurs to a critical activity of the project’s schedule causing a delay to the time for completion.

**Disruption** means “Disturbance, hindrance or interruption of a Contractor’s normal work progress, resulting in lower efficiency or lower productivity than would otherwise be achieved. Disruption does not necessarily result in a Delay to Progress or Delay to Completion”.
Why Delay Analysis is so important?

Delay analysis is an effective tool to:
- simulate the delays occur in the project;
- Identify the impact of these delays;
- Apportion the liability of each party to the occurred delay; and
- Work as a base to prove entitlement for associated monetary claims ‘prolongation costs’
Methods of Delay Analysis

Prospective Approach
- Net Impact
- Impacted As Planned
- As-Planned But for

Retrospective Approach
- As-Planned v. As-Built
- As-Built But for
- Collapsed As-Built
- Window Analysis
- Time Impact Analysis

There is no universally accepted method of delay analysis which can be called ‘the correct’ method. However, many methods are proposed to analyze the delay and assign the liability thereof.
Delay Analysis Methods in SCL Protocol

The SCL Protocol has recognized the existence of several methods for delay analysis and identified the main categories of the delay analysis methods as follows:

• As-Planned Vs. As-Built
• Collapsed As-Built
• Time Impact Analysis (Recommended by SCL Protocol)
• Impacted As-Planned
Delay Analysis Methods in SCL Protocol

SCL Protocol stated:
“4.3 Some forms of contract provide that the Contractor is only entitled to relief from LD’s for Employer Risk Events that actually cause delay to completion. Collapsed as-built, as planned v as-built, and time impact analysis may be suitable for those forms.
4.4 other forms of Contract provide that Contractor is entitled to relief from LDs for the likely effect of an Employer Risk Event. Under those forms impacted as-planned and time impact analysis may be appropriate.”
Challenges in Delay Analysis

• Lack of uniformity in the application of the methodologies
• Lack of sufficient guidance from contracts and case law on Delay Analysis
• Poor planning and programming practice
• Poor records keeping and timely notices
Concurrent Delay

The question now! “is there a universally accepted precise definition of the term ‘concurrent delay’”?  

The Oxford dictionary defines the word ‘concurrent’ as “occurring or operating simultaneously or side by side, or acting in conjunction.”  

The SCL Protocol, 2002 defines “true concurrent delays” as “the occurrence of two or more delays 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.”
Stance in U.K. courts

Royal Brompton Hospital NHS Trust v Hammond & Others (No.7) [2000] 76 Con LR

A very narrow definition, as described in several literatures, was suggested by Judge Seymour in this case where he defined the concurrent delay as “Two or more delay events occurring within the same time period, each independently affecting the Completion Date.”
The English Approach

Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited (1999) 70 Con LR 32

Dyson J. rejected the argument of the Employer and stated:

“It is agreed that if there are two concurrent causes of delay... then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event. Thus, to take a simple example, if no work is possible on site for a week not only because of exceptionally inclement weather i.e. a relevant event but also because the contractor has a shortage of labor i.e. not a relevant event and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if it considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the ground that the delay would have occurred in any event by reason of the shortage of labor.”
The Scottish Approach

City Inn v. Shepherd Construction [2010] BLR 473

Lord Drummond Young stated:

“...Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion delay between the two causes”
Back to the English Approach
Malmaison is Back!

Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC)

Judge Akenhead stated:
“...Where delay is caused by two or more effective causes, one of which entitles the contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time.”
Summary of the U.K. courts

• Under the ‘English approach’ established by Malmaison and Walter Lilly, the contractor is entitled to a full extension of time for the delay caused by the two or more events, provided one is a ‘Relevant Event’ under the contract.

• Under the Scottish approach established by City Inn, the contractor only gets a reasonably apportioned part of the concurrently caused delay.
Tips enhance the management of Delay Claims

There are five main issues that must be considered when dealing with Delay Claims and Analysis.

• The Contract Requirements
• Quality of the Baseline Program
• Availability and Accuracy of Periodical Schedule Updates
• Availability of the contemporary records
• Time and Cost for the Analysis
One More Thing....One More Problem in Delay Disputes...
Language Problem in Delay Dispute

A Lawyer without construction background or an Engineer without legal background in a delay dispute!

Arbitrator without construction and legal background!
Thank You...