



SCL Delay and Disruption Protocol; Rider 1

Welcome amendments to the Protocol?

Most in the industry are aware of the SCL Delay & Disruption Protocol. The SCL has now issued 'Rider 1', the first substantive modification to it since it was first published in 2002.

In this article the Delay and Disruption Protocol and background to Rider 1 is discussed as well as the changes it introduces.

Delay and Disruption Protocol

It is fair to say that the SCL's Delay and Disruption Protocol, first published in 2002 has been a very successful document. It has become widely known in the industry providing a focus for matters of extensions of time, delay and disruption. MBM is aware of it being quoted in claims documentation and many of its ideas being incorporated into contract documents, although the Protocol itself specifically states that it is not intended to be a contract document.

The Protocol provides useful guidance on how to deal with extensions of time and associated compensation for additional time and resource costs. The intent was that, going forward, the guidance given in the Protocol would be adopted within contracts. If contracts did not adopt its guidance, it would still be of use as much of the Protocol concerns matters not generally covered in standard forms of contract.

Since its publication it has arguably become a key industry reference regarded by many as "good practice" in the area of delay and disruption. Part of its appeal may be its brevity and succinctness in providing a summary of many of the principles regarding the management of delay and disruption. However such appeal belies arguably inherent weaknesses, particularly its recommendation of time impact analysis for both prospective and retrospective analysis.

Why was Rider 1 introduced?

The Protocol has been subject to much commentary and analysis. The changing background context driving the review of the Protocol since it was first published is set out in Rider 1¹:

- a) developments in the law and construction industry practices since the Protocol was first published in 2002;*
- b) feedback on the uptake of the Protocol since that time;*
- c) developments in technology since 2002;*
- d) the scale of large projects having increased leading to a wider divergence between small scale and large scale projects; and*
- e) anecdotal evidence that the Protocol is being used for international projects as well as domestic UK projects.*

The groundswell of opinion that the Protocol was due a review was effectively crystallised at an SCL meeting held in London in April 2013. This prompted a review panel to be set up to address eight key issues²:



- 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 referenced 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*

The outcome of the review has produced Rider 1, which has been published addressing the first two key issues only at this stage. The review of the remaining issues is ongoing. The SCL is stating that there will be a second draft of the Protocol to be produced for public consultation towards the end of 2015.

What does Rider 1 address?

The two issues that Rider 1 addresses concern “time distant from the delay event” delay analysis, particularly the use of Time Impact Analysis as well as consideration of the various other methodologies available and the circumstances for their use. The Protocol’s recommendation for Time Impact Analysis as the preferred choice of delay analysis methodology for both prospective and retrospective analysis has been revised. In respect of prospective delay analysis, Rider 1 maintains the recommendation for the use of Time Impact Analysis. This is consistent with the Protocol’s desire for extensions of time to be dealt with at the time rather than adopting the all too often “wait and see” approach. This typically leaves the contractor with a lack of certainty as to how to progress the works. Should he continue as currently planned in the hope of an extension of time, but with the risk of incurring liquidated damages or should he deploy mitigative measures to try and reduce the extent of the delay, but at the risk of not recovering these costs. Such an approach avoids dealing with the issue and may simply compound the problem, leading to disputes which could otherwise have been avoided.

In terms of retrospective analyses, Rider 1’s Core Principles and Guidance are welcomed. The Rider advises that Time Impact Analysis may no longer be relevant or appropriate for retrospective analysis. This is a positive and practical step. Many analysts have noted their concerns that the Time Impact Analysis methodology may produce theoretical results which do not match reality and may invite criticism. Rider 1 however does not prescribe a single preferred retrospective method of analysis but sets out a menu of six methodologies which can be used depending on circumstances. Explanations as to these are given within the Guidance section and it is pleasing to see the Time Slice Windows Analysis included as this has been a popular and frequently used retrospective methodology.

Rider 1 also mentions five other methodologies which may be suitable depending on the circumstances, including summary level as planned versus as built and time chainage analysis.



General Conclusions

What is particularly welcome is Rider 1's general comments regarding the selection of retrospective delay analysis methodologies. The overriding objective is to ensure any conclusions reached are sound on a common sense basis. This requirement has been identified by the courts in a number of judgments whereby results should reflect what actually happened as opposed to producing theoretical results.

At MBM, our approach has always been one of pragmatism whereby the choice of methodology is not simply picking from the list and implementing without further consideration. We have always viewed various methodologies simply as a starting point from which the particular circumstances of the project, the form of contract, the available records and various other factors must all be taken into consideration. This may result in certain modifications being made to the methodology such that the results generated are reliable and can be tested and cross checked as far as possible against the various sources of records.

In circumstances where Time Impact Analysis has had to be used in a retrospective context, our approach has always been to test the results as to do otherwise would only be doing part of the job. It seems inconceivable that results could be put forward simply because that is what the methodology has produced without verifying whether the results stand the test of scrutiny based on contemporaneous data and sound, professional common sense. It is always best that this is done in house before any results are blown apart at tribunal.

Given the contents of Rider 1 we look forward to the publication of the 2nd edition of the Protocol with enthusiasm.

References;

¹ & ²:SCL Delay and Disruption Protocol – Rider 1 – FINAL.pdf
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