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## Delays in Construction Contracts

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### Obligation to complete the Works

**Contractual Completion Date**

- Most building contracts and engineering contracts contain express provision for completion of the works by a certain date.
- The Contractor is often required to submit a programme of works illustrating how the works are intended to progress up to the completion date, which is approved by the employer, the Project Manager or the Contract Administrator.
- Building and engineering contracts usually contain express wording to require the contractor to progress the works diligently. For example:
  - The JCT Standard Building Contract, 2016 Edition (SBC 2016) refer to the contractor proceeding *"regularly and diligently"* with the works (in clause 2.4)
  - The Infrastructure Conditions of Contract, 2014 edition, refers to the contractor proceeding *"with due expedition and without delay in accordance with the Contract"* (in clause 10.1)

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### Obligation to complete the Works

**No contractual Completion Date**

- If the contract does not include a contractual date for completion, this does not mean that the contractor can take as much time as it likes. Section 14 of the Supply of Goods and Services Act 1982:
 

*"Where, under a contract for the supply of a service by a supplier acting in the course of business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time..."*
- What is "a reasonable time"?
 

*Shawton Engineering Ltd v DGP International Ltd [2005] EWCA Civ 1359: to be determined "at the time when the question arises in the light of all relevant circumstances".*

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### What do we mean by "delay"?

**Localised disruption, or project delay?**

- An incident or series of incidents that cause the project as a whole to be completed later than an originally planned date.
- An incident that affects the progress of a particular activity on a programme or schedule and which may postpone the planned completion date of a particular activity without prolonging the overall project completion date.

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### What do we mean by "delay"?

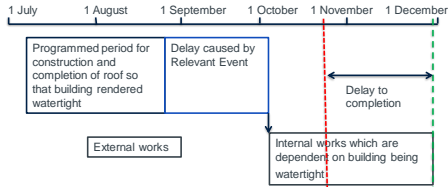
**Critical delay?**

- A construction programme will identify all the activities that are necessary to achieving the completion date. A "critical activity" is an activity that is necessary to achieving that completion date. The "critical path" is the combination of critical activities in a construction programme that determines the overall project duration of a construction programme.
- A "critical delay" is a delay to the progress of a critical activity, which extends the overall project duration and the completion date (without acceleration or re-sequencing of the works) because it causes delay to subsequent critical activities. It is a necessary component of an extension of time claim.
- In contrast, a "non-critical activity" is an activity not necessary to achieving the completion date and it will not be on the critical path. That means a delay to a non-critical activity will not delay the completion date. A "non-critical delay" is a delay to a non-critical activity. A non-critical delay may become a critical delay where non-critical activities are excessively delayed.

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### Example:

**KEY:**  
 --- = Completion Date      — = Relevant Event  
 — = Works required to complete      - - - = Practical Completion



1 July      1 August      1 September      1 October      1 November      1 December

## Common causes of delay



- ▶ Contractor management and performance problems.
- ▶ Changes to the scope of the works or design.
- ▶ Inclement weather.
- ▶ Unavailability of labour, materials and equipment.
- ▶ Defective specifications and plans.
- ▶ Employer interference.

## What are the effects of delay?



- ▶ May entitle the employer to levy liquidated damages against the contractor, if the contract provides for liquidated damages
- ▶ May prolong construction and lead to disruption costs, which the contractor may seek to recover from the employer as damages

## "Time at large"



### What is time at large?

- ▶ If a delay event occurs that is the employer's fault and the contract does not make provision for that delay, the original completion date falls away and time is put "at large". This means the contractor is under an obligation to complete the works within a reasonable time (not that it has as long as it likes to complete the works).
- ▶ Time at large results from the application of the "prevention principle": no party may require the other to comply with a contractual obligation in circumstances where that party has itself prevented such compliance. If the employer has prevented the contractor from carrying out the works "on time" according to the original contractual completion date (and the contract does not provide for how that delay is dealt with), the employer cannot insist that the contractor meets the original date for completion.

## Extension of time



Two types of delay for which a contractor may be able to claim an extension of time:

- ▶ **Delay the employer caused.** For example, clause 2.29.7 of the JCT Standard Building Contract 2016 states that the following is a Relevant Event:
 

*"any impediment, prevention or default, whether by act or omission, by the Employer, the Architect/Contract Administrator, the Quantity Surveyor or any Employer's Person, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or any Contractor's Person".*
- ▶ **Other delays that are not the contractor's responsibility under the contract.** Other delays, not caused by the employer, may entitle the contractor to an extension of time, e.g. those caused by strikes, force majeure, or a shortage of materials and labour. Unless there is an express provision in the contract for an extension of time, these delays will be at the contractor's risk.

## Example: Adverse weather



- ▶ May be a Contractor risk, may be an Employer risk, or may be shared:
  - ▶ Clause 2.26.8 of the JCT Design and Build Contract, 2016 Edition (DB 2016) states that the employer takes the risk of "exceptionally adverse weather conditions".
  - ▶ Clause 8.4(c) of the FIDIC Red Book 1999 places the risk on the employer of "exceptionally adverse climatic conditions"
  - ▶ NEC4, clause 60.1(13):
    - "a *weather measurement* is recorded:
      - within a calendar month
      - before the Completion Date for the whole of the works and
      - at the place stated in the Contract Data
    - the value of which, by comparison with the *weather data*, is shown to occur on average less frequently than once in ten years."

## Notification





- ▶ Contractor usually (but not always) required to issue notification of a delay as a pre-cursor to being entitled to claim an extension of time. For example, clause 2.19 of the JCT Intermediate Building Contract, 2016 edition:


*"If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give the Architect/Contract Administrator notice of the cause of delay....."*


### Condition precedent or not?


- ▶ JCT Design and Build Contract 2016 edition, clause 2.25: "If on receiving a notice and particulars under clause 2.24..... the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable."


Notification	
<b>Time bar on claims?</b>	
<ul style="list-style-type: none"> <li>▶ NEC4 Engineering and Construction Contract, clause 61.3:</li> </ul> <p>"If the Contractor does not notify a compensation event within eight weeks of becoming aware that the event has happened, the Prices, the Completion Date or a Key Date are not changed unless the event arises from the Project Manager or the Supervisor giving an instruction or notification, issuing a certificate or changing an earlier decision".</p>	

Assessment of extensions of time	
Employer's Agent/Contract Administrator/Project Manager should:	
<ul style="list-style-type: none"> <li>▶ Apply the relevant provisions of the construction contract.</li> <li>▶ Make a logical and methodical analysis of the effect any employer risk events had or were likely to have on the programme.</li> <li>▶ Conduct a calculation of the relevant critical relay, rather than an impressionistic general assessment.</li> </ul> <p>(John Barker Construction Ltd v London Portman Hotel Ltd 83 BLR 31.)</p>	

Delay analysis	
Two approaches to delay analysis:	
<ul style="list-style-type: none"> <li>▶ <b>The theoretical approach.</b> This considers the impact of a delay event by reference to a planned programme of work that is updated to a point immediately prior to the delaying event.</li> <li>▶ <b>The actual approach.</b> This involves identifying the actual impact of a delay by reference to an as-built programme that identifies and analyses how the works progressed and then identifies the actual causes of delay and the actual impact of delay.</li> </ul> <p>Whether a party to a dispute adopts an actual or theoretical approach generally boils down to the quality and extent of records. If the availability of as-built records is limited, then an actual approach may not be possible and the party will be wholly reliant upon a theoretical approach.</p>	

The importance of programmes	
<b>Planned programme:</b>	
<ul style="list-style-type: none"> <li>▶ Should be the starting point of any delay analysis.</li> <li>▶ <b>BUT:</b> Exercise caution. The planned programme may be inaccurate, optimistic and subject to scheduling errors in the logic. Obvious errors have to be corrected to establish a reasonable baseline programme for the delay analysis.</li> <li>▶ The planned programme must be updated with details of what actually happened.</li> <li>▶ If the programme has not been regularly updated during the course of the works then it will have to be reconstructed from as-built records. If this is done, there may be further uncertainty in whether the works could have been completed by a number of alternative methods (some of which might have avoided delay).</li> </ul>	

The importance of programmes	
<b>As built programme:</b>	
<ul style="list-style-type: none"> <li>▶ The most accurate as-built programme will be recorded contemporaneously, as the works progress, and will be supported by site diaries and progress reports.</li> <li>▶ The as-built programme should identify the start and end dates of every activity, together with those activities that were introduced during the construction process</li> <li>▶ Where a contemporaneous programme does not exist, it will need to be reconstructed retrospectively by reference to contemporaneous records and key personnel involved with the project.</li> <li>▶ It is generally helpful for the as-built programme to define activities in the same way as the as-planned programme for ease of comparison.</li> </ul>	

Methods of delay analysis	
<b>As-planned versus as-built</b>	
<ul style="list-style-type: none"> <li>▶ Comparison between the as-planned and as-built programmes.</li> <li>▶ Generally takes the form of a bar chart that enables a straightforward graphical comparison between what was planned and what occurred.</li> <li>▶ Can be substantiated by witness evidence and/or graphical forms of analysis (such as manpower and plan histograms comparing planned and as-built levels of labour and plant, as well as graphs plotting capital expenditure).</li> <li>▶ Requires an agreed as-planned programme and as-built records that enable a detailed comparison to be made.</li> <li>▶ Simple and relatively inexpensive.</li> </ul>	

## Methods of delay analysis



### As-planned impacted

- ▶ Requires an as-planned programme that delays are added to, so that the programme is dynamically updated.
- ▶ Does not require as-built records, simply a planned programme that can be updated with the effects of delaying events.
- ▶ Can be used for prospective or retrospective analysis, but it is a "theoretical" method.
- ▶ Perceived as a "contractor-friendly" method: it only considers the effects of employer risk events and takes no account of the contractor's own delays, or any mitigation or acceleration measures.

## Methods of delay analysis



### Collapsed as-built

- ▶ Opposite approach to the as-planned impacted method: uses the as-built programme as its baseline.
- ▶ Delay events are then removed from the as-built programme in reverse chronological order, resulting in a new theoretical programme purporting to show the completion date that the contractor would have achieved absent the delays it holds the employer responsible for.
- ▶ Depends on a detailed as-built programme in the form of a linked bar chart or critical path format and relies on good quality as-built records.

## Methods of delay analysis



### Time impact analysis

- ▶ Involves updating the as-planned programme and then "impacting" it with the effect of a delay event (or events).
- ▶ Prospective form of analysis: it seeks to analyse the position of (and impact on) the project at the time of the delay event.
- ▶ Can be difficult to prepare if there are overlapping or concurrent delaying events (rather than sequential delaying events) that impacted the progress of the works.

## Methods of delay analysis



### Windows analysis

- ▶ The project is broken down into periods of time (typically monthly periods) known as "windows".
- ▶ May be used where there is a planned programme with appropriate logic and regular and detailed progress updates over the course of the project, supported by contemporaneous records.
- ▶ The original as-planned programme is updated with as-built information to tell the story of the project from commencement to completion on a "real time" basis.
- ▶ Each window identifies the planned completion date at the beginning and end of that window. The windows are generally established by reference to significant project milestones.
- ▶ Dependent on good quality records.

## Concurrent delay



*De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC).*

"The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary.

By contrast, the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible."

## Record keeping



- ▶ The strength of the parties' commercial and legal positions is dependent on the quality of good records.
- ▶ The terms of the contract may require the provision of records. This means that the parties have the right to ask for them. For example, NEC4 ECC Option C, clause 52.2:
  - "The Contractor keeps these records
    - accounts of payments of Defined Cost,
    - proof that the payments have been made,
    - communications about and assessments of compensation events for Subcontractors, and
    - other records as stated in the Scope"
- ▶ NEC4 ECC Option C, clause 52.4:
  - "The Contractor allows the Project Manager to inspect at any time within working hours the accounts and records which it is required to keep".

## Record keeping



Typical records may include:

- ▶ Progress meeting records.
- ▶ General meeting records.
- ▶ Programme progress updates.
- ▶ Marked-up drawings.
- ▶ Correspondence.
- ▶ Labour allocation sheets.
- ▶ Daily work area records.
- ▶ Daily site diaries.
- ▶ Quality control inspection sheets.
- ▶ Handover records.
- ▶ Daily weather records of weather conditions.
- ▶ Progress photographs.

## Record keeping



- ▶ Many claims fail because of poor records.
- ▶ Equally, poor claims can achieve much more than they should because they are supported by good records.
- ▶ The Society of Construction Law's *Delay and Disruption Protocol* emphasises the importance of record keeping. Further guidance on preparing and maintaining records is set out in section 2 of the first edition and Appendix B of the second edition.

## Questions?



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