IS DELAY ANALYSIS BECOMING TOO COMPLEX FOR ITS OWN GOOD?

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It is well recognized that a large portion of all construction claims arise from delay. Getting to the causes of delay involves what is often referred to as the "black art" of delay analysis. There are many different forms of analysis and these are described in two widely used protocols.

- the Society of Construction Law Delay and Disruption Protocol ("the SCL Protocol"); and
- the AACE International Recommended Practice No 29R-03: Forensic Schedule Analysis ("the AACEI Protocol").

THE SCL Protocol includes 6 different methods of analysis whereas the AACEI Protocol, which broadly breaks down the analyses into two groups, goes on to describe 16 iterations of these two groups. Some of the methods of analysis are fairly crude, others are incredibly complex, time consuming and expensive to prepare and, to the uninitiated are unintelligible.

Delay analyses are most often needed in support of claims for extensions of time and payment of delay and disruption costs and this raises the question, just how far does a claimant have to go to substantiate its claim? And what method of delay analysis is sufficient?

Of course, the first port of call is always the contract conditions since these may be fairly prescriptive as to the type of analysis required. For example, the NEC/ECC suite of contracts expressly requires a prospective (or predictive) form of analysis to be carried out. However, in many instances (and in contravention of the contract) delays are not assessed until well after the event (retrospective analyses). The difficulty with prospective analyses is that they often produce results totally divorced from reality and that can be a stumbling block when negotiating settlement of claims.

The case of *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited (2017 NIQB 43)* whilst relating to assessing monetary claims, seems to acknowledge that a retrospective analysis under the NEC/ECC forms is a sensible and acceptable approach when as built data is available. The House of Lords decision in *Bwllfa and Merthyr Dare Steam Colliers (1891) Limited v The Pontypridd Waterworks Company (1903 AC 426)* was quoted with approval.

> Why should he [the arbitrator] listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?

A frequent problem faced by many contractors is that the contract administrator may insist upon a claim being supported by a highly complex and detailed critical path analysis. Whilst analyses of this type are usually necessary for high value claims or complicated disputes, in some instances they can be counterproductive (see the comments on adjudication below), so how then should a potential claimant proceed with his delay analysis?

It is important to remember that a contractor only needs to substantiate its claim on the balance of probabilities, which is the burden of proof in civil matters.

> "If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."[1]

It is untenable for a contract administrator to demand a highly sophisticated form of analysis when a simpler form of analysis will satisfy this burden of proof. After all, should the matter end up in formal dispute resolution proceedings, it is against the balance of probabilities that the merits of the claim will be judged.

Furthermore, is it reasonable to expect a sophisticated analysis (which will likely need to be based on fully detailed and logic linked programmes) when throughout the project only fairly simple programmes have been submitted and reviewed by the contract administrator without complaint as to their form and content ?

Both the SCL and AACEI Protocols emphasize the need for a proportionate approach to delay analysis- see for example paragraph 11.3 Guidance on Core Principles in the SCL Protocol and paragraphs 5.4 and 5.5 in the AACEI Protocol.

In the United Kingdom, if disputes are not settled amicably, the next step is usually adjudication. Whilst this is a speedy and practical forum, it does present a dilemma for the contractor. On the one hand, the contractor may feel the need to submit a very detailed delay analysis in an effort to bring about settlement, yet on the other hand if settlement fails, such an analysis is likely to be totally unsuitable for adjudication.

1 (Lord Denning in Miller v Minister of Pensions [1947] 2 All ER 37)

Adjudicators are faced with a very short timescale to get to grips with a dispute and produce a decision. There simply is not time to wade through competing complex analyses to identify the causes of delay. Consequently, if a contractor has submitted a very detailed analysis in an effort to precipitate a settlement, it is recommended that this should be distilled and simplified before reference to adjudication. If anecdotal evidence is to be believed, some adjudicators will not look at multiple lever arch files full of programmes, even more so when both parties have their own versions of events.

There will always be the need for a full complex forensic delay analysis in certain circumstances. However, it is helpful to bear in mind the following salutary observations.

> **"I accept that the statutory provisions for adjudication reflect a Parliamentary intention to provide a scheme for a rough and ready temporary resolution of construction disputes."[2]**
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> **"The plain fact is that adjudication is a rough and ready process because it has to be carried out within a very strict timetable."[3]**

Of course, these observations do not let claimants off the hook. They must still state their claim clearly and coherently and meet the burden of proof. However, it is good to remember that although the Protocols cover a broad range of methods of delay analysis, the most complex is not necessarily the most appropriate.

2 The Master Of The Rolls Lord Justice Davis in *PC Harrington Contractors Ltd* v *Systech International Ltd* [2012] EWCA Civ 1371

3 The Honourable Mr. Justice Coulson in *CSK Electrical Contractors Ltd Claimant* v *Kingwood Electrical Services Ltd* [2015] EWHC 667 TCC).