THE SOCIETY OF CONSTRUCTION LAW (MALAYSIA) DELAY AND DISRUPTION PROTOCOL

1st Supplement

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THE SOCIETY OF CONSTRUCTION LAW (MALAYSIA) DELAY AND DISRUPTION PROTOCOL (1st Supplement)

A. The object of the Protocol is to provide useful guidance on some of the common delay and disruption issues that arise on construction projects, where one party wishes to recover from the other an extension of time and/or compensation for the additional time spent and the resources used to complete the project. The purpose of the Protocol is to provide a means by which the parties can resolve these matters and avoid unnecessary disputes. A focus of the Protocol therefore is the provision of practical and principled guidance on proportionate measures for dealing with delay and disruption issues that can be applied in relation to all projects, regardless of complexity or scale, to avoid disputes and, where disputes are unavoidable, to limit the costs of those disputes. On certain issues, the Protocol identifies various options, with the choice of the most appropriate being dependent on the nature, scale and level of complexity of a particular project and the circumstances in which the issue is being considered. On other issues, the Protocol makes a recommendation as to the most appropriate course of action, should that be available.

B. It is not intended that the Protocol should be a contract document. Nor does it purport to take precedence over the express terms and governing law of a contract or be a statement of the law. It represents a scheme for dealing with delay and disruption issues that is balanced and viable (recognising that some of those issues do not have absolute answers). Therefore, the Protocol must be considered against (and give way to) the contract and governing law which regulate the relationships between project participants.

C. The guidance in the Protocol is general in nature and has not been developed with reference to any specific standard form contracts. To do otherwise would not have been practical given the multitude and divergence of standard form contracts. Rather, the guidance is intended to be generally applicable to any contract that provides for the management of change.

D. Delay and disruption issues that ought to be managed within the contract all too often become disputes that have to be decided by third parties (adjudicators, dispute review boards, arbitrators, judges etc.). The number of such cases could be substantially reduced by the introduction of a transparent and unified approach to the understanding of programmed works, their expression in records, and the allocation of responsibility for the consequences of delay and disruption events.

E. Overall, the Protocol aims to be consistent with good practice, but is not put forward as the benchmark of good practice throughout the construction industry. The cost of achieving a level of good practice should be no more than is

required for the best of current standard forms of contract. So as to make its recommendations more achievable by project participants, the Protocol does not strive for best practice. That is not intended to detract from the benefits to project participants of applying best practice.

F. Users of the Protocol should apply its recommendations with common sense. The Protocol is intended to be a balanced document, reflecting equally the interests of all parties to the construction process.

G. This Protocol adopts, and acts as a supplement to, the 2nd consultation draft edition of the UK Protocol which was published in 2016 ("UK Protocol"). It is intended to be read together with the UK Protocol. This Protocol is drafted by the members of the Society of Construction Law (Malaysia) and the membership of the drafting committee is set out in page 18. The views and opinions expressed and the aims identified in the Protocol are those adopted by the drafting committee. They are not necessarily the views and opinions or aims of any particular member of the drafting committee or member of the Society.

H. The information, recommendations and/or advice contained in this Protocol (including its Guidance Sections and Appendices) are intended for use as a general statement and guide only. Neither the Society of Construction Law nor any committee or member of the Society nor any member of the committees that drafted the Protocol accept any liability for any loss or damage which may be suffered as a result of the use in any way of the information, recommendations and/or advice contained herein and any person using such information or drafting contracts, specifications or other documents based thereon must in all cases take appropriate professional advice on the matters referred to in this publication and are themselves solely responsible for ensuring that any wording taken from this document is consistent with and appropriate to the remainder of their material.

The Society of Construction Law welcomes feedback on the Protocol. Please contact the Society at sclmalaysiaprotocol@gmail.com.

*the "pages" referred to hereon are the pages of the UK Protocol.

INTRODUCTION

1. At pages 1 – 4,

DELETE paragraphs A – L.

CORE PRINCIPLES

2. At page 5, paragraph 1. Programmes and records,

REPLACE paragraph with:

Contracting parties should reach a clear agreement on the type of records that should be kept (see Guidance Section 2). Further, to reduce the number of disputes relating to delay and disruption, the Contractor should prepare and the Contract Administrator (CA) should accept a properly prepared programme showing the manner and sequence in which the Contractor plans to carry out the works (see for example, Pertubuhan Akitek Malaysia 2006 ("PAM 2006") Clause 3.6). The programme should be updated to record actual progress and any extensions of time (EOTs) granted. If this is done, then the programme can be used as a tool for managing change and determining EOTs and periods of time for which compensation may be due (see for example, PAM, 2006 Clause 3.7).

3. At page 5, paragraph 3. Entitlement to extension of time,

REPLACE paragraph with:

The parties and the CA should comply with the contractual procedural requirements relating to notices, particulars, substantiation and assessment in relation to delay events. Applications for an EOT should be made and dealt with as close in time as possible to the delay event that gives rise to the application (see Guidance Section 3.4). For example, PAM 2006 Clause 23.3 requires applications to be made within 28 days from cause of delay. A 'wait and see' approach to assessing EOT is discouraged and, where the Contractor has complied with his contractual obligations regarding delay events and EOT applications, the Contractor should not be prejudiced in any dispute with the Employer as a result of the CA failing to assess EOT applications within a reasonable time after submission (see Guidance Section 3.4). For example, PAM 2006 Clause 23.4 requires assessment to be made within 6 weeks of 'sufficient' particulars. The Contractor will potentially be entitled to an EOT only for those events or causes of delay

in respect of which the Employer has assumed risk and responsibility (called in the Protocol Employer Risk Events). The parties should attempt so far as possible to deal with the time impact of Employer Risk Events as the work proceeds (both in terms of EOT and compensation) (see Guidance Section 3.5).

4. At page 6, paragraph 9, Concurrent delay – its effect on entitlement to extension of time,

REPLACE paragraph with:

Where Contractor Delay to Completion occurs or has effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due, subject to contract requirements and the architect taking into account any other relevant events which will have an effect on the entitlement to EOT (see for example PAM 2006 Clause 23.5(b)) (see Guidance Section 3.10).

GUIDANCE SECTION 1

1. Meaning of delay, disruption and acceleration

5. At page 9, paragraph 1.3,

REPLACE paragraph with:

In referring to "delay", the Protocol is concerned with time – work activities taking longer than planned. In large part, the focus is on delay to the completion of the works – in other words, critical delay. Hence, "delay" is concerned with an analysis of time. This type of analysis is necessary to support an EOT claim by the Contractor and other possible time related costs associated with non-critical delay.

6. At page 9, paragraph 1.4 (b),

REPLACE paragraph with:

Of course, time means money. Typical monetary claims by a Contractor that are dependent upon an analysis of time (i.e. a delay analysis) are as follows (subject to the terms of the contract and depending on the specific circumstances):

(a) relief from LDs (with the inverse claim by an Employer for LDs);
(b) compensation for time-related costs associated with critical delay and non-critical

delay; and

(c) if the Contractor has taken steps to mitigate the delay, compensation for those steps.

GUIDANCE SECTION 2

2. Core Principle 1- records and programmes

7. At page 12, paragraph 2.5,

REPLACE paragraph with:

The Protocol recommends that the parties reach a clear and documented agreement prior to the time they enter into the contract (or at least at the outset of the works) regarding record keeping and programme use. For example, a clear statement is to be entered into particular conditions, preliminaries or planning specifications. In doing so, the parties need to take an approach that is proportionate and appropriate to the specific circumstances of the works. This will vary from project to project.

8. At page 12, paragraph 2.6,

REPLACE paragraph with:

There is often a lack of good record keeping and a lack of uniformity of approach to record keeping in relation to delay and disruption claims. It would be appropriate to consider that the Architect (as per the PAM Contract) may write to Nominated Sub-Contractor(s) as well as the Contractor(s). The Nominated Sub-Contractor's form of Contract would therefore be required to be unified with the Contractor's form of Contract.

9. At page 14, at the heading "**Format storage of records**",

REPLACE heading with:

Format, storage and backup of records

10. At page 14, paragraph 2.15,

REPLACE paragraph with:

Records should be produced, distributed and stored electronically and in a manner that allows them to be easily accessed, searched, stored and retrieved. In addition the primary storage of records, it is also advisable to back up these records to a secondary location (external hard-drive or cloud storage for example) in order to ensure retention of these records should the primary storage file. At a minimum (with the exception of emails), records should be kept in PDF searchable format and stored in an electronic document management system database. Emails, programmes and spreadsheets containing formulae should be kept in their native electronic format (which, in the case of programmes, is explained further below).

11. At page 14, paragraph 2.18,

REPLACE paragraph with:

The Protocol recognises the growing use of building information modelling (or 'BIM') in design development, project management, claims assessment, dispute resolution and operations and maintenance. The effective use of BIM requires specific agreement between the parties regarding its content, use and ownership. A detailed procedure should be prepared in advance providing details of the responsibility for the provision of data, access and modification rights etc.

12. At page 15, paragraph 2.22,

REPLACE paragraph with:

Progress records should be reconciled with and complementary to the Accepted Programme/Updated Programme and costs records. Progress is ideally recorded and coded to the Accepted Programme/Updated Programme activities and also to the cost accounts for the project. The measurement of progress should ideally be through the use of pre-agreed work-steps or rules of credit. These work-steps represent discrete portions of work that are weighted in accordance with the effort required to complete each step. This provides a credible, systematic and auditable method of determining progress and removes any subjective assessment.

13. At page 15, paragraph 2.23,

REPLACE paragraph with:

Resource records capture the resources utilised to deliver the works, including management, labour, plant, equipment, materials, and subcontractors. It is advised that such resource records show both the actual hours expended and earned hours (productive hours) as this will allow examination of the productivity achieved.

14. At page 18 paragraph 2.48,

REPLACE paragraph with:

Depending on the complexity of the works, it may be appropriate to specify in the contract the maximum duration of an activity in the Contractor's proposed programme. As a guide, no activity or lag (other than a summary activity or possibly the lead time for purchased equipment) should exceed ~~28 days~~ one month in duration. Wherever possible, an activity should not encompass more than one trade or operation.

GUIDANCE SECTION 3

3. Core Principle 2-20 – delay, disruption and acceleration

15. At page 23, paragraph 3.4.2,

REPLACE paragraph with:

Most if not all the standard forms of contract contain obligations on the part of the Contractor to give notice to the CA as soon as an Employer Risk Event occurs that the Contractor considers entitles it to an EOT. Some require notice of the occurrence of an Employer Risk Event irrespective of whether it is likely to affect the contract completion date (i.e. the latter of which the Protocol refers to as Employer Delay to Completion), and some require notice of all events that adversely affect progress irrespective of liability or consequence. In some standard forms these notices are expressed to be conditions precedent (i.e. pre-conditions) to entitlement. However, the Contractor should give notice to the CA of any Employer Delays as soon as possible. The CA should also notify the Contractor as early as possible of any Employer Delays of which it is aware. The Contractor should comply with the contractual procedural requirements relating to notices, particulars and substantiation in relation to delay events. The Contractor would be required to make the application as comprehensive as possible. This includes details of the cause(s) of delay, effect of delay on the work programme,

estimated length of delay, steps taken to minimise or mitigate delay, the required EOT. This would be supported by contemporaneous documents, programmes and reports. ~~However, whatever the contract says, the Contractor should give notice to the CA of any Employer Delays as soon as possible. The CA should also notify the Contractor as early as possible of any Employer Delays of which it is aware.~~

The following principal sources of information may be utilised:

i) Official work records and progress reports , e.g. daily reports, weekly reports, daywork records, periodic reports, monthly progress reports etc.;

ii) Site diaries;

iii) Letters, official instructions, etc.;

iv) Memoranda;

v) Emails, Facsimile transmissions, telexes, etc.;

vi) Drawings, diagrams, etc.;

vii) Official minutes of meetings, records of discussions, etc.;

viii) Work programmes, i.e. approved baseline schedules, progress updates, 'as-built' schedules, with the addition of the Contractor's analysis;

ix) Logs and Databases/Spreadsheets recording, Field Instructions, Site Technical Queries etc.;

x) Records and/or reports from independent bodies, e.g. Meteorological Department records, etc.;

xi) Shipping/airfreight and delivery records;

xii) Procurement records, invoices, etc.;

xiii) Delivery orders; and

xiv) Other miscellaneous records, documents, photographs, newspaper cuttings, video recordings, method statements, etc.

Refer also to Appendix B.

16. At page 23 after paragraph 3.5.2,

INSERT:

3.5.3 In Malaysia, there is a difference of views on the effect of a contract administrator making his assessment out of time and the Courts have not decided on this. One view provides that this provision is merely directory. The other view provides that this provision is prima facie mandatory.

As to the basis of the assessment, the prevailing principles are taken into consideration:

i) An EOT can only be validly granted if the procedures which the contract lays down are strictly followed;

ii) An EOT can only be validly granted in respect of an event that is expressly included in the contract as a 'relevant event' and which has delayed, or is likely to delay completion;

iii) The delay must be one affecting an activity or activities that are on the critical path or near critical path i.e. one that is having 'little' or no float' that cannot be delayed without affecting the others;

iv) The 'nett effective' delay must be assessed based on the contractor's approved work programme or one of its progressed updates, and the interdependence of the operations of the work in relation to the whole of the works. Consequential delays must also be considered.

v) In the assessment, a logical analysis and not a mere impressionistic assessment must be undertaken in a methodical way of the impact which the relevant matters had or were likely to have on the contractor's planned programme.

vi) The overriding requirement is as to the satisfaction of the 'Fair and Reasonableness Test' on the part of the assessor.

The contractor administrator must act fairly, reasonably and impartially to both the employer and the contractor. Any breach of such obligation may invalidate his decision and open up possible causes of breach of contract and/or tort.

17. At pages 27 – 28, paragraph 3.10.8,

REPLACE paragraph with:

On one view, the two events are both effective causes of Delay to Completion for the two week period from 6 to 20 February because they each would have caused Delay to Completion in the absence of the other (with the subsequent delay from 21 February to 25 February caused by the Contractor Risk Event alone). ~~This view may be supported by older English appeal court cases (no doubt predating critical path analysis) which provide that if the failure to complete the works is due in part to the fault of both the Employer and the Contractor, liquidated damages will not be payable.~~ In a situation like the example described in Guidance Section paragraph 3.10.7, it can be argued that both the Employer Risk Event and the Contractor Risk Event are in part the cause of the Delay to Completion.

18. At page 28, paragraph 3.10.10,

REPLACE paragraph with:

The Malaysian Courts does not appear to have dealt with this issue at the time of drafting the Protocol. The Protocol recommends the latter of these two views, i.e. that where an EOT application relating to the situation referred to in Guidance Section paragraph 3.10.7 is being assessed, the Employer Risk Event should be seen as not causing Delay to Completion (and therefore there is no concurrency). Concurrent delay only arises where the Employer Risk Event is shown to have caused Delay to Completion or, in other words, caused critical delay (i.e. it is on the longest path) to completion. The Protocol cautions that this recommendation would have to be re-considered were an appeal court to take a different approach to this issue.

19. At page 30, after paragraph 3.12.6,

INSERT:

Construction Industry Payment and Adjudication Act 2012 ("CIPAA") 3.13.1 A contractor has no general right to suspend or slow down works: unless there is an express provision in a construction contract permitting a contractor to suspend or slow down his works due to an employer's failure to pay, such an action amounts to a breach of contract. 3.13.2 There is however one exception. CIPAA allows a contractor to suspend

performance and reduce the rate of progress of performance when it is successful in an adjudication decision and subject to certain requirements.

3.13.3 Pursuant to Section 29(1) of CIPAA, a successful claimant is entitled to suspend the performance or reduce the rate of performance if the adjudicated amount pursuant to an adjudication decision has not been paid wholly or partly after the receipt of the adjudication decision.

3.13.4 This right to suspend is subject to strict procedural conditions and tight timelines as per Section 29(2) of CIPAA:

"the party intending to suspend the performance or reduce the rate of progress of performance…shall give written notice of intention to suspend performance or reduce the rate of progress of performance to the other party if the adjudicated amount is not paid within fourteen calendar days from the date of receipt of the notice".

3.13.5 A contractor is to resume performance or the rate of progress of performance of the work within 10 working days of being paid the adjudicated amount or an amount as may be determined by arbitration or court in a concurrent referral of the dispute pursuant to Section 37(1) of CIPAA (Section 29(d) CIPAA).

3.13.6 Furthermore, Section 29(4) of CIPAA permits the contractor to recover "any loss and expense incurred as a result of the suspension of reduction in the rate of progress of performance" from the respondent.

20. At page 30, after paragraph 3.14.2,

INSERT:

Liquidated Ascertained Damages (LD)

3.14.3 LDs are generally pre-estimated damages for a contractor's delay to the completion of a contract. It is provided for in most contracts that a specified sum will be paid per day in respect of delay to the completion of the contract.

3.14.4 An employer's right to claim LD is usually contingent on the validity of the Certificate of Practical Completion, Certificate of Extension of Time and Certificate of Non-Completion. Thus an LD claim may fail if any of these certificates be invalidated on the grounds such as incorrect form, not given

on time, issued by an unauthorised person, no certifier named in the certificate, subject to improper interference by the employer, not given fairly, subject to fraud on the part of the certifier etc.

3.14.5 The Protocol suggests that unless new developments in the law occur, a party should include evidence of actual losses suffered which are not too remote to prove its LD claim.

GUIDANCE SECTION 4

4. Other financial heads of claim

21. At page 39, paragraph 4.2.8,

REPLACE paragraph with:

Statutory interest on debts

4.2.8 In considering claims for prolongation costs (and any other monetary claims) the parties should be aware of the various contractual and statutory rights to interest that may be available to an adjudicator, judge or arbitrator should they not resolve their dispute.

4.2.9 Contractual interest is the pre-agreed interest rate between parties and is usually awarded by the adjudicator, judge or arbitrator at the pre-agreed rate.

4.2.10. Statutory interest rates are two pronged; Pre-judgment interest and post-judgment interest. Pre-judgement interest is provided under Section 11 of the Civil Law Act 1956 which provides:

> ***11. Power of Courts to award interest on debts and damages***
>
> *In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:*
>
> *Provided that nothing in this section-*

(a) shall authorize the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

Post-judgment interest is currently fixed by the Chief Justice of the Federal Court at the rate of 5% per annum under Order 42 Rule 12 of the Rules of Court 2012 and the Chief Justice of Malaysia's Practice Direction No. 1 of 2012:

12 Interest on judgment debts (O 42 r 12)

Subject to rule 12A, except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied.

GUIDANCE SECTION 5

5. Dealing with extension of time during the court of the project

22. At page 42, paragraph 5.3,

REPLACE paragraph with:

As well as the particulars that may be required under the form of contract, the Contractor should generally submit a sub-network (sometimes called a "fragnet") showing the actual or anticipated effect of the Employer Risk Event and its linkage into the Updated Programme. Under PAM 2006 Clause 23.2, the term Contractor is deemed to include Nominated Sub-Contractors where the Employer Risk Event concerns the works of the Nominated Subcontractors. The Contractor is obliged to copy the notice and particulars to the Nominated Sub-Contractors concerned. Under Clause 23.1a PAM 2006, the Contractor is to provide an initial estimate of the EOT. This sub-network is inserted into that Updated Programme which was submitted by the Contractor as close as possible to the date of the Employer Risk Event. Further guidance on the form of the sub-network is

given in Guidance Section paragraph 5.10. It should also be accompanied by such documents and records as are necessary to demonstrate the entitlement in principle to an EOT. Simply stating that Employer Risk Events have occurred and claiming the whole of any delay apparent at the time of the events is not a proper demonstration of entitlement and will have to be substantiated.

23. At page 42, paragraph 5.4,

REPLACE paragraph with:

Before doing anything else, the CA should consider whether or not the claimed event or cause of delay is in fact one in respect of which the Employer has assumed risk and responsibility (i.e. that it is an Employer Risk Event). The Contractor will potentially be entitled to an EOT only for those events or causes listed in the contract as being at the Employer's risk as to time. These events vary between the different standard forms of contract, and care is needed when reading them. If the CA concludes that the event or cause of delay is not an Employer Risk Event, the CA should so notify the Contractor. Without prejudice to that, the CA may wish to comment on other aspects of the Contractor's submission. When granting or refusing an EOT, the CA should preferably provide sufficient information to allow the Contractor to understand the reasons for the CA's decision.

24. At page 42, paragraph 5.5,

REPLACE paragraph with:

In the absence of a submission that complies with this section, the CA (unless the contract otherwise provides) should make its own determination of the EOT (if any) that is due or adopt the Contractor's initial estimate, based on such information as is available to it. Given that it is difficult if not impossible to withdraw an EOT once granted, it is reasonably to be expected that, where the CA has not been presented with the information on which to base its decision, the CA may continue to request for further particulars until the CA is satisfied and can make an assessment or will award only the minimum EOT that can be justified at the time .