Introduction
Agenda

- The Importance of Time
  - Establishing the time for completion
  - Why and when is time extended
  - What happens in the absence of a time for completion

- Changing Time
  - SCL Protocol
  - Primary methods
  - Role of the Expert

- Novel arguments
  - Carillion –v- EMCOR and discontinuous extension

- Time is money
The Importance of Time
Establishing the time for completion

- While they may use different terminology, all standard form construction contracts allow for a completion date to be identified.

- The completion date is the date on which the contractor is due to finish all of the work required under the contract.

- Where, for some reason, the contract either does not specify the time for completion or the mechanism for its calculation does not work the obligation will be to complete within a reasonable time in all the circumstances.

- The mechanism for establishing the completion date can be complex and that complexity can be added to by sectional completions, key dates and partial possession or take over of the work.
Why and when is time extended

Why extend time?
- The obligation to complete by a certain date is, to some extent, the same as any other contractual obligation, if breached damages can follow
- The primary reason to extend time is therefore to reflect the time which the contractor should be entitled to before being in breach and liable for damages

When should time be extended?
- Most standard forms now require extensions of time to be dealt with at or close to the time of the delay event
- The earlier the completion date is known, after a change, the more easily the project team can work together to ensure delivery or manage the consequences of late finish
- All too often extensions of time are still not granted until after the previous completion date has passed
4 key issues

- **Critical Path** – The shortest route from the beginning to the end of the project. Delay to activities on the critical path will therefore delay completion.

- **Dominant Cause** – The basic approach under English law is to establish what delay event was in fact delaying the critical path. The dominant cause then decides the amount of any extension.

- **Concurrency** – Two events occurring at the same time and which have effects occurring simultaneously. In other words, the theoretical situation you can be left in when a dominant cause cannot be ascertained.

- **Apportionment** – An alternative method to dominant cause where you look, in the round, at what was causing delay in any particular period and divide responsibility on that basis. Not applicable in England but it is in other jurisdictions, for example Scotland.
Changing Time
Basic Principles

- The starting point with an extension of time is that it should reflect the impact of the causative event which is the responsibility of the other party
  - Identify event
  - Who is responsible
  - What is the direct impact
  - What is the consequential impact

- In reality this is a factual exercise, looking at what happened, when and what that impacted on

- The difficulty arises when there is a shortage of information, then assumptions need to be drawn in
SCL Protocol

22 Core Principles and Guidance. They cover all the essential issues and points including:

- Effective record keeping
- Analyse at the time and incrementally
- Dealing with float
- Concurrency
- Mitigation and acceleration
- Global claims
- Disruption
- Valuation
Primary methods

- Time Impact Analysis
- Collapsed As-Built
- Impacted As-Planned
- As Planned -v- As Built

All of these methods are really just a guide to help with the assessment of the facts and to fill in any gaps where there is a shortfall in information.
Role of the Expert

- There are many delay experts with a wide variety of views on how delay can and should be analysed.

- If establishing extensions of time is really just facts, and an expert deals in opinions, is a delay expert then just a glorified fact compiler?
  - Certainly there is an argument that is exactly what the expert is, but without detracting from the importance of the role.
  - From a single main contractor to a single employer the need for an expert is more challengeable but what about where there are multiple subcontractors all impacting in some way on the main contractor’s works.

- Whether or not there is opinion evidence adduced to court is rather a secondary matter to having an experienced practitioner review, test and verify the claim being made.
Novel Arguments
Carillion -v- EMCOR

- The TCC and Court of Appeal have considered a preliminary issue, on a point of law, not the full case as yet

- Carillion were late completing works as main contractor and had a dispute with the employer which it settled. Carillion said that, in essence, the delay was caused by two subcontractors, the M&E subcontractor (EMCOR) and the M&E designer (AECOM)

- Carillion identified the total period of delay it had suffered and roughly divided it in two saying the first part was caused by EMCOR and the second by AECOM

- EMCOR said that they were delayed by AECOM giving them an EOT for the period alleged against them and no loss (there were no LDs) was caused by them in the later period

- Carillion argued that EMCORs EOT did not simply change the end date but created later periods in which they were entitled to carry out work
Carillion -v- EMCOR

What is a discontinuous extension of time?

- The premise put forward by Carillion was that an EOT must reflect not just the time of delay incurred but also the period.
- That would allow the time to match the approach for money, which should be for the actual period of delay.
- In this way, EMCOR had an original completion date under the contract and then a stop-start period of relief for failing to complete by that date.

Liability periods
Carillion v EMCOR

Why was the claim brought in that way?

- This is not really clear from the judgement although the following factors are likely to be at play
  - Carillion had already settled with the employer and was therefore trying to resolve matters within the four corners of that settlement
  - The approach and consequences had not been fully thought through at the time of settlement with the employer
  - The identification of delay periods was overly simplistic for the type of claim being pursued against multiple parties
Carillion -v- EMCOR

Problems with the approach

- The discontinuous approach did not match the approach of the contract
- The contract referred to extending the period, not creating new periods
- Significant reliance was placed on the Supreme Court decision in *Arnold -v- Brittan* [2015] to apply the contract not to alter it to meet a test of commercial common sense
- “While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for the parties to have agreed…” per Lord Neuberger at paragraph 20
- An extension is, in essence, the making longer of something
- In addition, the “blob” approach creates practical difficulties at a project management level
Carillion -v- EMCOR

- The answer
  - The TCC listed, heard and gave judgment very rapidly, which was certainly to the parties benefit
  - The TCC was not at all convinced by the argument of Carillion and stated that an extension of time must create a single continuous period for the works
  - Leave to Appeal was given (possible rather surprisingly although novel arguments in this area are rare)
  - Again it was listed, heard and decided very rapidly
  - While being more concerned than the TCC about the difficulties created in an analytical sense of keeping all of the time together, the Court of Appeal confirmed that Arnold -v- Brittan applied and therefore the natural meaning of “extension” and “completion date” must be adopted
Carillion -v- EMCOR

Relevance to the future

- The points raised in this case are not relevant where liquidated damages apply, only where there are claims for general damages
- The drafting of the contract will be followed so, where there are sectional completions and key dates, a different answer may be generated
- Some contracts (e.g., the NEC) are prescriptive in terms of how you assess time and therefore may provide a different answer
- Aligning delay claims throughout the supply chain is difficult but important
- Use of liquidated damages can simplify this area if the right level of damages can be agreed
Time is Money
Types of losses recoverable

- The essence of any delay claim is, in reality, the old adage that “time is money”

- That is true of both ends of the supply chain:
  - Employers will want to recover damage they suffer by not getting their asset when they expected; and
  - Contractors will want to recover the additional cost they incur for being on site longer

- The types of costs to be recovered, one way or the other, will include:

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<th>Extended prelims</th>
<th>Overhead contribution</th>
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<td>Additional management cost</td>
<td>Changes in market value</td>
<td>Alternative asset costs</td>
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Recovery of Time Related Money

- The starting point must be to find the period of critical delay.
- It is the time related costs incurred in that period that are recoverable, ie not the period at the end of the project where the EOT is added.
Liquidated -v- Unliquidated damages

Liquidated damages
- Need a clear completion date and amount
- Difficult to operate where there could be multiple parties partially causing or contributing to delays
- Difficult to use where the loss suffered at main contract level is disproportionate to the value of the subcontract works

Unliquidated damages
- Must show direct causative link between the delay and the damage
- Can be difficult to ascertain value
- Problems of establishing the correct period of delay apply equally
- Easier to manage multiple contributing parties
Review
Key Issues

- A time or period for completion will usually be stated, if it is not then a reasonable period in all the circumstances will be allowed.

- The period can change by application of contractual machinery or by the imposition of a new reasonable period if that machinery breaks down.

- The updated SCL Protocol provides guidance on the range of methods available to assess delay and is used extensively internationally, the update builds on that usage.

- Carillion -v- EMCOR confirms that, without specific wording, extensions of time alter the completion date rather than generating new periods of work.

- Tying time to money can be as difficult as establishing the time entitlement in the first place. Clear, well structured record keeping is needed.