Delay in Start Up insurance and Delay Analysis Techniques

In this article we look at the cover provided under a typical Delay in Start Up insurance and provide insight on some of the Delay Analysis Techniques available and appropriate for assessing delay in a Delay in Start Up context.

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Summary

The duration of contract performance has a direct effect on the profitability of construction projects for all stakeholders. For project owners, lost profits arise from being unable to commence commercial operations and receive income. In this article we look at the cover provided under a typical Delay in Start Up Insurance and provide insight on some of the Delay Analysis Techniques available and appropriate for assessing delay in a Delay in Start Up context.

Delay in Start Up (DSU) insurance

In order to protect against financial loss from delayed completion, project owners can purchase DSU insurance. This is a distinct and separate category of insurance that is triggered by indemnified physical damage to the construction works - insured under “Section 2” and “Section 1” in Construction All Risk policies respectively.

It is not uncommon for the physical damage component of a claim to be paltry by comparison to the DSU claim, but the extent and nature of the physical damage can be one of the most important questions in the claim. Insurers’ liability for DSU is driven by it. Additionally, the level of recovery is also highly dependent upon the terms of, and manner in which, the Section 1 and Section 2 covers interact.

In simple terms, the level of recovery under the DSU cover will be calculated by a combination of the number of days of delay caused by indemnified physical damage to the works multiplied by the financial value per day minus any applicable waiting period.

This simplistic explanation does not do justice to what can be a complex and often disputed area in construction claims. A detailed schedule analysis will be required to investigate the events that have actually caused the project to overrun. The most likely source of dispute is where there are both insured and uninsured causes of the delay. Also important is the Delay Analysis Technique (DAT). Traditional construction disputes employ a number of DATs that are relevant to ongoing and prospective schedule assessment but in an insurance and DSU context the value of some of the traditional

DATs may be limited. This can create a mismatch in expectations, between owners/contractors and insurers, when a delay occurs as to the “real delay” and the “real cost” to the business versus the value of any potential indemnity.

The DSU Insuring Clause

The starting point is the DSU wording in the policy. An example follows:

> “The policy shall indemnify the insured named as Principal in respect of loss of gross profit actually sustained due to the reduction in turnover and the increased cost of working as defined in this section, if at any time during the period of insurance the insured contract works suffer loss or damage covered under Section 1 of this policy that causes interference in the construction work resulting in a delay of commencement of and/or interference with the insured business, hereinafter referred to as “the delay”.”

Interpretation of the DSU Insuring Clause

The wording in the DSU insuring clause, sets out the nature and extent of the cover. It also indicates which DAT is appropriate when modelling the delay. In the example clause referred to above, it is worth highlighting a number of features of the cover:

1. In the example clause above, the cover is for “loss of gross profit actually sustained”. Therefore, the delay must cause a provable loss of production and gross profit. If “but for” the delay there would still have been loss of production and gross profit then no claim arises.

2. Cover is contingent on there being “loss or damage covered under Section 1”. This means a separate assessment of whether there is indemnified physical damage under Section 1 is needed.

3. The indemnified damage has to “[cause] interference in the construction work resulting in a delay of commencement of and/or interference with the insured business”. The indemnified physical damage must cause a delay in order for the DSU cover to engage and respond. To the extent the delay is caused by a defect or other uninsured events there will be no claim for DSU resulting from the delay. Again, this comprises a further part of the “but for” test - if “but for” the insured event there would have been interference with the business then a claim cannot be made.

4. As well as providing cover for lost gross profits, the example cover is extended to include the insured’s “increased cost of working”. This relates to the increase in costs for the owner of finishing works that are incomplete. It makes economic sense for the insurers to reimburse such costs so long as it reduces the claim for DSU.

5. As already mentioned, the most likely source of dispute between an insured and its insurer is likely to be where both insured and uninsured events cause delay. Whether the delay arose from a particular proximate cause and whether that cause is indemnifiable requires careful analysis. An insurer is normally not liable for delay caused by the occurrence of an insured event if it can be shown that the same delay would have happened as a consequence of an uninsured event.

Delay Analysis Techniques

The importance of deploying the correct methodologies when assessing DSU cannot be overstated, and is particularly vital ahead of engaging in a dispute resolution process. The appropriateness of the DAT will be a key point for cross-examination. An expert asked to give evidence will need to be able to justify why a particular technique was deployed.

There have been numerous reported cases where the approach or methodology of an expert has been criticised, with the result that little or no weight is then attached to his/her evidence. Any party embarking on a dispute resolution procedure must anticipate probing cross-examination of their instructed expert. This means ensuring that an instructed expert has the proper qualifications and expertise, and that they can justify their conclusions in a clear, logical way.

By way of example, take the quantity surveyor's negligence case of *Bank of Ireland v Watts Group Plc (2017)*. The banks' expert witness was heavily criticised, including for having used an unrealistic methodology. Similarly, in *Igloo Regeneration v Powell Williams Partnership (2013)*, one of the experts provided no explanation of how figures had been calculated and the court felt that his evidence lacked transparency to the extent that it was "wholly unconvincing".

In a DSU claim, the object of DATs is to calculate the project delay and to try to identify how much of it is attributable to insured and uninsured events. Often the key question to be addressed is - what would the project schedule have been "but for" the insured events?

Traditional construction disputes have employed a number of DATs depending on what data is available, but these can produce a significant variation in results and some are unlikely to be relevant in an insurance and especially DSU context. The most common DATs used are: "as-planned vs. as built", "impacted as-planned", "as-planned but for", "collapsed as-built" and "windows analysis".

We look in turn at the methodology behind each of the above DATs and their potential limitations/ application to DSU insurance:

- As-planned vs As-Built
  - Delaying events plotted on "as built" schedule; difference with "as planned" completion dates constitutes the delay
  - Limitations include: (i) net effect of all delays is calculated, ignoring impact of each delay; (ii) ignores dynamic nature of critical path (iii) can be manipulated to suit as no weight attributed to delay types; and (iii) **little scope to incorporate "but for" tests for causation per DSU insuring clause and therefore unlikely to be appropriate as a methodology**.
- Impacted As-Planned
  - Insured delaying events are added to the "as-planned" schedule chronologically. Delay is the difference between the schedules before and after impacting events.
  - Limitations include: (i) as-planned schedule not a reliable baseline model and may produce a one-sided analysis; and (ii) not always possible to schedule the entire project accurately at inception. **This analysis tends to be used to assess the impact of delays during the project and therefore unlikely to be appropriate for a DSU context that typically requires a retrospective analysis**.
- As-Planned But for
  - As-planned schedule is plotted with delays arising "but for" the insured event. Difference between the adjusted as-planned schedule and the actual completion is the delay.
  - Limitations include: (i) no account taken of changes in the critical path schedule during the course of the project; and (ii) assumes planned construction sequence remains valid during the project duration. **Despite taking a "but for the insured event" approach, the model is unlikely to be reliable as it does not factor in the dynamic nature of the project nor does it take a retrospective approach that is suitable for assessing "actual delay" or "loss of gross profit actually sustained" as required by the DSU insuring clause**.

- Collapsed As-Built
  - A form of “but for” method that uses the as-built schedule. Involves removing the delays from the as-built schedule so that the resulting schedule will give the completion date of the project “but for” the insured events.
  - **Highly credible because it is based on actual events on the project. Relevant given the nature of the example DSU insuring clause which requires actual lost profits to be calculated**.
  - Limitations include: (i) analyst who collapses the schedule inserts post fact logic - may not reflect the mind-set of the actual scheduler during the works; – so could be a mismatch of priorities from the perspective of one scheduler to another; (ii) there is the possibility of an unrealistic as-built “but for” schedule in circumstances where the schedule sequence has been massively impacted by both insured and uninsured delays; and (iv) identifying as-built critical path requires a degree of skill and judgement and therefore is potentially highly subjective which could give rise to a variation in expert opinions.
- “Window” Analysis
  - Updated schedules used at specific time periods of the project (“windows”) based on project milestones. Schedule within each window is updated and compared against the as-planned schedule which acts as a control. Critical path analysis is undertaken to produce a new completion date and compared against the as-planned completion date.
  - Advantage is that it takes into account the dynamic nature of the critical path but inherent flaws might arise in the manner in which the snapshots are structured that could be criticised by opposing experts and lawyers. **This DAT when combined with the “collapsed as-built” schedule can be an appropriate method with regards to DSU**.

Conclusion

We hope that this article provides some insight into DSU insurance and DAT considerations. All the DAT models have their limitations which means that ahead of any dispute resolution process, it is important to ensure your expert can justify their conclusions in a clear and logical way that is supported by the legal interpretation of the DSU insuring clause.