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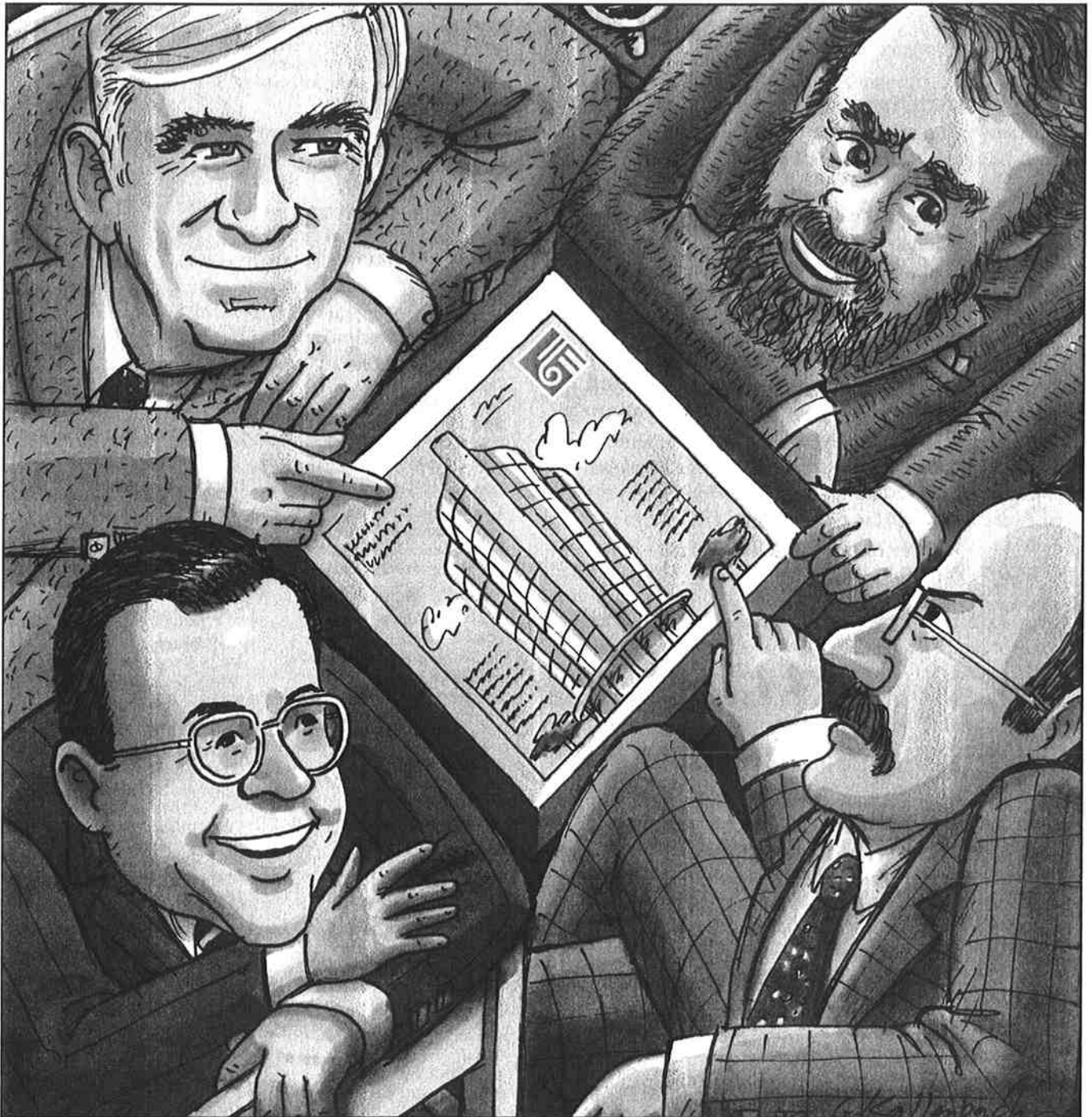


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Sharing Perspectives

View from Across the Pond: An American Perspective on the Society of Construction Law's Delay and Disruption Protocol

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On October 16, 2002, the Society of Construction Law (SCL) published its "Delay and Disruption Protocol" (the Protocol).¹ The SCL is an organization of approximately 1,800 members that "works to promote for the public benefit education, study, and research in the field of construction law and related subjects (including ADR, arbitration, and adjudication), both in the United Kingdom and overseas."² This

article will focus on the following aspects of the Protocol:

- the purpose, philosophy, and structure of the Protocol;
- the Protocol's approach to the preparation and maintenance of schedules and records;
- the Protocol's approach to float and concurrent delay; and
- the Protocol's approach to entitlement to time extensions and compensation for delays.

This article also will compare the Protocol's approaches to the current American approaches to float, concurrent delay, and entitlement to time extensions and compensation for delays.³

The Purpose, Philosophy, and Structure of the Protocol

The Purpose of the Protocol

The Protocol has two purposes. First, the Protocol provides

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useful guidance to construction professionals on issues that commonly arise when one party seeks a time extension or additional compensation for delays on a project or additional resources used to complete a project.⁴ Second, the Protocol provides construction professionals with guidance on and procedures for avoiding disputes relating to requests for time extensions or additional compensation, and for resolving such disputes.⁵ One of the SCL's stated goals in publishing the Protocol is that owners and contractors will eventually "adopt the Protocol's guidance as the best way to deal with delay and disruption issues."⁶ The Protocol readily recognizes that it is a document created as the result of certain compromises and "represents a set of balanced views on a number of issues, some of which do not have absolute answers."⁷ Further, the Protocol specifically states that it is not a contract document and is not meant "to take precedence over the express terms of a contract" or "be a statement of the law."⁸

The Philosophy of the Protocol

The overall philosophy of the Protocol is that requests for time extensions or additional compensation arising out of delays or disruption should be resolved during the course of the project and as close in time as possible to the event that gives rise to the request for additional time or compensation.⁹ In furtherance of this philosophy, the Protocol provides substantial guidance on the preparation and maintenance of schedules and other project documentation, as well as procedures for requesting and determining requests for additional time or compensation.¹⁰

The Structure of the Protocol

The Protocol sets forth twenty-one Core Principles and four Guidance Sections. This article will not discuss all of the Core Principles and Guidance Sections, but instead will focus on the Protocol's approach to the following:¹¹

- the preparation and maintenance of schedules and records;
- the concepts of float and concurrent delay; and
- the Protocol's philosophy and approach to evaluating and granting time extensions, both during the course of the project and after completion of the project.

The Protocol's Approach to the Preparation and Maintenance of Schedules and Records

The Protocol emphasizes the importance of properly preparing and maintaining schedules and other project records to avoid and efficiently resolve disputes relating to requests for time extensions or additional compensation. The

first Core Principle in the Protocol deals with the preparation and maintenance of schedules and records, and provides as follows:

To reduce the number of disputes relating to delay, the Contractor¹² should prepare and the Contract Administrator¹³ (CA) should accept a properly prepared programme¹⁴ showing the manner and sequence in which the Contractor plans to carry out the works.¹⁵ The programme should be updated to record actual progress and any extensions of time (EOTs)¹⁶ granted. If this is done, then the programme can be used as a tool for managing change, determining EOTs and periods of time for which compensation¹⁷ may be due. Contracting parties should also reach a clear agreement on the type of records that should be kept.¹⁸

Guidance Section 2, entitled "Guidelines on preparing and maintaining programmes and records," provides contracting parties with specific guidelines for preparing and maintaining schedules and records on a project so that the parties can accurately and efficiently deal with requests for time extensions as they arise throughout the course of a project. These guidelines are memorialized in the "Model specification clause" and "Model records clause" appended to the Protocol.¹⁹ Guidance Section 2 suggests, *inter alia*, the following:

- regardless of the size of the project, the contractor should submit and the CA should accept a properly prepared CPM schedule identifying all relevant activities (design, manufacturing, procurement, on-site construction) as early as possible in the project;²⁰
- along with its schedule, the contractor should submit a method statement²¹ describing how the contractor plans to perform the work required by the contract;²²
- the accepted programme²³ should be updated regularly;²⁴
- the accepted programme, as updated, should be the means by which actual against as-planned progress is monitored and can be used to determine whether the contractor is entitled to an EOT;²⁵
- due to the importance of preparing and maintaining an accurate project schedule, the CA may consider declaring the contractor in default for failing to meet its contractual obligations regarding the project schedule;²⁶
- the parties should reach clear agreement in their contract as to what kind of records are to be kept.²⁷

In Guidance Section 2, the Protocol notes that "[m]ost standard forms of contract contain inadequate requirements for generating an Accepted Programme and/or keeping it up-to-date."²⁸ This is also true of the major standard form contracts used in the United States for private projects, which do not contain any specific requirements regarding the type of schedule to be used for a project or how the schedule is to be maintained and updated.²⁹ By contrast, most construction contracts for major public projects contain critical path method (CPM) scheduling specifications.³⁰ Notably, the Protocol recommends that the accepted programme be saved

electronically at intervals of no longer than one month, and that these monthly updates be "archived as separate electronic files."³¹ This is a requirement that is not, although it should be, found in any of the major standard form contracts used in the United States for private projects.

The Protocol's Approach to Float

The Protocol defines "float" as "the amount of time by which an activity or group of activities may be shifted without causing delay to a contract completion date" or "the time available for an activity in addition to its planned duration."³² These definitions are essentially identical to the American definition of "float" as "the amount of time an activity can be delayed without extending the project's completion date."³³ Having established that the Protocol's definition of "float" is generally the same as the American definition of "float," we move to the similarities between the Protocol's approach to float and the American approach to float with respect to determining entitlement to a time extension.

In the Introduction to Guidance Section 1.3, entitled "Float as it relates to extensions of time," the Protocol recognizes that the question of who "owns" the float on a project can often lead to disputes between the parties to a construction contract.³⁴ The Protocol goes on to accurately and concisely state the positions usually advanced by contractors and employers³⁵ (i.e., owners or upper-tier contractors) as to why the contractor or the project should own the float.³⁶ Having explained that the issue of the ownership of float can be a cause of disputes, the Protocol recommends that the parties to a construction contract ensure that the issue of who owns the float is addressed in their contract, noting that the issue is rarely addressed in standard form contracts.³⁷ This advice applies equally to construction professionals in the United States as well, so that they can avoid disputes over who owns the float on a project. Like the standard form contracts mentioned in the Protocol, none of the most widely used standard form contracts in the United States for *private* projects contains a provision addressing which party owns the float on a project.³⁸ By contrast, most *public* contracts for substantial projects in the United States contain a provision specifying that the project owns the float.³⁹

The Protocol then recognizes that where a contract contains language stating that a contractor will only be entitled to a time extension where an employer delay⁴⁰ delays completion beyond the contract completion date, the effect is likely that the project owns the float.⁴¹ On the other hand, where the language in a contract suggests that the contractor is entitled to a time extension whenever the employer causes a delay, the likely effect of such language is that the contractor owns the float.⁴²

The Protocol then discusses the "unfairness" that can result when either the project or the contractor owns the float.⁴³ Where the project owns the float, the employer can cause delays and use up all of the float, resulting in the contractor paying liquidated damages as a result of a later-caused contractor delay, which would not have been critical had the employer not used up all of the float.⁴⁴ On the other hand,

where the contractor owns the float, the contractor may be entitled to a time extension, notwithstanding the fact that employer delays may not have actually delayed the project at all.⁴⁵ The Protocol then notes that because the issue of who owns the float has a significant effect on whether the contractor will be entitled to a time extension, the issue is likely to be the source of disputes between the parties if not addressed in their contract.⁴⁶

Next, the Protocol provides guidance for those situations where the parties have failed to specify in their contract who owns the float. Specifically, the Protocol states as follows:

Unless there is an express provision to the contrary in the contract, where there is remaining float in the programme at the time of an Employer Risk Event, an EOT should only be granted to the extent that the Employer Delay is predicted to reduce to below zero the total float⁴⁷ on the activity paths affected by the Employer Delay.⁴⁸

Thus, the Protocol takes the approach that where the parties have not specified in their contract who owns the float, the project owns the float, with “the effect that float is not time for the exclusive use or benefit of either the Employer or the Contractor.”⁴⁹ The Protocol notes that its approach is “consistent with current judicial thinking . . . that an Employer Delay has to be critical . . . before an EOT will be due.” In concluding Guidance Section 1.3 discussing float, the Protocol recognizes that “[a]ccurate identification of float is only possible with the benefit of a proper programme, properly updated.”⁵⁰

Construction professionals, commentators, and courts in the United States take an approach to float that is identical to the approach the SCL advocates in the Protocol. As an initial matter, American construction professionals would agree that the parties to a construction contract should address the issue of who owns the float on a project at the time of contracting.⁵¹ Further—after initially taking the approach that the contractor, rather than the project, owned the float—courts and commentators in the United States have adopted the approach advocated in the Protocol that, in the absence of a contract provision stating otherwise, the project owns the float.⁵² In fact, this principle has become so well established in the United States that “[a]lmost all significant public procurements include contract clauses providing that the float is not for the exclusive benefit of any one party to the project.”⁵³ Finally, commentators in the United States also have recognized the importance of regularly updating the schedule to accurately determine float.⁵⁴

The Protocol’s Approach to Concurrent Delay

The Protocol defines “true concurrent delay” as “the occurrence of two or more delay events at the same time, one an employer risk event, the other a Contractor Risk Event,⁵⁵ and the effects of which are felt at the same time.”⁵⁶ This definition of concurrent delay is essentially identical to the American definition of concurrent delay as “two or more independent causes of delay during the same time period.”⁵⁷

The Protocol notes that “[t]he term concurrent delay is often used to describe the situation where two or more delay events arise at different times, but the effects of them are felt . . . at the same time,” and states that this situation “is more correctly termed the ‘concurrent effect’ of sequential delay

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events.”⁵⁸ It is not entirely clear what the phrase “the ‘concurrent effect’ of sequential delay events” used in the Protocol means. We assume, however, that the Protocol uses this phrase to describe the situation where two or more delay events do not begin or end at the same time, but for some period of time both or all of the delay events are causing a critical delay. American commentators also recognize this situation as a concurrent delay.⁵⁹

Having established that the Protocol’s definition of “concurrent delay” is the same as the American definition of that term, we move to the similarities and differences between the Protocol’s approach to concurrent delay and the American approach to that issue. Core Principles 9 and 10 of the Protocol address concurrent delay. Core Principle 9, entitled “Concurrent Delay—its effect on entitlement to extension of time,” provides as follows:

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.⁶⁰

Core Principle 10, entitled “Concurrent Delay—its effect on entitlement to compensation for prolongation,” provides as follows:

If the Contractor incurs additional costs that are caused both by Employer Delay and concurrent Contractor Delay, then the Contractor should only recover compensation to the extent it is able to separately identify the additional costs caused by the Employer Delay from those caused by the Contractor Delay. If it would have incurred the additional costs in any event as a result of Contractor Delays, the Contractor will not be entitled to recover those additional costs.⁶¹

Thus, the Protocol takes the approach that where a contractor delay is concurrent with an employer delay, the contractor is entitled to an extension of time, but not any compensation (often referred to in the United States as “time—no money”), unless the contractor can demonstrate that any additional costs claimed were caused specifically by the employer delay rather than the contractor delay. This approach is identical to the American approach to concurrent delay; namely, that

"[w]here both parties contribute to the delay neither can recover damage, unless there is in the proof a clear apportionment of the delay and expense attributable to each party."⁶²

Consistent with the Protocol's fundamental principle that requests for extensions of time should be addressed as close in time to the event giving rise to the delay, the Protocol advocates that the parties deal with concurrent delays "at the time delay events occur," rather than "focus[ing] on an 'after the event' analysis of cause and effect of . . . different delays, and/or which of a number of delays is the dominant one."⁶³ At the same time, however, the Protocol recognizes that the issue of a contractor's entitlement to *compensation* for a concurrent delay can usually only be determined retrospectively, that is, after the effect of the delay events has occurred.⁶⁴ The Protocol readily acknowledges the contradiction but fails to explain why the issue of entitlement to a time extension in the context of a concurrent delay can be determined prospectively "at the time the delay events occur," while the issue of compensation cannot usually be determined until after the effect of the delay has already occurred. We submit that in the context of concurrent delay, it is extremely difficult, if not impossible, to determine entitlement to a time extension prospectively. Further, in many instances, the parties to a construction contract will unlikely be able to resolve issues of concurrency prospectively, as it would require the contractor to admit that it is delaying the project at the time it is seeking a time extension.

The Protocol's Approach to Entitlement to Time Extensions and Compensation for Delays

As stated above, one of the fundamental principles of the Protocol is that requests for time extensions should be made and resolved at the time of the delay event giving rise to the request for a time extension, or as close as possible to that time. Accordingly, Core Principle 3 provides as follows:

Applications for EOT should be made and dealt with as close in time as possible to the delay event that gives rise to the application. . . . The parties should attempt so far as possible to deal with the impact of Employer Risk Events as the work proceeds, both in terms of EOT and compensation.⁶⁵

Apparently, in an effort to encourage this behavior, the Protocol has developed a unique approach to deny an owner any benefits for waiting until the end of a project to determine the contractor's entitlement to additional time. To that end, the Protocol recommends that in deciding entitlement to a time extension retrospectively, the judge, arbitrator, or other adjudicator (referred to collectively hereinafter as the "adjudicator") of a dispute over entitlement to a time extension "should so far as is practicable put him/herself in the position of the CA at the time the Employer Risk Event occurred"⁶⁶ . . . [and] then determine what (if any) EOT entitlement could or should have been recognized by the CA at the time."⁶⁷

The Protocol's approach demonstrates a willingness to forgo the accuracy of determining entitlement to time extensions based on whether an event *actually* delayed the project in an effort to force employers to resolve requests—by

depriving employers of the benefit of using as-built data to argue that an employer delay did not actually delay the project. Specifically, to that end, Guidance Section 4.19 states:

The Protocol considers that the process of dealing with disputed EOT issues after the completion of the project should not replicate and validate that "wait and see" approach, and that is why it considers that, in deciding EOTs, adjudicators . . . should so far as is practicable put themselves in the position of the CA at the time the Employer Risk Event occurred.⁶⁸

Core Principle 4 and Guidance Section 3.2.6 echo the principle set forth in Core Principle 12 and Guidance Section 4.19, stating that extensions of time "should be granted to the extent that the Employer Risk Event is *reasonably predicted* to prevent the works being completed by the then prevailing contract completion date."⁶⁹

The Protocol's Approach to Dealing with Time Extensions During the Course of the Project

Guidance Section 3 of the Protocol, entitled "Guidelines for dealing with extensions of time during the course of the project," sets forth the Protocol's recommended procedure for "efficiently and accurately" resolving requests for time extensions during the course of a project.⁷⁰ Guidance Section 3 begins by noting that in order to utilize its recommended procedures, the parties will have to have followed the Protocol's recommendations on preparing and maintaining schedules and other project records, which are set forth in Guidance Section 2 and discussed above.⁷¹

Guidance Section 3 then describes its recommended procedure for addressing requests for time extensions during the course of a project. The procedure described by Guidance Section 3 is essentially the procedure for performing a prospective time impact analysis⁷² to determine a contractor's entitlement to a time extension.⁷³ By a "prospective" time impact analysis, we mean a time impact analysis performed as of the initiation of a delay or a change in the work. By a "retrospective" time impact analysis, we mean a time impact analysis performed after the delay has ended or the changed work has been performed. The Protocol's "prospective" time impact analysis procedure requires the contractor to submit a schedule "sub-network"⁷⁴ (usually referred to as a "fragnet" in the United States) to be inserted into the schedule update closest in time to the alleged employer risk event, showing the "actual or anticipated effect of the Employer Risk Event."⁷⁵ The schedule sub-network should be "accompanied by such documents and records as are necessary to demonstrate the entitlement to an EOT."⁷⁶ The Protocol provides general guidance as to how the schedule is to be updated prior to insertion of the subnetwork and how the subnetwork is to be inserted into the updated schedule.⁷⁷ The Protocol also provides general guidance as to the preparation of the subnetwork to be inserted into the most recently updated project schedule, and requires that the contractor and the employer agree on the subnetwork to be inserted into the schedule.⁷⁸

Although the Protocol appears to advocate performing

prospective time impact analyses *only* to determine entitlement to time extensions during the course of a project, there is some language in Guidance Section 3 that makes it difficult to determine whether, under the Protocol's guidance, it is ever appropriate to perform a *retrospective* time impact analysis when a contractor is seeking or an employer is determining entitlement to a time extension during the course of a project. For example, section 3.2.6 provides that "the Updated Programme should be the primary tool used to guide the CA in determining the amount of the EOT" and that "[t]he EOT should be granted to the extent that the Employer Risk Event is *predicted* to prevent the works being completed by the then prevailing contract completion date."⁷⁹ Notwithstanding this statement, section 3.2.2 provides that the subnetwork to be inserted into the updated programme show "the *actual* or anticipated effect of the Employer Risk Event."⁸⁰ Further, section 3.2.11, describing the methodology set forth in Guidance Section 3 as "time impact analysis," states that "[t]he Protocol recommends that this methodology be used wherever the circumstances permit, *both for prospective and (where the necessary information is available) retrospective delay analysis.*"⁸¹ The statements in sections 3.2.2 and 3.2.11—suggesting or specifically stating that *retrospective* delay analysis may be appropriate under certain circumstances for determining entitlement to a time extension during the course of the project—are difficult to reconcile with the use of the term "predicted" in section 3.2.6 and the procedure set forth in Guidance Section 3, which generally looks only at the impact of the employer risk event to the contractor's projected *planned* performance of the Work. In sum, it is not entirely clear from Guidance Section 3 whether, under the Protocol's guidance, it is ever appropriate to seek or determine entitlement to a time extension during the course of a project by performing a *retrospective* time impact analysis.

Significantly, the Protocol does not explain why a *retrospective* time impact analysis could not be performed during the course of a project when a contractor is seeking or an employer is determining entitlement to a time extension. In fact, it is certainly possible to perform a retrospective time impact analysis during the course of a project to determine entitlement to a time extension.⁸² Perhaps the reason the Protocol does not appear to allow for the performance of a retrospective time impact analysis during the course of a project is that allowing for such an analysis during the course of a project would be inconsistent with the Protocol's Core Principle, mentioned above and discussed in greater detail below, that adjudicators should, to the extent practicable, determine entitlement to a time extension by putting themselves in the shoes of the CA at the time the delay occurred.

The Protocol's Approach to Dealing with Time Extensions After Completion of the Project

Guidance Section 4, entitled "Guidelines on dealing with disputed extension of time issues after completion of the project—retrospective delay analysis," provides the Protocol's guidance for dealing with claims for time extensions

after completion of the project.⁸³ Guidance Section 4 begins by recognizing the fundamental tenet that an accurate and properly updated project schedule and proper record keeping are essential to performing an accurate retrospective delay analysis.⁸⁴ Numerous American courts and commentators also have recognized this fundamental principle.⁸⁵ The Protocol then goes on to recognize that, in situations where the parties have not followed the Protocol's recommendations regarding preparing and maintaining accurate schedules and records, "the method used to analyse and assess delay and prolongation after a project has been completed

The Protocol then discusses the "unfairness" that can result when either the project or the contractor owns the float.

will be largely dictated by" the following factors: "the relevant conditions of contract; the nature of the causative events; the value of the dispute; the time available; the records available; the programme information available; [and] the programmer's skill level and familiarity with the project."⁸⁶ Although this statement may be true, as discussed in greater detail below, it is unlikely that American adjudicators would accept at least two of the methods for retrospective delay analysis listed in Guidance Section 4 (the impacted as-planned and collapsed as-built methods), unless, perhaps, the parties' contract specifically required the use of one of those methods for performing a retrospective delay analysis.

The Protocol identifies the following four possible methods for performing a retrospective delay analysis:

- the as-planned versus as-built method;
- the impacted as-planned method;
- the collapsed as-built method; and
- the time impact analysis method.⁸⁷

As described in greater detail below, what the Protocol identifies as the retrospective "time impact analysis" method (the Protocol's Retrospective TIA Method) and states "is the best technique for determining the amount of EOT that a Contractor should have been granted at the time an Employer Risk Event occurred,"⁸⁸ is, as described in greater detail below, fundamentally different than the retrospective delay analysis methods generally referred to in the United States as the "contemporaneous," "windows," "chronological and cumulative," or "time impact analysis" methods. Unfortunately, American courts and commentators have been less than precise in describing the material differences, if any, between these various methods of retrospective delay analysis.⁸⁹ For purposes of this article we will define what we will refer to as the "American Retrospective TIA Method" as follows:

a real-time, after-the-fact schedule impact analysis procedure that utilizes Critical Path Method (CPM) net-

working techniques, in conjunction with an analysis of the as-built facts related to a change or delay in the work, to determine the actual number of days of impact to the as-built critical path associated with the change or delay, taking into account the changes' or delays' time relationship to past and any other current delays.⁹⁰

American courts and commentators generally agree that what has been referred to as the "contemporaneous," "windows," "chronological and cumulative," or "time impact analysis" method, and what we are referring to as the American Retrospective TIA Method in this article, is the most accurate method of performing a retrospective delay analysis.⁹¹ The American Retrospective TIA Method, although performed *after the project has been completed* or the *delay has ended*, is *not* a "hindsight" approach to analysis, but is rather a "forward-looking," contemporaneous type of analysis, because the analyst proceeds from the beginning of the project moving forward in time (on a chronological and cumulative basis) through the project day by day to determine the as-built critical path and the number of days of impact, if any, that the alleged delaying events may have had to the as-built critical path.⁹²

We submit that in the context of concurrent delay, it is extremely difficult, if not impossible, to determine entitlement to a time extension prospectively.

Although the Protocol considers the Protocol's Retrospective TIA Method to be a retrospective "time impact analysis" method, as discussed below, the Protocol's Retrospective TIA Method differs in one critical way from the American Retrospective TIA Method—namely, the Protocol's Retrospective TIA Method does not look at as-built data after the alleged delaying event occurred, but rather looks at whether the contractor "should have been granted" a time extension at the time the event occurred (i.e., at the initiation of the delaying event). By contrast, the American Retrospective TIA Method looks at actual as-built performance information and records to determine whether the alleged delaying event actually delayed the project, that is, whether the alleged delaying event caused a delay to the as-built critical path.

The Retrospective Delay Analysis Methods

As stated above, Guidance Section 4 identifies four possible methods for performing a retrospective delay analysis: (1) the as-planned versus as-built method, (2) the impacted as-planned method, (3) the collapsed as-built method, and (4) the "time impact analysis" method.⁹³ Set forth below is a brief explanation of each method, followed by the Protocol's

approach to the use of each method and the American perspective on these methods of delay analysis.

The impacted as-planned method of retrospective delay analysis involves taking the contractor's as-planned baseline schedule and inserting owner or upper-tier contractor delays to demonstrate how the contractor's baseline schedule was impacted by those delays.⁹⁴ The Protocol suggests that use of the impacted as-planned method may be an appropriate method of performing a retrospective delay analysis under certain circumstances, such as where the parties' contract provides that the contractor is entitled to relief for the "likely effect of an Employer Risk Event."⁹⁵ The Protocol also suggests that use of the impacted as-planned method may be appropriate "[i]f there is neither a planned network programme nor as-built records" or "[i]f there is a good as-planned network programme but it has not been updated with progress and there are no as-built records."⁹⁶ The Protocol does, however, recognize the flaws inherent in the impacted as-planned method of analysis, stating that "[t]he usefulness of the . . . technique is restricted due to the theoretical nature of the projected delays that are determined using this technique and uncertainty as to the feasibility of the Contractor's as-planned programme."⁹⁷

American courts and commentators have almost unanimously rejected the impacted as-planned method of performing a retrospective delay analysis.⁹⁸ As noted by one leading American commentator, "[t]he obvious flaw in this method is when it completely ignores the contractor's actual performance and all time impacts other than those selected."⁹⁹ The impacted as-planned method is a theoretical approach that assumes that the entire project was constructed as originally planned—often a highly dubious assumption. In sum, "[b]ecause the 'impacted as-planned' method is a theoretical approach that overlooks actual job history, it is recognized as a legally unacceptable method of proof."¹⁰⁰

In light of the almost unanimous rejection of the impacted as-planned method by American courts and commentators, it is unlikely that, absent extraordinary circumstances, any American adjudicator would accept the impacted as-planned method as an appropriate method for performing a delay analysis. Further, it is not clear from Guidance Section 4 of the Protocol why an impacted as-planned analysis would be appropriate in situations where (1) there is neither an as-planned (i.e., baseline) schedule nor as-built records or (2) the as-planned schedule has not been updated and there are no as-built records.¹⁰¹ In such situations, American courts and commentators might likely conclude that the contractor simply does not have sufficient documentation to prove entitlement to a time extension, no matter what method of delay analysis is used.¹⁰²

Further, the Protocol's suggestion that the impacted as-planned method might be appropriate where the parties' contract provides that the contractor is entitled to relief for the "likely effect of an Employer Risk Event" is probably inapplicable to the vast majority of construction contracts and disputes in the United States. As noted above, American courts and commentators agree that contractors must prove a delay to the critical path before the contractor will be enti-

tled to a time extension or additional compensation.¹⁰³ Moreover, American form contracts do not contain provisions allowing the contractor to recover for the “likely effect” of an employer-caused delay. In sum, the concept of recovery for the “likely effect of an Employer Risk Event” is foreign to American courts and commentators.

Similarly, the Protocol’s concept of proportionality (i.e., that the assessment of the impact of delays depends upon the level of detail in the contractor’s schedule and should take into account the size and complexity of the project) is foreign to American courts and commentators.¹⁰⁴ Although an employer could always agree to accept something less than proof of a delay to the critical path in granting a contractor a time extension or additional compensation, it is unlikely that an adjudicator in the United States would accept anything less than proof of a delay to the critical path before granting a contractor a time extension or additional compensation.

The collapsed as-built method of retrospective delay analysis “begins with an as-built schedule, either contemporaneously updated during construction or reconstructed from contemporaneous records after the fact,” and then removes from the as-built schedule the time impacts to critical path activities attributable to the other party.¹⁰⁵ This “result[s] in a ‘collapsed as-built’ schedule that identifies when the project would have been completed ‘but for’ the delays of the other party.”¹⁰⁶ The Protocol recognizes the collapsed as-built method as an appropriate method for performing a retrospective delay analysis.¹⁰⁷ Specifically, the Protocol suggests that use of the collapsed as-built method may be appropriate “[w]here there are good as-built records but the as-planned programme was not produced in adequate detail or not produced at all.”¹⁰⁸

American courts and commentators have not unanimously rejected the collapsed as-built method of performing retrospective delay analysis, but they have highlighted its significant flaws.¹⁰⁹ Although the collapsed as-built method of analysis “offer[s] the realism of being based on actual durations and sequences of all construction work activities, and of focusing only on time impact events clearly outside the claimant’s ‘control,’” it has several significant drawbacks, including the following:

- it does not “address the need to address the issue of time extensions on a real-time basis as required to address events on the project”;¹¹⁰
- it “is not forward looking, chronological, and cumulative”;¹¹¹
- “to collapse the schedule, the analyst typically is forced to insert after-the-fact logic ties that may not reflect the thinking of the contractor during actual performance”;¹¹²
- “adjustments for anomalies in the adjusted schedule require experienced judgment that is beyond the capability of many analysts and may be subject to dispute by experienced experts”;¹¹³
- the method is “susceptible to manipulation through oversight of concurrent causes of delay”;¹¹⁴ and
- it “fails to consider the as-planned schedule upon which

the contractor based its estimate for the project.”¹¹⁵

Notwithstanding the significant drawbacks to the collapsed as-built method, it still may be viewed as a valid method of retrospective delay analysis.¹¹⁶ Nevertheless, a party planning to use the collapsed as-built method of retrospective delay analysis certainly takes the risk that its method of analysis will not be accepted and subjects its analysis to all of the significant criticisms listed above.

The as-planned versus as-built method of retrospective delay analysis involves comparing the contractor’s as-planned schedule against a properly reconstructed as-built schedule.¹¹⁷ “The actual comparison process involves the effort of determining the actual ‘as-built’ critical path from the reconstructed ‘as-built’ schedule and the extent to which the contractor’s ‘as-planned’ performance was impacted by identifiable time impacting events.”¹¹⁸ The as-planned versus as-built method of delay analysis “is typically used when detailed project schedule updates do not exist, or they exist but are flawed to the extent that they cannot be relied upon to support a delay analysis.”¹¹⁹

The Protocol describes the as-planned versus as-built method as a useful “starting point in relation to other, more complex methods of analysis.”¹²⁰ American commentators would likely dispute this characterization of the as-planned versus as-built method, because they generally recognize this method as a more accurate method of delay analysis than the impacted as-planned or collapsed as-built methods.¹²¹ With respect to use of the as-planned versus as-built method, the Protocol states that the method may be appropriate “[w]here an as-planned programme and an as-built programme exist or the as-planned programme was regularly updated but little information is available in relation to the network logic followed.”¹²² Although it is not entirely clear what the Protocol means by there being “little information . . . available in relation to the network logic followed” notwithstanding regular schedule updates, we assume that this means that the schedule was not updated properly to allow the parties to use the more accurate time impact analysis method. Nevertheless, the Protocol’s statement that the as-planned versus as-built method may be appropriate where there is as-planned and as-built information, but the schedule has not been properly updated, is consistent with the American approach regarding when it is appropriate or necessary to use the as-planned versus as-built method.

American commentators agree that the as-planned versus as-built method of retrospective delay analysis is more accurate than either the impacted as-planned or the collapsed as-built methods. The accuracy of the as-planned versus as-built method, however, depends upon the accuracy of the as-built information, as well as the accuracy of any contemporaneous schedule updates.

The final method of retrospective delay analysis addressed by the Protocol is what the Protocol refers to as the “time impact analysis” method.¹²³ The Protocol states that this method is “the best technique for determining the amount of EOT that a Contractor *should have been granted* at the time the Employer Risk Event occurred.”¹²⁴ In sum, the Protocol’s

Retrospective TIA Method involves looking at the *anticipated effect* of a delaying event on the contractor's plan for completing the work based upon the actual progress on the project up to the initiation of the delaying event.¹²⁵ Specifically, it is the Protocol's position that, even when performing a *retrospective* delay analysis, entitlement to a time extension is to be determined *prospectively* based upon the status of the project at the time the delay occurred.¹²⁶ For example, the Protocol states that "[t]ime impact analysis is based on the effect of Delay Events on the Contractor's *intentions* for the *future* conduct of the work in the light of progress actually achieved at the time of the Delay Event."¹²⁷ Further, the Protocol also states that the time impact analysis method "is . . . the best technique for determining the amount of EOT that a Contractor *should have been granted at the time an Employer Risk Event occurred*."¹²⁸ Then, demonstrating that according to the Protocol's guidance entitlement a time extension should always be determined by looking prospectively, rather than at what actually occurred on the project after the initiation of the event causing the delay, the Protocol states the following:

In this situation [i.e., looking at entitlement to a time extension prospectively], the amount of EOT may not precisely reflect the actual delay suffered by the Contractor. That does not mean that time impact analysis generates hypothetical results—it generates results showing entitlement.¹²⁹

Finally, further demonstrating that, according to the Protocol's guidance, entitlement to a time extension should only be determined by looking prospectively, section 4.19 provides that "in deciding entitlement to EOT, the adjudicator . . . should so far as is practicable put him/herself in the position of the CA *at the time the Employer Risk Event occurred*," and "should then determine what (if any) EOT entitlement *could or should have been recognised by the CA at the time*."¹³⁰

As stated above, the Protocol's Retrospective TIA Method is fundamentally different from the American Retrospective TIA Method, because the American Retrospective TIA Method, although a forward-looking method of analysis, takes into account the as-built facts and calculates delays based on the actual number of days of impact to the as-built critical path.¹³¹ By contrast, the Protocol's Retrospective TIA Method does not take into account what actually happened on the project after the initiation of the delay event. As discussed below, the Protocol's guidance that entitlement to a time extension should be determined, even when performing a retrospective delay analysis, by looking prospectively from when the event causing the delay "occurred" is likely the most interesting and controversial principle in the Protocol.

The Protocol's Position That the Entitlement to Time Extensions Should Always Be Determined Prospectively, Even After the Alleged Delaying Event Has Occurred or Completion of the Project

Although American commentators have recognized the desirability of resolving requests for time extensions as they

occur during a Project, current American case law will likely make it difficult for an American adjudicator to accept the Protocol's guidance regarding putting himself or herself, "so far as is practicable," in the position of the person deciding entitlement to a time extension at the time the delay occurred. As described above, American courts require that a contractor seeking to recover on a delay claim prove with "reasonable certainty" that it was delayed, which in almost all circumstances requires the contractor to prove that the alleged delay actually delayed the completion of the project.¹³² Thus, in situations where the project has been completed—and the adjudicator and the parties have the benefit of the facts regarding what actually happened on a project after the occurrence of a delaying event (i.e., whether it actually delayed the project)—it may be impossible for a court or arbitrator to place itself in the position of the decision maker at the time of the initiation of the delaying event and ignore what actually happened on the project. Doing so may result in awarding the contractor with a time extension or additional compensation when the alleged delaying event did not actually cause a delay to the critical path, that is, delay completion of the Project.¹³³

In the Matter of an Arbitration Between Leighton Contractors (Asia) Ltd. and Stelux Holdings Ltd. is a case that recognized, albeit briefly, the potential problem with the Protocol's Retrospective TIA Method.¹³⁴ In *Leighton Contractors*, a Hong Kong court denied the contractor's application for leave to appeal from an arbitrator's award. One of the grounds upon which the contractor sought leave to appeal from the arbitrator's award was that the arbitrator rejected the contractor's expert's use of the Protocol's recommended approach for performing a time impact analysis. Although the court did not reject the Protocol's approach, it did affirm the arbitrator's rejection of the contractor's expert's analysis, which "focused on the prospect of delay resulting from an event at a given time, regardless of whether the event had actually caused delay."

Perhaps recognizing the potential problem that courts and arbitrators may have with the Protocol's Retrospective TIA Method (i.e., not considering whether the alleged delaying event actually delayed the Project), the Protocol recommends that the parties to a construction contract agree in advance on the method to be employed for retrospective delay analyses.¹³⁵ Our research has not uncovered any case law addressing the issue of whether an adjudicator would enforce such an agreement, notwithstanding the fact that an agreement to use the Protocol's Retrospective TIA Method could result in the award of a time extension for an event that did not actually delay the project. Although courts generally enforce the terms of an agreement between two sophisticated parties, there are exceptions to this general rule, such as liquidated damages, "pay-if-paid," and "no damages for delay" provisions, which may not be enforced under certain circumstances. From a practical standpoint, however, any debate as to enforceability may be superfluous, because it may be too much to expect a court or adjudicator to ignore the reality of whether an alleged delaying event actually delayed the proj-

ect in determining a contractor's entitlement to a time extension. Most likely, the adjudicator's decision will closely approximate, if not mirror, what actually happened after the occurrence of the delaying event. Any other result would raise the issue of a windfall recovery for the contractor.

The Protocol's apparent approach of sacrificing a degree of accuracy in determining entitlement to time extensions by recommending that an adjudicator avoid looking at what actually happened after the occurrence of a delaying event in the interest of encouraging employers to deal with requests for time extensions during the course of the project can be analogized to the agreement by parties to a construction contract to use a dispute resolution board to try to resolve disputes as they arise throughout the course of a project. A dispute resolution board is not designed to reach the most accurate and thorough resolution of a dispute,¹³⁶ but rather is designed to provide a prompt recommendation for resolving the dispute so that the project can continue to move forward. The Protocol's approach to resolving requests for time extensions can be seen as a similar compromise of accuracy and thoroughness for the arguably greater good of keeping the project moving forward.

Conclusion

In general, the Core Principles of the Protocol and the guidance provided therein are consistent with current American thinking on dealing with delay and disruption claims. There is no disagreement from this side of the pond that proper preparation and maintenance of schedules and other project records are extremely important for dealing with requests for time extensions as they arise during the course or after completion of a project, and, more importantly, for successfully completing a project. Further, the Protocol's approach to the issues of float and concurrent delay mirrors current American thinking on both of these issues. Additionally, it is fair to say that courts and commentators on both sides of the pond agree that it is desirable to resolve issues of entitlement to time extensions or additional compensation for delays or disruption during the course of the project. Doing so allows the project schedule to accurately reflect the status of the project, which allows the contractor to effectively manage the project.

Notwithstanding these substantial similarities between the Protocol's Core Principles and guidance and the American approach to dealing with requests for additional time or compensation resulting from delay or disruption, American construction professionals, courts, and commentators will likely have a hard time adopting the Protocol's view that in deciding entitlement to a time extension the adjudicator should, to the extent possible, put himself or herself in the position of the CA at the time the alleged delaying event "occurred" and ignore whether the alleged delaying event actually delayed the project. Nevertheless, there may be other mechanisms that the SCL could consider to achieve the goal of encouraging owners to decide or grant requests for time extensions prior to or at the same time as the alleged delaying event. For example, the parties could insert the following provisions

into their contract:

- if the employer fails to timely consider and respond to a contractor's properly prepared time impact analysis, then there will be a rebuttable presumption that the contractor is entitled to the time extension in any after-the-fact adjudication; or
- if the employer fails to timely consider and respond to a contractor's properly prepared time impact analysis, the employer must pay for the cost to the contractor of preparing an after-the-fact analysis in any after-the-fact adjudication.

Two of the most popular American standard form contracts include provisions that arguably discourage owners from waiting until the end of a project to determine whether a

American courts and commentators have almost unanimously rejected the impacted as-planned method of performing a retrospective delay analysis.

contractor is entitled to a time extension or additional compensation as a result of an owner-directed change. These provisions require the owner to pay half of the contractor's estimated cost for the proposed change, with the parties reserving their rights as to whether and to what extent the contractor is entitled to a time extension or additional compensation.¹³⁷ Although the provisions in these contracts deal only with the issue of the increased cost, if any, of the owner-directed change, it is possible that owners and contractors could modify these provisions to apply to a claimed increase in the contract time as well. Further, the same two major American standard form contracts contain provisions requiring the owner and contractor to negotiate in good faith and as expeditiously as possible contractor requests for time extensions or increased costs, if any, resulting from owner-directed changes.¹³⁸

In sum, the Protocol certainly advocates a unique and innovative approach for avoiding the much-too-common problem of owners and upper-tier contractors waiting until the end of a project, or at least the end of a delay, before deciding whether the contractor is entitled to a time extension or additional compensation as a result of the delay. In our opinion, however, American adjudicators would likely have a difficult time adopting the Protocol's approach, because of the emphasis American courts and commentators put on the requirement that contractors prove that a delaying event actually delayed the project before they will be entitled to a time extension or compensation.

(Continued on page 43)

- All will be to your greatest personal and professional benefit.

Participation in the Forum has stood me in good stead. I have developed meaningful friendships and professional

relationships that will endure throughout my career, and I hope the same for each of you.

Or, as Jerry Maguire said to Cuba Gooding Jr., "I'm glad we had this talk."

See you in San Francisco and Puerto Rico! ☪

VIEW FROM ACROSS THE POND

(Continued from page 13)

Endnotes

1. See <http://eotprotocol.com/>. The Protocol was produced by a drafting subcommittee formed by a group of eleven members of the SCL. See Protocol at 4, 51.

2. See SCL website, www.scl.org.uk/. Contact information for the SCL is as follows: 67 Newbury Street, Wantage, Oxon., OX12 8DJ, tel: 01235 770606, fax: 01235 770580, email: admin@scl.org.uk.

3. When we use the phrase "American approach," we refer to the approach reflected in the leading American treatises and case law.

4. Protocol, *supra* note 1, at 3.

5. *Id.* at 3.

6. *Id.*

7. *Id.* at 3-4.

8. *Id.* at 3.

9. See, e.g., *id.*, Core Principle 3.

10. See *id.*, Guidance Sections 2 and 3.

11. In a May 2002 article entitled "Blinding with Science? Extension of Time and Compensation 'Protocol': A Critique," IND Wallace QC offered a critique of a draft of the Protocol. See IND Wallace QC, *Blinding with Science? Extension of Time and Compensation "Protocol": A Critique*, 7:2 CONSTR. AND ENG'G L. 11-15 (May 2002). Some of Mr. Wallace's comments are quite critical of the Protocol's approach as being too favorable to contractors. Mr. Wallace also criticizes the draft of the Protocol as too likely to require the parties to use claims consultants. We have not responded to Mr. Wallace's article in detail, because we have not reviewed the draft of the Protocol that Mr. Wallace was critiquing, and many of his comments and criticisms are related to issues beyond the scope of this article (i.e., a contractor's right to recover for delays when the contractor planned to finish early). We do not, however, share Mr. Wallace's view that, at least with respect to the final version, the Protocol is too favorable to contractors. Further, as practitioners from the United States where the use of claims consultants is more common, we do not have the same reservations that Mr. Wallace does.

12. The Protocol underlines terms that appear in Appendix A (Definitions and Glossary) the first time that they appear in the text of the Protocol. The definitions of the terms defined in the Protocol will be provided in the endnotes to this article. Accordingly, the Protocol defines the contractor as "[t]he party responsible for carrying out the works," and notes that because "[t]he Protocol is applicable to sub-contracts as well as main contracts . . . when it is being applied to a sub-contract, it is the sub-contractor that is being referred to as the 'Contractor' in the Protocol." Protocol, *supra* note 1, Appendix A.

13. The Protocol defines the contract administrator (CA) as The person responsible for administration of the contract, including certifying what extensions of time are due or what additional costs or loss and expense is to be compensated. Depending upon the form of contract the person may be referred to by such terms as Employer's Agent, Employer's Representative, Contract Administrator, Project Manager or Supervising Officer or be specified as a particular professional, such as the Architect or the Engineer. The contract administrator may be one of the Employer's employees.

Protocol, *supra* note 1, Appendix A. English law may place a greater duty upon a contract administrator to act independently as between an owner and a contractor than American law. See, e.g., *Schelderbouw BV v. St. James Holmes*, [2006] EWHC 89 (T.C.C.); *Costain Ltd. v. Bechtel Ltd.*, [2005] EWHC 1018 (TCC).

14. The Protocol states that the programme "illustrates the major sequencing and phasing requirements of the project" and is "otherwise known as the schedule." Protocol, *supra* note 1, Appendix A.

15. The Protocol defines the works as "[w]hat the Contractor is obliged to construct." *Id.*

16. The Protocol uses the abbreviation EOT to refer to an "extension of time," which the Protocol defines as "[a]dditional time granted to the Contractor to provide an extended contractual time period by which work is to be, or should be completed and to relieve it from liability for damages for delay (usually liquidated damages)." *Id.*

17. The Protocol defines "compensation" as "[t]he recovery or payment of money for work done or time taken up whether by way of valuation, loss and/or expense or damages." *Id.*

18. *Id.*, Core Principle 1.

19. *Id.*, Appendix B (Model specification clause), Appendix C (Model records clause).

20. *Id.* §§ 2.2, 2.2.1.1, 2.2.1.3, 2.2.1.4.

21. The Protocol defines a "method statement" as "[a] written description of the Contractor's proposed manner of carrying out the works or parts thereof, setting out the assumptions underlying the programme, the reasoning behind the approach to the various phases of construction and listing all the work encapsulated in the programme activities. It may also contain the activity duration calculations and details of key resources and gang strengths." *Id.*, Appendix A.

22. *Id.* § 2.2.1.2.

23. The Protocol defines the accepted programme as the programme "accepted by the CA." *Id.*, Appendix A.

24. *Id.* §§ 2.2.1, 2.2.1.5, 2.2.4.

25. *Id.* § 2.2.2.

26. *Id.* § 2.2.5.

27. *Id.* § 2.4.1.

28. *Id.* § 2.2.1.

29. See American Institute of Architects Document A201, *General Conditions of the Contract for Construction*, § 3.10.1 (containing no specific requirements regarding the type of schedule to be used or how the schedule is to be maintained and updated); Associated General Contractors of America Document No. 200, *Standard Form of Agreement and General Conditions Between Owner and Contractor*, ¶ 6.2 (same); Engineers Joint Contract Documents Committee Document C-700, *Standard General Conditions of the Construction Contract*, ¶¶ 2.05-.07, 6.04 (same); Design Build Institute of America Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* § 2.1.3 (same). Although the documents listed above do not contain specific requirements regarding the type of schedule to be used or how the schedule is to be maintained and updated, such requirements may be found in specifications or other contract documents that are a part of the parties' contract.

30. Evans M. Barba, *Prospective and Retrospective Time Impact Analysis*, CONSTRUCTION BRIEFINGS, July 2005, at 1 [hereinafter *Prospective and Retrospective Time Impact Analysis*] (stating that "[t]he vast majority of construction contracts for major construction programs today contain . . . [CPM] scheduling specifications").

31. Protocol, *supra* note 1, § 2.2.1.5.

32. *Id.* § 1.3.2, Appendix A.

33. BARRY B. BRAMBLE & MICHAEL T. CALLAHAN, CONSTRUCTION DELAY CLAIMS § 11.02 (3d ed. 2000) [hereinafter CONSTRUCTION DELAY CLAIMS]. See also FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS 427 (Adrian L. Bastianelli III et al. eds. 2003) [hereinafter FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS] (“Float, in the context of construction scheduling, is the amount of time any given activity or path of activities may be delayed before it will affect the project completion time.” (internal quotations and citations omitted)); CONSTRUCTION SCHEDULING: PREPARATION, LIABILITY AND CLAIMS § 8.02 (Jon M. Wickwire et al. eds., 2d ed. 2003) [hereinafter CONSTRUCTION SCHEDULING] (“Float is the contingency time associated with a path or chain of activities. . . . Float is measured by comparing the start or finish of an activity on an early- and late-date basis.”); *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 3 (defining “total float” as “contingency time associated with a path or chain of activities, and represent[ing] the amount of time by which the early finish date of an activity may be delayed without impacting upon the critical path and thereby delaying overall completion of a project”).

34. Protocol, *supra* note 1, § 1.3.2.

35. The Protocol defines the “Employer” as “the party under the contract who agrees to pay for the works.” *Id.*, Appendix A. The Protocol adds that “when [the Protocol] is being applied to a sub-contract, it is the main contractor that is being referred to as the Employer in the Protocol.” *Id.*

36. *Id.*

37. *Id.* § 1.3.3.

38. See American Institute of Architects Document A201, *General Conditions of the Contract for Construction*, § 3.10.1 (containing no language regarding who owns any float in the schedule); Associated General Contractors of America Document No. 200, *Standard Form of Agreement and General Conditions Between Owner and Contractor*, ¶ 6.2 (same); Engineers Joint Contract Documents Committee Document C-700, *Standard General Conditions of the Construction Contract*, ¶¶ 2.05–07, 6.04 (same); Design Build Institute of America Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Build*, § 2.1.3 (same). Again, although the documents listed above do not contain specific language regarding who owns the float in the schedule, the specifications or other contract documents that are a part of the parties’ contract may contain such a provision.

39. See CONSTRUCTION SCHEDULING, *supra* note 33, § 9.08[E]. See also *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 4–5.

40. The Protocol defines an “Employer Delay” as “any delay caused by an Employer Risk Event.” Protocol, *supra* note 1, Appendix A. The Protocol defines an “Employer Risk Event” as “[a]n event or cause of delay which under the contract is at the risk and responsibility of the Employer.” *Id.*

41. *Id.* § 1.3.3.

42. *Id.*

43. *Id.* § 1.3.4.

44. *Id.*

45. *Id.*

46. *Id.*

47. The Protocol defines “total float” as “[t]he amount of time that an activity may be delayed beyond its early start/early finish dates without delaying the contract completion date.” *Id.*, Appendix A. This definition is nearly identical to the American definition of “total float” as “the amount of time an activity can slip without affecting the project completion date, or a fixed milestone date that is the basis for any float computation.” CONSTRUCTION SCHEDULING, *supra* note 33, § 3.10. See also *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 4.

48. Protocol, *supra* note 1, Core Principle 7; see also *id.* § 1.3.1.

49. *Id.* § 1.3.6.

50. *Id.* § 1.3.8.

51. *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 4 (noting that owners often include a provision in contracts stating that the project owns the float “[i]n order to clarify the owner’s position”).

52. See, e.g., 5 PHILIP L. BRUNER & PARTICK J. O’CONNOR, JR., BRUNER & O’CONNOR ON CONSTRUCTION LAW § 15:125 (2002) [hereinafter BRUNER & O’CONNOR ON CONSTRUCTION LAW] (“It is now well settled that, unless otherwise provided in the contract, float is not owned by any party and thus is a time resource available to be utilized by all parties working on the project.” (citing cases)); FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33, at 428 (“Overall, however, the position of most commentators who have addressed the subject is to embrace the shared resource approach mentioned previously: Unless specifically defined in the contract specifications, float is a resource that belongs to the project and is available for all parties to use.” (internal quotations and citation omitted)); *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 4 & nn.7–10 (“Early decisions held that the contractor, not the owner, owned schedule float. As critical path method delay analysis began to grow in terms of its acceptance by courts and boards, however, these tribunals departed from their traditional view and approach to float ownership issues, focusing not on ‘who owned the float’ per se but on whether the delay(s) in question affected the project’s critical path.”); *id.* (stating that the current approach of courts and boards is that “the project owns the float”). See also *Williams Enters., Inc. v. Strait Mfg. & Welding, Inc.*, 728 F. Supp. 12 (D.D.C. 1990), *aff’d in part, remanded in part on other grounds*, 938 F.2d 230 (D.C. Cir. 1991); *Weaver-Bailey Contractors, Inc. v. United States*, 19 Ct. Cl. 474, 481, (1990), *reconsid. denied*, 20 Ct. Cl. 158; *Appeal of MCI Constructors, Inc.*, D.C.C.A.B. No. D-924 (D.C. C.A.B. 1996); *Appeal of Blackhawk Heating & Plumbing Co.*, G.S.B.C.A. No. 2432, 75-1 B.C.A. (CCH) ¶ 11,649 (1975); *Appeal of Dawson Constr. Co.*, G.S.B.C.A. No. 3998, 75-2 B.C.A. (CCH) ¶ 11,563 (1975).

53. CONSTRUCTION SCHEDULING, *supra* note 33 § 9.08[E]. See also *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 5 (noting that clauses specifying that the project owns the float “are frequently used in Federal, State, and County government contracts, as well as in private sector contracts”).

54. See, e.g., 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:125 (“Regular updates of the CPM schedule allow the parties to actually compute the float lost or gained on non-critical activities as well as time lost or gained on the critical path.”).

55. The Protocol defines a “Contractor Risk Event” as “[a]n event or cause of delay which under the contract is at the risk and responsibility of the Contractor.” Protocol, *supra* note 1, Appendix A.

56. *Id.* § 1.4.4.

57. CONSTRUCTION DELAY CLAIMS, *supra* note 33, § 1.01[D]. See also CONSTRUCTION SCHEDULING, *supra* note 33, § 8.03 (defining concurrent delay “as a situation in which two or more delays are occurring at the same time during all or a portion of the delay periods being considered”); FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 424 (defining concurrent delay as the “situation[] where the overall project has unquestionably been delayed, but there are two or more possible explanations of the underlying cause of the delay . . .”). *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 5 (stating that “[c]oncurrent delay exists when two or more separate delay events occur during the same time period”).

58. Protocol, *supra* note 1, § 1.4.6.

59. See, e.g., CONSTRUCTION SCHEDULING, *supra* note 33, § 8.03 (recognizing that the delays do not need to be equal in duration, but rather “equal in duration for all or a portion of the delay periods being considered”); *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 7 (same).

60. Protocol, *supra* note 1, Core Principle 9.

61. *Id.*, Core Principle 10. See also *id.* § 1.10.

62. 5 BRUNER & O'CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:121 (quoting William F. Klingensmith, Inc. v. United States, 731 F.2d 805, 809 (Fed. Cir. 1984)). See also CONSTRUCTION DELAY CLAIMS, *supra* note 33, § 11.04 ("If owner and contractor both contribute to a delay, neither can recover damages unless clear proof of the apportionment of delay is presented, unless, of course the contract prohibits apportionment. If both parties contribute to a delay and neither is able to apportion the delays, neither party can collect damages." (internal citations omitted)); FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 424 ("The basic rules applicable to concurrent delay situations are readily stated . . . Where a contractor is seeking recovery on the basis of a compensable delay, but it is clear that the contractor also caused delay, there can be no recovery where the government's delay is concurrent or intertwined with other delays." (internal quotation and citation omitted)); *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 5 ("The traditional view of the courts and boards has been that when Government delay is concurrent or intertwined with contractor or excusable delays, neither party should be able to recover from the other for that period of delay."); *id.* ("A party asserting entitlement to a delay-based claim must also offer proof reflecting a clear apportionment of the delay."). See also *Blinderman Constr. Co. v. United States*, 695 F.2d 552 (Fed. Cir. 1982); *Aetna Cas. & Sur. Co. v. Butte-Meade Sanitary Water Dist.*, 500 F. Supp. 193 (D.S.D. 1980); *Titan Pac. Constr. Corp. v. United States*, 17 Cl. Ct. 630 (Cl. Ct. 1989).

63. Protocol, *supra* note 1, § 1.4.11.

64. *Id.* § 1.10.5 (stating that "[t]he loss and/or expense flowing from an Employer Delay cannot usually be distinguished from that flowing from Contractor Delay without . . . an as-built programme demonstrating the work and sequence actually carried out and the as-built critical path." (emphasis added)).

65. *Id.*, Core Principle 3. See also *id.* § 1.2.4.

66. The Protocol's use of the term "occurred" in Core Principle 12 and § 4.19 could lead to confusion, because it is not clear whether "occurred" means at the initiation of the Employer Risk Event or at some time during the delay caused by the Employer Risk Event. The phrase "at the initiation of the Employer Risk Event" would likely eliminate any confusion on this point.

67. Protocol, *supra* note 1, § 4.19. See also *id.*, Core Principle 12.

68. *Id.* § 4.19. See also *id.* ("[I]t is not a good practice for CAs to 'wait and see' what the full effect of an Employer Delay is, and justify not granting an EOT if the Contractor, by making efforts beyond that which are required of it under the Contract, overcomes the Employer Delay.").

69. *Id.*, Core Principle 4; *id.* § 3.2.6.

70. *Id.* § 3.1.

71. *Id.*; see also *id.* § 3.2.11.

72. See *id.* § 3.2.11 ("The methodology described in this section [Guidance Section 3] is known as 'time impact analysis.'").

73. See *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 11-13, for an explanation of the American approach to performing a prospective time impact analysis. This article also contains a sample contract clause specifying the procedures for performing both prospective and retrospective time impact analyses during the course of a project. See *id.* at 8-10. We suggest that the Protocol could be improved by specifying the procedures for performing both prospective and retrospective time impact analyses in Appendix B, the "Model specification clause."

74. The Protocol defines a "sub-network" as "[a] group of activities or durations, logically linked." Protocol, *supra* note 1, Appendix A. The Protocol adds that "[i]n the Protocol [the sub-network] . . . is to be used to illustrate the work flowing directly from an Employer Risk Event." *Id.*

75. See *id.* § 3.2.2.

76. *Id.* See also *id.* § 3.2.13 ("Although the programme should

be the primary tool for guiding the CA in his determination of EOT, it should be used in conjunction with the contemporary evidence to ensure that the resulting EOT is fair and reasonable.").

77. *Id.* §§ 3.2.7, 3.2.8.

78. See *id.* § 3.2.9.

79. *Id.* § 3.2.6 (emphasis added).

80. *Id.* § 3.2.2 (emphasis added).

81. *Id.* § 3.2.11 (emphasis added).

82. See *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 13-15 (describing the procedure for performing a retrospective time impact analysis); *id.* at 8-10 (giving an example of a contract clause providing for both prospective and retrospective time impact analyses during the course of a project).

83. See Protocol, *supra* note 1, Guidance Section 4.

84. *Id.* § 4.1.

85. See *supra* note 21.

86. Protocol, *supra* note 1, § 4.2.

87. See *id.* §§ 4.3-4.8.

88. *Id.* § 4.8.

89. See, e.g., 5 BRUNER & O'CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:130 (describing the "contemporaneous" analysis method as "based on contemporaneous records prepared at, or reasonably approximate to, the occurrence of a time impacting event," particularly a "properly prepared and periodically updated CPM schedule"); *id.* § 15:136 (describing the "window analysis method" as "a detailed impact analysis of the effect of a time impacting event upon the critical path, using a 'contemporaneous' schedule, either updated during performance or after-the-fact, by viewing the 'window' of time in which an event occurred and analyzing its cause and effect upon critical work activities"); CONSTRUCTION SCHEDULING, *supra* note 33, § 9.06[E] (using the phrase "Chronological and Cumulative Approach/Time Impact Analysis" to describe a method of analysis similar to that referred to as the "contemporaneous" analysis method by Bruner & O'Connor); FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 432-33 (describing the "time impact" method as "consider[ing] the state of the schedule both just before the start of and just after the conclusion of each delay encountered, typically relying on monthly updates," and the "windows method" as "us[ing] somewhat longer intervals or 'windows' of time, correlating to important interim milestones in the life of the project").

90. *Prospective and Retrospective Time Impact Analysis*, *supra* note 30, at 11.

91. See 5 BRUNER & O'CONNOR ON CONSTRUCTION LAW, *supra* note 52, §§ 15:130, 15:136; CONSTRUCTION DELAY CLAIMS, *supra* note 33, § 11.07[B] ("The best accepted method to measure the effect of a delay is the update impact method. . . . It has also been called the corps method, time impact analysis, contemporaneous impact, and snapshot technique."); CONSTRUCTION SCHEDULING, *supra* note 33, § 9.06[E] & [F]; FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 432-33 ("The time impact analysis and windows methods . . . represent the current state-of-the-art method of demonstrating the effect of individual delays on the project as a whole."); Kenneth R. Baker, *Presenting Delay Claims: Where's the Logic*, LORMAN CONSTRUCTION UPDATE (April 2006), www.lorman.com/newsletters/ [hereinafter *Presenting Delay Claims*] (stating that the "contemporaneous analysis" method "is usually the preferred method of analysis, but stating that "[t]he method does require project schedules that were updated regularly and reasonably accurately during the course of the project"). See also *Hennessey v. United States Agency for Int'l Dev.*, 121 F.3d 698, 1997 U.S. App. LEXIS 40840 (4th Cir. 1997); *Appeals of Donohoe Constr. Co.*, A.S.B.C.A. No. 47310, 99-1 B.C.A. (CCH) ¶ 30,387 (1999); *SAE/Americon-Mid Atlantic, Inc. v. General Servs. Admin.*, G.S.B.C.A. Nos. 12294 et al., 98-2 B.C.A. (CCH) ¶ 30,084 (1998); *Appeal of Cogefar-Impresit, U.S.A., Inc.*, D.O.T.B.C.A. No. 2721, 97-2 B.C.A. (CCH) ¶ 29,188 (1997).

92. The procedure for performing a retrospective time impact

analysis is set forth on pages 13–15 of the article *Prospective and Retrospective Time Impact Analysis*, *supra* note 30. Further, pages 8–10 of that article provide an example of a contract clause providing for both prospective and retrospective time impact analyses.

93. See Protocol, *supra* note 1, §§ 4.3–4.8.

94. See *Presenting Delay Claims*, *supra* note 91 (“The impacted-as-planned . . . method makes use of the schedule that was created at the start of the project—the as-planned schedule. The analyst inserts delay activities into this schedule to allegedly represent the impacts to the work caused by the particular delay events. These inserted activities cause the project completion date to be extended.”). See also 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:134; CONSTRUCTION DELAY CLAIMS, *supra* note 33, § 11.07[C] (“The [impacted] as-planned method measures not the effect of the delay on the contractor’s actual performance but rather the effect on the contractor’s planned or intended performance. Under the [impacted] as-planned method, the various delays are formulated as events with time durations and added to the as-planned network schedule, without regard to when the delays may have or actually occurred.”).

95. Protocol, *supra* note 1, § 4.4.

96. *Id.* §§ 4.9–4.10.

97. *Id.* § 4.6.

98. See 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:134; CONSTRUCTION DELAY CLAIMS, *supra* note 33, § 11.07[C] (“The [impacted] as-planned method has disadvantages and is generally disfavored by both practitioners and courts.”); CONSTRUCTION SCHEDULING, *supra* note 33, § 9.06[D]; FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 430 (“The inherent flaws in the impacted as-planned method are well-known, and generally a delay analysis premised on this method will not be accepted.”); *Presenting Delay Claims*, *supra* note 91 (“Most construction industry professionals and third-party venues have agreed that the [impacted as-planned] method is not an accurate method to quantify the impact of delays on a construction project.”). But see CONSTRUCTION DELAY CLAIMS, *supra* note 33, § 11.07[C] (“The [impacted] as-planned method has disadvantages and is generally disfavored by both practitioners and courts. However, like the disfavor shown the total cost method of calculating damages, there are limited situations in which the [impacted] as-planned method may appropriately be used. The [impacted] as-planned method may be used when delays occur in the project before any (or very little) actual progress has been achieved or when no actual information is available after project records have been lost, destroyed, or, more likely, cannot be re-created.”). See also *Titan Pac. Corp. v. United States*, 17 Cl. Ct. 630 (1989), *aff’d*, 899 F.2d 1227 (Fed. Cir. 1990); *Appeal of Gulf Contracting, Inc.*, A.S.B.C.A. Nos. 30195 et al., 89-2 B.C.A. (CCH) ¶ 21,812 (1989), *aff’d sub nom. Gulf Contracting, Inc. v. United States*, 23 Cl. Ct. 525 (1991), *aff’d*, 972 F.2d 1353 (Fed. Cir. 1992).

99. 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:134. See also CONSTRUCTION SCHEDULING, *supra* note 33, § 9.06[D] (“This approach, which purports to present a fair picture of responsibility for owner delays on the project by impacting the original CPM on the project solely with owner delays encountered during performance, suffers from one fatal flaw: It ignores what actually happened on the project, including excusable delays and delays by the contractor. Actual performance by all parties must be considered.”).

100. 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:134.

101. Protocol, *supra* note 1, §§ 4.9, 4.10.

102. See, e.g., 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:120 (“[L]iability for and relief from the consequences of time impacts are dependent entirely upon proof of causation, duration and ‘control’ of time impacting events. Recovery of damages by either contracting party requires proof that the other

party ‘controlled’ a time impacting event that was the sole cause of the damages.”); *id.* § 15:121 (listing elements that a contractor asserting a compensable delay claim must prove); *id.* § 15:129 (noting the significant difficulties inherent in performing an accurate delay analysis without an as-planned baseline schedule); FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 428 (“To recover on a delay claim, the contractor is required to prove with ‘reasonable certainty’ that its operations have been delayed. More specifically, to meet this burden, contractors with few exceptions must identify the specific event causing the delay, identify the delayed activities and the specified period they were delayed, and demonstrate that the delayed activities actually delayed completion of the overall contract (that is, they extended the critical path).”). See also *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000); *PCL Constr. Servs., Inc. v. United States*, 47 Fed. Cl. 745, 801–02 (2000); *G.M. Shupe, Inc. v. United States*, 5 Cl. Ct. 662, 728 (1984). But see CONSTRUCTION DELAY CLAIMS, *supra* note 33, § 11.07[C] (suggesting that the impacted as-planned method might be appropriate “when delays occur in the project before any (or very little) actual progress has been achieved or when no actual information is available after project records have been lost, destroyed, or, more likely, cannot be re-created”).

103. *Id.*

104. Protocol, *supra* note 1, § 3.2.10.

105. 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:135. See also FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 432 (stating that the collapsed as-built method involves removing government-caused delays from the as-built schedule to show the date by which the project would have been completed if not for the government-caused delays); CONSTRUCTION SCHEDULING, *supra* note 33, § 9.06[B].

106. *Id.*

107. See Protocol, *supra* note 1, §§ 4.3, 4.11, 4.13.

108. *Id.* §§ 4.11, 4.13.

109. See, e.g., *Presenting Delay Claims*, *supra* note 91 (noting that the collapsed as-built method “gives the analyst great latitude to manipulate the analysis to produce the desired results” and “is highly subjective because the analyst creates the as-built schedule, assigns preferential logic, chooses the delay issues to address, creates a ‘fragnet’ to represent those issues, determines how those ‘fragnets’ tie-in and affect the work, and then removes the delays in some chosen sequence”).

110. CONSTRUCTION SCHEDULING, *supra* note 33, § 9.06[B]. See also 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:135 (citation omitted).

111. CONSTRUCTION SCHEDULING, *supra* note 33, § 9.06[B]. See also FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 52 at 432 (noting that the collapsed as-built method “does not take into account the ways the contractor would have proceeded differently except for the government’s delay”).

112. CONSTRUCTION SCHEDULING, *supra* note 33, § 9.06[B]. See also 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:135 (citation omitted).

113. CONSTRUCTION SCHEDULING § 9.06[B]. See also FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 432 (“[L]imitations in the available as-built information generally require the analyst to make numerous assumptions regarding what the relationships between activities would have been absent government-caused delays. These assumptions are difficult if not impossible to verify . . . , and the outcome of the analysis is usually quite sensitive to the specific assumptions that have been made.”).

114. 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:135. See also FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 432.

115. FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 432.

116. See 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 15:135 (noting that the collapsed as-built method continues to be

accepted as a valid method of measuring delay). See also FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 432 (“The collapsed as-built method has been frequently accepted as an appropriate means of delay analysis, though it is not the preferred method today. While accepted, the collapsed as-built method is nevertheless frequently criticized for its potential inaccuracies and the opportunity for abuse of the method.” (internal citations omitted)); Appeal of Fischbach & Moore Int’l Corp., A.S.B.C.A. No. 18146, 77-1 B.C.A. (CCH) ¶ 12,200 (1977); Appeal of John Murphy Constr. Co., A.G.B.C.A. No. 418, 79-1 B.C.A. (CCH) ¶ 13,836. *But see* 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:124 (“Where actual time impacting events are not proven or a ‘contemporaneous’ CPM analysis has not been performed, judicial rejection is likely.” (citing cases)); *id.* § 15:135 (“Failure to account for concurrencies and to assure historical accuracy of the sequencing and duration of work activities will cause the ‘collapsed as-built’ analysis to be rejected.”); Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516 (1993).

117. See 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:132.

118. *Id.* (citation omitted). See also *Presenting Delay Claims*, *supra* note 91 (noting that the analyst uses the project documents to “establish a detailed record of the as-built work,” “identif[ies] and document[s] any revised logic from the as-planned sequence in the as-built work,” and determines delays “in a sequential manner through comparative analysis of the critical as-built work to the critical as-planned work”).

119. *Presenting Delay Claims*, *supra* note 91. See also 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:132 (noting that the as-planned versus as-built method is usually used where the CPM schedule was not updated during the course of the project).

120. Protocol, *supra* note 1, § 4.5.

121. See, e.g., 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:132; *Presenting Delay Claims*, *supra* note 91.

122. Protocol, *supra* note 1, § 4.12.

123. *Id.* § 4.8.

124. *Id.* (emphasis added). See also *id.* § 4.16 (“Time impact analysis is the most thorough method of analysis, although it is generally the most time-consuming and costly when performed forensically.”).

125. See *id.* §§ 4.8, 4.19.

126. *Id.* § 4.8.

127. *Id.* (emphasis added).

128. *Id.* (emphasis added).

129. *Id.*

130. *Id.* § 4.19 (emphasis added).

131. See *supra* notes 101–03 and accompanying text for a description of the American Retrospective TIA Method.

132. See, e.g., 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 52, § 15:120 (“[L]iability for and relief from the consequences of time impacts are dependent entirely upon proof of causation, duration and ‘control’ of time impacting events. Recovery of damages by either contracting party requires proof that the other party ‘controlled’ a time impacting event that was

the sole cause of the damages.”); *id.* § 15:121 (listing elements that a contractor asserting a compensable delay claim must prove); CONSTRUCTION SCHEDULING, *supra* note 33, § 9.08[B] (discussing the requirement that the contractor establish that the alleged delaying event actually caused the delay for which the contractor is seeking additional time or compensation); FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, *supra* note 33 at 428 (“To recover on a delay claim, the contractor is required to prove with ‘reasonable certainty’ that its operations have been delayed. More specifically, to meet this burden, contractors with few exceptions must identify the specific event causing the delay, identify the delayed activities and the specified period they were delayed, and demonstrate that the delayed activities actually delayed completion of the overall contract (that is, they extended the critical path).”). See also *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000); *PCL Constr. Servs., Inc. v. United States*, 47 Fed. Cl. 745, 801–02 (2000); *G.M. Shupe, Inc. v. United States*, 5 Cl. Ct. 662, 728 (1984).

133. The Protocol’s Retrospective TIA Method is arguably inconsistent with the Protocol’s approach to float as it relates to claims for time extensions. As described above, the Protocol’s approach to float is that, in the absence of an agreement between the contractor and the employer as to who owns the float, the project owns the float, with “the effect that float is not time for the exclusive use or benefit of either the Employer or the Contractor.” Protocol, *supra* note 1, § 1.3.6. The Protocol then notes that its approach “is consistent with current judicial thinking . . . that an Employer Delay has to be critical . . . before an EOT will be due.” *Id.* Notwithstanding this recognition that current judicial thinking is that a delay must be critical before a time extension will be due, the Protocol’s approach to retrospective time impact analysis would allow contractors to obtain time extensions for alleged delays that may not have, in fact, turned out to be critical.

134. In the Matter of an Arbitration Between Leighton Contractors (Asia) Ltd. and Stelux Holdings Ltd., HCCT 29/2004 [2004], <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>.

135. Protocol, *supra* note 1, § 4.17.

136. This statement is based on the premise that lawyers, who may be barred from taking an active role in the proceedings before a dispute resolution board, enable parties to reach the most accurate and thorough resolution of their dispute. Some outside the profession may dispute our premise, but it is safe to say that lawyers do ferret out the facts—albeit at a significant cost.

137. See Associated General Contractors of America Document No. 200, *Standard Form of Agreement and General Conditions Between Owner and Contractor*, ¶ 8.2.2; Design Build Institute of America Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder*, § 9.4.3.

138. See Associated General Contractors of America Document No. 200, *Standard Form of Agreement and General Conditions Between Owner and Contractor*, ¶¶ 8.1.2, 8.2.2; Design Build Institute of America Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder*, § 9.2.2.

ARBITRATION

(Continued from page 25)

jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential busi-

ness sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

12. Comment 12 of Maryland Rule 5.5 adds the sentence “See Rule 14 of the Rules Governing Admission to the Bar of Maryland regarding admission to appear in arbitrations.” Rule 14 requires a motion for special admission to be filed in court by Maryland counsel on behalf of out-of-state counsel in an arbitration proceeding; out-of-state counsel can only act as cocounsel in the arbitration and can only participate when accompanied by Maryland