

How Should Claims for 'Delay' be Assessed?

Construction Update

Delay in construction projects leads to costs for both the Principal and Contractor; and claims between contracting parties eventuating from delay can be complex and difficult to resolve (particularly if the parties cannot agree on the process for assessing the delay). The recent decision of *Alstom Ltd v Yokogawa Australia Pty Ltd & Anor* (No 7) [2012] SASC 49 ("*Alstom v Yokogawa*") is a timely reminder to all parties involved in construction projects of the importance of establishing delay based upon one of the accepted delay analysis methodologies.

Accepted Delay Analysis Methodologies

By way of background, the Society of Construction Law Delay and Disruption Protocol ("SCL Protocol") identifies four main delay analysis methodologies: time impact analysis, as-planned versus as-built analysis, impact as-planned and collapsed as-built. A detailed analysis of each methodology is beyond this note, although each is a form of comparison from records, or programs, intended to show what was anticipated, and what was actually achieved in terms of progress.

Facts

The case of *Alstom v Yokogawa* arose from Alstom Ltd's ("Alstom") engagement by Flinders Power Partnership ("FPP") to undertake mechanical, civil and electrical work for the refurbishment of the Playford B Power Station in South Australia. Alstom in turn subcontracted with Yokogawa Australia Pty Ltd and Downer EDI Engineering Pty Ltd (in joint venture known as "YDRML") to carry out the electrical, control and instrumentation works to the Power Station.

The works were carried out between 2002 and 2005, and suffered substantial delays. A dispute arose between Alstom and FPP which was eventually settled with

Who does this affect?

- Principals
- Contractors

Article Highlights

- Parties involved in construction projects must be aware of the importance of establishing delay based upon one of the accepted delay analysis methodologies.
- There are four main delay analysis methodologies: time impact analysis, as-planned versus as-built analysis, impact as-planned and collapsed as-built.
- When a party uses an expert to assist with programme issues during the contract period, consideration should be given to engaging a different expert to assist with delay claims.



Alstom agreeing to pay \$20.5 million in liquidated and other damages. Alstom sought to recover its losses from YDRML accusing YDRML of being responsible for the delays Alstom suffered under its contract with FPP.

At trial each party relied on expert programming witnesses. Mr Lynas (for Alstom) relied on two methodologies, applied to different stages of the project. For the Mechanical Completion stages, Mr Lynas asserted used a "resource" analysis. For Provisional Acceptance and Acceptance stages, he used a windows analysis. Mr King (for YDRML) adopted an "as-planned" versus "as-built" analysis.

Decision

In a judgment spanning 469 pages Bleby J analyses the delay analysis expert evidence and use of different delay analysis methods.

Observations as to delay analysis methods

In rejecting the methodologies relied upon by Mr Lynas, Bleby J made the following observations:

- "resource" analysis does not feature in the SCL protocol and is not mentioned in the leading delay text of *Delay and Disruption in Construction Contracts* by Keith Pickavance; and
- "resource" analysis is not an accepted method of delay analysis for construction programming.
- whilst the windows analysis (also known as the time impact analysis) is a legitimate method, it was not appropriate in the circumstances because:
 - o it was based on Alstom's deficient programmes that were inadequate for the purpose of analysis; and
 - o it ultimately failed to support Mr Lynas' conclusions with regard to the delay.

Bleby J noted that the "as-built" versus "as-planned" methodology had its limitations, but accepted that in the circumstances of the case, that this methodology was particularly useful. His Honour stated that, "errors in the status programs and errors in the logic base program precluded a contemporaneous approach to the delay analysis".

Observations as to independence

Bleby J made comment on the credibility of each expert programming witness. His Honour noted that the weight afforded to Mr Lynas' opinion was substantially undermined as a result of his employer's and colleague's involvement in assisting Alstom's programming during the early stages of the project. This suggests that where a party uses an expert to assist with programme issues during the contract



period, consideration should be given to engaging a different expert to assist with delay claims.

Implications of the Decision

- We suggest this decision reinforces the following:
- parties to a dispute should not depart from using one of the four main delay analysis methodologies set out in the SCL Protocol;
- any prospective analysis must be based on contemporaneous materials and programmes that are thorough and reliable;
- the analysis should be able to support your conclusions;
- parties should use the most suitable methodology based on the evidence and circumstances available; and
- parties should be carefully consider the independence of their expert witness.

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