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CMS Guide to Concurrent Delay

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Introduction

Delays to construction projects are a universal issue and cause problems for all parties involved in them – it seems on a worldwide basis. Each jurisdiction can point to high profile projects which run late and over budget.

These problems are exacerbated when there are multiple causes of the delay. Untangling the causes to try to establish which party takes the risk of the delay can be an extremely complex and time consuming exercise. These difficulties can be increased yet further for parties venturing into a new jurisdiction where they are not familiar with the approach that jurisdiction may take to dealing with competing causes of delay.

Welcome, then, to the 1st Edition of the *CMS Guide to Concurrent Delay*. In this Guide we provide an introduction to the law relating to concurrent delay in each of the jurisdictions listed. For each jurisdiction the authors have answered the standard set of questions set out below and also considered how the law in their jurisdictions would treat the scenario referred to (taken from the 2nd Edition of the SCL's Delay and Disruption Protocol, February 2017).

It has become apparent whilst compiling this Guide that a distinction can be drawn between jurisdictions that have developed jurisprudence on this topic and those that do not; we have grouped the reports from the jurisdictions we've covered accordingly.

The questions

1. Is concurrent delay a well developed and understood concept?
2. Is there a generally understood and accepted definition of concurrent delay and when it arises?
3. How is the issue of concurrent delay treated?
4. Are there any general principles that apply to the treatment of concurrent delay?
5. How is the question of evidence as to causes and periods of delay dealt with?
6. Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

The scenario

An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February. In this scenario:

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?
2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

We hope you find this Guide useful.

Your CMS experts will be happy to answer any questions you may have.

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Australia

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Is concurrent delay a well developed and understood concept?

As a general concept, concurrent delay is a well developed and understood concept in Australia. However, the details of what it means and how it will be dealt with remains uncertain given the lack of recent judicial consideration.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

Cases in relation to concurrent delay are rarely brought before the Australian courts. This is likely a consequence of the most popular standard forms of contract used in the construction industry (the AS2124 and AS400 based forms of contract, PC-1 and ABIC MW-1) providing for the ultimate resolution of disputes through arbitration. The AS2124 and AS4000 contracts and ABIC MW-1 also make express contractual provision for how concurrent delays are to be dealt with but do not actually define concurrent delay. The relevant provisions also capture the concurrent effects of sequential delays (which is more commonly referred to as concurrent delay as noted at paragraph 10.4 of Guidance Part B of the Protocol despite not being true concurrent delay).

How is the issue of concurrent delay treated?

The limited amount of cases that have come before the Australian courts generally appear to deal with, the concurrent effects of sequential delays rather than true concurrent delay.

As a starting point, in determining how a period of concurrent delay (or sequential delays with concurrent effect) will be treated, the court will have regard to the interpretation of the relevant contract terms and their application to the facts in issue.

The current Australian authorities favour the "first in time" approach, with the effect that delays are not taken to be concurrent where the contractor risk event arises first, causes actual delay to the contractor and concludes after the effects of the qualifying event have ceased. Nevertheless, the Australian courts may not follow that approach in future cases, depending on

the express contractual terms, how the contract defines concurrent delay (if at all) and the factual matrix. There is no relevant legislation.

Are there any general principles that apply to the treatment of concurrent delay?

As noted above, the treatment of concurrent delay ultimately depends on the interpretation of the relevant contract terms and their application to the facts in issue.

As a result it cannot be assumed that as a general rule the contractor will be entitled to an extension of time for any period of concurrent delay (or indeed that it will not be entitled to one).

The comment in the Society of Construction Law's Protocol that: "*Where a Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due*" is, in our view, a correct representation of the position under Australian law in relation to true concurrent delays or where the effects of sequential delay events are felt at exactly the same time.

However, where the term concurrent delay is used to apply to sequential delays that are having overlapping effect on the works, then in our view the above position does not represent the position under Australian law if the Contractor risk event started before and ended after the Employer risk delay event.

However, the parties can displace this starting position by using clearly worded express provisions in the contract to allocate risk in a different manner.

In terms of any claim by the contractor for additional payment for periods of concurrent delay, again the treatment of any such claim depends on the interpretation of the relevant contract terms and their application to the facts in issue. Consistent with the position under English law (and that adopted in the Society of Construction Law Protocol), absent any specific contractual provision to the contrary it is generally thought that a contractor would not be able to recover additional costs attributable to the period of concurrent delay as it would not be able to show that "but for" the occurrence of the event that in principle entitles it to additional payment it would not have incurred those costs.

How is the question of evidence as to causes and periods of delay dealt with?

Typically, in litigation or arbitration, each party will each appoint a programming (schedule) expert as an expert witness in relation to delay.[1] Although parties normally appoint their own experts, they may agree to appoint a joint expert and a court or arbitrator (subject to the relevant arbitral rules or agreement to the contrary by the parties) may appoint an expert to assist the court/ tribunal.

The party appointed experts will each have their own preferred method of analysis out of a number of possible methods. The six most commonly accepted methods of delay analysis are outlined in the Society of Construction Law's Protocol.

Notably, the recent decision of Hammerschlag J in the NSW Supreme Court (*White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2019] NSWSC 1166 at [191]) held that "the fact that a method appears in the Protocol does not give it any standing, and the fact that a method, which is otherwise logical or rational, but does not appear in the Protocol, does not deny it standing."

Hammerschlag J went on to say that "[t]he Court is concerned with common law notions of causation.[2] The only appropriate method is to determine the matter by paying close attention to the facts, and assessing whether White has proved, on the probabilities, that delay in the underboring solution delayed the project as a whole and, if so, by how much"[3]

While the judgment in *White Constructions* appears at odds with Bleby J's judgment in *Alstom v Yokogawa Australia (No 7)*[4], it is often overlooked that Bleby J rejected the "Resource Analysis" methodology employed by Alstom's delay expert not just because it was not referred to in the Protocol, but also because Alstom's expert was unable to point to any recognition of this methodology in a construction law text or anything else to indicate its widespread acceptance as a recognised delay analysis methodology.[5]

Hammerschlag J's decision in *White Constructions* does not render the Protocol irrelevant to disputes governed by Australian law; it simply means that reliance on a methodology referred to in the Protocol is not enough of itself to establish the suitability of that methodology. The factual evidence adduced by the parties must also support the delay case advanced[6] and the assumptions adopted by the experts in their analysis.[7]

If the relevant contract specifies which method should be used, this should be adopted, but it is rare for a contract to specify this. Otherwise, there is no authoritative guidance as to which method is correct.

Even where the methodology to be used is not specified, the precise language of the contract may be relevant to what methodologies will be acceptable to be used. In *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*[8] it was held that either a prospective or a retrospective methodology could be used because clause 35.5 of the contract provided that the contractor was entitled to an EOT where it could demonstrate that it "has or will be actually delayed".[9] Flanagan J held that the "use of the words "has been … actually delayed" addresses past delay permitting or indeed inviting retrospective analysis. A Contractor would be entitled to an extension of time for Practical Completion if it demonstrates either a past or future delay."[10]

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

A clearly drafted term that imposed the risk of any period of concurrent delay on either the employer or the contractor will generally be given effect. Express provisions of this nature have for many years been included in the AS2124[11] and AS4000 forms of contract.[12]

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[1] In relation to litigation before the courts, it is noted that Australia consists of nine state and territory Supreme Court jurisdictions as well as a federal jurisdiction. Although there are similarities between some of the jurisdictions, the rules in relation to expert evidence are not consistent and a detailed consideration of the differences is beyond the scope of this publication.
[2] As set out in *March v E & MH StramarePty Ltd* (1991) 171 CLR 506.
[3] *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2019] NSWSC 1166 at [197].
[4] [2012] SASC 49.
[5] [2012] SASC 49 at [1282] – [1289].
[6] *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2019] NSWSC 1166 at [200] – [201].
[7] *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2019] NSWSC 1166 at [194).
[8] 2017 QSC 085.
[9] 2017 QSC 085 at [659].
[10] 2017 QSC 085 at [662].
[11] Which disentitles the contractor to an EOT to the extent of concurrency of qualifying and non-qualifying events.
[12] Which requires the Superintendent to apportion the period of concurrent delay according to the respective causes' contribution.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

As a starting point, in the above scenario (which refers to the concurrent effects of sequential delays), assuming that:

a) the contract contains an extension of time clause entitling the contractor to an extension of time for variations; and

b) that it does not contain any provisions governing the treatment of concurrent delay,

the Australian courts are unlikely to hold that the Contractor is entitled to an extension of time based on the judgment of Giles CJ in *Australian Development Corp Pty Ltd v White Constructions (ACT) Pty Ltd* (1996) 12 BCL 317, 345.

In that case, His Honour held that there was not a delay entitling the contractor to an extension of time where industrial action occurred (which would ordinarily have entitled the contractor to an extension of time under the contract), but the contractor was already being critically delayed by an event at its risk (a delay in obtaining a necessary building permit) and the permit delay continued after the effects of the industrial action ended. On the facts before him, His Honour held that the contractor could not establish that it was actually delayed by the event that would ordinarily entitle it to an extension of time, because the delays for which it was responsible started before and ended after the industrial action.

That actual delay, as opposed to potential delay, is clear from the judgment of Rolfe J in the NSW Supreme Court in *Turner Corp Ltd v Coordinated Industries Ltd*. Actual delay must be caused to works on the critical path; it was not sufficient that an event would have caused critical delay if the contractor was otherwise in a position to proceed.[13]

Such an approach is consistent with the general Australian common law principles of causation and is also in line with the "first in time" approach the English courts have at times adopted as the second event (which would otherwise ordinarily entitle the contractor to an extension of time) is not regarded as an effective cause of delay.[14]

If the facts clearly show that the variation was the delay event actually driving the critical path from 1 February to 14 February (and not merely that it would have caused delay absent the Contractor Risk Event) then the Contractor should be entitled to an extension of time for that period. Such an approach is not inconsistent with the decisions of Giles CJ or Rolfe J.

In relation to the apportionment approach adopted by the Scottish courts in *City Inn v Shepherd*, such an approach is inconsistent with Australian authority[15] and if the parties wish to have concurrent delay dealt with in such a manner they will need to make express provision for such in the contract (as AS4000 does).

However, given the relative lack of Australian case law on concurrent delay there is some uncertainty as to precisely how the courts might deal with concurrent delay (or the concurrent effects of sequential delays as is the case in the given scenario) given recent developments in other jurisdictions.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

Absent any specific contractual provision to the contrary it is generally thought that a contractor would not be able to recover additional costs attributable to the period of concurrent delay as it would not be able to show that "but for" the occurrence of the event that in principle entitles it to additional payment it would not have incurred those costs. As a result the Contractor would not be entitled to recover delay-related costs relating to the variation.

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[13] *Turner Corp Ltd v Coordinated Industries Ltd* (1995) 11 BCL 202, 219-21

[14] *See Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 and *Saga Cruises BDF Ltd v Fincantieri* SPA [2016] EWHC 1875

[15] *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184 at [184] to [206]

England

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Is concurrent delay a well developed and understood concept?

As a general concept, concurrent delay is a well developed and understood theory. However the details of what it means and how it applies are the subject of considerable debate.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

The most recent court judgment (North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744) suggests that the definition of concurrent delay most likely to be accepted by tribunals is:

"a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency".

This judgment is a Court of Appeal decision and should therefore bind courts of first instance, arbitrators and adjudicators.

It should be noted that this definition differs from that adopted in the Society of Construction Law's Delay and Disruption Protocol (2nd Edition).

How is the issue of concurrent delay treated?

How the risk of a period of concurrent delay should be treated depends on the interpretation of the relevant contract terms and their application to the facts in issue. There is also a body of case law that considers the issue and how it affects the parties' rights and obligations in the context of the contracts and facts applicable in each case. There is no relevant Act of Parliament.

Are there any general principles that apply to the treatment of concurrent delay?

As noted above, the treatment of concurrent delay ultimately depends on the interpretation of the relevant contract terms and their application to the facts in issue.

As a result it cannot be assumed that the contractor will be entitled to an extension of time for any period of concurrent delay (or indeed that it will not be entitled to

one). There are cases that suggest that (absent any contractual exclusion of entitlement) a contractor should generally be entitled to an extension of time for concurrent delay, but these cases are first instance decisions only and there are also other judgments that suggest (by virtue of taking a very narrow definition of concurrency) the contrary (some of these judgments are referred to in the commentary on the Society of Construction Law's Protocol scenario below). As a result the comment in the Society of Construction Law's Protocol that: "*Where a Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due*" cannot be taken as representing the position under English law.

In terms of any claim by the contractor for additional payment for periods of concurrent delay, again the treatment of any such claim depends on the interpretation of the relevant contract terms and their application to the facts in issue. Absent any specific contractual provision to the contrary however it is generally thought that a contractor would not be able to recover additional costs attributable to the period of concurrent delay as it would not be able to show that "but for" the occurrence of the event that in principle entitles it to additional payment it would not have incurred those costs. That is also the position adopted in the Society of Construction Law's Protocol.

How is the question of evidence as to causes and periods of delay dealt with?

In England, parties will appoint programming (schedule) experts/delay analysts as expert witnesses; each such expert will have his/her preferred method of analysis out of a number of possible methods. The various methods of analysis are outlined in the Society of Construction Law's Protocol. If the relevant contract specifies which method should be used, this should be adopted, but it is rare for a contract to specify this. Otherwise, there is no authoritative guidance as to which method is correct. The suggestion in the Society of Construction Law Protocol is that when the contractor's entitlement to an extension of time is being reviewed at the time the works are being carried out it should be done so by way of "time impact analysis" (one of the "prospective" methods of analysis). The Protocol suggests that when the review of the contractor's entitlement is carried out later (generally, after completion of the works) this may no longer be appropriate. Commentary in *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 suggested that it should make no difference whether the analysis was carried out on a prospective or retrospective basis, but more recently the judge in *Fluor v Shanghai Zhenhua Heavy Industry Co, Ltd* [2018] EWHC 1 thought (obiter) that the different methods would produce different results, and suggested that the correct approach when

evaluating an extension of time entitlement (as opposed to damages for breach of contract) was a prospective approach. Other cases, however, suggest that a retrospective analysis is required for evaluating extension of time claims (see *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm)).

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

A clearly drafted term that imposed the risk of any period of concurrent delay on either the employer or the contractor would generally be given effect. That was the situation in the North Midland case (referred to above) where the Court of Appeal decided that a clause in a contract imposing the risk of concurrent delay on the contractor should be given effect.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

Assuming that the contract contains an extension of time clause entitling the contractor to an extension of time for variations and that it does not contain any provisions governing the treatment of concurrent delay – the position in this situation under English law is currently unclear.

One line of cases suggests that if the Contractor Risk Event and the variation are of "*approximately equal causative potency*" then the Contractor should be entitled to an extension of time for the delay caused by the variation (see for example *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773). On that basis the Contractor would be entitled to an extension of time of 2 weeks (for the period 1 – 14 February).

Another line of cases takes a "first in time" approach which means that the event that occurs second is not regarded as an effective cause of delay (because the works were already in delay and the second event did not increase that delay) and does not entitle the Contractor to an extension of time (see for example *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 and *Saga Cruises BDF Ltd v Fincantieri SPA* [2016] EWHC 1875; this is also the position espoused in the Society of Construction Law's Protocol). On that basis the Contractor would not be entitled to an extension of time.

Yet a third line of cases takes a more liberal approach and would allow an extension of time where the Employer's variation would have caused a delay to completion in the absence of or "but for" any Contractor Risk Events (see for example, *De Beers v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC)). This line of cases presently appears to be less prominent than the other two noted above, but there is as yet no authoritative guidance from the English Court of Appeal as to which is correct.

One point which does appear to be reasonably settled on the English cases is that a partial extension of time apportioned across the two causes of delay is not permissible. This was the position reached by the Scottish Court of Appeal (known as the Inner House of the Court of Session) in *City Inn Ltd v Shepherd Construction Ltd* [2010] BLR 473, but has been consistently rejected in the English cases.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

As noted above, absent any specific contractual provision to the contrary it is generally thought that a contractor would not be able to recover additional costs attributable to the period of concurrent delay as it would not be able to show that "but for" the occurrence of the event that in principle entitles it to additional payment it would not have incurred those costs. As a result the Contractor would not be entitled to recover delay-related costs relating to the variation.

Scotland

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Is concurrent delay a well developed and understood concept?

Similar to the position under English law, the general concept of concurrent delay is well developed and understood. It can however be a difficult concept to apply in practice and it is frequently disputed when arising in construction claims for additional time.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

There is no single definition of concurrent delay. This was discussed in a leading case in Scotland, *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68, which is a decision of the Scottish Court of Appeal (known as the Inner House of the Court of Session – see more on this case below). There the court noted that "concurrent delaying events" may refer to a number of different situations. This included in the broad sense i.e. where two delaying events both have a causative influence upon a subsequent event such as completion, even though they do not overlap in time; and in the narrow or "true sense" i.e. where two delaying events both exist simultaneously, which may or may not also require a coincidence of start and/or end points. (The latter is perhaps more akin to the definition in the Society of Construction Law's Delay and Disruption Protocol 2nd Edition, which says that true concurrent delay is the occurrence of two or more delay events at the same time, the effects of which are felt at the same time and which are an effective cause of delay to completion.) What may be applicable in the circumstances of a particular contract must always be looked at in the context of that contract's terms.

How is the issue of concurrent delay treated?

As per many other jurisdictions, there are no overarching statutory provisions setting out how concurrent delay shout be treated. The applicable contract terms are always the starting point, to be considered in the relevant circumstances.

In the event that a contract does not specifically deal with concurrent delay, parties turn to case law to establish their resulting rights and obligations.

Are there any general principles that apply to the treatment of concurrent delay?

English law cases, although not binding on Scottish courts may be considered. However the leading case in Scotland mentioned above, *City Inn Ltd v Shepherd Construction Ltd*, differs from the English law position. *City Inn* found that one must firstly consider whether there was a "dominant" cause of delay i.e.

"If a dominant cause can be identified as the cause of some particular delay in the completion of the works, effect will be given to that by leaving out of account any cause or causes which are not material".

Depending on whether or not the dominant cause of delay is one for which the employer is responsible or not, a contractor's claim for an extension of time to complete the works will or will not succeed.

If however where there are two causes of delay, one being an event for which the employer is responsible and the other being an event for which the contractor is responsible and neither could be described as the dominant cause of delay, the court found that one should then turn to the concept of "apportionment" i.e.

"… it is open to the decision maker to apportion the subsequent delay in the completion of the works as between both events and a claim for an extension of time by the contractor would not necessarily fail. In such a situation, which could, as a matter of language, be described as one of concurrent causes, in a broad sense … it will be open to the decision-maker, whether the architect, or other tribunal, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the [event for which the employer is responsible] and the other event".

In how the exercise of apportionment is carried out, the lower court in *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190, said that the degree of culpability involved in each of the causes of the delay and the "causative significance" of each (including the length of the delay caused and the significance of each) were important. When it comes to approaching that apportionment in a "fair and reasonable way", the Appeal Court in *City Inn* also noted that the background, in particular the possibility of a claim for liquidated damages (i.e. fixed damages which may be applied when a contractor does not complete the works by the completion date), must be borne in mind.

It is worth noting that the City Inn decision was specific to standard form wording (the 1980 JCT standard form building contract) which expressly refers to the granting of a "*fair and reasonable*" extension of time, however it is considered as a leading case on concurrent delay in Scotland and has been the subject of much commentary.

The English courts have subsequently considered and specifically rejected this application of apportionment (as per *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm) and *Walter Lilly & Company Limited v Giles Patrick Cyril Mackay, DMW Developments Limited* [2012] EWHC 1773 (TCC)).

How is the question of evidence as to causes and periods of delay dealt with?

Much like in England, parties will typically each appoint programming experts/delay analysts as independent expert witnesses. Such experts, although appointed by a party, owe a duty to assist the court and to remain independent of the parties. They will review factual evidence (such as documentary and witness evidence) and again similar to the position in England they will usetheir preferred method of analysis out of a number of possible methods.

The various methods of analysis are outlined in the Society of Construction Law's Protocol. If the relevant contract specifies which method should be used, this should be adopted, but it is rare for a contract to specify this. Otherwise, there is no authoritative guidance as to which method is correct. Again the commentary in English cases (for example those noted under in the England section above) as to the different possible methods of analysis may be considered, but would not be binding authority in Scotland.

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

If a contract contained a provision which allocated the risk of concurrent delay to one or other party this would be effective, provided always that the provision was sufficiently clearly drafted. Such clauses are not uncommon in Scottish law contracts.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

Assuming that the contract contains an extension of time clause entitling the Contractor to an extension of time for variations, here there is both an event for which the Employer is responsible and an event for which the Contractor is responsible. The starting point would be to look at the contract, to see if there is any definition of concurrent delay and any provisions as to how a claim by the Contractor for additional time in such a situation should be treated.

If the contract is silent, one would then look to which event may be described as the "dominant cause" of delay. This is often done with reference to the event's "causative potency", which may involve looking at a critical path analysis of the works and applying a common sense approach. For example, here it may be that in carrying out such an exercise, the Contractor Risk Event appears to be the dominant cause, because the causative potency of the variation instructed by the Employer is "weaker". In that case the Contractor would not be awarded any extension of time for the period 21 January to 25 February. If however neither event could be described as a dominant cause, one would then apportion the delay between the two events, taking a fair and reasonable approach, in light of the degree of culpability and causative significant of each. In that case it is likely that the Contractor would be awarded a partial extension of time, but not for the full period from 21 January to 25 February.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

Again the starting point would be to look at the contract, to see if there is any definition of concurrent delay and any provisions as to how a claim by the Contractor for additional monies in such a situation should be treated.

Assuming there is not, *City Inn* confirmed the general principle is that even if the Contractor is entitled to an extension of time, it is not automatically entitled to delay-related costs for an identical period.

Where however the Contractor has incurred such delay-related costs which were caused both by the Contractor Risk Event and the variation instructed by the Employer, the case of *John Doyle Construction Limited v Laing Management (Scotland) Limited* 2004 S.C. 713 as confirmed by *City Inn*, found that it is possible to apportion these between the two causes. This would again involve a balancing exercise of the degree of culpability and causative significance of each of the sources of delay.



Singapore

Adrian Wong – CMS Singapore

Is concurrent delay a well developed and understood concept?

The term "concurrent delay" is a concept that is used relatively frequently in Singapore, particularly in the context of construction disputes and claims.

Similar to the position under English law, there is no "standard" or universal definition as to what it entails or how it is to be treated.

As a concept, the Singapore courts appear to acknowledge that concurrent delay is a factor that needs to be considered when assessing delay claims.[16]

Relatively recently, the Singapore Court of Appeal considered a matter involving concurrent delay but unfortunately did not provide much guidance in terms of the basis for assessment of extension of time claims in cases of such concurrent delay.[17]

From a contractual perspective, the Public Sector Standard Conditions of Contract for Construction Works 2014 (Seventh Edition July 2014) ("**PSSCOC**") (which is a commonly adopted standard form contract in Singapore particularly for public sector projects) does address the issue of concurrent delay.

In dealing with time and delay, Clause 14.2 of the PSSCOC provides that the Superintending Officer, when assessing the Contractor's application for extension of time, **shall** take into account any delays which "***may operate concurrently*** *with the delay due to the events being considered by the Superintending Office and which are due to acts or default on the part of the Contractor*".

However, the PSSCOC does not define the term "concurrent delay", and neither does it provide how the Superintending Officer should treat such "concurrent delay".

The 1st Edition of the Society of Construction Law Delay and Disruption Protocol (Society of Construction Law 2002, Reprint 2004) is often referred to in Singapore and relied upon by parties as a guide. Although there is yet to be judicial precedent in respect of the use of the SCL Protocol (either the 1st or 2nd Editions), it may have persuasive authority.

[16] *Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] SGHC 50; *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2016] SGHC 246.
[17] *PPG Industries (Singapore) Pte Ltd v Compact Metal Industries Ltd* [2013] SGCA 23.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

See above. The position in Singapore with respect to extensions of time for concurrent delays remains unsettled. To this end, English jurisprudence will be instructive and will have persuasive authority.

How is the issue of concurrent delay treated?

Primarily, the terms of the contract will govern. A well-drafted and clear clause in a contract that addresses the risk and treatment of concurrent delays will be enforceable in Singapore. However, as mentioned above, the standard form contracts ordinarily used in Singapore do not define what is meant by concurrent delay, and how time and delay should be addressed in the face of concurrent delays.

Singapore is a common law jurisdiction, and English jurisprudence still has persuasive authority in Singapore. English common law have significantly influenced the law in Singapore and to-date the Singapore courts still often refer to English case law for guidance. Scottish case law will also have persuasive authority, and it will be interesting to see which approach the Courts will take.

Are there any general principles that apply to the treatment of concurrent delay?

See above. The position in Singapore in respect of extensions of time due to concurrent delay remains unsettled. This will primarily depend on the terms of the contract, and as stated above, a clearly drafted contract that places the risk of concurrent delay on the contractor will be enforced by the Singapore courts.

How is the question of evidence as to causes and periods of delay dealt with?

Not dissimilar to the practice in England, in Singapore, parties will appoint delay analysts and/or programmers to provide expert evidence as to the cause and extent of a delay. These delay analyses will then be tested by each opposing party, and the Courts will then decide as to which expert provided the between report.

[18] PPG Industries (Singapore) Pte Ltd v Compact Metal Industries Ltd [2013] SGCA 23 at [10].

The Singapore Court of Appeal has clarified that expert opinions do not bind the court, particularly when "the expert's opinion relates to an issue of mixed fact and law".[18]

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

Yes, if the term is clearly drafted, we expect that the Singapore courts will give such terms effect.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

This question will turn very much on the factual circumstances and the effects of each delaying event.

We have assumed that the contract contains an extension of time clause entitling the contractor to an extension of time for variations (which delay the contract completion date) and the contract does not contain any provisions governing the treatment of concurrent delay. We have assumed also that the variation which was subsequently instructed lay on the critical path.

There is currently no clear indication as to which approach the Singapore courts would take.

While English and Commonwealth case law will have persuasive authority, the recent Singapore Court of Appeal decision in *PPG Industries (Singapore) Pte Ltd v Compact Metal Industries Limited* (which did not expressly consider the English or Scottish positions) seems to resolve the issue based on causation of the delay.

In *PPG Industries*, the Court reduced the time for which the sub-contractor was found to be liable for its own delay and found that "*the defendant could not have been solely liable for the full 273 days of delay, because there were other delaying events which in all likelihood contributed in some measure to the 273 days of delay*" so that instead of being liable for 273 days' worth of delay, the sub-contractor was only liable for 186 days' worth of delay.

This approach seems suggestive of the Court's inclination towards the Scottish position in *City Inn v Shepherd* though the position remains unclear.

Based on this approach, and also assuming that the Contractor Risk Event and the variation are of "*approximately equal causative potency*" then the Contractor would be entitled to an extension of time for the delay caused by the variation. On that basis the Contractor would be entitled to an extension of time of 2 weeks (for the period 1 – 14 February), and would only be liable for 20 days delay (21 to 31 January and 15 to 25 February).

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

Absent any specific contractual provision to the contrary, it is considered that if the employer and contractor are responsible for concurrent delay, the general position would be that neither party would be able to recover damages for the other party for that period of delay.[19] As a result, the Contractor would not be entitled to recover delay-related costs relating to the variation.

[19] Chow Kok Fong, *Law and Practice of Construction Contracts*, Sweet & Maxwell Asia, 5th Ed, 2019, pp. 658, 659

United States

Aidan Steensma – CMS London

Is concurrent delay a well developed and understood concept?

Yes, there is a large body of case law dealing with concurrent delay.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

Broadly speaking, concurrent delay refers to two or more delays which occur at the same time, each of which would independently delay the critical path. This definition of concurrent delay is reflected in the two most widely accepted technical publications dealing with delay analysis in the United States: the American Association of Cost Engineering's *Recommended Practice 39R-03, Forensic Schedule Analysis* (the "AACE RP-FSA") published in 2011 and the American Society of Civil Engineers' *Schedule Delay Analysis Standard* published in 2017 (the "ASCE SDAS").

The AACE RP-FSA separates the timing element of concurrent delay into literal and functional categories. Literal concurrent delay is defined as requiring the delay events to occur literally at the same time (usually on the same day) whereas functional concurrent delay requires only that they occur within the same analysis period (usually coinciding with a monthly reporting period). The functional theory seeks to recognise the real-world limitations of precisely measuring the occurrence of delaying events and recognises the fact that delays are often reported together at the end of the relevant period.

A more contentious concept is "offsetting delay", described in the ASCE SDAS's Guideline 4.6 and accompanying commentary as follows:

"In situations where the completion date is adjusted properly for change orders and the contractor is behind schedule, owner delays that occur thereafter on a separate path may have a mitigating effect on assessment of damages.

In certain situations when the current, as adjusted contract completion date has passed or the current, updated schedule is projecting a completion date that is later than the contract completion date, owner-responsible delays occurring thereafter may mitigate the assessment of liquidated damages. This type of delay is referred to as "offsetting delay," recognizing that an owner-caused delay may result in recognizing a noncompensable time extension to offset all or a portion of any potential liquidated damages."

This concept is also addressed in the AACE RP-FSA by reference to divergent views as to whether criticality is to be determined by the longest path to completion only, or may also refer to any activity which has a negative float relative to completion (i.e. the activity is planned to complete after the contractual completion date). As this document notes (at 4.3.A.2):

"Which one is correct depends on which principles are considered. If only CPM principles are used to evaluate the theories, the [longest path to completion] school is correct. The [any negative] float school may have an arguable point if contractual considerations are brought into play, since all paths showing negative float are impacting (albeit not equally) the contractual completion date."

How is the issue of concurrent delay treated?

Parties are generally free, subject to the limitations of public policy and relevant legislation, to stipulate how concurrent delay is to be defined and treated within their contract. In the absence of express provisions dealing with the topic, general common law principles apply as discussed below.

Are there any general principles that apply to the treatment of concurrent delay?

If concurrent delay is found to exist between events which would have otherwise entitled each party to claim against the other, the so called "no harm, no foul" rule applies and neither party may benefit monetarily from the delay. The contractor may not claim for the costs of delay and receives an extension of time so that the employer does not recover delay damages.

Questions may arise as to whether one of the parties has intentionally delayed in response to the other party's delay – termed "pacing". Generally speaking, pacing is legitimate and will not result in a finding of concurrent delay, a principle often voiced by the phrase: "Why hurry up to wait?" However, parties taking such action run the risk that the delay being responded to reduces or resolves in the future, or that subsequent delay analysis shows the supposed pacing to be the original cause of delay.

Earlier cases had found that any concurrent delay would deprive the parties of a financial remedy for delay altogether. These cases pre-date critical path analysis and the popularity of liquidated damages clauses and have now been overtaken by what is referred to as the "apportionment rule" whereby the court will attempt to segregate delays were possible. This is not to be confused with the apportionment of liability for concurrent delay based on relative fault as applied in some other jurisdictions (such as Scotland). Apportionment in the United States refers simply to the process of allocating responsibility for different parts of an overall project delay to individual parties based on a critical path analysis. Where such an analysis shows specific delays to be concurrent, the "no harm, no foul" rule noted above applies and neither party may claim financially in respect of those delays.

The treatment of offsetting delay has recently given rise to controversy as a result of the 2017 ASCE SDAS noted above. This document suggests that delay which is not on the longest path to completion may nonetheless be treated in the same way as concurrent delay if it would independently cause any activity to be delayed beyond the contractual completion date as adjusted. Ultimately the position depends on whether criticality is defined by reference to the contractual completion date or by reference to the longest path to completion. There are cases supporting either approach: see for example *Framlau Corp*, 71-2 BCA (CCH) and *In re Fire Security Systems, Inc,* 02-2 BCA (CCH) in favour of offsetting delay being treated in the same way as concurrent delay and *Electronic & Missile Facilities, Inc,* GSBCA No. 2787, 71-1 BCA for the opposite conclusion. However, the more commonly accepted position (supported by the AACE RP-FSA) is against treating offsetting delay in the same way as concurrent delay and to adopt the longest path to completion as the basis for measuring criticality.

How is the question of evidence as to causes and periods of delay dealt with?

In the United States, the parties appoint programming (schedule) experts/delay analysts as expert witnesses; each such expert will select an appropriate method of analysis out of a number of possible methods which are discussed in detail in AACE RP-FSA and ASCE SDAS some of which are also included in the Society of Construction Law's Protocol. Whilst the choice of an appropriate method will be governed by a number of factors, including the available evidence, there is a general preference for contemporaneous methods where possible (i.e. those methods which assess the impact of delays by reference to contemporaneous evidence).

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

It is unclear whether such a clause would be effective. There is, however, a substantial body of case law on the interpretation and enforceability of "no damage for delay" clauses which provide that a contractor is not entitled to compensation for delays which would ordinarily be compensable (e.g. for acts of prevention by the employer). The authors of one leading text book note that, "*No other type of contract clause used to allocate and apportion time delays and impacts has generated the controversy and litigation caused by the 'no damage for delay' clause*" (*Bruner & O'Connor on Construction Law § 15:75*). Some States have enacted legislation to limit or bar the enforceability of such clauses. Others have developed judicially recognised exceptions such as for uncontemplated delay or delay caused by fraud or bad faith. Many will also give such clauses a strict reading, giving the contractor the benefit of any doubt.

There do not appear to be any reported cases in the United States involving a clause which allocates the risk of concurrent delay to one of the parties – thereby allowing the other party to maintain their right to claim financially in relation to the delay. A clause which sought to give such a right to an employer is likely to give rise to many of the same arguments which have plagued "no damage for delay" clauses.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

This question raises the issue of offsetting delay as discussed above. The ASCE SDAS and some cases suggest that the Contractor would be entitled to an extension of time. However, the more commonly accepted position, supported by the AACE RP-FSA, is against such an approach.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

On neither of the above approaches would the Contractor be entitled to delay related costs.



Austria

Thomas Hamerl – CMS Vienna

Is concurrent delay a well developed and understood concept?

In order to best grasp how the phenomenon of concurrent delay fits into Austrian law, a closer look at the general concept of delay is helpful. Under Austrian law, delay is one form of defective performance of contractual obligations. A party to a contract is in delay if it fails to perform its obligations by the agreed time, at the agreed place or in the agreed manner (§ 918 Austrian Civil Code ABGB). Unless agreed otherwise, the contractor of a construction contract is in delay if and as soon as it does not finish the agreed works within the time for completion. Missing an interim date is only considered to constitute a delay if agreed beforehand, i.e. if interim dates are agreed to be binding.

A party can be in delay until the employer takes over the works. After taking over, defects can lead to warranty claims or claims for damages.

This legal definition of delay is slightly different from an economic or technical understanding, according to which delay usually means that already the progress of works (before the end of the deadline) is slower than planned. However, when measuring the duration of delay in hindsight, this difference is of minor importance.

In general, the responsibility for any case of delay can be attributed to one of the parties to the (construction) contract, depending on whether the delay was caused by a reason for which the employer or the contractor carries the risk. To better understand the contractual risk allocation, Austrian courts use the so-called "theory of spheres", through which it can be determined whether any particular cause of a delay falls into the employer's or the contractors' sphere of responsibility. Each party's sphere of responsibility is defined by the scope of its tasks and the risks allocated to this party by the contract or by statutory provisions. However, Austrian law also uses a third category, the neutral sphere, which contains all risks that neither party can influence (e.g. natural disasters). Unless otherwise agreed, the contractor is also responsible for the neutral sphere.

A contractor is entitled to an extension of time for completion if and insofar as the cause of the delay comes from the employer's sphere or responsibility. This means that a contractor who claims not to be responsible for an additional time needed to complete the works (i.e. that he is not in delay) must prove a

particular cause lying within the employer's sphere of responsibility and for how long this particular cause extended the time needed to perform his tasks in the agreed manner. Consequently, concurrent delay can occur if two separate causes, each arising in a different sphere of responsibility, result in additional time required for completion during the same time period.

However, there is no generally accepted definition of concurrent delay in Austria. Thus a broader understanding would also be possible. One could, for example, also classify scenarios as concurrent delay in which a cause for which one party would have been responsible has no effect because of the other party's cause which exclusively results in the actual delay. Scenarios where two separate causes, each from a different sphere, only jointly resulted in a delay could also be considered concurrent.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

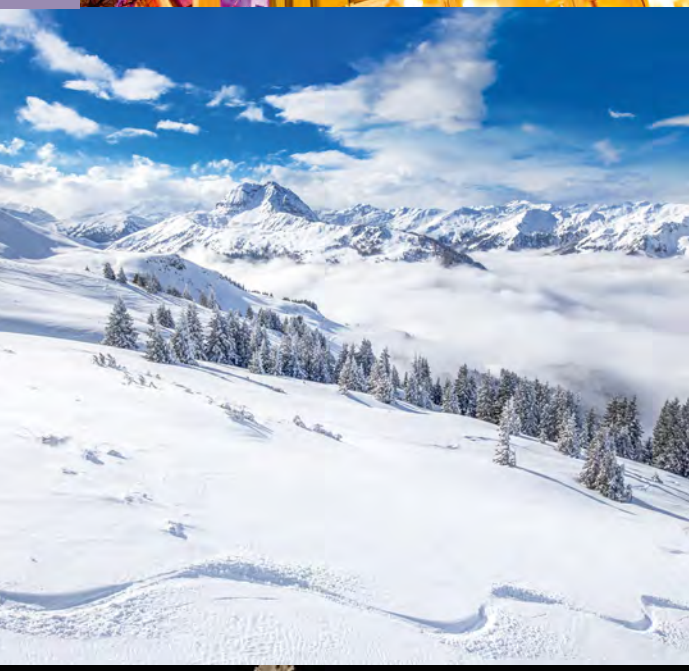
Concurrent delay is not defined in statutory legal provisions. Neither is it considered a specific legal phenomenon; it is just one form of delay. The term "concurrent delay" is more common among Austrian delay experts who use internationally accepted definitions – for example, the one in point 10 of the SCL Delay and Disruption Protocol (but excluding the legal consequences stipulated there).

The Austrian standard construction contract, the so-called *ÖNORM B2110* (and its many derived forms), does not contain an explicit provision on concurrent delay. Instead it only allocates potential causes of delay to the employer's or the contractor's sphere and by doing so.

Further, in Austria, freely negotiated constructions contracts rarely include specific provisions about concurrent delay issues.

How is the issue of concurrent delay treated?

The Austrian Civil Code *ABGB* contains general rules on the legal consequences of delay that apply to all contract types (§§ 918 – 921 *ABGB*). In addition, the *ABGB* also contains a few specific provisions for works contracts that deal with liability for additional costs caused by delay (§ 1168 *ABGB*). Although these rules do not explicitly mention an extension of time but only deal with additional costs, it is generally accepted that events in the employer's sphere of risks entitle the contractor to an extension of the time for completion (or other agreed deadlines).



The Austrian standard construction contract at least explicitly states that the contractor is entitled to an extension of time, but does not explain how to calculate it. It presumes that this will be done by claim experts on a case by case basis.

There are no Supreme Court decisions or other published court decisions available that specifically deal with concurrent delay. This does not mean concurrent delay never occurs in Austria. Rather that (attorneys, experts and) courts usually manage to solve such disputes either by applying normal legal tools or by settling the case with a fair compromise.

Although the entitlement to additional time or payment has a completely different legal nature than a claim for damages, Austrian scholars and courts – as far as decisions are published – apply the same set of rules of causation. These tools Austrian law provides for solving causality issues in relation to claims for damages of causality say the following: No automatic mechanism or fixed formula applies, rather the actual effects of each cause in each single case are taken into consideration.

All cases in which there are two causes for delay but the effects of each can be separated can be solved by finding out which event resulted in the delay at hand so that no specific solution is needed.

If two causes, one from each sphere of responsibility, could only have jointly produced the delay, each party is liable for such a portion of the delay which is equal to its contribution.

If the share of responsibility cannot be determined, both parties are jointly liable for the delay and each is liable for an equal share of the additional time.

Are there any general principles that apply to the treatment of concurrent delay?

The general principles of the Civil Code on delay, termination due to delay, and compensation for damages apply (as above: §§ 918 – 921 *ABGB*). Further, the *do-ut-des* principle (similar to *quid pro quo*) requires each party to perform its own obligations for being entitled to raise claims based on the other party's allegedly defective performance.

Another general principle in Austrian jurisprudence applies (which is somewhat comparable to "time at large" under English law): If a cause of delay arising from the employer's sphere of responsibility only results in additional time spans which are so short that a contractor usually has to expect them, it extends contractual deadlines accordingly. Contractual penalties or liquidated damages then remain applicable to the

new deadlines. If, however, the additional time needed to complete the works exceeds what is proportional for the particular works and what can be expected from the contractor taking into account its economic standing, the contractual time for completion is not extended, instead the contractor simply has to finish the works within a time period appropriate for such work.

These principles are another reason why well-advised parties usually analyse such cases from the legal and technical perspective and then try to settle them – either before they even go to court or at least after some preliminary results from the court/tribunal become apparent.

Numerous court decisions about delay in general exist, in particular relating to the ground risk, permit risk, defects in the design or the defective work of other contractors and damage to the works before handover. However, these decisions only provide a reference point because there are no (Supreme Court) decisions that explicitly refer to concurrent delay.

Unlike the extension of time, a contractor's claims for additional payment are covered by explicit provisions of the Civil Code *ABGB*. The contractor may base such claims either on the specific statutory provisions:

1. for additional payment under works contracts or
2. for claims for compensation of damage.

In order to claim extra costs (i.e. additional contractual payments for additional efforts caused by events in the employer's sphere of responsibility), the contractor needs to fully perform his own contractual obligations. This is not the case if he is in (concurrent) delay.

The contractor may have better chances when he bases his claims on the rules for damage compensation. However, the contractor's claims will be proportionally reduced if he is at fault in performing his own contractual obligations.

How is the question of evidence as to causes and periods of delay dealt with?

A contractor who denies responsibility for a delay must prove that the delay was caused by a particular event in the employer's sphere of responsibility and demonstrate how long the event extended the amount of time needed to perform his tasks in the agreed manner. Further, the contractor has to prove that he was ready and willing to perform these tasks (i.e. he was not himself delayed at this time).

If the contractor claims additional payments, he must also prove that the actual delay resulted in the claimed amount.

The employer has a counter-claim against the contractor's claims for additional payment if there are costs and expenses the contractor did not incur because of the delay or if the contractor could have taped other sources of income. The employer carries the burden of proof for these facts.

It would not be sufficient to prove a cause, compare the as-planned time schedule with the actual time needed after this cause appeared and claim the difference as extension of time for completion. Neither would it be sufficient to compare planned costs with actual costs during a certain period and just claim the difference as additional costs. However, the statutory rules for the evidence concerning delays and additional payments caused by a particular event are often extremely difficult to fulfil. For this reason, an intensive discussion among experts in Austria is going on. In 2019, the Austrian Construction Law Society (ÖGEBAU) commenced developing a set of guidelines how expert reports on delay and additional costs should be drafted.

As a solution, state courts can estimate the amount of additional payments whenever proving this is inappropriately burdensome for the claimant.

For these reasons, success in Austrian construction disputes not only requires competent lawyers, but also experts to determine delays and the extension of time/costs. Fulfilling the agreed documentation requirements is essential. In Austrian state courts, a court-appointed expert is the most common solution. The judge usually discusses the questions to be put to the expert with the parties or gives them an opportunity to comment. In any case the parties can ask the court expert questions and request additional issues be dealt with. Parties also appoint their own experts in addition to court experts, if the amount in dispute and the complexity of the case justify the additional expenses. In arbitration, party-appointed experts are more common.

Neither claims for additional time nor additional payment require either party to be at fault. However, when claiming compensation for damage, one must prove the other party is at fault (at least negligence).

The contractor carries the burden of proof for the cause of the delay and its precise effects. There is no clear jurisprudence about the details of how an extension of time or an additional payment ought to be calculated. Delay is usually measured in days, if no other way is agreed how events and their effects at the site shall be documented.

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

The statutory rules on delay are not mandatory, so parties may deviate from, or add details to, these provisions. It is well accepted in Austrian jurisprudence that a party to a construction contract may accept full responsibility for a risk that the law normally allocates to the other party. The only limits to such agreements are aspects such as good faith or agreements that are unreasonably burdensome due to unbalanced negotiation power or errors made by one party.

Individual agreements allocating risks have a particularly high practical relevance for the risks associated with ground conditions and defects in the employer's design. Careful contract drafting helps to avoid disputes and uncertainties.

The parties can agree on the legal consequences of a concurrent delay and also how additional time or payment will be calculated (e.g. whether actual costs or additional payments based on the original contractual prices are used). Contractual provisions such as the clauses of the FIDIC Books on delayed drawings or instructions, right of access to the site, unforeseeable physical conditions or on commencement, delays and suspension would in principle be valid under Austrian law.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

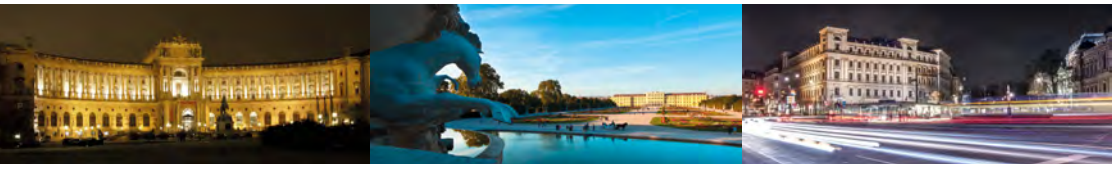
1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

In this case the concurrent delay amounts to 14 days. If it can be determined what portion of the 14 days the contractor and employer are each responsible for, the 14 days must be allocated accordingly. If this is not possible, each party is responsible for seven days.

If the employer's instruction would only theoretically have caused delay but did not actually have any delaying effect, the contractor is responsible for the whole period. The employer would only have to pay the price of the variation.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

As the contractor would in any event have been in delay for the whole duration of the 14 days, generally he would not be entitled to additional payments for delay related costs.



Brazil

Ted Rhodes and Rita Albuquerque Zanforlin – CMS Rio

Is concurrent delay a well developed and understood concept?

There is no established concept of concurrent delay under Brazilian law.

There is, however, the concept of concurrent fault, defined by article 945 of the Brazilian Civil Code (BCC):

"If the victim has concurred with fault to the event causing the damage, its indemnification will be determined taking into account the extent of its fault compared to the fault of the person causing the damage."

Concurrent fault is a broader concept than concurrent delay. It applies generally when there is any action of the victim that contributes to its own damage, resulting in a reduction of its indemnification to be determined by the court taking into consideration the specifics of each case.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

No. By applying the concept of concurrent fault, as mentioned above, a court will look at the particularities of each case. There is no established case law on how to apply the concept of concurrent fault to causes of delay in construction contracts.

How is the issue of concurrent delay treated?

In Brazil the issue of concurrent delay is treated by the terms of the contract and by general rules on contractual liability defined by the law. Construction contracts are regulated in Brazil by articles 610 to 626 of the BCC. Those articles, however, do not deal with the situation of delay.

In addition to that, article 476 of the BCC establishes that if one of the parties to a contract fails to perform its obligations, it may not demand the performance of the other, and this principle can be applied in cases of concurrent delay. Articles 389 to 420 of the BCC also contain general rules on contract default. Another contract principle is good faith, which in Brazil is derived from the law, specifically article 422 of the BCC. The principle of good faith is applicable during contract negotiation and during contract performance. Therefore, in case of a dispute around concurrent delay, a Brazilian court or the arbitrators applying Brazilian law will also consider whether the delay claim was made in good faith.

Finally, according to article 396 of the BCC a party may only be liable for delay if the delay results from an action of omission of that party.

Are there any general principles that apply to the treatment of concurrent delay?

Specifically in relation to liability for delay when an event of force majeure starts after the party is already in delay, according to article 399 of the BCC, the liability of the party in delay shall not be excused by the force majeure event, unless it can prove that the delay does not result from its fault or that the damage would still occur if the obligation was timely performed.

How is the question of evidence as to causes and periods of delay dealt with?

In Brazil, if the dispute is being dealt with in litigation, it is likely that the court will appoint a court expert to evaluate the causes of delay.

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

According to article 392 of the BCC, a party to an onerous contract (where both parties to the contract have rights and obligations towards one another) is liable for its fault, except if the law provides otherwise. A contract term whereby a party takes the risk of concurrent delay may be understood to result in that party being liable for events that do not result from its own fault (but from the other party's fault), and the exclusion of the other party's liability for its own faults. Brazilian courts, however, tend not to accept the exclusion of liability clauses in contracts. Although we have not found a court precedent dealing specifically with this type of contract term, there are reasons to believe that the effectiveness of such contract term may be challenged by Brazilian courts.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

Brazilian law and Brazilian case law do not provide any specific guidance on the above issues. However, the concepts of good faith, concurrent fault, and article 396 of the BCC, discussed above, could lead a court or arbitrators to allocate the delay (and any associated costs) proportionally between the parties.

Colombia

Maria Lucia Amador – CMS Bogotá

Is concurrent delay a well developed and understood concept?

There is no legal definition of "concurrent delay" in Colombian law. Although it is not clear whether it is a well-developed and understood market-practice in the real estate construction sector, it is common for real estate developers and constructors to include a concurrent delay provision in contracts entered into with project investors and purchasers.

Additionally, it does not seem to be a well-developed and understood concept in public works projects.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

No.

How is the issue of concurrent delay treated?

In the real estate construction sector, concurrent delay is governed by the terms of the contract entered into by the parties; this means that the agreement itself is the mechanism through which the parties allocate all their risks and responsibilities. Nevertheless, there are certain legal concepts that result applicable. For instance, the Colombia Civil Code provides some general rules applicable whenever any of the parties to the agreement incurs in a delay in performance. Article 1610 of the Colombian Civil Code provides that if a contractor incurs in a performance delay ("*mora*"), the creditor (in this case the constructor who retained the contractor´s services) may file a request before a court to demand, along with the damages resulting from the delay, one of three options at the creditor´s election:

1. performance by the breaching party of the agreed upon obligations,
2. authorization to enter into a new contract with a third party to execute the unperformed obligations, or
3. all the damages resulting from the breach.

Code provides the *exceptio non adimpleti contractus* defense which allows any party to a contract to withhold the performance of its own obligations if the counterparty has not performed an obligation which should have been performed first in time or concurrently.

Although it is not clear whether it is a well-developed and understood market-practice in the real estate construction sector, it is common for real estate developers and constructors to include a concurrent delay provision in contracts entered into with project investors and purchasers. According to the provision, constructors would not be responsible against purchasers and investors for delays resulting from project contractors' delays occurring concurrently with delays for which the constructors are responsible.

Even though there does not seem to be a well-developed and understood concept applicable for public works projects, Article 4 of Law 1150 of 2007 provides that all public contracts must include provisions regarding the allocation of foreseeable risks and responsibilities between the contracting parties. To this end, it is very common that if one of the concurrent events is a result of a contractor's delay caused by a subcontractor's delay, the contractor would not be entitled to an extension of time or an additional payment because the responsibility for the execution of the project before the contracting authority and is of the contractor. Additionally, it is worth mentioning that the highest administrative court in Colombia (*Consejo de Estado*) has extended the application of the *exceptio non adimpleti contractus* to public contracts if the contracting authority is itself the other concurrent cause of delay, conditioned to the following requirements: (i) the existence of a bilateral contract between the parties, meaning that the obligation of one party constitutes the cause of its counterparty's obligations; (ii) that the breach of the contract is certain and real, meaning that it cannot be invoked due to an eventual or potential breach; (iii) that the breach is grave and decisive and if it comes from the contracting authority, it places the contractor in a reasonable impossibility to fulfill its obligations; and (iv) that the party invoking the exception must be the party that did not have the obligation to fulfill an obligation that must have been executed first in time. The *Consejo de Estado* has considered that a grave and decisive event attributable to the public authority that can trigger the application of the exception can be the case that the public authority has the obligation to make available the site where the work is to be executed and does not do it timely, or when it does not perform a retainer necessary for the contractor to initiate the works.

Nevertheless, it is worth mentioning that it has been recognized that in certain cases, concurrent delay, if triggered by events attributable to force majeure or

public interest reasons, it may allow the parties to agree on suspending the execution of the contract. Even more, if such kind of concurrent delay severely affects the financial equilibrium of the contract, the contracting party may request to the contracting authority for compensation of damages or the recognition of additional costs.

It is worth mentioning that in the absence of an express contractual provision or a special regulation applicable to public contracts, Article 13 of Law 80 of 1993 cross refers to the Colombian civil and commercial code stipulations which are described in the abovementioned paragraph.

Are there any general principles that apply to the treatment of concurrent delay?

In the real estate construction sector, there are no general principles that specifically apply to the treatment of concurrent delay, different from those arising out of private law which, among others, include the parties' freedom to agree their contract's provisions, the principle of reciprocity of obligations, good faith principle, and the prevalence of public interest legal provisions. In the Colombian real estate construction sector, the contractor will get an automatic extension of time for any period of concurrent delay only if the parties have agreed to do so.

In public works projects, public procurement principles apply to all kinds of delays, in addition to the general principles abovementioned. Therefore, the parties must bear in mind the economy and responsibility principles when dealing with such events of concurrent delay.

In addition to the above, whenever in an agreement for the construction of a building or project the parties agree a fixed price for the contracted services, the parties must observe, among others, the following rules provided in Article 2060 of the Colombian Civil Code): (i) the constructor may not request for an increase of the price where an increase on the construction (materials, labor and others) costs has occurred or if the construction plan is modified, unless said modifications have a set price and (ii) if any unknown circumstance arises (i.e. hidden geological fault) and leads to additional unforeseeable costs, the constructor must obtain the owner's authorization, in order to assign said costs; if the owner refuses to provide said authorization, the constructor may file a claim before a judge who will decide whether the construction's extra charge was foreseeable or unpredictable to accept or reject said extra charge and fix the correspondent value of the increased cost.

In a public works contract, if concurrent delay is caused by events attributable to force majeure, public interest, or to the contracting authority and they severely affect the financial equilibrium of the contract, the contracting party may request to the contracting authority compensation of damages or the recognition of additional costs. Even though these theses have been greatly developed by case law, Article 40 of Law 80 of 1993 provides that the addition of a public works contract to recognize additional costs to the contractor cannot exceed fifty percent (50%) of its initial price.

How is the question of evidence as to causes and periods of delay dealt with?

In the real estate construction sector, whenever the constructor claims that the work was not duly executed, both parties will appoint experts that will decide whether the work was duly executed or not. There are no special requirements regarding evidence of the cause or causes of the delay, except when the delay of the contractor is caused by an action of the constructor.

In public works contracts, an external controller is always appointed by the contracting authority to act as its representative to monitor and audit the works. Among its obligations, the controller must validate if the delay caused by events attributable to force majeure, public interest or to the contracting authority are valid and reasonable to suspend or extend the term of the contract.

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

In the real estate construction sector and public works contracts, the issue of concurrent delay is governed by the terms of the contract entered into by the parties; this means that the agreement itself is the mechanism through which the parties allocate all the risks and responsibilities.

Nevertheless, this allocation cannot lead to an unbalanced distribution of the risks since the Courts have settled precedents in which they have corrected said imbalances through their judgements. A clause which allocated the entire risk of concurrent delay to the Contractor may well be found to result in such an imbalance and not be enforced in part or in whole subject to the circumstances of the particular case.

On the other hand, public contracts (public works and concession contracts) often include the following contractual provision:

"If there are two or more concurrent delay causes and only one of them grants the right to the contractor to an extension, the contractor will be entitled to an extension equivalent to the term of such circumstance that fell within the extension of time clause."

Such a term in favour of the Contractor is generally considered to be valid and enforceable.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

In both the real estate construction sector and in public works contracts entered into with the State, the contractor will get an automatic extension of time for the materialization of a particular event or for Employer Variations if the parties specifically agreed to do so.

In this sense, if there is a clause allowing an extension of time for Employer Variations, the contractor would be entitled to the aforementioned extension. In such circumstances, the Contractor could claim delay costs in order to restore the initial financial equation of the contract, in terms of the Article 868 of the Colombian Commerce Code. This regulation provides that if an unforeseeable or unanticipated event occurs during the performance of the contract and its consequences seriously affect the execution of the contract, the affected party can claim the re-establishment of financial equation to its initial state by filing a claim before the competent judge (administrative courts for State contracts and civil judges for private contracts).

On the other hand, it is a well-developed practice in Colombia, in both private and public contracts, to expressly include risk events for which the parties are entitled to receive a compensation if those stipulated events materialize in order to restore the financial equation of the contract. One of the most common compensation mechanisms that the parties stipulate is the automatic extension of time. In such circumstances, the contractor would be entitled to an extension of time, as a compensation for the materialization of risk events.

However, in relation to the circumstances noted above, whether the Contractor is entitled to an extension of time in respect of the variation or not will be probably something that will trigger a dispute between the parties to be defined by a judicial decision or arbitration award. However, it is our opinion that the Contractor is not entitled to get an extension of the term as the pre-existing delay due to a Contractor Risk Event may already constitute a breach of its obligations of the contract before the variation instructed on behalf of the Employer.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

For the reasons given above, it is our opinion that the Contractor is not entitled to recover delay -related costs as the pre-existing delay due to a Contractor Risk Event may already constitute a breach of its obligations of the contract before the variation instructed on behalf of the Employer.

France

Simon Estival and Jean-Luc Tixier – CMS Paris

Is concurrent delay a well developed and understood concept?

In French law, the concept is not well developed but it is understood: during the execution of a contract of construction, several causes of delay can happen at the same time and be the origin of the same period of delay.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

There is not a generally accepted definition of this concept (either in statutory rules or case law).

How is the issue of concurrent delay treated?

In French law, the delay is governed by contract law, by the contract and by case law. Each kind of delay is governed by its own rules.

Exemptions governed by contract law

The first case of exemption for the contractor in case of delay is an act of God (article 1218 of the French Civil Code). It is an unforeseeable, irresistible and external event. If the event is temporary, the execution of the contract is suspended and the contractor gets an extension of time (except if the delay is so important that the contract must be terminate). If the event is definitive, the contract is terminated without other formality.

Exemptions governed by the contract

Legitimate causes of suspension of time can be decided by the parties. They create their own acts of God in the contract. These legitimate causes of suspension lead to an extension of time for the contractor. For example, bad weather, public holiday, strike, war, etc.

Sanctions governed by the contract and by contract law

If the delay is not caused by any aforementioned cause of exemption, it is a contractual fault by the contractor governed by the French Civil Code and the contract.

The obligation to finish the works on time is essential in that an incorrect behaviour of the contractor has not to be proved.

The contractor is liable for damages in case of a contractual fault that causes a delay (article 1231-1 of the French Civil Code). The owner has to prove a fault, an injury and a causal link between the fault and the injury.

A penalty clause can be stipulated in the contract in case of delay. In such a case, an injury doesn't have to be proved because the penalty clause stipulates a sanction for delay.

Are there any general principles that apply to the treatment of concurrent delay?

A contractual fault can happen at the same time as an act of God or as a legitimate cause of suspension of time and cause simultaneously the same period of delay. In this case, the contractor is not liable for damages because the owner can't prove an injury. Indeed, the delay would have occurred anyway because of the act of God or legitimate cause of suspension. However, the contractor is liable for damages if the owner prove a separate injury (i.e. an extra period of delay due to the contractual fault).

Similarly, if the two causes of suspension of time happen at the same time and cause the same period of delay, the contractor gets only one extension of time and the penalty clause does not apply. However, if the two causes of suspension of time happen at the same time and don't cause the same period of delay, the contractor gets an extension of time (act of God or legitimate cause of suspension) but also has to pay damages (if the fault causes a longer delay).

A proper analysis of entitlement to extension of time and any associated loss and expense in each case must involve a careful consideration of the wording of the relevant clauses and an assessment of the (possibly different) tests of causation that should be applied to them.

How is the question of evidence as to causes and periods of delay dealt with?

The contractor who claims an exonerating cause of delay must prove it. For instance, the contract can stipulate that the cause of delay is proved by the architect's certificate. As regards weather, the contractor can use certificates from *Météo France* (the national weather bureau).

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

In a case of concurrent contractual fault and an act of God, a clause which provides that the Contractor would not be entitled to an EOT is very unusual in practice (but possible).

The SCL Protocol scenario

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1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

The possibility of obtaining an extension of time depends on the possibility of executing the variation instructed on behalf of the Employer regardless of the occurrence of an event that is at the Contractor's risk under the contract.

Indeed, if it is possible to execute the variation instructed on behalf of the Employer in masked time (i.e. without adding to the existing delay due to the Contractor's risk), the Contractor will not get an extension of time. If that is not possible, the contractor will get an extension of time of two weeks from 25 February (or for whatever other period the execution of the variation adds to the existing delay due to the Contractor's risk).

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

In French Law, a variation of the project instructed on behalf of the Employer constitutes additional work and the contractor is paid for that.

If the variation is performed in "masked time" (i.e. all works after the Works Variation can be completed by 25 February) and so no EOT is given, the Contractor would not be entitled to claim general delay costs. Nevertheless, the contractor shall retain the right to claim other costs caused specifically by the variation (i.e. cost of extra materials…).

If however, the variation cannot be realized in "masked time" and results in works completion delay, the Contractor will be entitled to claim delay-related costs starting from 26 February until completion of the works (i.e. the additional delay caused by the variation).

Germany

Andreas J. Roquette and Tom Pröstler – CMS Berlin

Is concurrent delay a well developed and understood concept?

Under German law concurrent delay is a question of causality. Thus, the general principles of legal causality, including the concept of concurrent causality (*konkurrierende Kausalität*), apply. The concept of concurrent causality and the rules applicable to it have been developed by extensive case law and literature. However, there is no jurisprudence on the specific application of these rules to construction related delay scenarios, i.e. to concurrent delay. Further, the German standard construction form contract, the VOB/B, does not include provisions dealing with concurrent delay and it is also not common to include such provisions into construction contracts.

Thus, while the case law on causality provides certain guidance, the specific assessment of the prerequisites and consequences of concurrent delay has been left to legal scholars, which have developed a number of possible solutions. However, in absence of statutory law and jurisprudence, there is not the one correct answer.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

Based on the definition of concurrent causality generally accepted under German law, concurrent delay is most commonly defined as parallel but independent contributions to causation, i.e. concurrent delay occurs were there are two causes, one arising from the sphere of the employer and one from the sphere of the contractor, each of which lead to the delay independent of the other.

Under this definition, it is not relevant whether the two causes took effect at the same time or whether one of them took effect before the other. Similarly, the causes' duration is irrelevant. Rather, the relevant time period of concurrent causality/delay is the period during which both causes were effective.

How is the issue of concurrent delay treated?

As stated above, it is generally accepted that concurrent delay is a question of causality and that it must therefore be resolved in accordance with the principles developed for the resolutions of concurrent causality. In addition, the resolution of situations of concurrent delay is aided by the general statutory rules on performance, default and liability contained in the German Civil Code (*Bürgerliches Gesetzbuch*).

Are there any general principles that apply to the treatment of concurrent delay?

In German legal literature, three possible solutions for a contractor's entitlement to extension of time in concurrent delay scenarios are discussed:

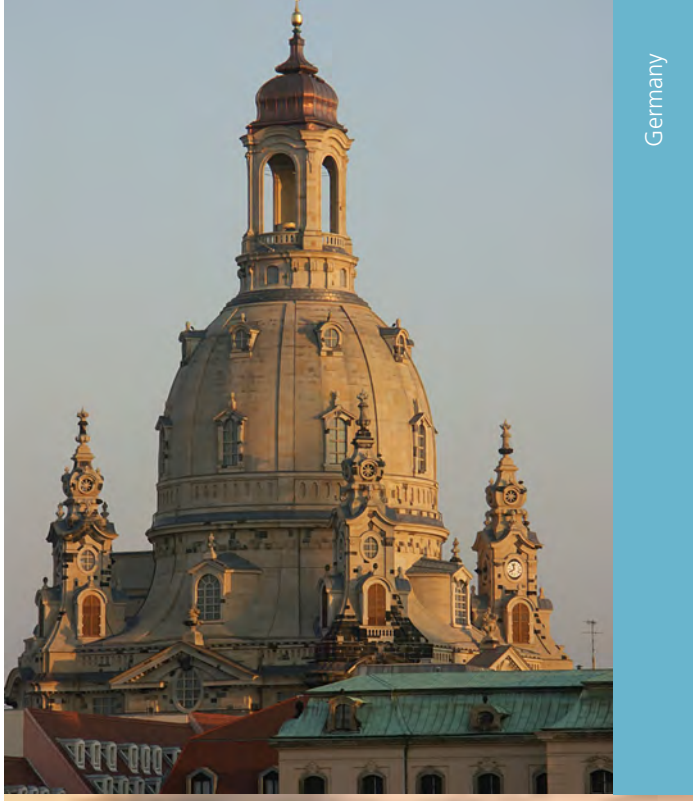
— Under the first solution, the contractor is entitled to an extension of time for the full duration of the concurrent delay. This solution is based on the notion that pursuant to § 286 (4) German Civil Code the contractor is not legally in default as long as the employer sets an additional cause for the delay which would anyhow prevent the contractor from performing the works.

— Pursuant to the second solution, the contractor is entitled to a reduced extension of time apportioned pursuant to the parties' respective contribution to the concurrent delay. This solution is based on an application of the principle of apportioning legal liability according to causation as stipulated in § 254 German Civil Code.

— Under the third solution, the contractor is not entitled to any extension of time for the period of the concurrent delay. This is based on a strict application of the *conditio sine qua non* formula, which defines that a party is responsible for a result if it has set a cause without which the result would not have occurred.

While there is no case law providing a definitive answer which of these three solutions is to be followed, the first solution is preferred by the majority in legal literature. In contrast to the other two solutions, it is fully in line with the German statutory provisions and case law on causality and provides clear-cut results.

There are no statutory rules or jurisprudence regarding specific causes of concurrent delay.



With regard to the contractor's entitlement to additional payments for periods of concurrent delay, two possible solutions are discussed in German legal literature:

— Under the first solution, the contractor is not entitled to prolongation costs or damages as a result of the concurrent delay. This result is either based on § 297 German Civil Code, pursuant to which the employer is not legally in default of its duties to accept performance and cooperate with the contractor as long the contractor is itself not ready to perform the works. Alternatively, this is based on a strict application of the *conditio sine qua non* formula.

— The second solution provides the contractor with a reduced claim for prolongation costs or damages which is apportioned pursuant to the parties' respective contribution to the concurrent delay. This solution is based on an application of the principle of apportioning legal liability according to causation as stipulated in § 254 German Civil Code.

While there is no case law providing a definitive answer which of these two solutions is to be followed, the first solution is preferred by the majority in legal literature. If based on the rules on default pursuant to § 297 German Civil Code, it is fully in line with the German statutory provisions and case law on causality and provides clear-cut results.

How is the question of evidence as to causes and periods of delay dealt with?

German courts will generally appoint experts to assess and give evidence on the causes and periods of delay. These experts will receive their instructions from the court and most often the court will draw up their instructions, including the questions to be answered by the experts. While not commonly done, courts may also consult with the parties before phrasing their questions to the experts.

In addition or rebuttal to the court appointed experts, parties may provide opinions of party appointed experts. While these opinions constitute formal evidence, courts generally perceive them as less neutral and award them less weight compared to the opinions of the court appointed experts.

There is no general defined standard for the calculation of critical delay and resulting costs. However, the common method applied by experts and accepted by courts is a three step analysis (*Soll'-Methode*):

1. Determination of the contractual time schedule (as-planned schedule).
2. Determination, documentation and analysis of the delay events.
3. Incorporation of the delay events in the contractual time schedule and determination of their effect.

This three step analysis shows how the as-planned schedule changed due to the different delay events. The result obtained is a theoretical as-built schedule providing a new theoretical total construction time, which provides an estimate of the delay events' overall effect. For it to constitute sufficient evidence before courts, the schedule has to directly allocated costs and delays to certain causes. As such, the expert analysis is required to have a high level of detail, which poses a considerable threshold for successful claims.

Pursuant to § 287 German Code of Civil Procedure (*Zivilprozessordnung*) courts are allowed to estimate, *inter alia*, the effects of delay events. Such an estimation is possible if the responsibility for a delay event is clearly allocated, the effect is probable and there are sound indications on which the estimate can be based. However, as these prerequisites are interpreted narrowly by the courts, this provision is seldom applied in practice.

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

Parties to a construction contract are generally free to agree the terms to govern their contractual relationship. The limits are provided by mandatory laws, including the law on standard terms. While there are no mandatory laws preventing the parties of a construction contract from assigning the risk of concurrent delays to either the contractor or employer, such a provision may be problematic if included in standard terms.

The statutory provisions on standard terms are included in §§ 305 *et seq*. German Civil Code. In international comparison, these provisions, and particularly the related case law, are very strict.

The law defines standard terms as contractual terms that have been drafted for a multitude of contracts and which one party presents to the other party. The courts' interpretation of this definition is very broad. For example, a sole clause which has been specifically drafted and negotiated for a previous contract and is then copied into a second contract by one party will regularly be considered a standard term.

Generally, standard terms are held invalid if they lead to an unreasonable disadvantage of the other party. This is assumed by the courts in two constellations:

— if a term is not compatible with the basic principles of the statutory provisions from which it deviates, or

— if a term restricts the essential rights and duties resulting from the nature of the contract in such manner that the purpose of the contract is jeopardised.

There is no relevant case law on the validity of standard terms dealing with the risk of concurrent delay. Nevertheless, the general jurisprudence on standard terms suggests that a clause that puts the full risk of a concurrent delay on either of the parties and releases the other party from all liability may well be invalid.

Accordingly, a party wishing to incorporate a term on the risk of concurrent delays into its construction contracts should take care that the term is either not a standard term or, were it is, that the clause does not unreasonably disadvantage the other party in the meaning of the laws on standard terms.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

If applying the preferred solution for concurrent delay under German law set out above, the described scenario would be solved as follows.

The relevant time of concurrent delay is the time during which both causes of delay, i.e. the Contractor Risk Event and the Employer's Variation, are effective. This are the 14 days from 1 to 14 February.

Since the Employer was not ready to receive the Contractor's performance during this time, the Contractor is not in default of its performance. Pursuant to § 286 (4) German Civil Code this consequence is independent of whether the Contractor could or, as presently, could not perform itself. Thus, the Contractor is in default of performance from 21 January to 1 February and from 14 to 25 February, but not for the time in between. As a result, the Contractor is entitled to an extension of time of 14 days for the time from 1 to 14 February as it is not legally at fault regarding this delay.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

However, since the Contractor was itself not ready to perform its duties under the contract during these 14 days, pursuant to § 297 German Civil Code the Employer is also not in default of its duties to accept performance and cooperate with the Contractor. Hence, the Employer is not required to reimburse delay-related costs to the Contractor for the time from 1 to 14 February as the Employer is not legally at fault regarding this delay either.



Poland

Lidia Dziurzynska-Leipert – CMS Warsaw

Is concurrent delay a well developed and understood concept?

Concurrent delay is not a well-developed or understood concept in Poland.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

There is no definition of concurrent delay in Polish law or in Polish case law.

How is the issue of concurrent delay treated?

Under Polish law there are no statutory rules for delay and/or allocating risks and responsibilities to the parties in the event of concurrent delay. There is also no established case law dealing with concurrent delay. Potential claims of the parties relating to concurrent delay are dealt with according to the rules for defective performance/non-performance and for compensation of damages relating thereto.

The general rule under Polish law is that damages are due only if the delay is culpable. Therefore, unless the contract provides otherwise, the contractor can only claim costs of the extended performance of the contract from the employer if the extension was caused by the employer's fault.

At the same time, in a judgment of 27 September 2013 (I CSK 748/12) the Supreme Court stated that contractual penalties imposed on the contractor after a delay caused by the employer are not acceptable for being in conflict with the principle that a debtor cannot be in delay if the creditor is in delay.

Therefore, if the contract provides for contractual penalties for delay, in the situation where the delay was caused by both, the employer and the contractor, the contractor will not pay contractual penalties for delay but will also not be able to claim the costs of the extension from the employer (depending on the employer's contribution to the contractor's delay in performing the work).

Delay might be caused by both the employer and contractor where the contractor has delayed in performing the works and the employer has delayed in co-operating with the contractor, especially handing-over the construction site, providing permits

required to perform the works, informing about circumstances impacting the course of the works, etc. or other circumstances delaying the works caused by the employer (e.g. instructed variations).

Therefore, a delay caused by both the employer and the contractor would be a delay in performance of the works for which the contractor is partially liable as the delay was caused also, to the certain extent by the employer e.g. by delay in handing-over the construction site to the contractor. Consequently, the employer's delay must be at least one of the reasons (must contribute) to the contractor's delay in performing the works. Depending on the extent of such contribution the contractor may be still liable towards the employer for delay damages (if the employer's breach of the contract was minor and did not significantly contribute to the contractor's delay).

Are there any general principles that apply to the treatment of concurrent delay?

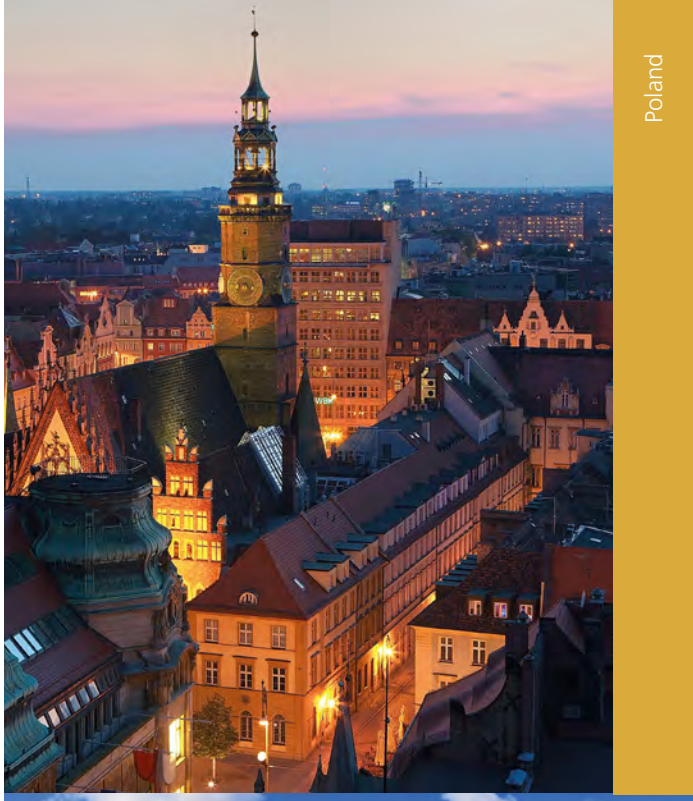
In Polish law there are no general principles that apply to the treatment of concurrent delay. In particular, there is no rule according to which the contractor would automatically get an extension of time for any period of concurrent delay. There are no causes of delay for which statutory rules or case law exist.

The contractor's claims for additional payment for periods of concurrent delay are to be assessed pursuant to the general rules for defective performance/non-performance described in point 3 above. Moreover, an entitlement for additional costs requires that such costs can be directly allocated to a certain cause (requirement of causal link).

How is the question of evidence as to causes and periods of delay dealt with?

Polish law does not provide for any specific rules for evidence as to causes and/or periods of delay. In particular, there are no officially accepted methods of analysis. The general rules provided for in the Polish Civil Procedure Code (the "CPC") apply.

Usually each of the parties will hire a programming expert/delay analyst to prepare a so-called private expert opinion, who has his/her preferred method of analysis out of a number of possible methods. At the same time, in the light of the CPC such opinion is treated as any other private document and does not have the same evidentiary value as the court expert opinion. Therefore, in court proceedings in most of the cases a court expert opinion will also be prepared.



Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

Under Polish law the debtor may assume by contract the liability for the non-performance or improper performance of the obligation due to specified circumstances for which he is not liable by virtue of statutory law. This includes taking the risk of concurrent delay.

At the same time, according to the case law and legal doctrine, in order for such extension of liability to be effective, the parties should expressly and unequivocally indicate the circumstances for which the debtor is to be liable.

The SCL Protocol scenario

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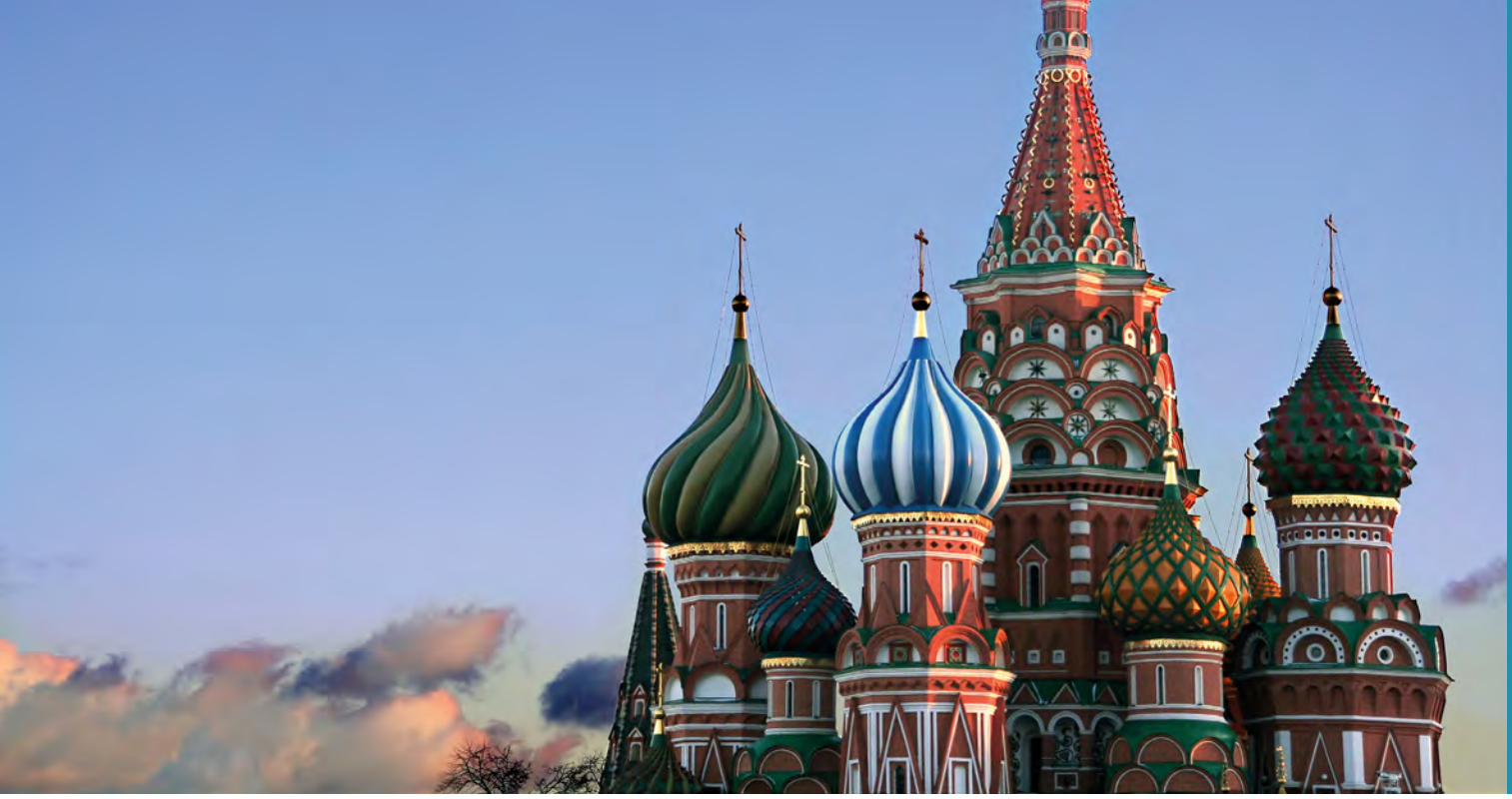
1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

Due to lack of statutory regulations and the case law concerning the concurrent delay it is difficult to assess whether and to what extent the contractor would be entitled for additional time under the presented circumstances. However, if the works covered by the variation are not on the critical path along with the works delayed by the contractor's risk event, then the delay due to the contractor's risk event would occur anyway, regardless whether any variation is instructed. Under such assumption most probably the contractor would not be entitled to any extension for the variation's works period, since with the variation or without the variation the delay would be the same. If, on the other hand, such dependence was existing, then the contractor could claim that employer has partially contributed to the contractor's delay because the variation disrupted performing the (already delayed) works. However, it is difficult to assess the exact number of days of such prolongation (the maximum would be the period of the variation's works i.e. 14 days).

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

The Contractor could only recover delay-related costs to the extent that it was entitled to an extension of time as discussed above (and assuming that the contract provides for a basis for recovery of delay-related costs).



Russia

Artashes Oganov – CMS Moscow

Is concurrent delay a well developed and understood concept?

No, concurrent delay is not a well-developed concept in Russia. Russia belongs to the civil law (continental law) family, and the Russian Civil Code that is the main source of civil legislation does not recognise the concept. To the best of our knowledge court practice does not widely recognise or deal with this issue as well. To some extent this issue is covered by the parties in more advanced contracts drafted under the Russian law, but based on the foreign law standard forms, e.g. FIDIC silver book or a mix of different standard forms based on contractor's or employer's level of expertise and country of origin.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

No, for the reasons stated above there is no generally understood and accepted definition of concurrent delay.

How is the issue of concurrent delay treated?

In case of concurrent delay (or any delay in general), the court will review the contract and the statutory law, and to some extent will take into account a previous relationship between parties that was established during the contract performance. Imperative rules (if any) of the statutory law will always prevail, and all other issues will be governed by the contract. In general, there could be three reasons that would grant the contractor a pardon and sometimes provide a right for reimbursement or right to claim damages/penalties in case of the delay: (a) default on the behalf of the employer, (b) force major event, or (c) another reason stipulated by the contract. The history of relationship is important because the parties most likely shall treat similar cases in the same manner and the court may pay attention to it.

In most cases, the contractor must suspend the work, notify the employer about such suspension and reasons thereto, and then the contractor and the employer would most likely sign an additional agreement to the contract or will have to settle a dispute in court or via other means.

If there are two or more (concurrent or not) reasons for delay, each party will need to prove the event, which it refers to, and, what is more important, will need to prove the whole period of delay and extension of time requested, as well as damages/penalties (if applicable).

The contractor will be entitled to receive the amount of reimbursement, damages and / or penalties from employer in the amount that the contractor will be able to prove. Thus, the situation may differ from case to case. For example, if the employer failed to deliver the materials timely to the contractor, the contractor had to declare a delay and would be entitled for reimbursement of damages for idle time. In case, any force major event affecting the contractor starts later, and during such event the employer delivers the materials, we might assume that the contractor will be able to claim damages for the whole or most period of the delay (including force major that would otherwise be not reimbursable), in case the contractor will be able to prove, that he could finish the works before force major event, in case the employer had delivered the materials on time. However, the positive outcome of such claim for contractor is not guaranteed in case of court dispute.

Are there any general principles that apply to the treatment of concurrent delay?

First, the contractor should suspend the works if he believes that there are grounds for delay and extension of time. Otherwise, he may lose his right to claim extension of time and damages / penalties, if he continues to work.

Second, the contractor must notify the employer and state all the reasons for delay that the contractor envisages.

Third, the contractor shall be ready to prove all the time extension and damages / penalties he claims, thus it is important to gather all related documents and other evidence in the process to be ready when the time comes (e.g. notice or certificate of suspension of works, expert opinions, reference letters from authorities confirming events causing the delay, if possible, etc.). Usually, the contractor never receives any automatic extension of time, unless otherwise specified in the contract, and in most cases, the contractor is at risk that he will not be able to prove that he had valid grounds for an extension time.

The most common delays, where contractor has a right for reimbursement, are the delays caused by the employer's failure to perform obligations that in turn prevents the contractor to perform his respective obligations. The Russian Civil Code and jurisprudence

thereto generally cover these situations. Concurrent delays would be an additional factor to consider in that scenario on a case-by-case basis.

How is the question of evidence as to causes and periods of delay dealt with?

There are two general types of evidence: (a) documents (including expert opinions and results of technical expertise), and (b) witnesses (including, expert witnesses). In practice, opinions of experts and expertise results often differ from one another. Usually, each party will bring their own experts, supporting such party's point of view. In that case, the court may appoint its own expertise to clear out the confusion. However, none of the evidence will have a pre-set prevailing force, and the court must decide the case on its merits.

There is no such requirement that there must be a direct link between the cause and the delay, however, the claimant must prove the event itself, the outcome and the causation. The more remote/indirect the cause, the harder it will be to prove that it somehow caused the delay/damages.

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

Yes, the parties do have a freedom of contract and contract rules governing the risk on concurrent delay will be acceptable and enforceable. However, this would not change the general principles stated above, that (a) imperative rules (if any) of the law will prevail, (b) the contractor must notify the employer, and (c) the contractor must prove whatever events he is referring to or claims he is making.

In terms of imperative rules, for example, we believe it would be impossible to set out in the contract, that the employer in all cases is not responsible for defaults on his side, e.g. late delivery of materials. However, we believe that it may be valid to state in the contract that in case another non-compensated event outside of employer's control occurs on par with late delivery of materials, then the contractor may be entitled to reimbursement for the period of delay (if any) purely (excluding overlapping time) caused by the employers default, and not by such other event.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

As there are no direct regulations governing this situation, it is difficult to assess the exact impact and many factors will have effect on the outcome. However, if we assume there are no defaults on either side, then most likely no additional time will be granted, if the process is parallel (i.e. the contractor can deal with his delay and variation at the same time and not in sequence).

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

The question of delay costs compensation, without having regard to other potential variation related costs, will depend on the fact, whether the variation itself causes any variation specific delay costs (i.e. idle time for delivery of materials necessary for variation that would not be required otherwise), or if only the additional time, not exceeding the Contractor Risk Event delay, is necessary. The contractor may be entitled for compensation of variation specific costs that contractor would incur regardless of the Contractor Risk Event. In the end such costs reimbursable by the employer might be set off against potential penalties payable by the contractor for the delay.

In the above example, if no additional time is granted for the variation because the work related to the Contractor Risk Event and the variation will be done in parallel, there should be no entitlement for general delay costs for the time taken to implement the variation. However, the contractor shall retain the right to claim other costs caused specifically by the variation, if applicable, for example, cost of extra materials or cost of re-doing the already completed works.

The assistance of Andrey Mironov in the preparation of this chapter whilst working at CMS Moscow is gratefully acknowledged.

Serbia

Marija Marošan – CMS Belgrade

Is concurrent delay a well developed and understood concept?

Serbian law does not recognize legal concept of concurrent delay and, hence, does not prescribe a mechanism for resolving these situations. Additionally, case law and jurisprudence on this issue are practically non-existent.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

There is no generally accepted definition of concurrent delay, as Serbian regulations, case law and jurisprudence do not deal with this concept.

How is the issue of concurrent delay treated?

Even though the Serbian law does not establish specific rules for handling concurrent delay, the issue of concurrent delay may be dealt with by using general rules for delay and damage compensation stipulated by Serbian Law on Contracts and Torts, as well as rules on extension of time prescribed by Specific Customs on Construction (*Posebne uzanse o građenju*). Specific Customs on Construction are collection of construction customs that are applied to construction agreements only if contractual parties have specifically agreed to their application.

The Law on Contracts and Torts differentiates between debtor's and creditor's delay and sets out consequences of those delays.

Namely, under the said Law, a debtor's delay occurs if the debtor fails to perform its obligation at due time. A debtor's delay may occur even without debtor being at fault. Accordingly, if the delay was caused by circumstances that were outside of debtor's control, the debtor will not be responsible for damages suffered by the creditor. However, if the debtor's fault exists, the creditor will be entitled to damages.

On the other hand, a creditor will be in delay if it refuses, without justified ground, to accept performance by the debtor or if it prevents performance through its conduct. A creditor will also be in delay if, although ready to accept performance of a debtor's simultaneous or dependent obligation, it fails to offer performance of its due obligation. At that moment, the creditor is considered to be in delay both as creditor and as debtor.

However, creditor's delay will not occur if it proves that, at the time the debtor offered its performance, or at the time set for performance, the debtor was unable to perform its obligation.

Hence, under the Law, creditor's delay prevents occurrence of debtor's delay. Once creditor's delay takes place, the debtor's delay ceases and the risk of loss or damage is transferred to the creditor. Additionally, the creditor is obliged to compensate the debtor for damages suffered due to its delay.

As seen from the above, the delay provisions of the Law on Contracts and Torts are most suitable for resolving issues of delay in case of simultaneous obligations of debtor and creditor. As concurrent delay does not have to imply delay in simultaneous obligations, but also obligations that are due independently of each other, the below presented provisions of the Specific Customs on Construction may be more useful for resolving concurrent delay issues.

Under the Specific Customs on Construction, a contractor would be entitled to seek extension of time, in case it was prevented from performing the works due to changed circumstances or employer's failure to fulfil its obligation. The Specific Customs on Construction envisage a list of circumstances that can be considered as circumstances giving right to extension of time – natural events (fire, flood, earthquake, etc.), unforeseen works that could not be anticipated by the contractor at the time of conclusion of the contract, delay in delivery of equipment (if the employer or person appointed by employer is responsible for such delivery), etc.

The contractor would not be entitled to seek an extension of time in case the relevant changed circumstance occurred after completion date (note that, under the Specific Customs on Construction, completion date implies not only final completion date but completion date of each phase of the works). But, the contractor would be granted an extension of time if it proved that the changed circumstance would occur even if the works had been performed within the agreed deadline.

The Specific Customs on Construction do not regulate contractor's entitlement to damage compensation in case of extension of time. But, based on the above described rules of the Law on Contracts and Torts, the contractor would be entitled to additional payment if the reasons for delay can be attributed to the employer.

Further on, the Specific Customs on Construction allow a contractor to suspend construction works if performance of works is hindered or prevented due to the employer's actions (i.e. due to employer's non-fulfilment or delay in fulfilment of obligations) and

the employer failed to fulfil the relevant obligation within an additionally provided period of time. Note that such employer's actions are considered as a circumstance that entitles contractor to the above mentioned right to seek an extension of time.

Additionally, the Specific Customs on Construction envisage that the party responsible for suspension of works has to compensate the other party for the damages suffered due to such suspension.

Are there any general principles that apply to the treatment of concurrent delay?

There are no general principles that would apply to treatment of concurrent delay and each concurrent delay dispute has to be analysed and resolved on a case by case basis.

How is the question of evidence as to causes and periods of delay dealt with?

Principally, under the Serbian civil procedure rules, in case of dispute brought before a court, calculation of delay would be performed by the court with the help of an expert(s) proposed by parties and appointed by the court. However, as already mentioned, Serbian regulations, case law and jurisprudence do not deal with the concept of concurrent delay. Hence, there is no officially determined method of calculation and each such calculation would depend on an approach adopted by the acting court/judge.

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

Considering the lack of relevant statutory provisions dealing with concurrent delay, such term would be given effect to the extent such term does not produce effects that are contrary to mandatory provisions of the Serbian Law on Contracts and Torts. Moreover, exactly because of lack of statutory provisions, it is advisable that a contract (governed by Serbian law) specifies, as unambiguously as possible, how concurrent delays are to be resolved.

The SCL Protocol scenario

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1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

Given the above described rule of Specific Customs on Construction on extension of time, the Contractor is likely to be entitled to an extension of time corresponding to the time period needed for implementation of the variation. It may be possible for the Employer to argue that no additional delay to completion had been caused by the Variation, because with or without the Variation the completion date would still be 25 February. However, the Employer should only be able to raise such an argument if it is actually possible for the Contractor to address both events (the Contractor Risk Event and the Variation) at the same time, which should be assessed on a case to case basis, without undue burden for the Contractor.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

As for the contractor's / employer's entitlement to delay related costs and damage compensation – the damage would have to be calculated based on the respective degree of default and causation, at all times having in mind the above described rules of Law on Contracts and Torts on damage compensation in case of delay.

Spain

Lina Kondrushkina Guseva and Álvaro Otero Moyano – CMS Madrid

Is concurrent delay a well developed and understood concept?

Under Spanish Law, there is not a specific definition or regulation of "concurrent delay". Concurrent liability concept is extensively used in Spanish case precedent albeit the specific definition and consequences of the same are analysed by the Courts on a case by case basis.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

No, there is no a generally understood and accepted definition. It shall be contractually determined between the parties in the relevant construction agreement when a "concurrent delay" event occurs. In any case, if a concurrent delay event takes place and any of the parties judicially claims its rights before the relevant Court, the judge will discretionally construct the concurrence of faults, the damages caused, the relevant penalties and their moderation (i.e. adjustment), if applicable. By this means concurrent delay is implicitly accounted for.

How is the issue of concurrent delay treated?

The relevant construction agreement shall contain the delay causes attributable to each of the parties and the allocation of risks. Thereafter, in the event of judicial claims, the Court, at its sole discretion will be entitled to construct the agreement and to determine the penalties (and its moderation, if applicable). In this sense, the agreement shall expressly define (i) which delays are attributable to each of the parties; (ii) the possibility or not to extend the term of the works in the event of concurrent delay event and (iii) the costs/penalties applicable in case of fault or delay in the works attributable to each of the parties.

Are there any general principles that apply to the treatment of concurrent delay?

Under Spanish law, there are no specific general principals applicable to the concurrent delay. Thus, the contractor would not have an automatic extension for any period of concurrent delay. However, it is

recommendable to include and duly regulate in the relevant construction agreement the causes and consequences of delays in the handover of any specific works attributable to each of the parties and any possible penalties applicable to the same. Moreover, under Spanish common market practice the following causes may imply an extension of the works term:

— force majeure events: however, the relevant contract shall duly define which events are considered a "force majeure event".

— variations requested by the owner which were not included in the initial project.

There is not a legal provision by means of which the contractor is entitled to claim for a compensation in the event of delays. However, when said delays are caused by the owner (either when it is a concurrent delay or not), the contractor will be entitled to judicially claim for a compensation of the damages effectively caused by it.

How is the question of evidence as to causes and periods of delay dealt with?

Generally, the contract shall clearly define which causes may be considered as an admitted delay and which of the parties shall be liable on each case. However, if a delay occurs, and the parties do not reach an agreement regarding the (i) possible extensions; (ii) compensation applicable or (iii) the party who is liable for said damage, an independent expert clause is usually included in the relevant agreement. In this sense, the agreement usually states that in case of unsolved discrepancy an independent technical expert will determine the relevant damages caused (to be elected between three or four different experts to be appointed by the parties or at random).

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

It could be included in the agreement but in the event any of the parties file a claim before the relevant Court, the judge may determine that the clause has been included in benefit only of one of the parties, and thus, there is a risk that the judge will declare this clause null and void.

The SCL Protocol scenario

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1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

In our understanding, the Contractor is not entitled to get an extension of the term. Note that the works have been already delayed until 25 February ("New Handover Date") due to a contractor's default (or, at least, due to an event which risk should be covered by the Contractor). Therefore, to the extent that the variation requested by the developer does not imply an increase of the New Handover Date, we understand that the Contractor may not request an extension of the handover date.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

The Contractor is entitled to recover any costs that have risen as consequence of a developer's variation which was not initially included or requested in the works projects. However, if the variation in the above example has not caused any additional delay to completion, the contractor would not be entitled to claim for additional delay cost.

Switzerland

Sibylle Schnyder – CMS Zurich

Is concurrent delay a well developed and understood concept?

The topic of concurrent delay is not widely dealt with in Swiss legal doctrine and case law.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

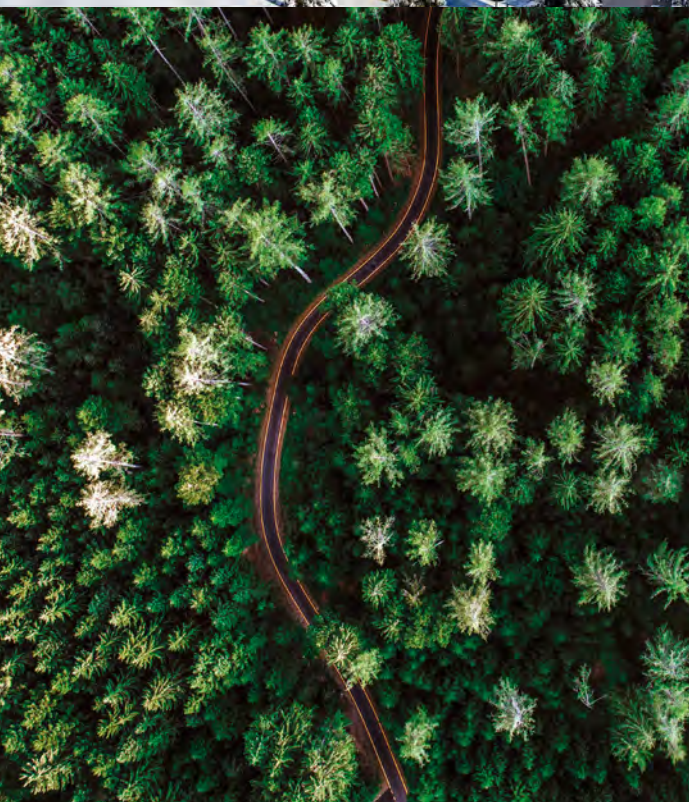
There is no generally understood and accepted definition of concurrent delay. Basically, legal scholars agree that a concurrent delay is caused at least by a reason in the risk area of the principal and a reason in the risk area of the contractor. Exact definitions vary, especially when it comes to the question whether an actual breach of a contractual obligation respectively intent or negligence on the side of either party is required.

How is the issue of concurrent delay treated?

There are statutory rules regarding default of a creditor and a debtor. The Swiss Society of Engineers and Architects has issued general conditions for construction contracts which – amongst others – also deal with deadlines and the possibility to extend them. These general conditions only apply if the parties explicitly agree that they are part of the contract. Generally, the parties are free to agree upon more precise and specific rules on concurrent delay in the contract.

Are there any general principles that apply to the treatment of concurrent delay?

Some scholars hold the view that in case of a concurrent delay, the contractor is entitled to an extension of time irrespective of whether he could actually have performed himself within the originally agreed time frame.



According to other scholars, there is no absolute right of the contractor to extend a deadline in case of a concurrent delay. According to this view, each case has to be considered individually taking into account the particular situation and the causality. It can be argued that the principal's participation duties (e.g. delivery of plans) require that the contractor can actually benefit from such participation (e.g. that he is actually ready to start with the respective execution work). This means, that unless the contractor is capable to perform, the principal cannot be in delay with his obligations.

As there is currently very little case law, it remains uncertain how a court would decide these issues.

Neither statutory law nor the general conditions of the Swiss Society of Engineers and Architects for construction contracts provide for an automatic extension of time. According to these provisions, an extension of time can only be granted if the contractor immediately notifies the principal of a delay. An extension of time is only granted for an "adequate" period which is required in order to catch up the delay, as contractors usually already build in some buffer time. The extension of time is therefore not in any case identical with the period of concurrent delay.

If no lump sum price has been agreed, statutory law provides that the contractor's extra effort that was caused by the principal's delay has to be considered when determining the compensation for the work. There is, however, no statutory provision which provides for an extra compensation due to a concurrent delay in case of an agreed lump sum price. According to legal doctrine and case law, the contractor could nevertheless claim for additional payment in case of a delay of the principal; such claim can be based by analogy on the principles of change orders.

How is the question of evidence as to causes and periods of delay dealt with?

If a court has to decide on adequate new deadlines, it would, amongst others, consider the following:

— Nature, duration and intensity of the breach of an obligation of the principal

— Degree of fault on the side of the principal

— Effects of the default attributable to the principal on the contractor's time line

— The specific operational situation of the contractor, e.g. workload situation

If the contractor claims that he is entitled to an extension of time and/or additional compensation, he has to proof the causality between the delay / extra costs and the cause of the delay attributed to the principal. The court can, upon request of either party or upon its own discretion, appoint one or several experts in order to determine the causes and effects of a delay.

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

In accordance with the principle of freedom of contract, the parties can contractually agree which party bears the risk of which kind of delay. Thus, it would also be allowed to contractually impose the risk of a concurrent delay on the contractor.

The SCL Protocol scenario

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1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

This is a typical situation that arises often in construction projects and leads in practice to a lot of discussions which – in the prevailing amount of cases – will eventually be solved with an amicable compromise. From a legal point of view, there is no universal answer. The solution will depend on the specific circumstances and the contractual wording. If the contractor's delay is for example due to a delivery delay of a subcontractor, one might argue that the contractor could nevertheless execute the variation during the waiting time for the delivery and thus he is not entitled to an extension of time in respect of the variation beyond 25 February. On the other hand, if the construction schedule does not allow the variation work to be done during the delay period caused by the Contractor Risk Event, and the variation thereby causes delay beyond 25 February, a court might approve an extension of time in connection with the variation order beyond 25 February and even allow the contractor to recover delay-related costs in connection with the variation.

Turkey

Levent Bilgi – CMS Istanbul

Is concurrent delay a well developed and understood concept?

Although there are no specific regulations on concurrent delay, there are scholarly opinions and precedent cases available on the topic of default.[20] In this respect, provisions in relation to "default" under the Turkish Code of Obligations Law No. 6098 (hereinafter: "**Law No. 6098**") may be applied by analogy.

Turkish law allows parties to agree on application of laws of other nations or incorporate standard contracts (e.g: FIDIC) to their agreements. There is no unified approach to interpretation of FIDIC agreements within Turkish jurisdiction. Nevertheless, parties are free to settle matters of concurrent delay outside of the court, using an approach similar to the British courts by way of mediation or arbitration. In fact, 20 % of the Arbitral Tribunals held by the Istanbul Arbitration Centre (ISTAC) consist of construction contracts.[21] As the content of such settlements are not accessible to the public, further information on the methods used outside of the Court cannot contribute to the development of the doctrine.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

There is no specific definition of concurrent delay under Turkish Law. Nevertheless, Article 117 of Law No. 6098 shows a clear path on the matter of default by stating: "*The default occurs with the notice of the creditor*". The communications intended to put the other party in default, to terminate the contract or to withdraw from the contract between merchants shall be conducted in line with the Article 18 of Turkish Commercial Code, which requires the utilization of registered letters, telegrams, or registered e-mail addresses as well as notices made through notary publics.

The sole "payability" ("*ödenebilir olması*") of an obligation, does not suffice to the occurrence of a default for the debtor. The creditor's notice of default regarding the performance is necessary as well. As a rule the debtor will go into default, if these two conditions are present.

[20] Yargıtay 15. HD., E. 2016/4747 K. 2018/756 T. 22.2.2018; HGK., E. 1991/340 K. 1991/467 T. 09.10.1991; HGK., E. 2012/13-161 K. 2012/216 T. 21.3.2012; HGK., E. 2012/13-162 K. 2012/217 T. 21.3.2012.

[21] Casework Report of ISTAC, istac.org.tr/wp-content/uploads/2018/05/rakamlarla_istac_en.pdf (last accessed on 03.01.2020).

However, there are exceptions; if the debtor and the creditor have agreed on a specific day of performance in their contract, then a notice of default is not needed for going into default. In a contract of synallagmatic nature, the party that has gone into default by the other party not performing its obligation, can give that party a reasonable period to perform or may request the Court's intervention on giving the creditor the reasonable period.

How is the issue of concurrent delay treated?

Law No. 6098 does not make explicit reference to concurrent delays, and there is no case law on this specific issue. In Turkish practice, subjects of "concurrent delay" and "default" are generally governed within contracts.[22] Within the rulings of the Turkish Supreme Court ("the Court"), it can be observed that the Court usually interprets the contract and/or uses its power of discretion in line with the general principles of contract interpretation and contributory fault ("*birlikte kusur*").

In case of a delay in the due delivery – which constitutes default under Turkish Law – the contract parties may determine a penalty clause that may compensate the damage prior to occurrence of the damage. The presence of the penalty clause accelerates the execution of the contract by forcing the parties to fulfill their contractual obligations. Penalty clauses under Turkish Law are valid and frequently applied. It is unanimously agreed that these clauses constitute an extension of the principle of "private autonomy".

Are there any general principles that apply to the treatment of concurrent delay?

The parties may agree on the beginning of work and specify a time for delivery. If this has not been done, the essence of the contract must be taken into consideration to evaluate a reasonable period. Therefore, an extension of time for any period of concurrent delay would not be granted automatically.

In Turkish jurisprudence, there are no specific kinds of delay which statutory rules have been constituted for. However, if the contractor fails to perform within the set period, the creditor may terminate the contract and may use his/her right of choice arising from the Law No. 6098.[23] Under Article 125 of the Law No. 6098, the Employer may either deny the specific performance and claim its positive damages or cancel the whole contract

[22] Yargıtay 15. HD., E. 2010/4513 K. 2011/744 T. 14.02.2011.
[23] HGK., E. 2012/13-161 K. 2012/216 T. 21.3.2012.

and claim its negative damages. However, if the Employer intends to sustain the contract and request specific performance, then the Employer is required to grant an additional time of reasonable length, whose length is to be determined on a case-by-case basis. According to Article 123 of the Law No. 6098, in a bilateral contract, if one of the parties is in default the other party may grant a proper time to perform the obligation or may demand from the judge to grant proper time. It should be also noted, that Article 124 regulates the circumstances, in which the extension of time is out of question. These circumstances are as following:

— If it is obvious from the circumstances or attitude of the contractor that granting time would be ineffective;

— If the performance of the debt is useless for the employer because of default;

— If it is obvious from the contract that the performance will not be accepted as the performance of the debt, if it has not been fulfilled within a specific time or time period.

How is the question of evidence as to causes and periods of delay dealt with?

In front of Turkish courts, the rule for evidence is "proving by deed", where the expert reports constitute a supportive means of evidence.

Since there are no unified opinions on nor legal definition of the additional payments and periods of concurrent delay, these period/costs are unlikely to be allocated to a certain cause and each individual claim shall be examined by the competent court according to its own discretion. However, the Court might decide during the proceedings that it is necessary to obtain the advice of experts and analysts. In Turkish jurisprudence, the party that receives an unfavourable court ruling, shall be burdened with the Court expenses on a pro rata basis. (The Court expenses will be distributed in accordance with the actual ruling of the Court.)

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

In a case, where one party takes the risk of concurrent delay, the risk allocation may be interpreted as a form of non-liability clauses. Turkish Law generally allows parties to agree on non-liability clauses and grants a broader freedom to merchants, as long as it stays in compliance with the prudent merchant principle. The limitation brought to non-liability clauses prohibits parties from benefiting from such clauses in cases of gross fault or fraud.[24]

The SCL Protocol scenario

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1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

The agreement provisions might determine the matter of granting an extension of time, for instance if the provisions foresee that FIDIC terms will apply, the Employer variation would entitle the Contractor to an extension of the contract completion date. In these circumstances, the Contractor will be entitled to an extension of time for the period of delay caused by the Employer variation. In case that the Employer and Contractor have jointly caused the delay (as appears to be the case in the above scenario), they would be liable for their defective fraction and accordingly the compensation amounts, and the extension of time would be settled by the courts, unless otherwise agreed between the parties.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

As mentioned in the previous answer, if the Employer and Contractor have jointly caused the delay, any compensation would be settled by the courts. This includes a determination of any entitlement to delay-related costs arising from the Employer variation.

[24] Yargıtay 15. Hukuk Dairesi, 22.12.2014 tarihli ve 2014/5266 E., 2014/7471 K. sayılı kararı.

Ukraine

Anna Pogrebna – CMS Kyiv

Is concurrent delay a well developed and understood concept?

The concept of concurrent delay is unknown under Ukrainian law.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

There is no definition of concurrent delay as such.

How is the issue of concurrent delay treated?

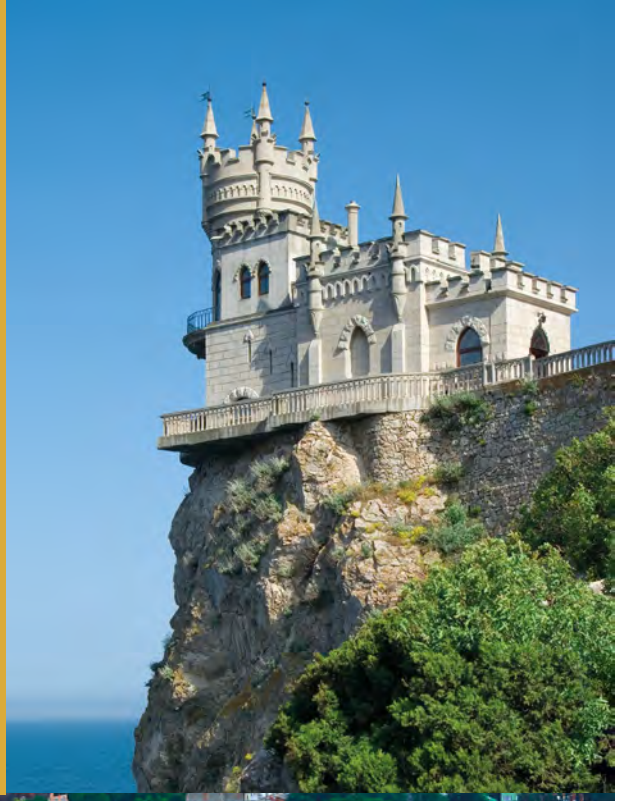
Even though the concept of concurrent delay is not developed, the Civil Code of Ukraine, the Commercial Code of Ukraine and secondary legislation set out provisions on contractual delays, including under construction contracts (i.e. risks and responsibilities of a defaulting party, rules for defective performance/ non-performance, liability). In addition, the issue of concurrent delay may be regulated by the terms of the contract.

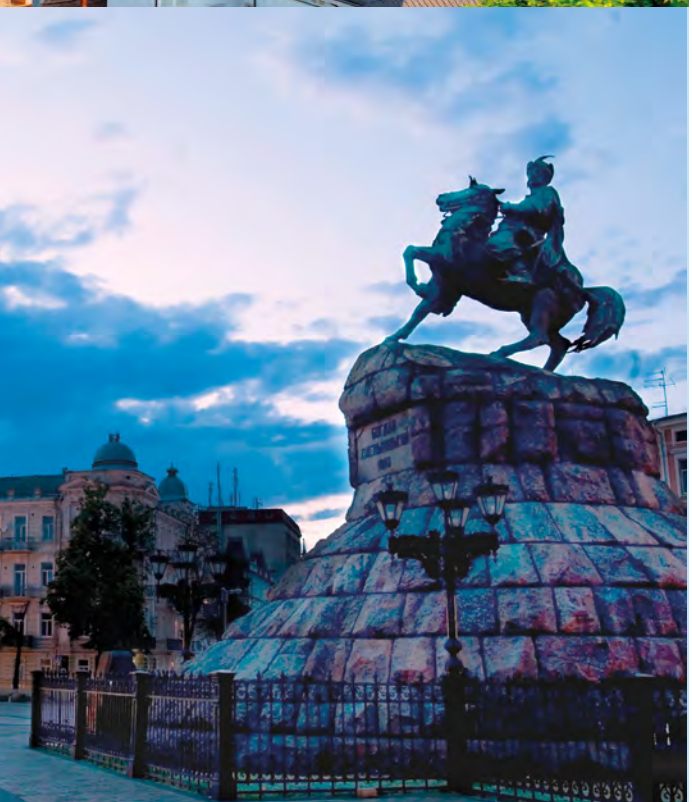
Are there any general principles that apply to the treatment of concurrent delay?

Under the general rule, the contractor is not responsible for the delay, if it has been caused by the delay of the employer, and vice versa.

Under the law, there is no automatic extension of construction works completion term (the "**Extension**"). However, there is no statutory restriction for the parties to include provisions on the Extension into the construction contract (either automatic or subject to an additional consent). In case the construction contract does not regulate the issue of the Extension, the Extension will require amendments to the construction contract.

Under the law, a party is entitled to request the Extension subject to amendments to the construction contract in the following cases: (a) a force majeure event; (b) a breach of contractual terms by the employer (e.g. delays in transferring an advance payment, delayed provision of construction materials, equipment); (c) changes to the design specifications and estimates; (d) third parties actions affecting the performance of





works, which are not under control of the contractor; (e) other circumstances, which may influence the works completion terms.

If the parties cannot reach agreement as to the Extension in the above cases, the dispute may be referred to the court. The court will carefully analyse whether there are justified and legitimate grounds for the Extension, and whether the requested Extension is proportional to claimed grounds. Should the contract between parties provide for specific procedure for requesting of the Extension, the court will analyse whether such procedure was followed by the requesting party. The cases on such issues rarely come before the courts in Ukraine, as parties usually negotiate such issues and agree acceptable solutions.

If a delay is due to the contractor's fault, the contractor will be required to pay a penalty or a fine, as provided for in a contract or established by law, and compensate employer's damages in full. If a delay has been caused by the employer (failure to provide a construction site, non-performance of the obligation to transfer the design specifications and estimates, etc.), the contractor will not be accountable for the delay or suspension of the construction works and may claim compensation of damages caused by the breach of the employer's obligations.

There is no specific case law relating to concurrent delay in Ukraine. However, in case of a dispute regarding the concurrent delay, courts may take into consideration the following factors: the nature of each event; interconnection of events; gravity of a contractor's/employer's breach; whether each party took sufficient efforts to mitigate the situation.

How is the question of evidence as to causes and periods of delay dealt with?

In case of any delay under a construction contract, the affected party usually sends a notification to the defaulting party specifying the breach of contractual obligations. In practice, a confirmation of such notifications serves as a valid evidence of delay under a construction contract before a court. In case of force majeure circumstances, it is usually required that a suffering party provides a confirmation issued by the Chamber of Trade and Commerce evidencing a force majeure circumstance and its duration. Third party actions also require documentary evidence.

It is up to the parties to regulate contractually the entitlement to the extension of time and/or additional costs and their affiliation with a specific cause.

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

There is no limitation under Ukrainian law to assign the risk of concurrent delay to a specific party, and the respective contractual provision would generally be considered as valid and binding. Nevertheless, the outcome of a potential court dispute is unclear as there is no settled case law dealing with validity and enforceability of concurrent delay provisions.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

Under Ukrainian law, the Employer has a statutory right to change the design specifications and estimates during the course of performance of the construction works, i.e. to introduce a variation to the agreed works if (i) the cost of the additional works does not exceed 10% of the total cost of construction works and (ii) the nature of works remains unchanged. Such variation does not require the Contractor's consent. If the cost of the additional works instructed by the Employer exceeds 10% of the total cost of the construction works, the Contractor is entitled to terminate the construction agreement and to claim damages from the Employer.

In the above scenario, the Contractor is not entitled to the automatic extension of time. It will be liable for the delay caused by the Contractor Risk Event for a period from 21 January to 25 February. It will not be liable, however, for completing the Variation during the period from 1 February to 14 February. At the same time, other works, performed in the period from 1 February to 14 February, which are not affected by the Variation, would not be excluded from the Contractor's liability (unless differently regulated by the construction contract).

The extension of time for completion of the Variation occurring after the agreed works completion date should be agreed by the parties in writing, and this is the Contractor who should initiate the Variation and the extension. Such extension would normally only apply to the works, which are subject to the Variation (the parties, however, are free to agree on the extension of the whole contract). Practically, a daily rate for delay damages should apply for the whole period of delay caused by the Contractor Risk Event. However, at the time of agreeing the Variation, the Contractor would have some leverage to negotiate the damages waiver for a period of 1-14 February or any other period.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

If the Works Variation does not result in works completion delay, i.e. all works after the Works Variation can be completed by 25 February, the Contractor would not be entitled to claim delay-related costs. If, however, the Works Variation results in works completion delay, i.e. the scope of works changed by the Works Variation results into works completion taking place after 25 February, the Contractor will be entitled to claim delay-related costs starting from 26 February until completion of the works. These costs would ordinarily be claimed as part of the cost of the Variation.



United Arab Emirates

Patrick McPherson – CMS Dubai

Is concurrent delay a well developed and understood concept?

While concurrent delay is a relatively underdeveloped concept in the United Arab Emirates ("UAE"), employers and contractors are becoming increasingly willing to assert it in an attempt to defeat claims for extensions of time and liquidated damages respectively.

Is there a generally understood and accepted definition of concurrent delay and when it arises?

There is no definition of concurrent delay referred to in UAE legislation or case law.

How is the issue of concurrent delay treated?

Under UAE law, there are no statutory rules dealing with delays and/or the allocation of risks and responsibilities in the event of concurrent delay arising. Further, as a civil law system, there is no established body of case law dealing with the treatment of concurrent delay.

Potential claims relating to concurrent delay are often argued on the basis of the general legal principles contained in Federal Law No. 5 of 1985 (the "Civil Code"). The Civil Code arguably provides courts and arbitral tribunals with a high degree of flexibility when determining liability for concurrency and is often used as a basis to promote an apportionment approach:

— **Article 290 states:** "*[i]t shall be permissible for the judge to reduce the level by which an act has to be made good or to order that it need not be made good if the person suffering harm participated by his own act in bringing about or aggravating the damage.*"

— **Article 291 states:** "*[i]f a number of persons are responsible for a harmful act, each of them shall be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability.*"

These articles arguably permit the court/tribunal to assess the causes of competing delays and apportion responsibility for these between the parties. These provisions can in turn be complimented by other articles of the Civil Code:

— **Article 246(1)**, which requires that contracts must be performed in a manner consistent with the requirements of good faith. This principle essentially allows considerations of fairness and common sense to be applied to situations where concurrent delays have arisen in relation to a contract. This could be used to argue that both parties' contribution to a delay period should be taken into account when assessing the associated time and costs consequences.

— **Article 106**, which generally precludes a party from unlawfully exercising its rights. This provision can be relied upon by contractors seeking to avoid the application of liquidated damages in circumstances where concurrent delays have arisen. For example, it can be argued that the application of liquidated damages by an employer (which had contributed to the delays), would be an unlawful exercise of its rights.

— **Article 318**, which is generally regarded as a prohibition against unjust enrichment. Again, this could be relied upon by both parties to argue that if compensation associated with a concurrent delay were paid, the recipient would be unjustly enriched; which is not permissible.

Reading these provisions together, there is a plausible basis for an apportionment approach to be applied to concurrent delays as a matter of UAE law.

That being said, there is no guidance as to how any delays or costs associated with concurrent delay should be apportioned, as such, this issue will be entirely at the discretion of the court or the tribunal.

Are there any general principles that apply to the treatment of concurrent delay?

As highlighted above, while the issue of competing causes of delay and concurrency are not expressly addressed under UAE law, it is commonly argued that the general principles contained in the Civil Code support an apportionment approach.

How is the question of evidence as to causes and periods of delay dealt with?

UAE law does not provide for any specific rules for evidence as to causes and/or periods of delay. In particular, there are no officially accepted types of delay analysis. Furthermore, if this issue is not dealt with by the contract then disputes as to the correct method often arise.

In such circumstances, each of the parties will usually present independent opinions issued by delay experts who will adopt their own preferred method of analysis.

In arbitration, the tribunal will generally determine which method of delay analysis (and consequently which expert opinion) it prefers. However, in disputes before the UAE courts, a court expert will generally be appointed who may choose to disregard any third party reports in favour of his/her own assessment.

Would a contract term which provides that one or other party will take the risk of concurrent delay be effective in your jurisdiction?

Article 257 of the Civil Code states: "*[t]he basic principle in contracts is the consent of the contracting parties and that which they have undertaken to do in the contract.*" This reflects the general principle that the parties have freedom of contract, provided that the terms agreed do not conflict with the law and are not contrary to public order or public morals.

As such, a contract term which clearly provides that one or other party will take the risk of concurrent delay should be effective in the UAE.

The SCL Protocol scenario

"An event that is at the Contractor's risk under the contract (a "Contractor Risk Event") will result in five weeks delay to completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in delay to completion from 1 February to 14 February."

1. Is the Contractor entitled to an extension of time in respect of the variation? If so, for how long?

In this case, the contractor has accepted responsibility for Contractor Risk Events. As such, it is liable for the delay from 21 January to 25 February.

However, the Civil Code arguably permits the court to apportion responsibility where competing delay events have occurred:

- **Article 290** – the court can reduce the obligation to complete on time if the employer participated in the harm suffered.
- **Article 291** – where the employer and the contractor are responsible, they shall be held liable in the proportion of their share.

As a result it is arguable that the contractor should be awarded an extension of time for the period between 6 February and 20 February. Otherwise, the contract would not be operated in accordance with the requirements of good faith, the employer could be viewed as unlawfully exercising its rights (e.g. by applying LDs when it contributed to the delay) and there could be an unjust enrichment of the employer if it obtained LDs in circumstances where it had contributed to the delays which arose.

2. Assuming the Contractor is contractually entitled in principle to recover delay-related costs relating to the variation, for what period (if any) could it recover those delay-related costs?

Each party would have competing arguments which would be at the discretion of the court or tribunal.

Taking into account Article 290 and 291, along with good faith and unjust enrichment – it would be arguable that the contractor should not be awarded delay costs in these circumstances. Equally, LDs should not be applicable for the period of delay caused by the employer.

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