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Concurrent delay: time to take stock?

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One of the most contentious topics any construction lawyer must grapple with, whether they are based in England or abroad, is that of concurrent delay. The challenges concurrent delay presents are compounded by the increasingly common use of bespoke contractual wording designed to shift more of the risk on to the contractor and/or subcontractor. To complicate matters further, approaches to concurrent delay differ between jurisdictions. Accordingly, it is critical that those using the same form of contract under different governing laws understand that the risks associated with the same clause may vary significantly.

In this edition of *Insight* we take stock of the most recent English case law and guidance on concurrent delay and analyse how the standard forms deal (or don't deal) with the issue. In doing so, we consider what parties entering into English law construction contracts need to be aware of when determining how to address concurrent delay and the risks they are prepared to accept. By way of comparison, we also consider how concurrent delay is treated under the civil law codes in Switzerland and the United Arab Emirates.

Whilst the general consequences of concurrent delay under English law, absent contractual wording to the contrary, are well established, the more difficult question is often whether concurrent delay exists at all in the relevant case. Recent authorities from the English courts demonstrate that the principal difficulties concern the definition of "*true concurrency*" and the correct approach to causation rather than the consequences which follow once concurrency has been established. As explained further below, those authorities increasingly focus not on what happens once concurrency has been identified, but on the question as to whether the competing causes of delay are properly capable of being described as concurrent.

So, what is concurrent delay?

In broad terms, concurrent delay arises in circumstances where an employer-risk event and a contractor-risk event both cause delay to completion of a project during the same period.

As noted above, a universally applicable definition of concurrent delay has proved difficult to formulate. However, the definition put forward by John Marrin KC in his "*Concurrent Delay*" paper for the Society of Construction Law in 2002[1] has broadly been adopted by the English Courts, including in *Adyard Abu Dhabi v SD Marine Services*[2] and *North Midland Building Ltd v Cyden Homes Ltd*,[3] as a "*useful working definition*" of the concept. Mr Marrin KC defined concurrent delay as requiring "*two or more effective causes of delay which are of approximately equal causative potency*".

In English law, it is generally accepted that whilst the employer-risk and contractor-risk events need not have occurred at the same time for the delay to amount to concurrent delay, the delaying effects of those events must occur simultaneously – that is, they must be felt at the same time. "*True concurrency*", where the delay events occur at the same time and exert an equal, simultaneous delay impact on completion of the works, will rarely, if ever, be encountered.

The SCL Protocol

The SCL Protocol (Second Edition) sets out some practical guidance on the treatment of concurrent delay. The Protocol draws a distinction between "*true concurrent delay*" and a "*more common usage of the term 'concurrent delay'*".

The Protocol defines "*true concurrent delay*" as follows:

> "*True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event* ***must be an effective cause of Delay to Completion*** *(i.e. the delays must both affect the critical path). Where 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*"[4] [emphasis added].

The common usage of concurrent delay, however, is described as concerning "*the situation where two or more delay events arise at different*

times, but the effects of them are felt at the same time".[5]

As noted above, true concurrency, where both the delay events and their (comparable) delaying effects occur simultaneously, will rarely arise in practice. Accordingly, under English law it is generally considered that the competing delay events need not occur at the same time to give rise to concurrent delay. Rather, their delaying effects on completion must be felt at the same time.

Accordingly, concurrency arises where both an employer-risk event and a contractor-risk event are effective causes of delay and the effects of both are felt simultaneously on completion of the works. In those circumstances, the Protocol adopts the *Malmaison* approach,[6] namely, where an employer-risk delay event and a contractor-risk delay event occur concurrently, the contractor remains entitled to any extension of time otherwise due for the employer-risk event, notwithstanding its own concurrent delay.

The Protocol does, however, distinguish between entitlement to an extension of time and entitlement to compensation. In relation to compensation, it provides as follows:

> "*Where Employer Delay to Completion and Contractor Delay to Completion are concurrent and, as a result of that delay the Contractor incurs additional costs, then the Contractor should only recover compensation if it is able to separate the additional costs caused by the Employer Delay from those caused by the Contractor Delay. If it would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover those additional costs.*"[7]

Accordingly, the Protocol broadly endorses the generally accepted principle of "*time but no money*" in circumstances of concurrent delay.[8] It distinguishes between protecting the contractor from liquidated damages where the employer has contributed to the delay to completion of the works and compensating the contractor only for losses which are genuinely and demonstrably attributable solely to the employer.

How do the key contract forms deal with concurrent delay?

FIDIC

The 2017 FIDIC form is the only major standard form contract to refer expressly to concurrent delay, although it leaves it to the parties to the contract to set out which principles should apply.

Clause 8.5 of the Yellow Book (2017 Edition) provides that where there is concurrent delay, entitlement to an extension of time is to be assessed in accordance with any rules set out in the Special Provisions – in the absence of which, the assessment of entitlement to an extension of time is to be undertaken having regard to all relevant circumstances:

> "*The Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Special Provisions (if not stated, as appropriate taking due regard of all relevant circumstances).*"

In the Guidance Notes, FIDIC explains that the above provision has been drafted in this way because a standard approach has not yet been adopted on an international basis, such that different rules and procedures may apply in different jurisdictions. However, FIDIC does suggest that the approach in the SCL Protocol (Second Edition), discussed above, may be worth adopting.

In practice, bespoke amendments to FIDIC extension-of-time provisions altering the allocation of delay risk are common. A 2024 study of 454 FIDIC-based contracts[9] identified amendments requiring contractors to demonstrate critical-path impact, mitigate delay and comply with claims procedures. It also identified amendments dealing expressly with concurrency, including provisions preventing separate extensions for concurrent causes and, more significantly, denying an extension where a concurrent contractor or subcontractor delay would itself have delayed completion.

JCT

The 2024 JCT standard form does not contain any express provisions addressing concurrent delay.

Accordingly, in circumstances of concurrent delay, deciding entitlement to an extension of time generally falls to be determined by reference to the contract's extension of time provisions along with the applicable case law. In the absence of bespoke amendments to the relevant contract, the prevailing view is that the contractor will ordinarily receive an extension of time where a Relevant Event is an effective cause of delay, notwithstanding concurrent delay on the part of the contractor. That approach was derived from *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*,[10] was subsequently applied in *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd*,[11] and was expressly endorsed in *Walter Lilly & Co Ltd v Mackay*,[12] all of which are discussed further below.

JCT contracts are, however, frequently amended to alter that general position. In the light of the case of *North Midland Building Ltd v Cyden Homes Limited*[13] (discussed further below), it is becoming increasingly common to encounter bespoke amendments which expressly provide that contractor-culpable concurrent delay will reduce or extinguish entirely any entitlement to an extension of time. Such amendments can take various forms. They may provide, for example, that a Relevant Event is to be disregarded if it is concurrent with contractor-risk delay, that no extension of time is available to the extent that delay results from the contractor's own default, or that periods of concurrent or preceding contractor-risk delay are to be deducted from the extension of time otherwise due in respect of a Relevant Event.

NEC

As with the JCT form, the NEC contract does not expressly deal with concurrent delay. Further, there is very little assistance from case law on how the NEC provisions should be interpreted when it comes to concurrent delay.

However, the NEC contract envisages dealing with delays through the prospective compensation event mechanism. Whilst this provides a contractual framework for assessing delay, it does not expressly provide for how concurrent employer-risk and contractor-risk delay events are to be treated.

The NEC contract does, however, deal with concurrency indirectly through the compensation event mechanism and the state of the Accepted Programme. Under clause 63.5 of the NEC4 ECC, the effect of a compensation event on the Completion Date depends on the extent to which that event causes planned Completion to be later than shown on the Accepted Programme current at the dividing date. Any contractor-risk delay already reflected in that programme therefore forms part of the starting point for the assessment. The Completion Date moves only to the extent that the compensation event itself causes further delay to planned Completion. The quality and currency of the Accepted Programme therefore assumes particular importance when assessing competing causes of delay.

Keating suggests that this assessment should not be applied mechanistically – that is, in determining the delay reasonably attributable to a compensation event, it may also be necessary to take account of other compensation events and contractor-risk delays.[14] Where potential concurrent or sequential delays make the effects of a compensation event too uncertain to forecast reasonably, the NEC mechanism for assessment based on stated assumptions may provide a means of addressing that uncertainty.[15]

The development of English law on concurrent delay

Against the background of the standard form contracts discussed above, the English courts have developed a number of principles addressing both the consequences of concurrent delay and the often more difficult question as to when competing causes of delay will be regarded as concurrent. The development of English law in this regard is discussed further below.

The Malmaison approach – time but no money

In cases of concurrent delay, the generally accepted position in English law, unless the contract expressly provides otherwise, is that the contractor is entitled to an extension of time but not loss and expense – that is, "*time but no money*". This is commonly referred to as the *Malmaison* approach, derived from the leading authority of *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*[16] as well as, in part, the later case of *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin Services UK Ltd*.[17]

In *Malmaison*, the parties entered into a JCT Standard Form Building Contract (Private with Quantities, 1980 edition) by which Henry Boot was engaged as the main contractor to undertake certain design and construction works on the completion of the Malmaison hotel in Manchester. The contract was not amended to make provision for the risk of concurrent delay.

The project was delayed by overlapping employer-risk and contractor-risk causes, and a dispute arose as to whether the contractor was entitled to an extension of time for completion of its works in those circumstances. The court ruled that the contractor was entitled to an extension of time in respect of the period of delay caused by the employer-risk Relevant Event under clause 25 of the contract notwithstanding the concurrent effect of the other (contractor-risk) event:

> "*… it is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event.*"

Accordingly, the *Malmaison* approach provides that, if an employer-risk event occurs and causes delay to completion, then the existence of a contractor-risk event is irrelevant to the assessment of an extension of time entitlement. In such circumstances, absent any express provision to the contrary in the parties' contract, the contractor will generally be entitled to an extension of time and relief from liquidated damages. It is important to remember that the contractor will only be entitled to an extension of time if the employer-risk event was an effective cause of delay to completion.

Following the court's decision in *De Beers v Atos*, however, the contractor will generally not be entitled to recover prolongation costs in respect of the delay period.

In *De Beers*, Atos was engaged by De Beers to design, supply and implement a global IT system. Completion of the project was delayed, and each party alleged that the other was responsible for that delay.

The court found that the employer and contractor were in concurrent delay on the project. In the light of *Malmaison*, the contractor was therefore entitled to an extension of time and relief from liquidated damages. Applying the ordinary principles of causation, however, it was not entitled to recover loss and expense in respect of the period of delay, given that it would have suffered exactly the same loss as a result of causes within its control (that is, the delay for which it was responsible):

> "*The general rule in construction and engineering cases is that*

where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary.

By contrast, the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible."[18]

The Scottish approach – apportionment

A different approach, that of apportionment, has emerged in Scotland.

The case of *City Inn Ltd v Shepherd Construction Ltd*[19] concerned a dispute which had arisen out of the construction of a hotel in Bristol under an amended JCT contract. Completion of the works was delayed, and disputes arose concerning entitlement to extensions of time.

In the first instance decision in the Outer House, the court concluded that, in cases of concurrent delay, it may be appropriate to apportion responsibility between the two competing causes of delay on a fair and reasonable basis:

"Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable. Precisely what is fair and reasonable is likely to turn on the exact circumstances of the particular case."[20]

On appeal, the Inner House affirmed the first instance decision of the Outer House, stating that:

"...where a situation exists in which two causes are operative, one being a Relevant Event and the other some event for which the contractor is responsible, and neither of the causes can be described as the dominant cause, it may be appropriate for the architect to apportion the extension of time between the two causes on a fair and reasonable basis... it will be open to the decision-maker... approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event."[21]

In Scotland, *City Inn v Shepherd* remains the leading authority in cases of concurrent delay. Accordingly, Scottish law permits the fair and reasonable apportionment of responsibility where two competing causes of delay, neither of which are dominant, exist. Whether this approach is favourable to any given party will depend upon the facts of the case.

The rejection of apportionment in England

The English courts have, however, declined to follow the Scottish apportionment approach established in *City Inn*.

In the 2011 case of *Adyard Abu Dhabi v SD Marine Services*,[22] Mr Justice Hamblen sitting in the Commercial Court stated that:

"...the English law approach would be to recognise that the builder is entitled to an extension of time, not an apportionment: see, for example, Malmaison at para 13."[23]

Hamblen J adopted Mr Marrin KC's definition of concurrent delay – that is, "*a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency*"[24] – as a useful working definition, and noted that:

"...there is only concurrency if both events in fact cause delay to the progress of the works and the ***delaying effect of the two events is felt at the same time***"[25] [emphasis added].

The Scottish apportionment approach was also addressed by the English courts in the later case of *Walter Lilly & Co Ltd v Mackay*.[26]

The dispute in *Walter Lilly* concerned the construction under a JCT contract of three large residential properties. The project suffered from extensive design development, delayed provision of information, prolonged construction and competing allegations concerning responsibility for delay.

Mr Justice Akenhead carried out a detailed review of the relevant authorities and expressly reaffirmed the *Malmaison* approach:

"...where there is an extension of time clause such as agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time."[27]

He went on to note that:

"...there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question. There is nothing in the wording of Clause 25 which expressly

> *suggests that there is any sort of proviso to the effect that an extension should be reduced if the causation criterion is established. The fact that the Architect has to award a 'fair and reasonable' extension does not imply that there should be some apportionment in the case of concurrent delays. The test is primarily a causation one*",[28]

and further observed, importantly, that:

> "*…although of persuasive weight,* ***the City Inn case is inapplicable within this jurisdiction***"[29] [emphasis added].

Whilst the *City Inn* approach of apportionment between competing causes of delay remains the approach taken in Scotland, it has not been adopted by the English courts. They have instead continued to follow the *Malmaison* approach of time but no money.

English law and freedom of contract

Under English law, the parties to a contract are free to agree between them how to allocate the risk of concurrent delay. This extends to stating that a contractor is not entitled to an extension of time where there is any concurrent delay.

The Court of Appeal put this beyond doubt in the case of *North Midland Building Ltd v Cyden Homes Ltd*,[30] upholding the parties' agreed amended contract wording which expressly stated:

> "*any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account*".

Lord Justice Coulson held that the above provision of the parties' contract was "*unambiguous*" and that it "*plainly seeks to allocate the risk of concurrent delay*".[31]

The Court of Appeal also confirmed that this was not contrary to the prevention principle, holding that the prevention principle "*is not an overriding rule of public or legal policy*" and "*has no obvious connection with the separate issues that may arise from concurrent delay*".[32]

Of course, the wording in the parties' contract would not prevent disputes as to the definition of concurrent delay and/or whether it has occurred, and new wording regularly appears in contracts to try to deal with these arguments. That wording is subject to the normal rules of contractual interpretation. Under English law that means a court will be concerned to ascertain the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to mean.

Actual critical delay – Adyard v Abu Dhabi and Saga Cruises v Fincantieri SpA

In practice, many concurrent delay disputes are likely to turn on whether there are, in fact, genuinely competing causes of delay to completion. This is a question of causation and will require an assessment of what was actually driving the delay to completion as a matter of fact.

In *Adyard*,[33] Hamblen J concluded from a review of the relevant authorities that if a contractor is to be entitled to an extension of time, it is essential that it prove that the employer-risk event had caused actual delay to completion of the works:

> "*The act relied on must actually prevent the contractor from carrying out the works within the contract period or, in other words, must cause some actual delay*"[34] [emphasis in judgment].

This was emphasised in the 2016 case of *Saga Cruises BDF Ltd v Fincantieri SpA*,[35] in which Ms Sara Cockerill KC (sitting as a Deputy High Court judge in the Commercial Court) stated that:

> "*A careful consideration of the authorities indicates that unless there is a concurrency affecting the completion date as then scheduled the contractor cannot claim the benefit of it. Causation in fact must be proved based on the situation at the time as regards delay.*"[36]

In this regard, and as explained in *Construction Law*, where a project is already in delay as a result of one event, and a subsequent event makes no difference to the overall delay, the later event may not be an "*effective or operational*" cause of delay because the project would have remained delayed even if that event had not occurred. The overlap in time of two delaying events is not, therefore, sufficient – each event must actually affect completion.[37]

The judgments in the *Adyard* and *Saga Cruises* cases marked a move towards a "*first-in-time*" approach to assessing concurrent delay, whereby in circumstances where an existing delay event has caused delay to completion of the works, a subsequent delay event will not be treated as a cause of delay unless it increases the period of delay already caused by the earlier event.

Thomas Barnes (in administration) v Blackburn with Darwen Borough Council – a common-sense approach?

The most recent significant consideration of concurrent delay by the English courts is the 2022 case of *Thomas Barnes & Sons plc (in administration) v Blackburn with Darwen Borough Council*,[38] which concerned a dispute as to extension of time and prolongation cost entitlements arising out of the construction of Blackburn Bus Station.

Blackburn Council engaged Barnes under a JCT Standard Building Contract for the construction of a new bus station. The works were significantly delayed, and the Council issued default notices following Barnes' failure to achieve completion. Barnes then stopped work, which prompted the Council to terminate Barnes' employment and engage a replacement contractor. Barnes subsequently claimed an extension of time of 251 days and loss and expense in the region of £1.8 million, whereas the

Council maintained that Barnes was entitled to only 27 additional days.

The parties' respective delay experts agreed that the internal finishes to the Hub were the final activity on the project critical path, but they disagreed as to the cause of the critical delay to completion. Barnes argued that the critical delay resulted from a deflection of the Hub steelwork, which was an employer-risk event, whereas the Council attributed the critical delay to Barnes' delayed completion of the roof coverings, a contractor-risk event. Neither Barnes nor the Council had argued that the above delays were concurrent – it was the judge, HHJ Stephen Davies, who raised concurrency during the cross-examination of the parties' delay experts.

Relying on Akenhead J's judgment in Walter Lilly, HHJ Davies found that the court was not compelled to choose between the competing expert analyses. Ultimately, it was for the court to determine, as a matter of fact, what delayed the works and for how long.[39] The judge concluded that both the steelwork and roof covering delays were effective causes of critical delay during the same period.

Barnes was therefore awarded an extension of time of 119 days, but its recovery of prolongation costs was restricted to only 27 compensable days because the employer-risk event was concurrent with the contractor-culpable delay during the remaining 92-day delay period. As explained by HHJ Davies:

> "*...for a very considerable period of time there was also a problem caused by the [contractor-risk] delay to the roof coverings which was itself a cause of delay to the critical path.*"[40]

The court's judgment in *Thomas Barnes* is significant for its approach to identifying concurrency. The employer-risk steelwork issue arose before the contractor-risk roof covering delay, yet the court decided that this did not prevent the later contractor delay from becoming an effective concurrent cause of critical delay. The decision therefore demonstrates the limitations of an overly rigid "*first-in-time*" analysis and instead adopts a pragmatic, fact-sensitive approach focused on what was actually causing critical delay during the relevant period.

The decision is not, however, beyond criticism. HHJ Davies' description of the law as "*settled*"[41] arguably understates the continuing debate as to what constitutes concurrent delay. In particular, the judgment does not define precisely what is required for a competing event to be an "*effective cause*", nor does it fully address how its approach sits with the *Adyard*/SCL Protocol analysis requiring both events actually to cause delay to completion during the relevant period. This is notable given Coulson LJ's earlier observation in *North Midland* that the position under the JCT standard forms regarding contractor entitlement to an extension of time in circumstances of concurrent delay is "*not entirely free from doubt*".[42] The judgment in *Thomas Barnes* has therefore been criticised for leaving uncertainty as to the boundary between genuinely concurrent and merely overlapping or sequential delay.

That difficulty is arguably illustrated by HHJ Davies' obiter observations[43] in which he indicated that contractor delay to the erection of steel frame sections and a subsequent employer design change requiring that work to be dismantled and re-erected would also have amounted to concurrent delay. That conclusion has been criticised on the basis that the two delaying effects were sequential rather than concurrent, with the contractor delay operating first, followed by the employer delay arising from the instruction to dismantle and re-erect the work. On that analysis, neither the causes nor their effects were concurrent. This example highlights the potential difficulty in reconciling the broad, common-sense approach adopted in *Thomas Barnes* with the requirement elsewhere in the authorities that both events must actually operate as effective causes of delay during the relevant period.

Concurrent delay under international civil law codes

So how do other jurisdictions compare? The treatment of concurrent delay under the civil law codes in Switzerland and the United Arab Emirates is considered below.

Switzerland

A settled doctrine of concurrent delay has not yet been developed under Swiss law. The issue is instead approached through general principles governing damages, including Article 44(1) of the Swiss Code of Obligations, which permits compensation to be reduced or excluded where circumstances attributable to the injured party contributed to the loss.

In the specific context of concurrent delay, however, the generally accepted approach broadly resembles the *Malmaison* approach of "*time but no money*". Where independent employer-risk and contractor-risk delays overlap, the contractor is generally entitled to an extension of time notwithstanding its own concurrent delay, but not to recover the additional costs associated with the employer-risk delay. Accordingly, although Swiss law recognises apportionment as part of its general damages regime, its treatment of concurrent delay appears closer to the English approach than to a *City Inn*-style apportionment of delay responsibility between the parties.[44]

UAE

The apparent approach under UAE law is materially different to that in Switzerland (and, indeed, England). Rather than applying a "*time but no money*" rule, the general principles of UAE law favour apportionment, whereby responsibility for concurrent delay may be allocated between the parties according to their respective contributions to it. This is consistent with Articles 246, 290 and 291 of the

UAE Civil Code, reflecting principles of good faith and responsibility for harm caused. As explained by Jeremy Glover of Fenwick Elliott and Simon Hughes KC in *Understanding the FIDIC Red and Yellow Books*:

> "*The UAE Civil Code therefore does expressly recognise the concept of apportionment. Taken together, these three provisions do seem to suggest that a Tribunal under UAE law might be able to adopt an apportionment approach when there is concurrent employer and contractor delay.*"[45]

Article 390 also gives the tribunal discretion to adjust agreed compensation to reflect the actual loss suffered, potentially permitting liquidated damages to be reduced where employer-risk and contractor-risk delays operate concurrently.

Thus, while both the Swiss and UAE jurisdictions lack a fully settled doctrine of concurrent delay, Swiss law broadly produces a *Malmaison*-style outcome, whereas UAE law appears more receptive to apportioning the consequences of concurrent delay between the parties by reference to their respective responsibility.[46]

Where does this leave matters?

The consequences of concurrent delay under English law are now reasonably settled. Absent express wording to the contrary, the *Malmaison* approach applies – the contractor is entitled to an extension of time for the period of delay caused by the employer-risk event, but will not ordinarily recover prolongation costs unless it can show that those costs would not have been incurred in any event as a result of its own delay. The Scottish apportionment approach in *City Inn* has not been adopted south of the border, although *North Midland* confirms that parties remain free to agree between them how to allocate concurrency risk.

There is, however, no universal approach to concurrent delay globally. In civil law jurisdictions such as Switzerland and the UAE, the position on concurrent delay principally depends on the applicable civil codes and general principles of contractual liability and damages, rather than a developed doctrine of concurrent delay equivalent to that under English law. Under Swiss law, the treatment of independent employer and contractor delays appears broadly comparable to the English "*time but no money*" position, although the Swiss Code of Obligations also recognises a wider power to reduce compensation where circumstances attributable to the injured party contributed to the loss. Under UAE law, the UAE Civil Code provides a potential basis for apportioning the consequences of competing causes according to the parties' respective responsibility.

Under English law, the more difficult question is whether concurrency exists at all. In particular, it remains uncertain as to when a later delay event can properly be regarded as an effective concurrent cause where completion is already being delayed by an earlier delay event. The "*first-in-time*" approach adopted in the *Adyard* and *Saga Cruises* cases must now be considered alongside the more pragmatic, fact-sensitive approach adopted in *Thomas Barnes*.

Ultimately, therefore, concurrent delay disputes are likely to continue to turn on detailed, fact-specific analysis. The key questions are likely to be what events were actually driving critical delay, whether those events were effective causes during the same period, and for how long. Clear contractual drafting and robust contemporaneous programming and delay expert evidence will therefore remain critical to allocating the risk of concurrency and to determining whether concurrent delay has, as a matter of fact, arisen.

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Footnotes

1. "*Concurrent Delay*" by John Marrin QC for the Society of Construction Law (SCL), 2002.
2. [2011] EWHC 848 (Comm).
3. [2018] EWCA Civ 1744.
4. SCL Delay and Disruption Protocol, Core Principle 10.
5. SCL Delay and Disruption Protocol, Guidance Part B: Guidance on Core Principles, paragraph 10.4.
6. (1999) 70 Con. L.R. 32.
7. SCL Delay and Disruption Protocol, Core Principle 14. See also *Insight*, Issue 93: Contractor claims for prolongation costs: a comprehensive guide – Fenwick Elliott.
8. This is what has come to be known as the *Malmaison* approach, discussed further below.
9. *The Global Use of FIDIC by Chinese Architecture, Engineering, and Construction (AEC) Firms*, Dr. Yuting Chen (London South Bank University), Prof. Yongqiang Chen, Prof. Shuibo Zhang, and Prof. Wenxue Lyu (Tianjin University).
10. (1999) 70 Con. LR 32.
11. [2010] EWHC 3276 (TCC).
12. [2012] EWHC 1773 (TCC).
13. [2018] EWCA Civ 1744.
14. Paragraph 7-178, *Keating on NEC*, Second Edition, 2022, David Thomas KC.
15. Paragraph 7-137, *Keating on NEC*, Second Edition, 2022, David Thomas KC. Keating notes the lack of express guidance on concurrent delay in the NEC ECC and also of decided cases on concurrency under the ECC wording. Drawing on *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, Keating considers that the project manager and contractor should take account of delays caused by other compensation events and contractor-risk delays when assessing the delay reasonably attributable to a compensation event. It also identifies clause 61.6 as potentially relevant where concurrent or sequential causes make the effects of a compensation event too uncertain to forecast reasonably.
16. (1999) 70 Con. LR 32.
17. [2010] EWHC 3276 (TCC).
18. [2010] EWHC 3276 (TCC) at 177–178.
19. [2007] CSOH 190; [2010] CSIH 68.
20. [2007] CSOH 190 at 19.
21. [2010] CSIH 68 at 42.
22. [2011] EWHC 848 (Comm).
23. *Id.* at 288.
24. *Id.* at 277.
25. *Id.* at 279.
26. [2012] EWHC 1773 (TCC).
27. *Id.* at 370.
28. *Id.*
29. *Id.*
30. [2018] EWCA Civ 1744.
31. *Id.* at 22.
32. *Id.* at 30 and 32.
33. [2011] EWHC 848 (Comm).
34. *Id.* at 282.
35. [2016] EWHC 1875 (Comm).
36. *Id.* at 251.
37. Paragraph 11.75, *Construction Law*, Volume II, Fourth Edition, 2024, Julian Bailey.
38. [2022] EWHC 2598 (TCC).
39. And see footnote 242 to paragraph 11.73 of *Construction Law*, Volume II, Fourth Edition, by Julian Bailey: "*There is an array of technical terminology that is often used to distinguish between particular events and types of delay... much of this terminology is apt to confuse or obfuscate the analysis of delay, and often what really matters is what factual effect a particular event (or events) had on the performance of the works.*"
40. [2022] EWHC 2598 (TCC) at 144.
41. [2022] EWHC 2598 (TCC) at 118.
42. [2018] EWCA Civ 1744 at 17.
43. [2022] EWHC 2598 (TCC) at 153.
44. Global Arbitration Review, *Comparative approaches to concurrent delay*, Ryan Whelan and Emily Kemp, The Guide to Construction Arbitration – Sixth Edition – Comparative approaches to concurrent delay – Global Arbitration Review.
45. Paragraph 8-029, *Understanding the FIDIC Red and Yellow Books*, Third Edition, 2018, Jeremy Glover and Simon Hughes KC.
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