



The Arbitration Review of the Americas

2024

**Concurrent delay: is there a
continental shift?**

The Arbitration Review of the Americas

2024

The Arbitration Review of the Americas 2024 contains insight and thought leadership from 38 pre-eminent practitioners from the region. It provides an invaluable retrospective on what has been happening in some of Latin America's more interesting seats. This edition also contains an interesting think piece on concurrent delay as well as an excellent pair of reviews of decisions in the US and Canadian courts.

Generated: February 8, 2024

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2024 Law Business Research

Concurrent delay: is there a continental shift?

Ted Scott and **Meera Wagman**

Secretariat

Summary

[IN SUMMARY](#)[DISCUSSION POINTS](#)[REFERENCED IN THIS ARTICLE](#)[INTRODUCTION](#)[WHAT IS CONCURRENT DELAY?](#)[CHALLENGES IN DETERMINING DAMAGES DUE TO CONCURRENT DELAY](#)[ENDNOTES](#)

IN SUMMARY

This article will address how concurrent delay is defined and how it is applied in different parts of the Americas along with discussing pitfalls, industry trends and current thoughts on apportionment.

DISCUSSION POINTS

- What is the definition of concurrent delay?
 - Variance of definition in different jurisdictions
 - How concurrent delay can be treated (binary or apportioned)
 - Considerations to be taken when dealing with concurrent delay
-

REFERENCED IN THIS ARTICLE

- *George Sollitt Construction Co v United States*
 - *Weaver-Bailey Contractors, Inc v United States*
 - General Services Administration Board of Contract Appeals in *Utley-James, Inc*
 - Association for the Advancement of Cost Engineering International
 - American Society of Civil Engineers
 - Society of Construction Law
 - *Schindler Elevator Corporation v Walsh Construction Company of Canada*
 - Brazilian Civil Code
 - *Lebolo-Watts Constructors v Secretary of the Army*
 - *Newport News Shipbuilding & Dry Dock Co v US*
 - *Raymond Constructors of Africa, Ltd v United States*
 - *Foundation Co of Canada v United Grain Growers Ltd*
-

INTRODUCTION

On construction projects, the potential for two delay events to occur in parallel or overlap is very high. The probability significantly increases the more complex the project is, and there may be more than two delay contenders. However, if delay events merely share common date ranges, it does not necessarily make them concurrent delays. The answer can be as complex as the projects themselves and entirely dependent on the governing law. How resulting damages get decided can be even more convoluted.

The problem has long stemmed from the fact that, no matter where you are in the world, there has been no uniform definition of concurrent delay and little guidance on how to assess resulting damages. While the problem is faced worldwide, this article focuses on the Americas, where recent rulings may be able to shed some light on what has often been termed 'Black Magic'.

WHAT IS CONCURRENT DELAY?

In principle, it is generally understood that concurrent delay occurs when two or more delays (which are the result of independent causes by independent parties) overlap during a given period. But what does that really mean?

Consider the following scenarios:

- Scenario one: there is an employer delay relating to permits that impacts the critical path. At the same time, there is a contractor delay relating to procurement of materials. However, the materials are not needed until later in the project, and therefore the delay does not impact the critical path (whereas the permits are needed to commence the project and therefore are critical).
- Scenario two: there are both employer and contractor delays impacting the start of critical path works at exactly the same time (the permit and the contractor's materials are both required to start the project).
- Scenario three: there is first an employer delay related to permits that impacts the critical path. Later, there is a contractor delay related to material procurement that also impacts the critical path. Unlike the previous scenario, the impacts do not start at the same time but they both get resolved at exactly the same time.
- Scenario four: there are initially both employer and contractor delays impacting the start of critical path works. However, the employer's permit delay is resolved while the contractor's material procurement continues and causes a longer impact to the critical path.
- Scenario five: there is first an employer delay related to permits that impacts the critical path. Later, there is a contractor delay related to material procurement that also impacts the critical path. The employer delay gets resolved first while the contractor delay continues to impact the critical path.

Whether any of the stated delays in the above scenarios are considered concurrent delay, in their entirety or in part, depends on the governing law. However, even in common law jurisdictions wherein the courts have grappled with concurrent delay in their decisions, it is still not crystal clear.

For instance, in the United States, the Court of Federal Claims in ***George Sollitt Construction Co v United States*** found the following in relation to concurrent delays:

The exact definition of concurrent delay is not readily apparent from its use in contract law, although it is a term which has both temporal and causation aspects. Concurrent delays affect the same 'delay period.' A concurrent delay is also independently sufficient to cause the delay days attributed to that source of delay.^[1]

The court in ***Weaver-Bailey Contractors, Inc v United States*** formed a slightly different definition of concurrency,^[2] as did the General Services Administration Board of Contract Appeals in ***Utley-James, Inc.***^[3] The latter stating:

Strictly speaking, there can be but a single delay over a given period of time, and when that delay has multiple, indivisible causes, it is attributable not to

either party but to both. Hence it would probably be more accurate to speak not of concurrent delays but of a single delay with concurrent causes.

There is no one court decision that defines concurrent delay, and industry associations are also generally unaccommodating. The Association for the Advancement of Cost Engineering International's Recommended Practice No. 10S-90 Cost Engineering Terminology lists five separate (though similar) definitions for concurrent delay as follows:

- Two or more delays that take place or overlap during the same period, either of which occurring alone would have affected the ultimate completion date. In practice, it can be difficult to apportion damages when the concurrent delays are due to the owner and contractor respectively.
- Concurrent delays occur when there are two or more independent causes of delay during the same time period. The 'same' time period from which concurrency is measured, however, is not always literally within the exact period of time. For delays to be considered concurrent, most courts do not require that the period of concurrent delay precisely match. The period of 'concurrency' of the delays can be related by circumstances, even though the circumstances may not have occurred during exactly the same time period.
- 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. The term 'concurrent delay' is often used to describe the situation where two or more delay events arise at different times, but the effects of them are felt (in whole or in part) at the same time. To avoid confusion, this is more correctly termed the 'concurrent effect' of sequential delay events.
- Concurrent delay occurs when both the owner and contractor delay the project or when either party delays the project during an excusable but non-compensable delay (eg, abnormal weather). The delays need not occur simultaneously but can be on two parallel critical path chains.
- The condition where another delay-activity independent of the subject delay is affecting the ultimate completion of the chain of activities.^[4]

The American Society of Civil Engineering (ASCE) defines concurrent delay as simply: 'Delay to the project critical path caused concurrently by multiple events not exclusively within the control of one party.'^[5]

The Society of Construction Law (SCL) confirms that the occurrence of 'true concurrent delay', namely 'two or more delay events at the same time', is a 'rare occurrence'.^[6] It clarifies that 'a more common usage of the term "concurrent delay" concerns the situation where two or more delay events arise at different times, but the effects of them are felt at the same time'.^[7]

Considering all of the above, it is likely that the following would be found regarding the above five scenarios:

- scenario one: no concurrent delay;
- scenario two: the entirety of the impacted period could be considered concurrent; and
- scenarios three, four and five: the overlapping period could be considered concurrent.

However, concurrent delay is often not that simple.

In Canada, the recent Ontario Superior Court case, *Schindler Elevator Corporation v Walsh Construction Company of Canada*,^[8] added clarity to the definition by finding:

It is not necessary for the independent causes of delay to occur exactly at the same time for them to be considered concurrent. Indeed, it is rare that concurrent delays start and end at the same time. Concurrent delays are more commonly experienced as overlapping events.^[9]

Given the apparent alignment on the rareness of exact concurrency, *it is likely that the results in Canada for the scenarios described above would be similar to those found in the United States.*

Civil law jurisdictions, however, prove to be far more opaque in their definition of concurrent delay, if they provide a definition at all.

In Mexico, while the affected party can allege a concurrent delay, the law is silent on the matter.^[10]

In Brazil, while there is no established concept of concurrent delay, there is the concept of concurrent fault which is defined by article 945 of the Brazilian Civil Code:

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.^[11]

Peru deals with public and private construction disputes differently. Public works are regulated in accordance with the Public Procurement Law^[12] and a Legislative Decree.^[13] However, neither directly addresses concurrent delays. Private works, on the other hand, offer different routes to resolve concurrent delays, considering foreign legal case law.

While there does not appear to be a legal definition of 'concurrent delay' in Colombian law, it does seem to be common practice for real estate developers and contractors to include a concurrent delay provision in contracts.^[14]

From the above, attempting to determine a likely outcome of the five scenarios in civil law countries is difficult and would probably depend on whether the contract itself provided a definition.

CHALLENGES IN DETERMINING DAMAGES DUE TO CONCURRENT DELAY

Apportionment is a buzzword in concurrent delay discussions. In the not-so-distant past, if concurrent delay was deemed to have occurred, it typically meant a contractor was due 'time but no money'. Recently, however, there has been a trend towards 'apportionment'.

Yet, if the definition of concurrent delay was confusing, the meaning of apportionment is even more so. Part of the confusion stems from whether the apportionment is referring to time or to damages.

In the United States, *the 'time but no money' concept originated in the 1934 case Newport News Shipbuilding & Dry Dock Co v US*, which found that neither party could recover if both parties contributed to the same total delay.^[15]

Later, the George Sollitt Constr Co v United States case found that a party may recover damages where there are multiple causes of delay to project completion, but only ‘when clear apportionment of the delay attributable to each party has been established’.^[16]

In this case, it would seem that ‘apportionment’ is referring to the allocation of delay (time) to each party. In other words, if a delay period can be refined such that segments of time can be allocated individually to the separate parties, then damages can likewise be apportioned.

As an example, and using scenario three from above, if delay can be measured at the time the contractor delay commences (while the employer delay was ongoing), then it should be possible to segregate the time when just the employer delay was occurring from the time when both the employer and contractor delay were overlapping.

While apportionment may be possible in some instances, the US courts continue to apply the principle that a party may not recover damages during a period of concurrent delay for which it was responsible. In the recent case *Lebolo-Watts Constructors v Secretary of the Army*, the US Court of Appeals (Federal Circuit) explained that:

In order to recover on a delay claim, a contractor must establish that ‘the government’s actions are the sole proximate cause of the contractor’s additional loss, and [that] the contractor would not have been delayed for any other reason during that period.’^[17]

In applying the above principle, the Court found that there was concurrent contractor delay during the period of the government delay and affirmed a Board ruling that the contractor therefore could not recover on its delay claim.

In the United States and Canada, it is common for a critical path delay analysis to be used in expert evidence to support such an apportionment (ie, allocation of delay). However, in civil law jurisdictions, such technical analysis is less common.

If courts find the delays to be truly concurrent and intertwined (ie, the specific amount of time attributable to each event or party cannot be determined), does it still mean that the damages also cannot be?

In the United States, there is precedence where courts have apportioned damages using a percentage based upon factual records. In *Raymond Constructors of Africa, Ltd v United States*, the courts viewed the overall delay as being concurrent and caused by three different parties.^[18] The court, therefore, split the responsibility into thirds.

Canadian courts are also said to apportion damages in instances of concurrent delays. In *Foundation Co of Canada v United Grain Growers Ltd*, a case in which there was a four-month delay to the project and each party alleged different causes for the delay, the court found that one party was responsible for three months of the delay, and another party was responsible for one month of the delay. The damages were then apportioned: 75 per cent to United Grain Growers and 25 per cent to the Foundation Company.^[19]

However, the recent Canadian case, *Schindler Elevator Corporation v Walsh Construction Company (WBP) of Canada*, reaffirmed the challenges with precisely quantifying resulting damages. The court stated that, in addition to proving that claimed delays impacted the critical path and to what extent (ie, via a reliable critical path analysis), a causal connection is required to link claimed damages to delays:

[W]hile I am obliged to 'do my best' in assessing WBP's damages, any determination that I make must still be supportable on the evidence. I cannot undertake an exercise that amounts to guesswork that may effectively vitiate WBP's evidentiary onus of proving damages. WBP is not relieved of its burden to demonstrate both delay by Schindler and cause of material contribution to losses and damages simply because the analysis is difficult.^[20]

The SCL's Delay and Disruption Protocol recommends a common sense approach to assessing concurrent delay, recognising the imprecise nature and challenges in exacting apportionment:

In considering whether concurrent delay exists, the Protocol recommends a common sense approach to delay analysis. In particular, the Protocol recognizes that delay analysis is rarely precise down to the day (or even few days). The application of common sense requires that the margin for imprecision^[21] should be taken into account in reaching a conclusion on concurrency.

It seems that North America may be trending towards (or at least entertaining) this concept of a practical view; however, these practical decisions will still need to be supported by evidence and analysis. Therefore, delay analyses are of utmost importance as courts try to more accurately apportion concurrent delay.^[22] The concept of apportionment, which will be discussed further below, has become a more commonly discussed and debated topic.

In Latin and South America, given the prevalence of civil law, a trier of fact may be less concerned about supportable evidence and apportion the delay based on what is deemed fair and reasonable.

In Brazil for instance:

If there is specific provision addressing concurrent delays, each party's responsibility will be proportionate to the fraction of the delay it has caused.

Considering that the contractor's fault contributed to the delay, the employer shall not be required to pay the total costs regarding the concurrent delay and the contractor will not be entitled to an extension of time with respect to the whole period of the delay. The purpose is to avoid any imbalance and to compensate proportionally the employer's delay with the contractor's concurrent delay.^[23]

And in Colombia:

[I]n 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 from 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 recognise additional costs to the contractor cannot exceed fifty per cent . . . of its initial price.^[24]

Based on the above, it seems that in Latin America, unless concurrent delay is specifically defined by the contract, the concept may not be recognised by the courts.

Given the pervasive lack of clarity that still remains on the issue, we offer the following points for consideration.

- Parties should not only define concurrent delay in the contract but also how damages will be handled. For example, the contract could expressly limit delay damage entitlement to critical path delays pursuant to proof based on a critical path analysis. Alternatively, if the parties want to allow for an alternative approach to the treatment of concurrent delay, such as specifying some portion of recoverable costs or establishing a percentage split between owner and contractor delay responsibility, that approach also can be specified in the contract.
- There is a clear trend in the courts regarding the preference of fact-based delay analyses that apply practicality and common sense. Modelled or theoretical types of analyses can often be manipulated to give an illusion of concurrency where none actually exists.
- The same could be said for a contractor's contemporaneous schedule updates. Whether purposeful or misguided, a schedule can show multiple critical paths again giving the illusion of concurrency. Without a real-time understanding of the actual critical path, contractors may find themselves barred from compensable delay claims later on.
- 'Pacing' may also need to be given consideration in concurrent delay. As an example, assume an employer event is known to have caused delay to the project. As a result of the delay, a contractor decides to reduce its manpower knowing that this would not cause delay to the project. Using a purely retrospective analysis, the contractor's 'slow' progress can appear to have caused a concurrent delay event though the employer event happened first and should have created relative float in the contractor's work. To avoid this misconception, if the contractor is purposefully pacing its work, it should document its intent contemporaneously. Looking at scenario three above, the contractor delay could be seen as pacing (ie, not concurrent).
- The above gives rise to the concept of 'primacy of delay'. The basis behind this argument is that whatever event happened first is the primary cause of delay and creates relative float to the other paths of work. The key in making this argument is whether the extent of the delay was known at the time the event arose. ***If a known delay impact could be reasonably quantified at the time, and the other concurrent delay candidate known to be less, it could then be considered to be the driving, or dominant, cause of delay.*** Again, looking at scenario four, the contractor delay could be seen as dominant and the employer delay non-critical (ie, not concurrent).
- The covid-19 pandemic has impacted construction projects throughout the world. These impacts pertain to delay as well as disruption (or loss of productivity or inefficiency) claims. Assessing these impacts faces the challenge of separating impacts stemming from the pandemic versus other issues. Here, concurrent delay may actually exist or may be used as a defence against pandemic-related claims. While certain pandemic-related impacts can be discretely quantified, others may be limited to estimations. Having the proper records will be a key factor in the ability to identify and segregate delay impacts to deal with concurrent delay in the best

way possible. The challenge of apportioning concurrent delays will likely be faced with even more layers of complexity and scrutiny as covid-19 claims continue to be brought.

Endnotes

- 1 *George Sollitt Construction Co v United States*, 64 Fed Cl 229, 239 (2005). [^ Back to section](#)
- 2 *Weaver-Bailey Contractors, Inc v US*, 19 Cl Ct 474, 476, 36 Cont Cas Fed (CCH) ¶ 75801, 1990 WL 10845 (1990). [^ Back to section](#)
- 3 *Appeal of Utley-James, Inc*, GSBGA No. 5370. 85-1 BCA (CCH) ¶ 17816, 89109, 1984 WL 13874 (Gen Services Admin BCA 1984), aff'd, 14 Cl Ct 804, 34 Cont Cas Fed (CCH) ¶ 75478, 1988 WL 42130 (1988). [^ Back to section](#)
- 4 AACE International Recommended Practice No. 29R-03 FORENSIC SCHEDULE ANALYSIS p. 102. [^ Back to section](#)
- 5 ASCE Standard 67-17. [^ Back to section](#)
- 6 Society of Construction Law Delay and Disruption Protocol, February 2017, paragraph 10.3. [^ Back to section](#)
- 7 Society of Construction Law Delay and Disruption Protocol, February 2017, paragraph 10.4. [^ Back to section](#)
- 8 *Ontario Superior Court Schindler Elevator Corporation v Walsh Construction Company of Canada* (2021 ONSC 283). [^ Back to section](#)
- 9 *Ontario Superior Court Schindler Elevator Corporation v Walsh Construction Company of Canada* (2021 ONSC 283). [^ Back to section](#)
- 10 The International Comparative Legal Guide to: Construction & Engineering Law 2021-2022. [^ Back to section](#)
- 11 <https://cms.law/en/int/expert-guides/cms-expert-guide-to-concurrent-delay/brazil>. [^ Back to section](#)
- 12 Law No. 30225. [^ Back to section](#)
- 13 Legislative Decree No. 1224 on the Private Investment Promotion Framework Through Public Private Partnership for Projects on Assets. [^ Back to section](#)
- 14 <https://cms.law/en/int/expert-guides/cms-expert-guide-to-concurrent-delay/columbia>. [^ Back to section](#)

- 15 *Newport News Shipbuilding & Dry Dock Co v US*, 79 Ct Cl 25 (1934). [^ Back to section](#)
- 16 *George Sollitt Constr Co v United States*. [^ Back to section](#)
- 17 *Lebolo-Watts Constructors v Secretary of the Army*, No. 21-1749 (Fed Cir 2022) (citation omitted). [^ Back to section](#)
- 18 *Raymond Constructors of Africa, Ltd v United States*. [^ Back to section](#)
- 19 *Foundation Co of Canada v United Grain Growers Ltd* (1996), 25 CLR (2d) 1 (BCSC), var'd (1997), 33 CLR (2d) 159 (CA). [^ Back to section](#)
- 20 *Ontario Superior Court Schindler Elevator Corporation v Walsh Construction Company of Canada* (2021 ONSC 283). [^ Back to section](#)
- 21 Society of Construction Law Delay and Disruption Protocol, February 2017, paragraph 10.11 [^ Back to section](#)
- 22 James K Bidgood Jr, Steven L Reed and James B Taylor, 'Cutting the Knot on Concurrent Delay', Thomson West Construction Briefings, February 2008. [^ Back to section](#)
- 23 *The International Comparative Legal Guide to: Construction & Engineering Law 2019*. [^ Back to section](#)
- 24 <https://cms.law/en/int/expert-guides/cms-expert-guide-to-concurrent-delay/columbia>. [^ Back to section](#)



Ted Scott
Meera Wagman

tscott@secretariat-intl.com
mwagman@secretariat-intl.com

1175 Peachtree Street NE, 100 Colony Square, Suite 400 Atlanta, GA 30361, United States

Tel: +1 856 396 8217

<https://secretariat-intl.com/>

Read more from this firm on GAR