

Delay Analysis

Concurrent Delays in Construction Projects Across the UK, Saudi Arabia, UAE, South Africa, Kenya, and Japan: A Delay Expert's perspective. By Mark Watson



Introduction

In construction claims, delay experts are often brought in to assess how employer-caused events, which might support requests for more time or extra payment for contractors and contractor-driven events which could lead to liquidated damages, affect a project's timeline. When these events happen at the same time and both impact the project's critical path, this is known as concurrent delay. Delay experts concentrate on technical details: pinpointing when each event happened, how it influenced the project, and how much it affected completion. The legal and contractual consequences depend on the applicable laws and contract terms.

While definitions of concurrent delay may differ, the Society of Construction Law Delay and Disruption Protocol (2nd edition, February 2017) is widely recognised as an authoritative reference for delay specialists across various jurisdictions, including those where the Protocol lacks formal legal standing. The Protocol broadly characterises concurrent delay as "two or more events occurring at the same time, where each is an effective cause of delay to the completion date."

The Protocol highlights that concurrency is evaluated based on its impact on the critical path, rather than just by how events overlap in time. Simply having events occur at the same time isn't sufficient. Each delaying event must separately influence the project's critical path within that timeframe.

Additionally, the Protocol specifies that when genuine concurrency happens, the contractor is generally granted a time extension for the duration of the concurrency but is not entitled to extra compensation for prolongation costs during this period. The contractor is responsible for covering these costs.

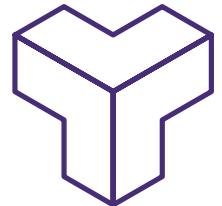
Why concurrent delay matters to a Delay Expert

From the perspective of a delay expert, concurrency is a technical issue about what caused delays on the critical path, rather than just a legal term. It involves establishing whether:

- there are two or more critical paths at the same time,
- one path is affected by employer-risk events and another by contractor-risk events, and
- both paths actually contribute to extending the project's completion date.

Once genuine concurrent delay is identified, legal outcomes such as extensions of time, costs, or how responsibility is divided, are determined by the tribunal based on the relevant law, applied to these technical findings.





Therefore, as a delay expert, your role is to:

- provide a clear and strong timeline showing delays on the critical paths,
- pinpoint where genuine concurrency occurs (not just where activities overlap), and
- present your findings so they can be used within different legal frameworks in various jurisdictions.

Against this background, we examine how the law in each jurisdiction influences the responsibilities and actions required of a delay expert.

United Kingdom

Within UK construction law, a significant divergence exists regarding the treatment of concurrent delay. England and Wales adopt the *Malmaison* approach, which does not allow for apportionment of time. In contrast, Scotland follows the *City Inn* approach, permitting the apportionment of time in such cases.

England and Wales

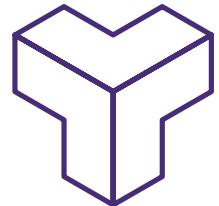
Under England and Wales law, the prevailing position is established by *Henry Boot v Malmaison* and subsequent authorities such as *Walter Lilly v Mackay*. These cases hold that where an employer-risk event is an effective cause of delay to completion, the contractor is entitled to an extension of time, notwithstanding the presence of concurrent contractor delay. The courts generally reject apportionment of time; consequently, the contractor is granted the full extension. Nevertheless, contractors are typically unable to recover prolongation costs for periods of genuine concurrency. This principle is also reflected in the *Protocol*: entitlement to additional time is recognised, but additional monetary compensation is generally not awarded where true concurrency exists.

Based on our experience, tribunals in England and Wales frequently ask: "What is the critical path and what caused it?" Therefore, when dealing with an England and Wales-law dispute, delay experts should be careful when identifying "true" concurrency, since tribunals are cautious about labelling too many situations as concurrent delays.

As a result, the delay expert must clearly indicate whether only one cause of delay is actually critical, or if one path is predominant while another is less significant (meaning no actual concurrency).

Subsequently, the delay expert should distinguish between time entitlement, where the *Malmaison* principle is applicable, and cost entitlement, for which concurrent delays typically preclude the recovery of prolongation costs. Therefore, unless expressly stipulated by the contract, any attempt to apportion delay is likely to be subject to challenge.





Scotland

Under Scottish law, the leading authority is *City Inn Ltd v Shepherd Construction Ltd*. In this case, the court determined that when delays to completion are caused concurrently by both the employer and the contractor, it is permissible for the decision-maker to apportion responsibility between the parties. Accordingly, an extension of time (EOT) may be granted that reasonably reflects the employer's contribution to the delay.

In Scotland, delay experts should provide two parallel causation analyses, showing how each event would have delayed completion individually and the extent of their impact. This allows courts or tribunals to fairly apportion responsibility for delays instead of defaulting to an equal split. Experts should clearly demonstrate the relative contribution of each event rather than imply concurrency always results in a 50/50 division.

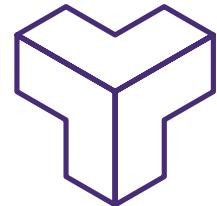
Kingdom of Saudi Arabia

Since December 2023, Saudi Arabia's Civil Transaction Law (CTL) has been in effect, codifying many contract principles that were previously based on Sharia law. The CTL gives courts the authority to divide liability when both parties are responsible for harm, and to lower compensation if the claimant also contributed to the damage. While the CTL does not include a specific Article regarding concurrent delay, such situations are dealt with using general rules of causation and contributory fault.

FIDIC-based contracts are commonly implemented in large-scale projects, with many under the CTL utilising either the 1999 or 2017 editions, often incorporating bespoke amendments. Clause 8.5 of FIDIC 2017 addresses the Contractor's entitlement to an extension of time (EOT), specifying particular events that may result in delays, such as Variations or exceptionally adverse climatic conditions. Key provisions include the procedure for submitting EOT claims, which necessitate the contractor to issue notice and provide detailed particulars in accordance with Sub-Clause 20.2. The 2017 edition also introduces enhanced provisions regarding climate conditions and establishes a revised approach to concurrent delay.

From the viewpoint of a delay expert, projects in Saudi Arabia tend to offer a more apportionment-oriented environment compared to those in the United Kingdom. As a result, it is often necessary for courts or tribunals to assess the respective contributions of delays caused by both the employer and the contractor. In this context, a delay analysis should be sufficiently robust to support a *Malmaison*-style interpretation when required by contractual terms, as well as facilitate an apportionment process that enables the tribunal or court to allocate responsibility proportionally.





In addition, delay expert reports should provide a quantified assessment of delay periods primarily attributable to employer-related and contractor-related events, clearly distinguishing instances where both parties had a critical impact and objectively outlining each party's contribution without making any legal apportionment. For projects governed by FIDIC 2017 clause 8.5, where the clause does not specify a methodology, the factual narrative serves as the principal means for the tribunal to apply relevant local CTL principles.

United Arab Emirates

The UAE Civil Code does not specifically address concurrent delay, and there is a limited body of published case law relating directly to this issue. In practice, courts and tribunals apply general principles of causation, good faith, and contributory fault when determining cases in which the party making a claim has contributed to the loss incurred.

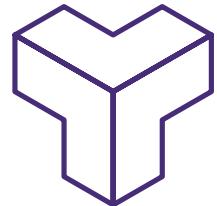
The 2017 edition of FIDIC contracts, although significantly amended, is seeing increased adoption, particularly as Clause 8.5 now directly addresses concurrency issues. Arbitrators from common-law jurisdictions frequently apply principles akin to UK-style concurrency; however, in practical terms, UAE tribunals tend to implement apportionment approaches, especially regarding financial claims. While they may award extensions for employer-related risk events, these tribunals often adjust monetary outcomes according to the contributory fault principles.

When serving as a delay expert in UAE cases, it is important to anticipate that the tribunal may seek a detailed analysis rather than simply labelling events as “concurrent” or “not concurrent.”

To meet these expectations, be sure to organize your findings so that you distinctly identify intervals of exclusive employer delay, exclusive contractor delay, and periods where delays overlap or occur simultaneously.

Additionally, detail how each event impacts the critical path, even when they occur within the same timeframe, and supply evidence supporting either a Malmaison approach, should the contract or tribunal prefer UK reasoning, or an apportioned outcome if Civil Code principles apply. When using the FIDIC 2017 contract and Clause 8.5 addresses concurrency by considering all relevant circumstances, treat your factual analysis as those circumstances. Thus, presenting a clear cause-and-effect relationship will strengthen your credibility as a delay expert in the UAE.





South Africa

South Africa operates under a mixed legal system and does not acknowledge the prevention principle in the same manner as English law. While there is no definitive binding authority regarding the approach to concurrent delay, the Supreme Court of Appeal in *Thoroughbred Breeders Association of South Africa v Pricewaterhouse* established that, as a general rule, the defaulting party is responsible for all loss or damage resulting from its breach or delay, regardless of any other contributing causes.

The JBCC Principal Building Agreement remains the predominant contract for building projects, while FIDIC and NEC3/4 contracts are typically utilised for large-scale infrastructure developments. Although the Protocol is referenced in addressing concurrent delay in practice, it lacks legal authority, and its implementation depends on explicit incorporation into the relevant contract.

Delay experts should thoroughly review the contract and seek guidance regarding its interpretation, as amendments frequently address issues such as concurrency, penalties, and extensions of time (EOT).

It is important to anticipate that the tribunal may enquire about the fairness of apportionment and the potential application of SCL-style guidance, should it be contractually incorporated.

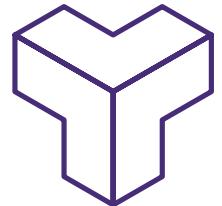
Accordingly, it is recommended to present concurrency analyses based on factual scenarios. For example, in Window 2, if only the employer-caused event had occurred, completion would have been delayed by x days; had only the contractor-caused event occurred, the delay would have been y days; since both events transpired, the actual delay amounts to 10 days. This approach enables the tribunal to apply its preferred legal principle, whether that results in a full EOT award, apportionment, or an alternative outcome.

Kenya

Kenya operates as a common-law jurisdiction in which FIDIC contracts are prevalent for infrastructure projects. In cases where disputes proceed to arbitration, both tribunals and counsel typically have experience with, and often reference, English law.

Although there is limited published Kenyan case law specifically addressing concurrent delay, there has been a noticeable rise in disputes involving concurrency issues, accompanied by an increasing focus on contractual provisions that address such matters.





Delay experts should be aware that tribunals may refer to English law and the Protocol as persuasive sources when contracts do not address concurrency. However, these are not automatically binding. It is recommended that delay experts provide an analysis compatible with Malmaison principles, distinguishing between time and cost, and presenting data so it could support apportionment if the tribunal deems it fair.

Because many Kenyan projects are FIDIC based, be explicit about how your analysis fits within FIDIC's relevant events/compensation events framework and highlight how Clause 8.5 of FIDIC 2017 or the silence of FIDIC 1999 edition interacts with your concurrency findings. In presenting your delay analysis, ensure that intervals of employer and contractor delay are clearly segregated and supported by contemporaneous records, while also referencing the contract's risk allocation and notification requirements. Such clarity allows the tribunal to gauge whether the contractual mechanisms for extensions of time and compensation have been satisfied and, where the contract is silent, facilitates a reasoned application of persuasive authorities such as the Protocol or English law. This approach not only reinforces the credibility of the expert's evidence but also empowers the tribunal to adopt the most appropriate legal and contractual principles in resolving concurrency issues in Kenyan infrastructure disputes.

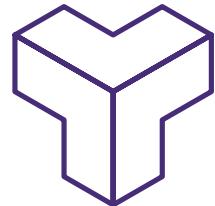
Japan

There is no specific statutory provision or settled precedent on concurrent delay and Japanese judges and tribunals are likely to consider relative degrees of fault and causation and may grant EOT and/or costs based on proportionate liability between the parties.

As a delay expert, assume that the court or tribunal will be interested in how much each party's actions contributed to project delays, making it essential to present a clear, fact-based apportionment of responsibility. By providing a detailed breakdown of the events, their timing, and the extent of their impact on the critical path, you can support a proportionate allocation of liability that aligns with Japanese adjudicative tendencies. This approach not only demonstrates a nuanced understanding of local legal expectations but also strengthens the credibility of your analysis in the absence of settled statutory or case law.

In addition, be prepared for a more causal analysis style of questions, focusing on fairness and contribution rather than rigid rules on time and money. This necessitates a flexible approach, where delay experts should not only quantify the impact of each party's actions but also demonstrate an understanding of how these factors intersect with the tribunal's or court's likely emphasis on equitable outcomes.





Conclusion

In all six jurisdictions, a delay expert who constructs a clear and robust critical path analysis, accurately differentiates between genuine concurrency and simple overlap, and presents data to support various legal outcomes is more likely to provide evidence that tribunals find useful and, consequently, exert greater influence on the case outcome.

International arbitrators are increasingly looking for delay experts to provide dynamic, time-segmented analyses that clearly show periods of concurrency and incorporate up-to-date schedule changes. As a result, selecting the right Critical Path Method (CPM) for delay analysis is essential, as it significantly influences whether concurrency is identified or dismissed.

To meet tribunal standards for assessing concurrent delay, the Windows/Time Slice Analysis Method is regarded as a reliable, effective, and commonly accepted solution. When combined with an additional As-Built Critical Path Analysis, this approach offers a thorough timeline, realistically reconstructs project progress, delivers credible evidence of concurrency, and supports defensible conclusions in claims or dispute resolution.

From a delay expert's viewpoint, technical methods for assessing concurrency remain consistent across jurisdictions; only the application of findings varies.

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