

CONSTRUCTION

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CONCURRENT DELAY: THE SOUTH AMERICAN EXPERIENCE [OR LACK THEREOF]

INTRODUCTION

Concurrent delay is broadly defined as a situation in which two or more delays are occurring at the same time during all, or a portion of, a delay period. It can occur under various scenarios, including an owner and a contractor simultaneously delaying separate critical paths, one party delaying another in two different critical paths, or three or more parties causing delays at the same time.¹ As simple as this definition may sound, concurrent delay, and its effects on time extension and damages calculations, is one of the grayest areas in construction law. In the United States, court rulings and decisions on concurrent delay issues vary considerably depending on jurisdiction and venues. While the concept of concurrent delay is nothing new to the construction industry, many developing countries and emerging markets that have experienced rapid industry and infrastructure growth are now experiencing an increased number of construction disputes related to concurrent delay.

In recent years, Latin America, and especially South America, has become an emerging market for the construction industry. This boom has been fueled by the worldwide demand for natural resources available in this area. The increased demand for these resources has resulted in construction of large scale projects such as drilling rigs, on-site storage facilities, and logistics and transportation facilities. Furthermore, along with the positive economic impact of these projects, there has been significant infrastructure development, such as the construction of power generation stations, highways, and rail projects. In 2013, construction output in Latin America increased 2.9%, with an additional 3.2% increase expected in 2014.²

As the market for construction emerges in the region, construction law also becomes more sophisticated. This article examines the issue of concurrent delay from a South American perspective. From local regulations, to short- and long-term trends on this issue, this article brings together different perspectives of three South American countries: Argentina, Chile, and Peru.

1. Wickwire, Driscoll, Hurlbut, Groff. Construction Scheduling: Preparation, Liability, and Claims. Third Edition. Page 282.
2. <http://www.khl.com/magazines/international-construction/detail/item97191/Economic-Outlook:Latin-America>.

CURRENT LOCAL REGULATIONS

In summary, concurrent delay is not specifically regulated by Argentinian, Chilean, or Peruvian law. The following is a summary of how the issue is handled by local courts and arbitral tribunals.

Argentina

In general, the provisions of the Argentinian Civil Code concerning construction contracts do not regulate the different contracting methods available in the industry, or the consequences of concurrent delay.

Private construction contracts in Argentina typically address all the issues that are common in the industry internationally, including specific provisions dealing with concurrent delay, even when those issues do not have a specific treatment under applicable legislation. However, if during the term of the contract, an issue that was not specifically addressed by the parties under the agreement arises, then such issue will have to be resolved through the dispute resolution method that the parties may have chosen and agreed to under the contract. At that time, the provisions of the Civil Code and the relevant case law on such issue come into play. In other words, absent any specific provisions in the contract dealing with a certain issue, then the provisions of the Civil Code and the judicial interpretation of contractual terms and applicable law shall apply.

Both the Civil Code and the Federal Public Works Contracts Act establish strict compliance for the contractor to (i) execute under the contract terms and (ii) complete the project on-time. Failure to comply with the agreed terms and delivery deadlines is often penalized by imposing fines and sometimes will result in the termination of the contract due to contractor's default on its obligations. However, as noted earlier, no specific regulation for concurrent delay exists.

With respect to time extensions, the impacts may vary depending on whether the issue is related to a private or a public contract. For private contracts, essentially, the need for a time extension and the granting of the extension itself will be established by the court. The court would have to base its decision on the contract terms, and if there were no terms outlined in the contract, the decision would be based on non-existing regulations.

For public contracts, in general, the contractor shall not be granted a time extension, unless: (i) there is a material breach by owner of its obligations under the contract, and such breach is strictly related to, and has a directly impact on, the contract time (e.g., the granting of access to the project site), (ii) owner includes additional works under the scope of the contract, and such additional work reasonably requires additional execution

time, and (iii) contractor proves that delays were caused by force majeure or causes attributable to third parties out of the contractor's control. However, once again, the issue of concurrent delays is not clearly addressed by the local legal system.

Chile

In Chile, concurrent delay is not specifically treated under the national law, so it becomes an issue of interpretation based on rules and regulations of current national law combined with the decisions of a few private arbitration tribunals. In this regard, Article 1552 of the Chilean Civil Code indicates, in practical terms, that if both parties are responsible for an issue, then both defaults are canceled. Other Articles of this code, such as Articles 1655 and 1656, address the issues of compensation, however, no jurisprudence is available from this country addressing concurrent delays in construction projects.

Peru

Since Peruvian law does not regulate concurrent delay, in general, it is dealt with depending on the risk allocation established in the specific contractual clauses related to time. In other words, it will depend on the consent of the parties. If there is no contractual clause dealing with concurrent delay, the Peruvian Civil Code applies.

The Peruvian Civil Code recognizes the right of any party affected by events or risks, which are the responsibility or are taken by its counterpart, to obtain the necessary relief (time and money in the case of a Contractor). When there is multiplicity of events and risks, and both parties are responsible for them, an apportionment is normally applied.

In public construction contracts under the Public Procurement Law, an extension of time is regulated and is granted if it is the consequence of causes not attributable to the Contractor. This law does recognize the existence of concurrent delay, and since it is a public matter in which public interests are involved, the concurrent delay theory is not discussed nor applied in arbitration. The principle of legality limits parties and arbitrators to apply only what is regulated by this law. Therefore, the contractor is favored under the existing regulation.

However, in private sector contracts, owners have recently been using extension of time clauses with the requirement for the contractor to be up-to-date with respect to the original baseline schedule before granting an extension of time. When parties submit their claims to arbitration, arbitrators usually decide on a "Solomonic" award in which each party assumes part of the delay. The time extension granted will vary based on the arbitrators' decision.

With respect to liquidated damages, the Peruvian Civil Code establishes the possibility of including penalty clauses in construction contracts. The assessment of penalties (if they were incorporated in the contract) will depend primarily on whether or not a time extension is granted, and secondly, on whether or not the delay event was attributable to the contractor.

In regards to the recovery of extended overhead costs, as concurrent delay is almost never analyzed, in the event that arbitrators grant time extensions, the contractor is typically compensated for extended overhead costs.

LANDMARK CASES AND RECENT RULINGS

Landmark cases involving the apportionment of time extensions and economic damages related to concurrent delays were not found in these countries.³

In general, in this region, construction cases are not heard by judges, as in some instances the local laws require these cases to be tried in arbitrations, and also, private parties tend to resolve their disputes in this manner as it tends to be faster and more efficient than going through the public court system. Furthermore, there are very few judges in the public systems who specialize in construction law.

In this regard, for instance, the Chilean Construction Chamber has requested additional involvement from the Public Procurement Tribunals, but no appreciable progress has been made on this front.

Although some local arbitrators do have the required knowledge and skills to understand these disputes, no cases were found in which concurrent delay was addressed. This lack of jurisprudence leads to unpredictability in arbitration rulings.

Despite efforts to increase knowledge and awareness of construction law issues, many theories and topics are not yet fully accepted by the majority of local lawyers, judges and arbitrators.

BEST PRACTICES AND LESSONS LEARNED

As the construction industry in South America becomes more sophisticated, at least from a private perspective, it is important that the contracting methods progress as well to include the use of contracts based on international standards (such as FIDIC or NEC).

From a proactive point of view, contracts should contain detailed time management, time extension, and concurrent delay clauses, including the financial consequences and responsibilities derived therefrom. Including these provisions in contracts, and as such garnering agreement from all parties, should allow for a more expeditious and timely resolution to disputes regarding these issues.

From a forensic standpoint, the lack of jurisprudence and regulation regarding concurrent delay in South America places the onus on legal counsel to gather and prepare appropriate evidence to convince arbitrators that construction law theories, which could be completely unknown to local judges and arbitrators, can be applied. If there is a concurrent delay matter in a case, sufficient preparations should be done to provide arbitrators with easy explanations about construction law theories (e.g., disruption, constructive acceleration, unabsorbed home office overheads), and to emphasize the need to focus attention on the evidence.

SHORT- AND LONG-TERM TRENDS

As noted earlier, the construction industry has experienced considerable growth in South America in recent years. From a Construction Law perspective, the trends regarding concurrent delay are probably best defined in their application to private and public contracts.

From a private perspective, the industry is moving towards the adoption of international standards and contracts, including the use of FIDIC-based dispute resolution clauses. As a result, it is likely that the discussions regarding concurrent delay will be first addressed in private-contract arbitrations, which will require arbitrators and counsel to directly address the issue.

However, from a public perspective, the trend is not as clear. For instance, in Argentina, many of the provisions of the Federal Public Works Contracts Act, passed in October 1947 and regulated through a presidential Decree in 1984, can be considered obsolete or antiquated to deal with modern technologies and new constructive methods. The same issues apply to the legal systems in Chile and Peru.

The challenge, from the public perspective, would be to undertake deep reform of the legal systems to incorporate modern international standards and state-of-the-art procedures concerning government procurement and public contracting. As

3. The research performed for this article only uncovered a judgment of the Arbitration Center of the Chamber of Commerce of Santiago, in which Article 2330 of the Chilean Civil Code was used ("the assessed damages are subject to reduction, if the victim recklessly exposed itself to the damages"), in a situation of contractual liability. The importance of this judicial interpretation is that it neutralizes the figure of fines as a way to unbalance the concurrent responsibilities in a contract. This ruling may be reviewed at the web address: http://www.camsantiago.cl/sentencias/IndiceGral_2011/444.pdf.

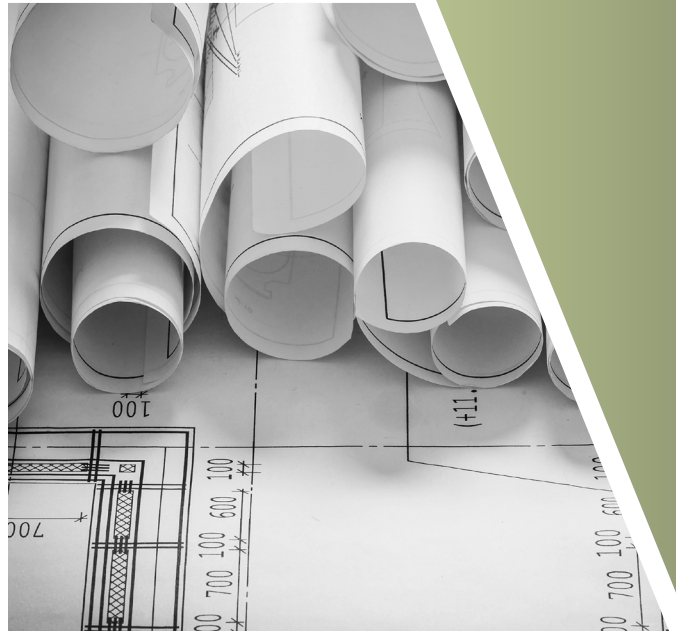
such, the development of construction law organizations, such as the recently founded Peruvian Society of Construction Law, and other local construction industry chambers, will be crucial. These organizations will become key influencers in the discussion of matters related to general construction law and particularly the increase in awareness and information regarding the issue of concurrent delay.

ABOUT THE AUTHORS

Israel Almodovar is an Associate Director in Navigant's Global Construction practice with more than 17 years' experience specializing in providing consultation on construction projects in the areas of planning, scheduling and delay analysis, project controls, contract management, as well as other project management issues. He has prepared and defended claims, as well as provided expert testimony and litigation support for mediations, arbitrations and trials. Mr. Almodovar has provided these services across a wide range of projects both, in the United States and internationally, with a large focus in Latin America.

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Jaime Gray is co-founder and senior partner of the Peruvian law firm Navarro Sologuren, Paredes, Gray (NPG Abogados). He is a legal specialist in engineering, construction, arbitration, alternative dispute resolution methods and public procurement matters. Mr. Gray has represented Peruvian public entities, local and foreign companies based in Latin America, the USA, Japan and Europe in the planning, negotiation and execution of some of the most important Peruvian engineering and construction projects (power stations, roads, shopping malls, hotels, mining, gas and petroleum operations, ports and other transportation facilities, etc.) over the past decade. Not only a lawyer, he is also an arbitrator and dispute resolution specialist and as such has participated in many national and international arbitration proceedings, many involving the use of FIDIC forms.



Alex Wagemann is a partner of Brücke Consultores with 18 years of experience, including the last 16 years in mining and industrial projects, integrating a broad legal base (utilizing his attorney background) with a business vision, supporter by his work experience and graduate degrees. In particular, he specializes in leading projects and supports clients with strategic analysis in design processes, best practices in bidding and contracting, negotiations, dispute resolution, claims, supply market analysis, supply chain management, support to contract administrators, and contract drafting.

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