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CONCURRENT DELAY: A CONTRACTOR GET OUT OF JAIL CARD OR EMPLOYER WINDFALL?

INTRODUCTION

Delay of some sort is almost inevitable on any major construction project. Indeed as projects become more complex and clients need completion faster, the likelihood of two or more delays occurring together is significant. However, despite the frequency with which concurrent delays occur, particularly on "problem jobs", the contractor's entitlement to an extension of time when there is concurrent delay remains unclear and, therefore, an area of contention.

The objective of this paper is to review the current position on concurrent delay in common law jurisdictions such as England and Wales in comparison to the position within the UAE. A particular emphasis of the paper is the consideration of potential tension between the employer's ability to deduct damages for delay whilst on one view continuing to prevent the contractor from completing any sooner.

THE PROBLEM

The pertinent question for the session therefore being; if the contractor is in culpable delay but is also effectively concurrently being prevented from implementing mitigation measures to reduce its liability to damages for delay, as a result of employer event(s), does the UAE civil code provide relief for the contractor or does it allow the employer to deduct damages for delay and, finally what alternative remedies, if any, exist?

In order to analyze the above question it is important to establish: what is a 'delay event'; what is meant by the term 'concurrent delay' and 'concurrency'; how concurrency is currently dealt with in common law jurisdictions such as England and Wales; if and how the laws of the UAE (civil code) deal with concurrency; how concurrency can be identified and resolved within the context of a project executed within the UAE.

What is a 'delay event'?

'Delay events' are events which impact the progress of construction projects, the causation of which can be due to a plethora of reasons. All delays, however, can be considered in two broad categories: 1) Employer delay events and, 2) Contractor delay events.

An Employer delay event is an occurrence which, under the Conditions of Contract, is the responsibility and/or risk of the Employer. An Employer delay event can cause either critical or non-critical delay: A critical Employer delay event is an event which causes a delay to the contract completion date. This is sometimes referred to as an excusable delay event, which entitles the Contractor to an extension of time (EOT). Figure 1 illustrates an example of critical Employer Risk Event.

A non-critical Employer delay event is an event which causes delay to certain activities on site, but is assessed as not causing any impact to the contract completion date as, for example, the event impacts a non-critical element of work or activities which contain positive float.

The AACE helpfully provides a definition of excusable delay within its 'Recommended Practice 10S-90' as follows:

> "Delays not attributable to contractor's action or inactions. Excusable delays when founded, entitle contractor to a time extension if the completion date is affected."[1]

It is to be noted, however, that this definition has to be considered in light of the applicable contract terms. It is entirely possible, and common, for a contractor to accept progress risks outside of its control and, therefore, unrelated to any action or inaction, third party design approvals being one example.

A Contractor delay event is an occurrence which, under the Conditions of Contract is the responsibility and/or risk of the Contractor. As with an employer delay event, a Contractor delay

Figure 1. Example of Critical Employer Risk Event

1. AACE International Recommended Practice No. 10S-90. Rev. May 3, 2012. *Cost Engineering Terminology*, Page 45. AACE International, United States of America.

event can also cause either critical or non-critical delay: A critical Contractor delay event is an event which causes a delay to the contract completion date. This is sometimes referred to as a non-excusable delay event, as illustrated in Figure 2.

A non-critical Contractor delay event is an event which causes some delay to activities on site, but is assessed as not causing any impact to the contract completion date.

The AACE provides a definition of non-excusable delay within its 'Recommended Practice 10S-90' as follows:

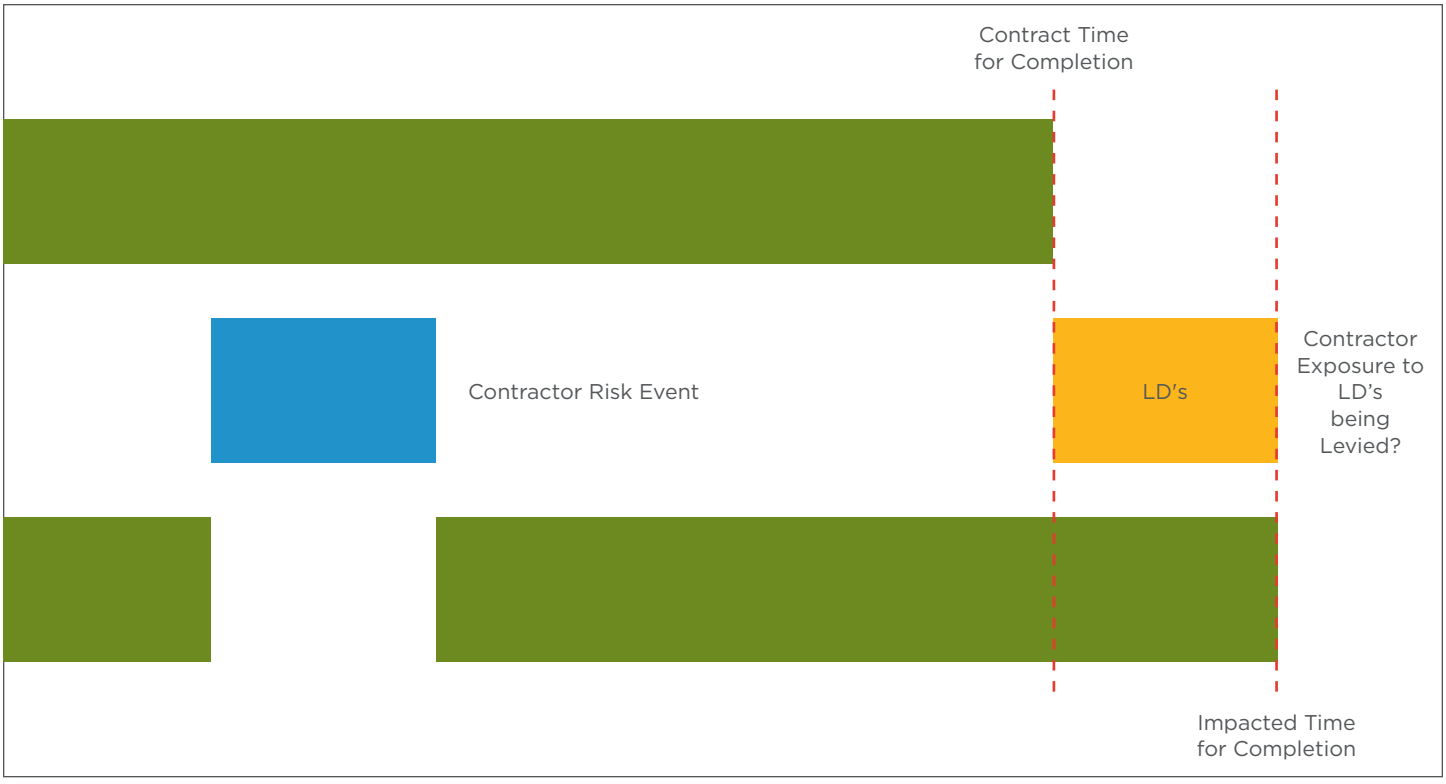
> "Delays that are caused by the contractor's or its subcontractor's actions or inactions. Consequently, the contractor is not entitled to a time extension or delay damages. On the other hand, owner may be entitled to liquidated or other damages."[2]

Again, this definition has to be read in the context of the contract terms governing the contractor's entitlement to extension of time.

Consideration of excusable and non-excusable delays, either contemporaneously by the contract administrator or retrospectively by delay analysts, is relatively straightforward provided a logical and robust form of analysis is applied. Once entitlement to time is determined the administrator would then have to consider whether the contractor is entitled to additional payment as a consequence of the delay, but that's an entirely separate and equally contentious topic!

However, the occurrence of the above types of delay events at the same time, i.e. concurrently provides a dilemma. Which delay event should take precedence? Should the delay be considered as an excusable delay and the contractor be awarded an extension of time or, should the delay be considered a non-excusable delay and the employer's right to levy damages (usually liquidated damages), be maintained?

Figure 2. Example of a Critical Contractor Risk Event



2. ACE International Recommended Practice No. 10S-90. Rev. May 3, 2012. *Cost Engineering Terminology*, Page 71. AACE International, United States of America.

What is meant by the term 'concurrent delay'?

The term and subject of concurrent delay has been discussed and argued by leading authorities and industry experts for many years. The first problem is actually determining what is meant by concurrent delay because it is clear from the debate that the term is used to sometimes describe slightly different concepts.

In 2002, the UK Society of Construction Law (SCL) first published its 'Delay and Disruption Protocol' ('SCL Protocol')[3], which provided a guide to parties in dispute and industry experts on the "Core Principles relating to delay and compensation" which occur on construction projects. Appendix A of the SCL Protocol provides a definition for 'concurrent delay'/'concurrency' 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."[4]

The above statement provides a high level summary of the term "True" concurrent delay' in its simplest form, which is basically the occurrence of two competing separable party delay events.

It is to be noted that the definition has two criteria:

1. Two or more events occur at the same time, **and**
2. The effects are felt at the same time.

Figure 3. Example of True Concurrency of a Critical Employer and Contractor Risk Event

3. Society of Construction Law. October 2002, Reprint October 2004. *The Society of Construction Law Delay and Disruption Protocol*. Society of Construction Law, Oxford, England.
4. Society of Construction Law. October 2002, Reprint October 2004. *The Society of Construction Law Delay and Disruption Protocol*, Page 53. Society of Construction Law, Oxford, England.

The SCL Protocol also provides diagrams that illustrate various delay scenarios to explain how the principles of concurrency should be adopted in practice. A simplified version of true concurrency as explained by the SCL Protocol is shown below.

The SCL Protocol provides an example within its Appendix D which indicates that in the above scenario the contractor should be entitled to a full extension to the time for completion. It also states, however, that the contractor should not be entitled to recover any prolongation costs, but is entitled to recover direct costs of the employer risk event.

The SCL Protocol also provides a secondary string to its explanation of concurrency:

> "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."[5]

Figure 4 shows an interpretation of the concurrent effect of delay, as described within the SCL Protocol.

Unfortunately the SCL Protocol does not clarify if and how the date of the event (as opposed to the delay itself) is relevant to entitlement where the delay is concurrent. If the contract is being administered properly and events are being considered contemporaneously as and when they arise, which in our experience is sadly very rare, then obviously the administrator can only deal with delay events as and when they arise. If, however, one is retrospectively determining what actually caused delay, is the timing of the event relevant in the context of a concurrent delay, i.e. is there any reason why the first event should be given any greater significance than subsequent events? Pragmatically the answer might appear to be "yes" but as a matter of causation is that right?

Figure 4. Example of the 'Concurrent Effect' of an Employer and Contractor Risk Event

5. Society of Construction Law. October 2002, Reprint October 2004. *The Society of Construction Law Delay and Disruption Protocol*, Page 53. Society of Construction Law, Oxford, England.

Based on the above it is evident that the SCL Protocol merely clarifies what is arguably the obvious and simple scenario of true concurrent delay, but steps over the more common, likely and contentious scenario of the concurrent effect of employer and contractor delay events.

As such, the approach to concurrency adopted within the SCL Protocol can only be considered as providing a practical guide or clarification on a simplified and straight forward scenario of concurrency. In more complex programme scenarios, which contain a plethora of concurrent effects, the frequency and ability to demonstrate concurrency of delay events becomes more clouded, thus meaning that actual entitlement remains as an issue of contention due to a lack of full clarification.

The AACE, within its 'Recommended Practice 10S-90', refers to the definition of concurrent delay as contained within the SCL Protocol, thus indicating that AACE accepts the SCL position. It is noted that the AACE provides further definitions for concurrent delay, which are stated to have been extracted from acknowledged alternative sources, various AACE International technical subcommittees, special interest groups and project teams. The following definition for concurrent delay is provided by the AACE without any acknowledgement to an external party, thus indicating that it has been developed by the AACE:

> "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."[6]

There are two points to note from this definition. Firstly, the use of the word delays in the definition is referring to concurrent effect as defined by the SCL Protocol, and set out above. Secondly, the definition provided by the AACE also appears to advocate the application and principles of apportionment due to its reference to the difficulty in apportioning damages. The concept of apportioning liability where there are concurrent delays is discussed in detail later within this paper.

Notwithstanding the issue concerning the timing of the event, as opposed to the effect of delay, it seems that based on the above the SCL Protocol achieves what it set out to provide, which is a guideline/recommended practice for disputing parties and industry experts on the "Core Principles relating to delay and compensation"[7] which occur on construction projects. As such, the SCL Protocol provides a high level approach, which in turn provides principles on such aspects as concurrent delay, which can be applied to similar scenarios. It is to be accepted, however, that the principles laid down in SCL Protocol are difficult to apply in practice as it over simplifies how concurrent delays develop and are managed on a complex construction project.

How is concurrency dealt with under common law in England and Wales?

As noted above, concurrency has been the subject of great debate by leading authorities and industry experts for more than a decade. The SCL Protocol and the AACE Recommended Practice, as demonstrated above, provide sound principles and methodology on a practical basis as to how concurrency should be analyzed. Understandably, however, neither consider how concurrency is dealt with under the various law jurisdictions.

It is pertinent to highlight at this juncture that any full analysis of potential entitlement to an extension of time between parties, whether considered concurrent or not, is firstly governed by the terms of the contract which has been agreed and signed by the parties. This important point is highlighted in chapter 8 of Keating on Construction Contracts[8], which states:

> "...a proper analysis of entitlement to extension of time and any associated loss of expense in each case must involve a careful consideration of the wording of the relevant clauses and an assessment of the (possibly different) tests of causation that should be applied to them in order for the contractor's actual entitlement to be arrived at."

6. AACE International Recommended Practice No. 10S-90. Rev. May 3, 2012. *Cost Engineering Terminology*, Page(s) 20-21. AACE International, United States of America.
7. Society of Construction Law. October 2002, Reprint October 2004. *The Society of Construction Law Delay and Disruption Protocol*, Page 10. Society of Construction Law, Oxford, England.
8. The Hon Sir Vivian Ramsey; Stephen Furst, QC. 2012. *Keating on Construction Contracts*, 9th Edition, Chapter 08. Sweet and Maxwell, London, England.

The common standard forms of contract utilized in the United Kingdom (JCT, ECC etc.) do not expressly deal with concurrent delay in their standard form, thus meaning that in cases where these common forms of contract have been adopted by the parties the courts are required to interpret the contract wording in the context of the applicable law of the contract.

A good example of the differing approaches adopted within the various standard forms of contract outside of the United Kingdom is the no-nonsense approach utilized within an Australian standard form reference AS2124, which attempts to deal with the issue of concurrent delays expressly, in what appears to be in a rather pro-employer provision:

> "Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause referred to in the preceding paragraph, then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for Practical Completion."[9]

I understand, anecdotally, that this clause is invariable amended at the insistence of the bidding contractors. It is easy to understand why, but at least the drafters have attempted to clearly allocate the risk.

Under English contract law it is well established that damages are awarded to compensate the injured party and put him back in the position he would have been had the breach not occurred. As such the award of damages is not to be confused with any form of penalty or punishment.

It was established as far back as 1970 under English law that a contractor will normally be entitled to an extension of time, thus relief from potential damages, if the employer has caused a competing critical delay, regardless of whether the contractor itself has caused concurrent non-excusable delay. This approach by the English courts became known as the 'prevention principle', which was established in the decision of Peak Construction v. McKinney Foundations.[10]

"If the failure to complete on time is due to the fault of both the employer and the contractor, in my view the clause does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled..."[11]

Over the years the courts have considered the exact wording contained within the various standard forms of contract, and applied various legal tests to determine to what extent, if at all, a contractor is entitled to relief from delay related damages by the award of an extension of time.

Of course the decisions reached in the various cases must be considered in the context of the facts of each case, but key tests developed and applied in the English courts include: the 'but for' test; the dominant cause approach; apportionment; and, the '*Malmaison*' approach. Each of the above approaches is considered below.

The 'but for' test

When considering whether a contractor event, for example, caused any delay this 'but for' test is built upon the simplistic question:

> but for the contractor delay would the project have been completed any earlier?

If through analysis or otherwise the answer to this question is "no" then, so the theory goes, the contractor event cannot be said to have caused any delay.

It can quickly be seen that this test is of limited assistance when one is considering entitlement in the context of concurrent delays of equal causative potency, as the question can simply be posed again, but the word "contractor" replaced with "employer".

Putting the question this way would indicate that but for the employer event the project would not have completed any earlier, hence it cannot be said that the Employer event caused any delay! Clearly the but for test is unhelpful in the context of concurrent delays.

The 'dominant cause' approach

The dominant cause approach is based on the proposition that it is possible to determine that one of the competing concurrent

9. Australian Standard General Conditions of Contract. AS2124-1992, Clause 35.5.
10. *Peak Construction v. McKinney Foundations* [1970] 1 BLR 111 (CA).
11. *Peak Construction v. McKinney Foundations* [1970] 1 BLR 111 (CA), at Page 121.

causes of delay is more "dominant" than another and, therefore, should be determined as the actual cause of delay. Thus if an employer delay is determined to be dominant the contractor will be entitled to an extension of time and, conversely, if a contractor delay is determined to be dominant then the employer shall be entitled to delay damages.

An initial reaction to this dominant cause approach is that it sounds logical and workable. It suffers, however, from our point of view from a number of difficulties:

- What does "dominant" in this context mean? It has been defined as follows:

> 'It there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point of order in time, but is to be decided by applying common sense standards.'[12]

  I am not clear what is meant by "effective, dominant cause…" that can be determined, presumably objectively, as a fact.

- Concurrent delays, almost by definition, have equal causative potency in the sense that either would cause a delay to the completion date? Is that not the fundamental test to apply when considering whether one delay or another is "effective"?
- Despite the foregoing definition, the determination of dominance is often argued to be a subjective decision, i.e. it is up to the contract administrator or analyst to determine which of two competing delays, of equal causative potency, is the dominant delay. Unfortunately, subjective decisions are fertile ground for disputes.

In the case of *H. Fairweather and Company Limited v London Borough of Wandsworth*[13] the Court held that the 'dominant cause' approach was inappropriate as the application of the test was easy when in situations where there is a clear dominant cause, but almost impossible when the principal agent is confronted with competing causes of approximately the same causative effect. However, the principle was adopted in *Laing Management (Scotland) Ltd v John Doyle Construction Ltd*[14], as being "the application of common sense to the logical principles of causation".

Apportionment

The apportionment approach refers to the apportionment of liability for concurrent delays between the parties. The apportionment between the parties is determined by assessing the relative causative potency and the significance of the competing causes of delay. Again, initially this approach may appear to be logical, sensible and fair; and was in fact adopted by the Scottish Courts in the case of *City Inn v. Shepherd Construction*[15], and was further endorsed in an appeal court decision of the Inner House of the Scottish Court of Session.[16]

> "…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 to be taken to be responsible, and neither of which could be described as the dominant cause, the claim for extension of time will not necessarily fail. In such a situation, which could, as a matter of language, be described as one of concurrent causes, in a broad sense, it will be open to the decision-

12. *Plant Construction plc v Clive Adams Associates and JMH Construction Services Ltd* [2000] BLR 205; Galoo Ltd v Bright Grahame Murray [1994] 1 W.L.R. 1360, CA; Alexander v Cambridge Credit Corporation Ltd [1987] 9 N.S.W.L.R. 310; March v E and MH Stranmore Property Ltd (1991) 171 C.L.R. 506.
13. *H. Fairweather and Company Limited v London Borough of Wandsworth* [1987] 39 BLR 106.
14. *Laing Management (Scotland) Ltd v John Doyle Construction Ltd* [2004] B.L.R. 295 at 302.
15. *City Inn v. Shepherd Construction* [2007] CSOH 190.
16. *City Inn v. Shepherd Construction* [2010] CSIH 68.

maker, whether the architect, or other tribunal, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event."[17]

However, this approach by the Scottish Courts was recently criticized in the English Courts in the cases of *Adyard Abu Dhabi v SD Marine Services*[18] and, very recently, in *Walter Lilly v Giles Mackay and DMW Developments*[19], where in thelatter it was specifically concluded by Mr. Justice Akenhead that the apportionment approach in the City Inn case was not applicable under the principles of English Law.

"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. It therefore follows that, although of persuasive weight, the City Inn case is inapplicable within this jurisdiction."[20]

The 'Malmaison' approach

The 'Malmaison' approach arose out of the English case of *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*[21], within which Mr. Justice Dyson (as he was then) determined that if there are two competing delaying events and one is identifiable as an employer risk event under the contract, then the contractor will be entitled to an extension of time.

"...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. Thus to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers if fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour."[22]

The approach taken in the Malmaison case appears clear and workable from a legal perspective under English Law, however, some feel that the approach only benefits contractors, as it dismisses the that fact that contractor was also in concurrent delay.

17. *City Inn v. Shepherd Construction* [2010] CSIH 68 at 42.
18. *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm).
19. *Walter Lilly v Giles Mackay and DMW Developments* [2012] EWHC 1773 (TCC).
20. *Walter Lilly v Giles Mackay and DMW Developments* [2012] EWHC 1773 (TCC) at 370.
21. *Henry Boot Construction (UK) Ltd v Malmaison Hotel* (Manchester) Ltd [1999] 70 Con LR 32 (TCC).
22. *Henry Boot Construction (UK) Ltd v Malmaison Hotel* (Manchester) Ltd [1999] 70 Con LR 32 (TCC) at 13.

In the recent case of *Walter Lilly*[23], as noted above, the relevant authorities regarding concurrent delay were considered, and it was concluded that the *Malmaison* approach was approved and the apportionment approach was expressly rejected.

> "I am clearly of the view that, where there is an extension of time clause such as that 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."[24]

Based on the above, it can be concluded that the position under English law regarding concurrent delay has, for now, been clarified. The position being that where concurrent delays occur if at least one of the delays is an excusable delay pursuant to the terms of the contract then contractor will be entitled to an extension of time and the contractor's risk event(s) will effectively be ignored for extensions of time purposes.

It is important to highlight that a majority of the above cases have been in consideration of various derivatives of the JCT Suite of Contracts, thus meaning that the judgments must be reviewed with caution when considering alternative jurisdictions and different wording as expressed in the various standard forms of contract, such as the FIDIC Conditions of Contract prevalent in the Middle East.

How do the laws of the UAE (civil code) affect/ influence the principles of concurrency?

From the outset it is important to understand that the principles of Islamic Law (Sharia law) govern the interpretation and application of the UAE Federal laws and the separate laws of the individual Emirates, as laid down in the Civil Codes. Even a cursory review of the moral code and religious law of Sharia, and its relevance to contract and commercial law, is on the one hand beyond the scope of this paper (and the expertise of the authors), but on the other hand fundamental to understanding how a local court, as opposed to an international arbitration, for example, might deal with concurrent delay.

The pertinent laws under the UAE civil code which could be applied in scenarios involving concurrent delay are considered to be Articles 246, 290 and 291. Article 246(1) in particular is considered to cover a wide range of scenarios, which could easily be construed as being applicable in cases involving concurrent delay.

> "Article 246(1). — The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith."

The wording of Article 246(1) and the reference to 'good faith' provides UAE courts with the ability to consider aspects such as concurrency on a basis of what could be considered 'common sense', rather than by applying strict principles such as the 'but for' test or the 'Malmaison' approach. As such, it could be argued that the provision of 'good faith' allows the UAE courts to apportion culpability for time and costs as it sees fit. This potentially utilization of the apportionment approach by the UAE courts in occurrences of concurrent delay is further applicable if Articles 290 and 291 are considered relevant, as they expressly state that:

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

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

23. *Walter Lilly v Giles Mackay and DMW Developments* [2012] EWHC 1773 (TCC).
24. *Walter Lilly v Giles Mackay and DMW Developments* [2012] EWHC 1773 (TCC) at 370.

Based on the above extracts from the UAE civil code it appears that the courts have significant flexibility in terms of determining liability in the case of concurrent delays but are most likely to adopt an approach similar to the apportionment approach described above.

Practical considerations for projects executed in the UAE

The identification of concurrency on any project, whether in the UAE or any other jurisdiction, is likely to be highly contentious, especially if the purported events are not classed as being 'truly concurrent'. As such the principles regarding concurrency are likely to continue to be argued and brought into question each time a court from any jurisdiction has to consider occurrences of purported concurrency in construction claims.

In order to assist in the analysis and identification of any claim event, whether concurrent or not, the importance of properly updated programmes and contemporaneous records cannot be overstated. The use of such information and records becomes particularly pertinent to carrying out a detailed analysis of delay events, which in turn provides a detailed understanding of the various impacts suffered in the progress of construction contracts.

It is pertinent to highlight once more that the application and pursuit of any delay event, whether concurrent or not, is firstly dependent on the particular wording contained within the signed contract between the parties. As such, if any party seeks to rely on proving concurrency, it is essential that specific legal advice is obtained in order to establish a complete and robust understanding of the applicable contract law.

CONCLUSION

The first objective of this paper was to review the current legal position on concurrent delay in common law jurisdictions such as England and Wales in comparison to the legal position within the UAE. It is concluded from the considerations above that the recent decision in the Walter Lilly case has provided a clearer picture on how the courts will determine liability in the case of concurrent delay, and that the previous Scottish decision in the City Inn case is not applicable under English Law.

It is further concluded, however, that UAE courts are likely to adopt an approach more akin to the Scottish courts approach of apportionment of liability where there is concurrency. This conclusion is based on the apparent wide discretion set out in the relevant provisions of the Civil Code.

A particular further emphasis of this paper was the consideration of the contentious subject of the employer's potential entitlement to deduct damages for delay, in circumstances where there is arguably a concurrent delay for which the employer is responsible, that but for the contractor delay, would prevent the contractor from completing any sooner. It is concluded that published guidance such as the SCL Protocol and the AACE Recommended Practice 10S-90 fail to fully address and clarify the relevance, if any, of the relative timing of concurrent delay events, but do provide helpful guidance in relation to what is defined as 'true concurrency', that being when both the event and the delay effect are concurrent.

So, in answer to the question; Concurrent delay: A Contractor Get out of Jail Card or Employer Windfall? It seems that under current UK law a concurrent employer delay is a 'get out of jail card for the contractor', it is entitled to an extension of time, notwithstanding any culpable concurrent delay on its part. It's entitlement to delay related costs, however, may be reduced as a consequence of the concurrent delay.

Is the answer any different under UAE law? Potentially, yes! A much more commonsense approach and some apportionment of liability is likely to be determined where there is concurrent delay. So, neither get out of jail for the contractor nor a windfall for the Employer; but perhaps some old fashioned pragmatism.

Perhaps a better solution, with greater certainty, is the inclusion of clear and robust terms in construction contracts that expressly allocate the risk, one way or the other, for concurrent delays.

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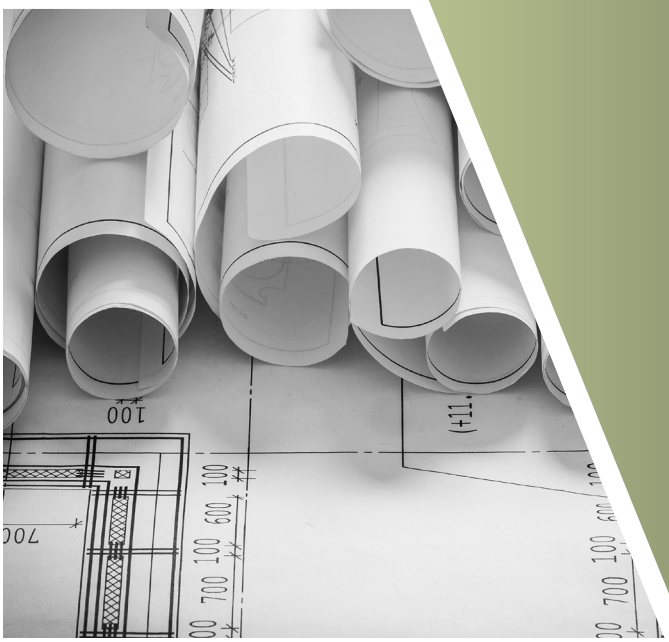

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