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CONCURRENT DELAY IN CONSTRUCTION CONTRACTS: A PRAGMATIC PERSPECTIVE



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Introduction

Delays on construction projects are common, often creating disputes over responsibility, extension of time and liquidated damages. Concurrent delays, where both the contractor and the employer contribute to the delay simultaneously, often create complexities. The legal principles governing concurrent delays are unsettled and inconsistent across common law jurisdictions. Nigeria has a significant dearth of legal analyses specifically addressing concurrent delays. This lack of guidance further complicates an already contentious issue within the construction sector. This article examines the contentious issue of concurrent delays in construction contracts and draws insights from different approaches that have emerged in resolving the issue.

Understanding Concurrent Delays

The concept underlying concurrent delay is straightforward. A contractor faces two types of delays: excusable delays, which entitle the contractor to an extension of time as they stem from the employer's non-performance of responsibility under the contract; and non-excusable delays, which originate from the contractor's actions or inactions, subjecting him to potential liquidated damages. Delays can also be categorized as compensable or non-compensable, depending on whether the contractor can recover additional costs incurred due to the delay.

The dilemma arises when excusable and non-excusable delays overlap, making it challenging to apportion responsibility and determine the appropriate remedies. Consider a scenario where the employer delays in providing site access, while the contractor simultaneously delays in deploying necessary equipment, both impacting an excavation work. Each delay alone would suffice to cause a project overrun. In such cases, traditional delay analysis techniques like the critical path method¹ prove inadequate in adjudicating responsibility.



¹The critical path method is a widely used technique for analysing delays in construction projects by identifying the longest sequence of dependent activities that determines the overall project duration.

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For example, a Nigerian government agency contracts a construction company to build a new expressway. Unfortunately, the project faces a double whammy of delays. Due to bureaucracy and complex land acquisition processes, the government agency takes significantly longer than anticipated to secure the necessary right-of-way for the expressway construction, delaying the contractor's ability to begin major earthworks. To make matters worse, the construction company faces internal procurement issues, which result in delayed delivery of essential heavy machinery needed for the same earthworks. Both delays happen within the same timeframe, ultimately causing a delay in the expressway's completion.

This scenario shows why determining concurrent delay is so challenging. It is difficult to isolate the exact amount of delay caused solely by the government's actions versus the delay caused by the contractor's issues, as both contributed to the project falling behind schedule. Disagreements are, therefore, inevitable – the contractor might argue that the entire delay is excusable since they could not have started the earthworks anyway due to the government's failure to provide access. The government, on the other hand, could claim that even if the land had been ready, the contractor's equipment would not have been available. The construction contracts might not have clear clauses explicitly addressing how to handle concurrent delays, which may cause ambiguity and potential disputes.

The consequences of this ambiguity are severe. Both parties might incur additional costs due to the extended project duration. The contractor could potentially face liquidated damages if the contract does not clearly address the concurrent delay scenario. Worst of all, the lack of clarity could lead to protracted disputes and legal battles if the parties cannot agree on who bears responsibility for the delays.

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Examining the Different Approaches to Concurrent Delays

Several approaches have been proposed within the common law tradition to address the complexities of concurrent delays, each with varying degrees of support and criticism among experts. We will discuss some of the common ones.

a. The Apportionment Approach

The apportionment approach attempts to address the conundrum of concurrent delays by splitting responsibility between the employer and contractor. Rather than placing the entire burden on one party, tribunals implementing this method seek to allocate blame based on the relative impact of each delay. While some jurisdictions find this intuitively appealing, experts see significant problems.²

First, the apportionment approach risks descending into subjective guesswork. How does one definitively determine what percentage of delay is due to a government's slow paperwork versus a contractor's equipment problems? Judges and arbitrators can reasonably disagree, leading to inconsistent and unpredictable results.³ Secondly, and more critically, apportionment dangerously flirts with undermining the 'prevention principle'.⁴ This principle is a bedrock of construction law: an employer cannot gain from disruptions they caused. If a contractor is denied a full extension of time due to apportionment, the employer's actions are partially excused under the guise of fairness.

While apportionment might seem like a common-sense answer to complex disputes, the practical and legal complexities it raises outweigh its benefits. Construction contracts thrive on clarity and predictable outcomes, elements this approach inherently undermines.

The Dominant Cause Approach

The dominant cause approach attempts to address concurrent delays by identifying the single most influential factor causing the delay and assigning responsibility accordingly. The rationale behind this approach stems from the notion that contractual provisions implicitly intend for delays to be attributed to a single cause.

The dominant cause approach assumes there is always one main, overriding factor causing a delay, even if multiple contributing events happened simultaneously. It is like pinpointing the single straw that broke the camel's back. The idea is to find that straw and place the full blame on the party responsible for it.

However, as Marrin QC rightly points out,⁵ the reality of construction projects is often messier than this approach allows. In a true concurrent delay, multiple factors might be equally significant in hindering progress. Expecting a court or arbitrator to definitively pick the "most important" one is unrealistic and may lead to arbitrary decisions. Again, and just like the apportionment approach, the dominant cause approach risks overlooking the prevention principle. Let us imagine that a contractor is slightly delayed

²John Marrin QC, "Concurrent Delay Revisited", (2014)

³Courts have taken divergent approaches to apportionment in concurrent delay cases. In *City Inn Ltd v Shepherd Construction Ltd*, Lord Drummond Young applied apportionment, granting a partial time extension. See *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190, para [159]. On the other hand, in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*, Lord MacFadyen rejected apportionment in favour of assessing whether employer-caused delays were critical. See *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] SC 713, para [16]. These cases show a lack of consensus on apportionment's suitability for resolving concurrent delays.

⁴Simmons & Simmons. (2018). Concurrent delay in construction contracts. Simmons & Simmons Publications. Retrieved April 20, 2024, from <https://www.simmonssimmons.com/en/publications/ck0bazxjoo1b40b33yz7j85k9/100818-concurrent-delay-in-construction-contracts>

⁵John Marrin QC, "Concurrent Delay Revisited" (2014), p. 2

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in doing their work, but that delay would not have mattered because the employer had yet to secure a permit anyway (an act of prevention). The dominant cause approach could focus on the contractor's minor delay, potentially giving the employer a pass on his more significant failure. This undermines the prevention principle, which bars an employer from benefiting from his disruptive actions.

While the dominant cause approach has a certain surface-level appeal, it is ill-suited for the complexities of true concurrent delays. Forcing subjective choices and potentially ignoring the employer's role in delays makes it problematic in upholding the principles of construction contracts.

The Malmaison Approach

The Malmaison approach, arising from the English case of *Henry Boot Construction (UK) Limited vs. Malmaison Hotel (Manchester) Ltd*⁶, offers a somewhat straightforward solution to the thorny problem of concurrent delays in construction contracts. Imagine this: a project stalls due to multiple overlapping events caused by the employer and the contractor. The Malmaison Approach says that if the contractor can prove the employer contributed to the delay, the contractor gets a full extension of time. It does not matter if the contractor was also dragging his feet. The core principle here is that the employer should not benefit from his own missteps, even when compounded by the contractor's actions. Disentangling the precise contribution of perfectly concurrent delays

can be a fool's errand, the kind of academic exercise courts usually avoid. The Malmaison approach cuts through this complexity. Besides, most construction contracts promise extensions of time for employer-caused delays – the Malmaison approach merely enforces that bargain.

Nevertheless, the Malmaison approach does not allow contractors to recover additional costs because accurately separating the costs caused solely by the employer's delay is extremely difficult. The focus is on preventing employers from benefiting from the delays they contributed to. Granting both time extensions and additional costs could potentially reward contractors for their own inefficiencies.

However, the Malmaison approach is not without its critics. Some argue that it can be too generous to contractors, potentially absolving them of any responsibility for delays they contributed to. This can seem unfair to employers, particularly if their contribution to the delay was relatively minor compared to the contractor's missteps.⁷ Additionally, the lack of ability to claim additional costs for the delay period can be a significant financial burden for contractors, even if they are protected from liquidated damages due to the extension of time.

The Civil Law Framework

The pragmatic approach adopted by civil law jurisdictions like Italy offers a refreshingly flexible framework for grappling with the issue of concurrent delays. In stark contrast

⁶[1999] 70 Con LR 32

⁷Paul Tobin, "Concurrent and Sequential Causes of Delay" (2007) 24 ICLR 142

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to the often unsatisfying methods employed by common law courts, the Italian system empowers judges to conduct a holistic, equitable valuation of the parties' respective conduct and apportion liability accordingly.

Under Article 1226 of the Italian Civil Code,⁸ when both the contractor's and employer's non-fulfillment of obligations contributes to a delay, and the precise degrees of responsibility is difficult to determine, the judge is not bound by rigid causation principles. Instead, they may proceed with a proportional valuation of damages, a judicious assessment of the seriousness and gravity of each party's actions in causing the delay.⁹

This approach acknowledges the futility of attempts to accurately determine the precise contributions of each overlapping delay events. Rather than indulging in such theoretical exercises, Italian law (and by extension, Civil Law) rightly focuses on the parties' substantive conduct and its relative culpability in precipitating the delay.

The judge's discretion under this framework is suitably broad. The judge may reduce contractual penalties levied upon the contractor and grant an extended completion deadline if the delay cannot be solely attributed to the contractor's neglect. Conversely, where the employer's actions are established as contributing factors, the contractor may be compensated for delay costs commensurate with the employer's degree of culpability. If, however, the parties provide sufficient evidence quantifying their

respective causal contributions to the damages, the judge's task transforms into a more straightforward allocation of damages based on these delineated shares of responsibility.

This pragmatic civil law approach represents a stark departure from the inconsistent and often unsatisfying methods that have plagued common law jurisdictions in their struggle to resolve concurrent delay matters.

Common law courts have long been caught in a web of conceptual difficulties, grappling with abstract causation doctrines like the "but-for" test¹⁰ or the confusing attempts to identify a "dominant cause" of delay. These inquiries have frequently led to outcomes that defy common sense and contravene the reasonable expectations of the parties as embodied in their negotiated and contracted allocations of risk.

In contrast, the civil law system, as seen in Italian jurisprudence, adopts a practical and equitable approach and moves away from strict adherence to formal legal principles. This method gives judges/arbitrators the flexibility to examine the actual behaviour of the parties involved and allows them to distribute responsibility fairly based on the specifics of the case.

The Importance of Contractual Provisions and Industry Guidance

Ultimately, the resolution of concurrent delay disputes may depend on the specific

⁸Codice Civile [C.c.] [Civil Code] art. 1226 (It.).

⁹Di Paola, Luigi & Spanu, Paolo. "Concurrent Delays." *The International Construction Law Review* 23, no. 3 (2006): 373-385

¹⁰The "but for" test requires proving that a delay would not have occurred "but for" the events attributable to the other party's responsibility.

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contractual provisions agreed upon by the parties. Adopting the Society of Construction Law's Delay and Disruption Protocol¹¹ could provide a balanced and transparent framework for addressing such situations.¹²

FIDIC contracts¹³ also address the issue of concurrent delays, and the guidance on this can primarily be found in the clauses related to delays and extensions of time. It must be noted, however, that the actual application and interpretation of these clauses can depend heavily on the laws of the jurisdiction governing the contract, and the factual matrix of the delays involved. Arbitration and court decisions in different jurisdictions have varied in their interpretations of the same/similar clauses based on or derived from FIDIC contracts.

In the absence of clear contractual guidance, the civil law approach of proportional valuation appears better suited to resolving the complexities of concurrent delays.

Adopting the Civil Law Approach in Nigeria

Nigeria, being a common law country, can benefit from the flexibility promised by the civil law approach. In the absence of explicit contractual provisions addressing concurrent delay, the judge might look at the contributions of both parties to the delay and apportion liability accordingly. This would involve a detailed analysis of the evidence presented regarding each party's actions leading to the delay, and a decision on their respective liabilities based on the

degree of fault or negligence that the evidence attributes to each, rather than strictly adhering to the other common law approaches that have been formalised by precedents.

However, any apportionment of liabilities risks descending into subjective guesswork. To avoid this, a mathematical approach is proposed. A judge may begin by identifying all the contributory factors involved in the delay. These could include actions taken by each party, external events, and any mitigating actions. Each factor is then assigned a weight based on its impact, which could be informed by expert assessments that evaluate the typical influence of such factors.

Next, the judge calculates the impact each party had on the delay by multiplying the duration of delay attributed to each factor by its corresponding weight (i.e. $\text{Impact} = \text{Duration of Delay} \times \text{Weight}$). This is performed for each contributory factor for every party involved. The total impact from all factors is then used to compute each party's percentage contribution to the overall delay. This percentage, calculated by dividing a party's impact by the total impacts from all parties, represents that party's share of liability.

Finally, the judge adjusts these calculations based on any relevant legal or contractual obligations that might influence the outcome, such as indemnity clauses and warranty clauses. This mathematical approach allows for a reasoned and

¹¹The Society of Construction Law was founded in 1983 in England as a multi-disciplinary forum for professionals involved in the construction industry, including lawyers, architects, engineers, surveyors, and academics.

¹²Society of Construction Law. (2017). Delay and Disruption Protocol (2nd ed.)

¹³FIDIC (the International Federation of Consulting Engineers) contracts are widely used international standard forms of contract for engineering and construction projects.

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equitable apportionment of liability.

Sample Concurrent Delay Clause

To mitigate the uncertainties associated with concurrent delays in construction projects and to avoid the need for courts or arbitrators to embark on a mathematical voyage in order to apportion liability, parties can include a clause in their contracts specifically designed to manage each party's liability in the event of concurrent delays. Parties can adapt or adopt the following clause to suit their specific circumstances.

1. "Concurrent Delay" means any delay to the completion of the Works caused by two or more overlapping, simultaneous, and independent delay events, all of which are non-excusable.
2. Upon identifying any potential non-excusable delay event, the Contractor shall promptly notify the Employer in writing, including a comprehensive description of each event, its anticipated impact on the project schedule, and relevant supporting documentation.
3. Both parties shall collaboratively conduct a detailed analysis of any concurrent delays to determine their impact on the project. This analysis shall include a timeline illustrating the overlap of delays and detailed explanations of the causes and effects of each delay.
4. No extensions of time or compensation for delay costs shall be granted for concurrent non-excusable delays. Each

party shall bear its own costs resulting from such delays and shall not be liable for any delay-related costs incurred by the other party.

5. Both parties shall undertake all reasonable efforts to mitigate the effects of delays on the project schedule. The parties may negotiate further strategies to minimize the overall impact, but such negotiations will not result in financial obligations or extensions of time.

6. Any disputes arising from the interpretation or application of this clause shall be resolved through the specified dispute resolution mechanisms in this Agreement.

Conclusion

The issue of concurrent delays in construction contracts remains a contentious and complex topic, with no universally accepted solution across legal jurisdictions. This article has attempted to contribute to the legal discourse on concurrent delays within the Nigerian context where there is sparse legal analysis on this subject. This article examined various approaches and contrasted the formalistic methods employed in common law jurisdictions with the more pragmatic and equitable civil law framework exemplified by Italian jurisprudence. The civil law system's ability to conduct proportional valuations of damages, considering the gravity of each party's conduct, offers a promising path forward in resolving the complexities of concurrent delays.

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