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Concurrent delay and COVID-19 - The amalgamation of two thorny issues: Navigational tips from a legal and expert perspective

Introduction

The novel coronavirus (COVID-19) outbreak has had, and continues to have, a dramatic and unavoidable economic impact. The pace of the virus differs from one country to another and, in fact, from region to region, giving rise to differences in the restrictions imposed. The construction industry has been particularly hard hit by restrictions, with projects facing supply chain and workforce issues, among others. Many construction sites are either shut or operating at limited capacity. This has inevitably caused delays to completion of projects. It is estimated that around £26 billion-worth of construction works have been delayed worldwide in the wake of COVID-19.[1]

Prior to COVID-19, practical (and legal) considerations concerning concurrent delay was a topic of debate in the construction industry. COVID-19 is undoubtedly the new kid on the block (ensure you keep at least two metres away from it!) that is likely to add fuel to the debate around concurrent delays. We consider below what a concurrent delay actually is and look behind the expert's curtain in terms of the evaluative process. We also explain the relevant English law principles in terms of concurrent delays and relatedly, in the current climate, of force majeure provisions.

In the past few weeks, a plethora of articles have been published analysing COVID-19 and its consequences as a force majeure and/or frustrating event. It is not the intention of this paper to seek to consider whether COVID-19 can be properly characterised as a force majeure. That is, naturally, an almost entirely fact and contract dependent exercise. It is assumed for present purposes that COVID-19 establishes a force majeure event under the contract and/or the applicable law. The objective of this paper is to consider possible entitlement to time extensions (or other remedies provided by contract or law) where delay to completion is caused by two or more concurrent events, one of which is a contractor or employer risk event and the other a force majeure event.

Executive summary

Generally speaking, English law characterises concurrent delay as two or more effective causes of delay which are of approximately equal causative potency. Concurrent delays give rise to thorny issues, most notably relating to time extensions, recoverability of additional costs and (liquidated) damages payable for delay, which are further complicated when when it is also necessary to consider force majeure. This article seeks to provide the members of the international construction community with the navigational tools to assist in the exercise of detection, analysis and determination of concurrent delays. It focuses principally on commonly disputed issues and require expert and/or legal advice and determination via the courts or arbitration.

Mehmet Karakoc, Senior Managing Director (Forensic & Litigation Consulting), FTI Consulting (London).

Dogan Gultutan, Associate and Solicitor-Advocate at Baker McKenzie (London).

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[1] https://www.constructionnews.co.uk/financial/coronavirus-delays-hit-26bn-worth-of-projects-27-03-2020/

In this article, we consider (i) the definition of concurrent delay and its treatment amongst delay experts, (ii) the requirement for causation in respect of the delay event(s), (iii) the delay expert's pathway to identifying and evaluating concurrency, (iv) the position under English law as regards responsibility for concurrent delay events absent contractual provision and, finally, (iv) the interaction between force majeure (and similar featured) provisions with concurrent delay and its impact on claims.

What is concurrent delay?

Delays to construction projects are not unusual occurrences. A construction contract will therefore often determine what the consequences of such delays should be, failing which the parties will need to turn to the applicable legal principles. However, what complicates matters and muddies the water is where the project is delayed by concurrent causes of delay.

Concurrent delays in construction contracts are well-trammelled terrains and the approaches different laws take to deal with concurrent causes of delay are not all consistent. That may in fact be the cause of the confusion and misconception in the industry as regards the exact definition of concurrent delay. Claims involving two overlapping delay events (one an employer risk event, and the other a contractor risk event) are not uncommon in practice. Similarly, two separate delay events for which a single party is responsible are also sometimes incorrectly labelled concurrent delays.

A widely-accepted definition, in the context of construction contracts, is that a concurrent delay is "*a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency*".[2] This was affirmed by the Court of Appeal in *North Midland Building Ltd v Cyden Homes Ltd* ("**North Midland**").[3]

The Society of Construction Law Delay and Disruption Protocol (the "**SCL Protocol**")[4] provides a narrower definition and states that "*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*,"[5] while noting 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*."[6]

Accordingly, there are two schools of thoughts in dealing with concurrent delays. One school maintains the view that "true concurrency" exists in exceptional factual circumstances where both the timing of the events and the delay caused coincide.

The below hypothetical example (Figure 1) illustrates a "true concurrency" delay:

(i) construction of an equipment foundation being delayed by the contractor for two months (May to June) due to reasons attributable to the contractor;

(ii) manufacturing and delivery of the equipment, an employer's responsibility, being delayed by the employer for the same two months (i.e., May to June); and

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[2] See, *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), para 277 (Hamblen J).

[3] *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744, para 16 (Coulson LJ).

[4] The SCL Protocol (the 2nd edition dated February 2017) is a non-binding document produced by the Society for Construction Law which provides useful guidance on some of the common construction delay issues. For a copy, see here.

[5] SCL Protocol, Core Principle 10.

[6] SCL Protocol, Guidance Part B, 10.4. See also *Keating on Construction Contracts*, 10th Ed., para 8-025.

(iii) the effects of both delay events being felt at the same time, and both events independently delaying the commencement of equipment installation on site by two months (i.e., June to August).

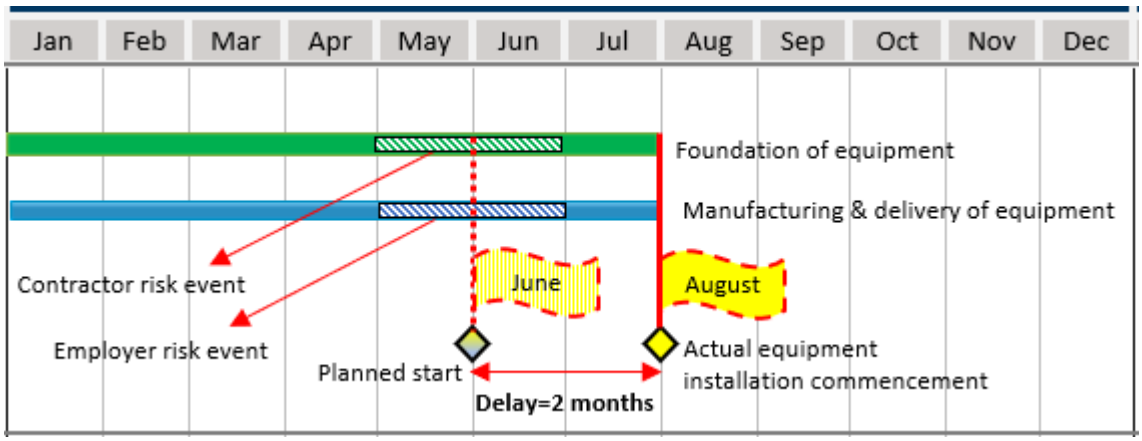

Figure 1

The second school of thought considers a concurrent delay to exist provided the effects of the two events in question (i.e., an employer risk event and a contractor risk event) are felt simultaneously regardless of whether they arise at the same point in time.

To illustrate using the same example but with dates modified, such that the delay associated with the contractor commences on April and continues until June, it can be said that there is concurrent delay in such cases since both events are the effective causes of the two-month delay to works during June and July, as shown in Figure 2 below.

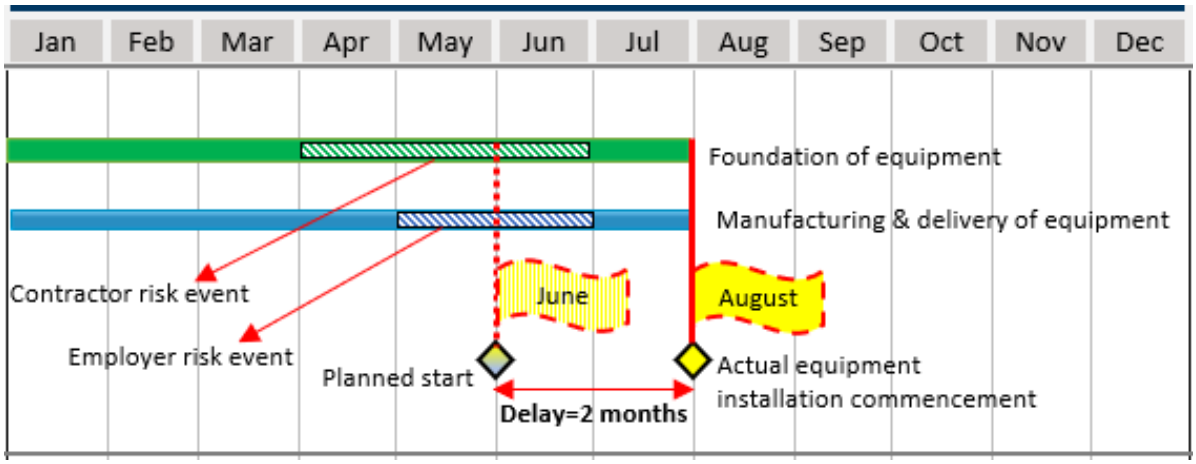

Figure 2

As noted above, the determination of whether the causes in question were actually concurrent is naturally a highly fact and contract dependent exercise. The act relied upon must actually prevent the contractor from carrying out the works within the contract period, or, in other words, must cause some delay.[7] The determination of this involves both programming and legal analysis, and it requires a two-step approach in many complex cases, namely establishing concurrent causation (through identification and evaluation of the concurrency) and determining responsibility for the concurrent delay.

[7] See, *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), paras 279 and 282.

Establishing causation

The test for establishing causation may differ from one jurisdiction to another. As affirmed by the Court of Appeal in *North Midland*,[8] under English law, the general position is that causation will be established where it can be shown that the event in question is "*of approximately equal causative potency*" as the other and is one of the effective causes of the delay.[9] Accordingly, it is important to establish causation in fact, i.e., whether the relevant event was likely to cause and/or did cause actual delay to the progress of the works[10] and, further, that the employer risk event and the contractor risk event were of equal causative potency.

Note, however, that there will not be a concurrent delay where completion is already delayed for reasons attributable to one party, which is then followed by delays to completion of particular activities by the other party. This is because such later acts or events do not in fact cause any delay to completion: "*Causation in fact must be proved based on the situation at the time as regards delay*".[11] The SCL Protocol also supports the view that the "*concurrent delay only arises where the Employer Risk Event is shown to have caused… critical delay (i.e. on the longest path) to completion.*" [12]

It is worthy of mention that certain delay events may be "neutral" in the sense that the delay is not caused by either of the contracting parties, i.e., the employer or contractor. The SCL Protocol refers to these events as "*non-compensable Employer Risk Events*" because "*they are only neutral in the sense that one party bears the time risk and the other party bears the cost risk*".[13] We note that there are certain *ad-hoc* contracts which provide both additional time and compensation for neutral events. Therefore, we call them "neutral events" in this paper to avoid any confusion.

Identification and evaluation of the concurrency

Whilst construction contracts are often silent about the effect of concurrent delays, they often require parties to deal with the time impact of a delay event by reference to some form of critical path assessment.[14] A work programme typically demonstrates critical work as work that is located on the "longest" or "critical path" of the programme's network of activities when the programme is scheduled. For this reason, the performance of non-critical works can be delayed for a certain period without affecting the project completion date. In other words, the completion date will not be impacted until the total float[15] available in the programme at the time of the risk event is exhausted.

The importance of, and need for, a reliable critical path analysis in assessing the real and effective cause(s) and extent of a delay cannot be understated, and is in fact underscored in case-law. It is the industry accepted methodology of evaluating entitlement to extension of time

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[8] *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744.

[9] Keating on Construction Contracts, 10th Ed., para 8-026.

[10] See, *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), para 292.

[11] *Saga Cruises BDF Ltd & Anor v Fincantieri SpA* [2016] EWHC 1875 (Comm), para 251.

[12] SCL Protocol, Guidance Part B, 10.10 (subject to reconsideration of a potential appeal court decision).

[13] SCL Protocol, Guidance Part B, 12.2.

[14] SCL Protocol, Appendix A defines critical path as "*the longest sequence of activities through a project network from start to finish, the sum of whose durations determines the overall project duration*".

[15] The amount of time that an activity may be delayed beyond its early start/finish dates with no impact to the project completion date.

and identifying concurrent causes of delay. This begs the question how one identifies the critical path, which we now consider below.

Determining the critical path

A range of delay analysis methodologies exist that allow one to undertake a critical path assessment. The SCL Protocol categorises these methodologies into three groups, pursuant to the manner in which the critical path is to be determined, i.e., (i) prospectively, (ii) contemporaneously and (iii) retrospectively. [16]

Determining the most appropriate methodology when analysing delay has both legal and factual aspects. Rarely do parties agree in their contracts which methodology to use in assessing critical delays, though they may stipulate for a mechanism in respect of extension of time claims and their assessment. For example, the standard form JCT and FIDIC suite of contracts require the contractor to provide a prospective assessment; however, they do allow for a retrospective review on the entitlement (in part or in full). On the other hand, extension of time applications under the NEC suite of contracts are generally, to the extent possible, considered prospectively. The SCL Protocol discourages the parties from adopting a "wait and see" approach, recommending the delay events to be addressed on a contemporaneous basis. This is generally in line with judicial recommendation.[17]

An important caveat to bear in mind in respect of the critical path analysis is that, in many cases, the exercise will involve making certain underlying assumptions of preference, based on professional opinion and experience. Similarly, not all delay analysis methodologies would reach the same conclusion; various factors such as analysis timing, nature of dispute and availability of programming records may impact the outcome of the analysis.[18] For example, the SCL Protocol recognises that a prospective analysis of delay may not be suitable where the analysis is time-distant[19] from the delay event.[20]

In light of the above, the delay analysis methodology (or approach) adopted and the timing of the assessment has the potential to affect the outcome of a delay analysis. We consider below the importance of conducting the concurrency analysis with appropriate frequency and precision, so that the results are as reliable as possible.

Frequency, interval and precision of concurrency analysis

Contracts almost always require a contractor to notify the employer of a delay as soon as is practicable, often within a certain period which acts as the long-stop date for any claim. For various reasons, in practice a contractor is not always able to prepare its delay assessment and ensure that the assessment is updated on a frequent basis. The availability of personnel with the right expertise, regular programme updates and the time needed to understand the potential impacts of a delay event are among the factors that may limit a contractor's ability to produce frequent assessments.

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[16] SCL Protocol, Guidance Part B, 11.4 and 11.5.
[17] See, e.g., *Saga Cruises BDF Ltd & Anor v Fincantieri SpA* [2016] EWHC 1875 (Comm), para 251.
[18] *Fluor v Shanghai Zhenhua Heavy Industry Co, Ltd* [2018] EWHC 1 (TCC), para 275. This case did not follow *Walter Lilly*, where the Court had held that a prospective and retrospective analysis should produce the same result.
[19] Assessment of delay after completion of the works or significantly after the effect of a risk event.
[20] SCL Protocol, Core Principle 11.

Failure to produce frequent assessments could potentially have a profound impact on identifying concurrency, i.e., whether the impact of the delay events were or were likely to be felt simultaneously. This may ultimately result in the delay analyst producing an incorrect analysis on delay to the critical path. In the same vein, the accuracy of data and the precision of the delay analysis[21] is pivotal in permitting the analyst to produce reliable findings that can withstand scrutiny.

Order of insertion or extraction of the delay events

Once the critical path has been identified and the period and probable causes of delays are ascertained, the next step is to determine whether such delay events can properly be characterised as concurrent delays. In circumstances where the employer and contractor risk events occur sequentially that have concurrent effects, the general rule is that the order of insertion[22] of the delay event ought to be from the earliest to the latest in time, and the analyses ought to be carried out for each event separately. [23] This approach is also recommended by the SCL Protocol.[24]

For instance, taking Figure 2 above as an example, one must first insert the contractor risk event occurring from April onwards into the programme to identify its individual impact. This will be followed with the separate insertion into the programme of the employer risk event operating from May onwards.

Common-sense approach

An important component of a delay analysis is the need to sense-check one's findings by resorting to "common sense". A delay analyst would often enquire whether the result of the delay analysis stands to reason and, if not, consider the possible reasons for it and how they should be remedied. A "degree of tolerance" is therefore needed to allow the analyst to properly consider all relevant factors. Also, many contracts provide a room for such allowances, for instance, by requiring a "fair and reasonable" determination of claims for extension of time.

Considering all of the above, a common-sense approach to extension of time claims in concurrent delay cases would therefore be to the benefit of all parties involved, so as to avoid going down an uncertain and rather expensive lane of formal dispute resolution. On one view, identifying a cause of delay is solely a matter of fact. However, that undermines the importance and utility of expert opinion guidance in the factually complex cases involving a large number of programming records, to help the parties and/or tribunal understand and deal with the issues.

The party seeking to establish concurrent delay and take some benefit from it must act swiftly, complying with the contractual requirements. A delayed analysis may limit the ability to contemporaneously analyse concurrency and may disentitle certain remedies, in part or in full. Time may be your enemy in such situations, so ensure that you keep it in sight.

Responsibility for concurrent delay

The starting point for assessing who should shoulder the responsibility for concurrent delay, as always, is the contract. However, the standard form contractual clauses in respect of extensions

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[21] See, SCL Protocol, Guidance Part B, 10.11, which also recommends that "*analyses should be carried out for each event separately and strictly in the sequence in which they arose.*"

[22] Certain methodologies, such as the collapsed as-built analysis method, require subtraction of a delay event. For those methods, the order would need to be reversed.

[23] This approach is applicable in particular for a dynamic delay analysis methodology, such as the Time Impact Analysis.

[24] SCL Protocol, Guidance Part B, 4.13.

of time seemingly stay silent on concurrent delays, save for FIDIC 2017 rainbow suite of contracts, which expressly refers to concurrent delay.

Under the 2017 FIDIC contracts, the parties are required to set out the rules and procedures to regulate the matter in the Particular Conditions. This approach arguably raises more questions than it answers in the absence of Particular Conditions actually addressing concurrent delay. The parties can (and should) agree on who should bear the risk of concurrent delays. The parties' freedom to do this was confirmed by the Court of Appeal in *North Midland*. The Court reiterated that parties are at liberty to allocate risk in respect of concurrent delays, but requiring such clauses to be clear and unambiguous. [25]

Silence in the contract - the law's territory

It is not uncommon to see contracts remain silent on the allocation of risk in respect of concurrent delays. This is in some cases by design. English law generally permits an extension of time claim by a contractor under standard form construction contracts where the "*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*", as was the case in *Walter Lilly v Mackay* ("**Walter Lilly**").[26] This is considered to be the natural and logical interpretation of such provisions.

Walter Lilly was a case where the contractor had agreed to build for the employer certain high-quality houses in London under the JCT Standard Form of Building Contract (1998) (with amendments). The completion was substantially delayed, and one of the issues the Court had to deal with was how to approach delays concurrently caused by the employer and the contractor. Akenhead J held that the contractor was entitled to a full extension of time.

The decision in *Walter Lilly*, as a first instance judgment, is persuasive authority only. Some have indeed questioned its accuracy. The Court of Appeal in *North Midland*, noting the "*potential difference of opinion*" and acknowledging the absence of an appellate decision, ducked the issue on the ground that its resolution was unnecessary for the purposes of the appeal.

The issue did not arise in *North Midland* as the clause in question was clear and unambiguous in allocating the risk of concurrent delay to the contractor. The contract in that case, incorporating the JCT Design and Build (2005) with certain bespoke amendments, provided that "*any delay caused by a Relevant Event [i.e., an event justifying an extension of time] which is concurrent with another delay for which the Contractor is responsible shall not be taken into account*" (*emphasis added*) (clause 2.25.1.3(b)).

Determination of concurrent delay in cases of force majeure

The current pandemic has disrupted many construction projects and many are, or will likely fall, behind schedule. We observe a rise in force majeure notices being issued by contractors and sub-contractors in an effort to excuse failure or delay in performance due to COVID-19. This necessitates the need to assess the relevance and impact of force majeure issues in the concurrent delay arena, given that COVID-19 may be one of several possibly concurrent causes of the delay.

Where a contractor formulates its claim on the basis that COVID-19 is a force majeure event, it will likely have to work within the self-contained force majeure regime and ensure that it complies with the contractual requirements relating to the timely notifications and entitlements.

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[25] *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744, para 39.

[26] *Walter Lilly and Co Limited v Giles Mackay and Another* [2012] EWHC 1773 (TCC), paras 369-370.

For instance, the FIDIC contracts stipulate that "*If the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], and suffers delay and/or incurs Cost by reason of such Force Majeure, the Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to: (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion]…"* Accordingly, a contractor must demonstrate that it has been prevented from performance and suffered delay as a result of the force majeure event, in addition to its obligations concerning notices.

English law requires the force majeure event to be an effective cause of the impediment. This was neatly explained by Males LJ in *Classic Maritime v Limbungan Makmur* ("**Classic Maritime**")[27], as follows:

> "*…the words "resulting from" together with the requirement that the events in question "directly affect the performance of either party" import a causation requirement. That is confirmed by the words "any other causes" in the concluding part of the first sentence and the reference to "such events or causes" in the second sentence. <u>These are not merely "events" which happen to have occurred, but "causes" which impact on performance</u>.*" (<u>*Emphasis added*</u>)

As recently explained by the Commercial Court, "*a force majeure event must be sole cause of the failure to perform an obligation.*"[28] Approving the sole cause test, the Court of Appeal held in *Classic Maritime* that the charterer was liable for damages for non-performance because it would not have performed the contract even if the dam had not burst, which was a valid excuse for non-performance under the contract. The Court reasoned that "*simply…[by]…construing the words of the clause*", that performance was not "*directly affect[ed]*" by the dam burst.[29] Males LJ (with whom the other two appellate judges agreed), agreed with the trial judge's following reasoning:

> "*…reasonable and realistic businessman "would see the broad common sense of saying that if, but for the dam burst, [the charterer] would not have performed its obligations, its failure to perform cannot fairly be said to have 'resulted from' the dam burst and the dam burst cannot fairly be said to have 'directly affected' the performance of [the charterer's] obligations".*[30]

It is not, unfortunately, crystal clear whether force majeure provisions will excuse failure to perform where the effect of the force majeure event(s) and the other event(s) are felt at the same time in terms of the delay caused and are truly concurrent causes. It seems that the Court of Appeal in *Classic Maritime* was of the opinion that 'but for' causation must be shown in all cases unless one is dealing with a contractual frustration clause, which "*brings the contract (or the relevant part of the contract…) to an end forthwith and automatically once an event occurs, regardless of the wishes of the parties*"[31],[32] though that is by no means entirely clear.

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[27] *Classic Maritime v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102, para 45.
[28] *Seadrill Ghana Operations Limited v Tullow Ghana Limited* [2018] EWHC 1640 (Comm), para 79.
[29] *Classic Maritime v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102, para 36.
[30] *Classic Maritime v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102, para 48.
[31] *Classic Maritime v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102, para 61.

[32] See, *Classic Maritime v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102, para 50 *et seq*.

The SCL Protocol also does not refer to a "force majeure" event in the sense explained above. It therefore does not distinguish, in its guidance on concurrent delays, between an employer caused delay and a "neutral" event delay. [33]

Accordingly, there is an element of uncertainty, at least under English law, as to how the "sole cause" test required in respect of force majeure events is to be applied in concurrent delay cases. Admittedly, the distinction is a fine one; as the Commercial Court ruled, "*ultimately… the question is one of construction of the contract before the court*"[34]. This highlights the importance of clear contractual drafting to cover for all possible eventualities.

Conclusion

Concurrent delays, often claimed but rarely successful, generate much debate and confusion. The sole cause test adds an additional layer of complication in circumstances where COVID-19 is relied upon as a force majeure event concurrently causing delay. Any endeavour to demonstrate concurrency and seek an extension of time, or any other remedy provided for in the contract, requires establishing responsibility for delay events and causation. A careful and methodical analysis of the delay(s) through a critical path assessment, with the application of the common-sense approach, will help distinguish between the effects of different delay events, including COVID-19 and its consequences.

Given the wide-ranging adverse effects of the current pandemic on the construction industry and the delays it has caused and will continue to cause, the inter-relation between potential concurrent delays and COVID-19 is likely to be an issue courts and tribunals will have to grapple with in the years to come. The current COVID-19 era is, as a result, very likely to produce the much needed judicial guidance to clarify certain gaps in the law on concurrent delays and force majeure, particularly on the meaning and limits of the causative requirement. One can only hope that the guidance comes in sooner than later, to assist parties swiftly and fairly resolve disputes out of court given the current build-up of claims.

Pandemics and associated lockdowns are said to have resulted in some solving the unsolvable or producing their most celebrated works, as did Shakespeare and Newton. Construction lawyers, as well as the judges and the arbitrators, are similarly likely to rise to the challenge and develop creative and novel arguments on the Day of Judgment when debating delay issues.

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[33] A similar industry guidance used in the US, *The American Association of Cost Engineers' (AACE) International Recommended Practice No. 29R-03*, expressly refers to concurrent delays caused by an employer/contractor delay event and a force majeure delay event (see, page 100, figure 12).

[34] *Seadrill Ghana Operations Limited v Tullow Ghana Limited* [2018] EWHC 1640 (Comm), para 79.