



# The Arbitration Review of the Americas

2022

**Concurrent Delay in the Americas: Is  
There a Continental Shift?**

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The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.


Other nuggets include:

- helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
  - an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
  - a similarly helpful summary of recent Canadian court decisions;
  - another on Mexican court decisions that showed a rather mixed year; and
  - the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.
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**Generated: February 8, 2024**

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# Concurrent Delay in the Americas: Is There a Continental Shift?

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## Summary

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## IN SUMMARY

This article will address how concurrent delay is defined and how it is applied in different parts of the Americas. It will also discuss pitfalls, industry trends and current thoughts on apportionment.

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## DISCUSSION POINTS

- Definition of concurrent delay
  - Variance of definition in different jurisdictions
  - How concurrent delay can be treated (ie, binary or apportioned)
  - Considerations to be taken when dealing with concurrent delay
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## REFERENCED IN THIS ARTICLE

- *George Sollitt Construction Co v United States*
- *Weaver-Baily Contractors, Inc v United States*
- *Armed Services Board of Contract Appeals in Utley-James, Inc*
- Association for the Advancement of Cost Engineering International
- American Society of Civil Engineers
- Society of Construction Law
- *Schindler Elevator Corporation v Walsh Construction Company of Canada*
- Brazilian Civil Code
- *Newport News Shipbuilding & Dry Dock Co v US*
- *Raymond Constructors of Africa, Ltd v United States*
- *Foundation Co of Canada v United Grain Growers Ltd*

## INTRODUCTION

On construction projects, the potential for two delay events to occur in parallel or overlap is very high. The probability significantly increases the more complex the project is, and there may be more than two delay contenders.

However, if delay events merely share common date ranges, it does not necessarily make them concurrent delays. The answer can be as complex as the projects themselves and entirely dependent on the governing law. How resulting damages get decided can be even more convoluted.

The problem has long stemmed from the fact that, no matter where you are in the world, there has been no uniform definition of concurrent delay and little guidance on how to assess resulting damages.

Although the problem is faced worldwide, this article focuses on the Americas, where recent rulings may be able to shed some light on what has often been termed 'Black Magic'.

## WHAT IS CONCURRENT DELAY?

In principle, it is generally understood that concurrent delay occurs when two or more delays (which are the result of independent causes by independent parties) overlap during a given period. But what does that really mean?

Consider the following five scenarios.

- Scenario one: there is an employer delay relating to permits that impacts the critical path. At the same time, there is a contractor delay relating to procurement of materials. However, the materials are not needed until later in the project; therefore, the delay does not impact the critical path (whereas the permits are needed to commence the project and are, thus, critical).
- Scenario two: there are both employer and contractor delays impacting the start of critical path works at exactly the same time (ie, the permit and the contractor's materials are both required to start the project).
- Scenario three: there is first an employer delay related to permits that impacts the critical path. Later, there is a contractor delay related to material procurement that also impacts the critical path. Unlike the previous scenarios, the impacts do not start at the same time but they both get resolved at exactly the same time.
- Scenario four: there are initially both employer and contractor delays impacting the start of critical path works. The employer's permit delay is resolved while the contractor's material procurement continues and causes a longer impact to the critical path.
- Scenario five: there is first an employer delay related to permits that impacts the critical path. Later, there is a contractor delay related to material procurement that also impacts the critical path. The employer delay gets resolved first while the contractor delay continues to impact the critical path.

Whether any of the stated delays in the above scenarios are considered concurrent delay, in their entirety or in part, depends on the governing law; however, even in common law jurisdictions (eg, the United States and Canada) wherein the courts have grappled with concurrent delay in their decisions, it is still not crystal clear.

For instance, in the United States, the Court of Federal Claims in ***George Sollitt Construction Co v United States***<sup>[1]</sup> found the following in relation to concurrent delays:

The exact definition of concurrent delay is not readily apparent from its use in contract law, although it is a term which has both temporal and causation aspects. Concurrent delays affect the same 'delay period.' A concurrent delay is also independently sufficient to cause the delay days attributed to that source of delay.

The court in ***Weaver-Baily Contractors, Inc v United States***<sup>[2]</sup> formed a slightly different definition of concurrency, as did the Armed Services Board of Contract Appeals in ***Utley-James, Inc,***<sup>[3]</sup> the latter stating:

Strictly speaking, there can be but a single delay over a given period of time, and when that delay has multiple, indivisible causes, it is attributable not to either party but to both. Hence it would probably be more accurate to speak not of concurrent delays but of a single delay with concurrent causes.

There is no court decision that defines concurrent delay, and industry associations are also generally unaccommodating. The Associates for the Advancement of Cost Engineering International's Recommended Practice No. 10S-90 Cost Engineering Terminology<sup>[4]</sup> lists five separate (albeit similar) definitions for concurrent delay:

- (1) 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.
- (2) Concurrent delays occur when there are two or more independent causes of delay during the same time period. The "same" time period from which concurrency is measured, however, is not always literally within the exact period of time. For delays to be considered concurrent, most courts do not require that the period of concurrent delay precisely match. The period of "concurrency" of the delays can be related by circumstances, even though the circumstances may not have occurred during exactly the same time period.
- (3) 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. 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 events.
- (4) Concurrent delay occurs when both the owner and contractor delay the project or when either party delays the project during an excusable but non-compensable delay (e.g., abnormal weather). The delays need not occur simultaneously but can be on two parallel critical path chains.
- (5) The condition where another delay-activity independent of the subject delay is affecting the ultimate completion of the chain of activities.

The American Society of Civil Engineering (ASCE) defines concurrent delay simply as follows: 'Delay to the project critical path caused concurrently by multiple events not exclusively within the control of one party.'<sup>[5]</sup>

The Society of Construction Law (SCL), which originated in the United Kingdom but has since crossed the pond and established a presence in the Americas, confirms that the occurrence of 'true concurrent delay' (ie, 'two or more delay events at the same time') is a 'rare occurrence'.<sup>[6]</sup> It clarifies 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.'<sup>[7]</sup>

Considering all of the above, it is likely that the following would be found regarding the five scenarios described above:

- scenario one: no concurrent delay;
- scenario two: the entirety of the impacted period could be considered concurrent; and
- scenarios three, four and five: the overlapping period could be considered concurrent.

However, concurrent delay is often not that simple.

In Canada, the recent Ontario Superior Court case, *Schindler Elevator Corporation v Walsh Construction Company of Canada* (2021 ONSC 283),<sup>[8]</sup> added clarity to the definition by finding:

[i]t is not necessary for the independent causes of delay to occur exactly at the same time for them to be considered concurrent. Indeed, it is rare that concurrent delays start and end at the same time. Concurrent delays are more commonly experienced as overlapping events.

Given the apparent alignment on the rareness of exact concurrency, it is likely that the results in Canada for the scenarios described above would be similar to those found in the United States.

Civil law jurisdictions, however, prove to be far opaquer in their definition of concurrent delay, if they provide a definition at all.

In Mexico, although the affected party can allege a concurrent delay, the law is silent on the matter.<sup>[9]</sup>

In Brazil, while there is no established concept of concurrent delay, there is the concept of concurrent fault which is defined by article 945 of the Brazilian Civil Code:

Concurrent fault is a broader concept than concurrent delay. It applies generally when there is any action of the victim that contributes to its own damage, resulting in a reduction of its indemnification to be determined by the court taking into consideration the specifics of each case.<sup>[10]</sup>

Peru deals with public and private construction disputes differently. Public works are regulated in accordance with the Public Procurement Law No. 30225 and Legislative Decree No. 1224 on the private investment promotion framework through public-private partnership for projects on assets; however, neither directly address concurrent delays. Private works, on the other hand, offer different routes to resolve concurrent delays, considering foreign legal case law.

Although there does not appear to be a legal definition of concurrent delay in Colombian law, it does seem to be common practice for real estate developers and contractors to include a concurrent delay provision in contracts.<sup>[11]</sup>

From the above, attempting to determine a likely outcome for the five given scenarios in civil law countries is difficult and would probably be dependent on whether the contract itself provided a definition.

## CHALLENGES IN DETERMINING DAMAGES OWING TO CONCURRENT DELAY

Apportionment is a buzzword in concurrent delay discussions. In the not-so-distant past, if concurrent delay was deemed to have occurred, it typically meant a contractor was due 'time but not money'.

In recent times, there has been a trend towards apportionment. However, if the definition of concurrent delay was confusing, the meaning of apportionment is even more so. Part of the confusion stems from whether the apportionment is referring to time or damages.

In the United States, the ‘time but no money’ concept originated in the 1934 case *Newport News Shipbuilding & Dry Dock Co v US*, which found that neither party could recover if both parties contributed to the same total delay.<sup>[12]</sup>

Later, the *George Sollitt Constr Co v United States* case found that a party may recover damages where there are multiple causes of delay to project completion, but only ‘when clear apportionment of the delay attributable to each party has been established’.<sup>[13]</sup>

In this case, it would seem that apportionment is referring to the allocation of delay (time) to each party. In other words, if a delay period can be refined such that segments of time can be allocated individually to the separate parties, then damages can likewise be apportioned.

As an example, and using scenario three from above, if delay can be measured at the time the contractor delay commences (while the employer delay was already ongoing), then it should be possible to segregate the time when only the employer delay was occurring from the time when both the employer and contractor delay were overlapping.

In the United States and Canada, it is common for a critical path delay analysis to be used in expert evidence to support such an apportionment (ie, allocation of delay). However, in civil law jurisdictions, such technical analysis is less common.

If courts find the delays to be truly concurrent and intertwined (ie, the specific amount of time attributable to each event or party cannot be determined), does it still mean that the damages also cannot be?

In the United States, there is precedence where courts have apportioned damages using a percentage based upon factual records.<sup>[14]</sup> In *Raymond Constructors of Africa, Ltd, v United States*, the courts viewed the overall delay as being concurrent and caused by three different parties.<sup>[15]</sup> The court therefore split the responsibility into thirds.

Canadian courts are also said to apportion damages in instances of concurrent delays. In *Foundation Co of Canada v United Grain Growers Ltd*,<sup>[16]</sup> a case in which there was a four-month delay to the project and each party alleged different causes for the delay, the court found that one party was responsible for three months of the delay, and another party was responsible for one month of the delay. The damages were then ‘apportioned’ as follows: 75 per cent to United Grain Growers and 25 per cent to the Foundation Company.

However, the recent Canadian case *Schindler Elevator Corporation v Walsh Construction Company (WBP) of Canada*<sup>[17]</sup> reaffirmed the challenges with precisely quantifying resulting damages. The Court stated that, in addition to proving that claimed delays impacted the critical path and to what extent (ie, via a reliable critical path analysis), a causal connection is required to link claimed damages to those delays:

while I am obliged to “do my best” in assessing WBP’s damages, any determination that I make must still be supportable on the evidence. I cannot undertake an exercise that amounts to guesswork that may effectively vitiate WBP’s evidentiary onus of proving damages. WBP is not relived of its burden to demonstrate both delay by Schindler and cause of material contribution to losses and damages simply because the analysis is difficult.

The SCL’s Delay and Disruption Protocol<sup>[18]</sup> recommends a common-sense approach to assessing concurrent delay, recognising the imprecise nature and challenges in exacting apportionment:



In considering whether concurrent delay exists, the Protocol recommends a common sense approach to delay analysis. In particular, the Protocol recognizes that delay analysis is rarely precise down to the day (or even few days). The application of common sense requires that the margin for imprecision should be taken into account in reaching a conclusion on concurrency.

It seems that North America may be trending towards (or at least entertaining) this concept of a practical view; however, these practical decisions must still be supported by evidence and analysis.

Delay analyses are, therefore, of utmost importance as courts try to more accurately apportion concurrent delay.<sup>[19]</sup> The concept of apportionment, which will be discussed further below, has become a commonly discussed and debated topic.

In Latin and South America, given the prevalence of civil law, a trier of fact may be less concerned about supportable evidence and apportion the delay based on what is deemed fair and reasonable. In Brazil:

If there is specific provision addressing concurrent delays, each party's responsibility will be proportionate to the fraction of the delay it has caused.

Considering that the contractor's fault contributed to the delay, the employer shall not be required to pay the total costs regarding the concurrent delay and the contractor will not be entitled to an extension of time with respect to the whole period of the delay. The purpose is to avoid any imbalance and to compensate proportionally the employer's delay with the contractor's concurrent delay.<sup>[20]</sup>

In Columbia:

in a public works contract, if concurrent delay is caused by events attributable to force majeure, public interest, or to the contracting authority and they severely affect the financial equilibrium of the contract, the contracting party may request to the contracting authority compensation of damages or the recognition of additional costs. Even though these theses have been greatly developed by case law, Article 40 of Law 80 of 1993 provides that the addition of a public works contract to recognize additional costs to the contractor cannot exceed fifty percent (50%) of its initial price.<sup>[21]</sup>

Based on the above, it seems that in Latin and South America, unless concurrent delay is specifically defined by the contract, the concept may not be recognised by the courts.

Given the pervasive lack of clarity that still remains on the issue, we offer several points for consideration.

Parties should not only define concurrent delay in the contract but also how damages will be handled. For example, the contract could expressly limit delay damage entitlement to critical path delays pursuant to proof based on a critical path analysis.

Alternatively, if the parties want to allow for an alternative approach to the treatment of concurrent delay, such as specifying some portion of recoverable costs or establishing a percentage split between owner and contractor delay responsibility, that approach also can be specified in the contract.

There is a clear trend in the courts regarding the preference of fact-based delay analyses that apply practicality and common sense. Modelled or theoretical types of analyses can often be manipulated to give an illusion of concurrency where none actually exists.

The same can be said for a contractor's contemporaneous schedule updates. Whether purposeful or misguided, a schedule can show multiple critical paths, again giving the illusion of concurrency. Without a real-time understanding of the actual critical path, contractors may find themselves barred from compensable delay claims later on.

'Pacing' may also need to be given consideration in concurrent delay. As an example, an employer event is known to have caused delay to the project. As a result of the delay, a contractor decides to reduce its manpower as this would not cause delay to the project.

Using a purely retrospective analysis, the contractor's 'slow' progress may appear to have caused a concurrent delay event, although the employer event happened first and should have created relative float in the contractor's work. To avoid this misconception, if the contractor is purposefully pacing its work, it should document its intent contemporaneously. Looking at scenario three above, the contractor delay could be seen as pacing (ie, not concurrent).

The above gives rise to the concept of 'primacy of delay'. The basis behind this argument is that whatever event happened first is the primary cause of delay and creates relative float to the other paths of work. The key in making this argument is whether the extent of the delay was known at the time the event arose.

If a known delay impact could be reasonably quantified at the time, and the other concurrent delay candidate known to be less, it could then be considered to be the driving, or dominant, cause of delay. Looking at scenario four, the contractor delay could be seen as dominant, and the employer delay non-critical (ie, not concurrent).

The covid-19 pandemic has impacted construction projects throughout the world. It will be interesting to see how the various courts treat delay moving forward in terms of concurrency with pandemic-related impacts. The challenge of apportioning concurrent delays will likely be faced with even more layers of complexity.

## Endnotes

- 1 ***George Sollitt Construction Co v United States***, 64 Fed Cl. 229, 239 (2005). [^ Back to section](#)
- 2 ***Weaver-Bailey Contractors, Inc v US***, 19 Cl. Ct. 474, 476, 36 Cont. Cas.Fed. (CCH) ¶ 75801, 1990 WL 10845 (1990). [^ Back to section](#)
- 3 ***Appeal of Utley-James, Inc***, G.S.B.C.A. No. 5370. 85-1 B.C.A. (CCH) ¶ 17816, 89109, 1984 WL 13874 (Gen. Services Admin. B.C.A. 1984), aff'd, 14 Cl Ct. 804, 34 Cont. Cas. Fed. (CCH) ¶ 75478, 1988 WL 42130 (1988). [^ Back to section](#)
- 4 AACE® International Recommended Practice No. 29R-03. Forensic Schedule Analysis, p. 102. [^ Back to section](#)

- 5 American Society of Civil Engineering, Standard 67-17. [^ Back to section](#)
- 6 Society of Construction Law (SCL) Delay and Disruption Protocol (February 2017), paragraph 10.3. [^ Back to section](#)
- 7 *ibid*, paragraph 10.4. [^ Back to section](#)
- 8 Ontario Superior Court, *Schindler Elevator Corporation v Walsh Construction Company of Canada* (2021 ONSC 283). [^ Back to section](#)
- 9 Nicholas Downing and David Nitek, eds, *The International Comparative Legal Guide to: Construction & Engineering Law*, 6th ed (Global Legal Group Ltd, 2019). [^ Back to section](#)
- 10 See Brazil section of CMS's CMS Expert Guide to the Law and Regulation of Concurrent Delay. [^ Back to section](#)
- 11 See Colombia section of CMS's CMS Expert Guide to the Law and Regulation of Concurrent Delay. [^ Back to section](#)
- 12 *Newport News Shipbuilding & Dry Dock Co v US*, 79 Ct. Cl. 25 (1934) [^ Back to section](#)
- 13 See endnote 1. [^ Back to section](#)
- 14 See Farrukh Arif and Ayman A Morad, 'Concurrent Delays in Construction: International Legal Perspective', *ASCE Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 2014. [^ Back to section](#)
- 15 *Raymond Constructors of Africa, Ltd, versus United States*, [411 F.2d 1227 (Ct. Cl. 1969)]. [^ Back to section](#)
- 16 *Foundation Co of Canada v United Grain Growers Ltd* (1996), 25 C.L.R. (2d) 1 (B.C.S.C.), *var'd* (1997), 33 C.L.R. (2d) 159 (C.A.) [^ Back to section](#)
- 17 See endnote 8. [^ Back to section](#)
- 18 SCL Delay and Disruption Protocol (February 2017), paragraph 10.11. [^ Back to section](#)
- 19 James K Bidgood Jr, Steven L Reed and James B Taylor, *Cutting the Knot on Concurrent Delay* (Thomson West Construction Briefings: February 2008). [^ Back to section](#)
- 20 See endnote 9. [^ Back to section](#)
- 21 See endnote 11. [^ Back to section](#)



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