Concurrent delay in the Gulf

STUART JORDAN* opines that common law (in particular English Law) and Gulf Law principles are likely to diverge in terms of how the GCC countries would deal with concurrent delay.

THIS question continues to come up: "How does the law in the Gulf countries deal with concurrent delay?" Concurrent delay is another of those concepts which is the subject of much academic debate (and court time) in common law countries, but which might not be treated the same way in the Middle East.

Construction contracts tend to be written using the same legal principles as would apply in (say) England, on the assumed basis that this issue will be dealt with the same way everywhere. We should, therefore, examine whether concurrent delay is one of those issues which "does not translate".

Concurrent delay has no official definition. Probably the most widely accepted source is the (UK) Society of Construction Law Delay and Disruption Protocol (Protocol). Even the Protocol doesn't attempt to impose a single definition: it mentions that there can be "True concurrent delay" which 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 Protocol acknowledges that this will be a rare occurrence: realistically happening only at commencement, when the contractor has not mobilised resources and the employer has not allowed access to the site.

The more common situation is where two or more delay events happen at different times but their respective effects on works progress are felt at the same time. This "concurrent effect" is the situation we generally encounter: one of the events might have a longer-lasting effect than the other, but those effects overlap. One point is clear: each of the employer risk delay (allowing a time extension) and the contractor risk delay (not allowing an extension) must be critical to completion on time, that is, they would each cause delay to completion beyond the contractual completion date, regardless of the other event.

The real question, of course, is about the outcome from this situation: does the contractor get an extension of time? Here is where common law (in particular English Law) and Gulf Law principles diverge. Under English Law, the contractor would expect to get an extension of time for the full effect of the employer risk delay (to the extent that it is critical to completion on time) without discount for the contractor's own culpable delay. This is "the Malmaison principle" (from *Henry Boot Construction (UK) Ltd* vs *Malmaison Hotel (Manchester) Ltd*) set out more than 20 years ago.

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Of course, the factual situation is rarely this simple, and contracts are not all written the same way. In most contracts, the contractor's entitlement to an extension of time is expressed as arising from the critical effect of the employer risk events, so this assists in the idea of excluding consideration of the contractor's own delay. However, there is a wide range of provisions across bespoke and published contract forms, which can mandate a different outcome.

In a recent case on concurrent delay (*Saga Cruises Ltd* vs *Fincantieri SPA* – ship refit works) the statement on entitlement was set up with reference to contractor culpable delay; requiring payment of delay damages upon delayed completion "for any reason whatsoever for which the Contractor is, or its employees, agents or sub-contractors are, responsible, the Contractor shall pay to the Owner liquidated damages.."

In this case, the court still addressed concurrency (as argued for by the shipyard) and did not seek to depart from the English Law approach, although it found that there was in fact no concurrent delay.

Does this principle apply in the Middle East? We need to consider both interpretation and policy.

The Malmaison Principle applies to contracts with English governing law but other jurisdictions have taken other approaches, most commonly seeking to apportion entitlement in accordance with each party's contribution to the overall delays.

On policy, it is doubtful that the Malmaison Principle would prevail in the Middle East (regardless of governing law) because it fully favours one party regardless of that party's culpability. We know that legal policy across the region would seek to amend that outcome.

For example, UAE Civil Code Article 290 states: "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."

And Article 291 states: "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."

It is fundamental to Middle East legal policy that it seeks to adjust outcomes, broadly on grounds of fairness. If this means that the Malmaison Principle will not translate, employers should also consider whether the opposite provision (the contractor never gets a time extension in concurrency) would also fail for the same reason. ■

** Stuart Jordan is a partner in the Global Projects group of Baker Botts, a leading international law firm. Jordan's practice focuses on the oil, gas, power, transport, petrochemical, nuclear and construction industries. He has extensive experience in the Middle East, Russia and the UK.*