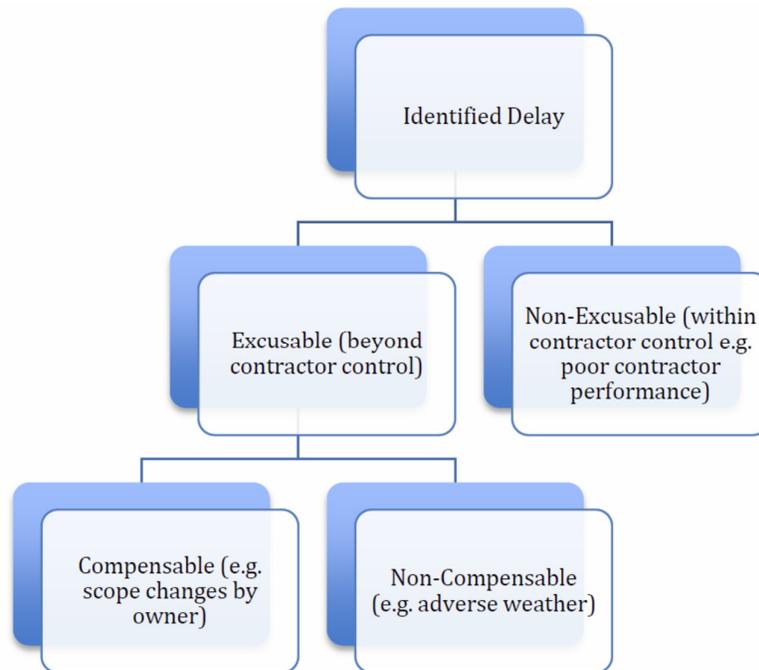


Independent, Serial and Concurrent Delays

To determine whether an event delayed the completion date of a project, it is important to determine whether the intervening event affected the current critical path¹, or created a new critical path, and which party is responsible for managing the consequences of the delay. The precise apportionment of these risks between the parties is usually defined in the contract.



Non-excusable delays are the responsibility of the contractor and the contractor bears the consequences, including liability to pay damages if the overall project finishes late.

Excusable delays are those against which the contractor is entitled to extension of time under the terms of the contract. Excusable delays are either:

- Ones for which the employer is responsible and compensation will be paid in addition to an authorised extension to the contract completion date (EOT); eg, variations required by the employer
- Are delays that are outside the control of both parties for which the contractor will receive an appropriate EOT, but no compensation; eg, exceptionally adverse weather conditions².

Compensability concerns the issue of whether the contractor is entitled to extra payment on account of the delay³. The UK *Delay and Disruption Protocol*⁴ separates the consideration of the intervening event causing

¹ For a definition of the **Critical Path** see: https://www.mosaicprojects.com.au/WhitePapers/WP1043_Critical_Path.pdf

² For more on methods to calculate the effect of a delay see:

- Based on the AACEi® Recommended Practice No. 29R-03 **Assessing Delay and Disruption – Tribunals**

Beware: https://mosaicprojects.com.au/PDF_Papers/P035_Assessing_Delays.pdf

- Based on the Society of Construction Law Delay and Disruption Protocol (2nd edition) **Assessing Delay – the SCL Options:** https://mosaicprojects.com.au/PDF_Papers/P216_Assessing_Delay_The_SCL_Options.pdf

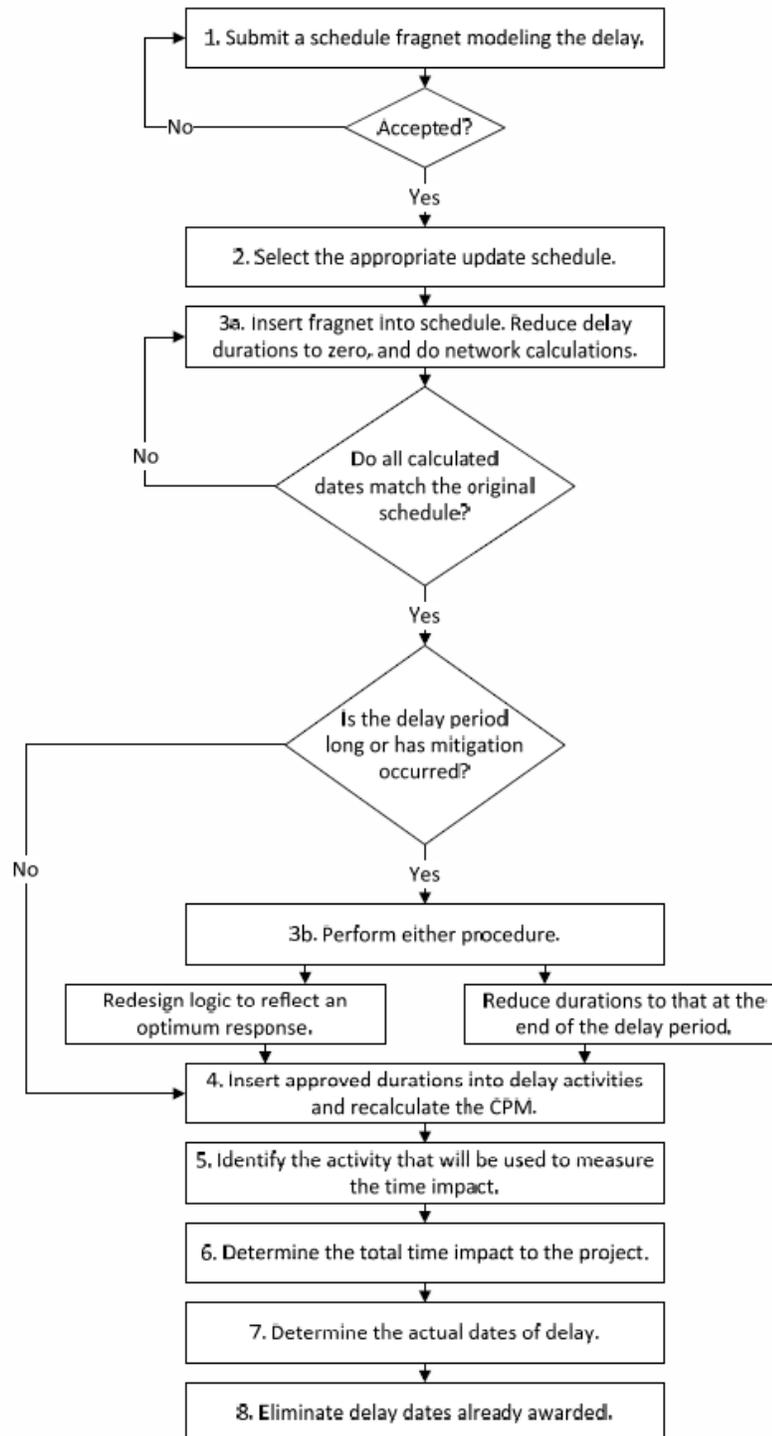
³ For more on the calculation of delay costs see **Delay, Disruption and Acceleration Costs:** https://mosaicprojects.com.au/PDF_Papers/P035_Disruption.pdf

⁴ See **Assessing Delay – the SCL Options:** https://mosaicprojects.com.au/PDF_Papers/P216_Assessing_Delay_The_SCL_Options.pdf



a delay that will generate an entitlement to an EOT, and the entitlement to costs to compensate for the disruption caused by the delay.

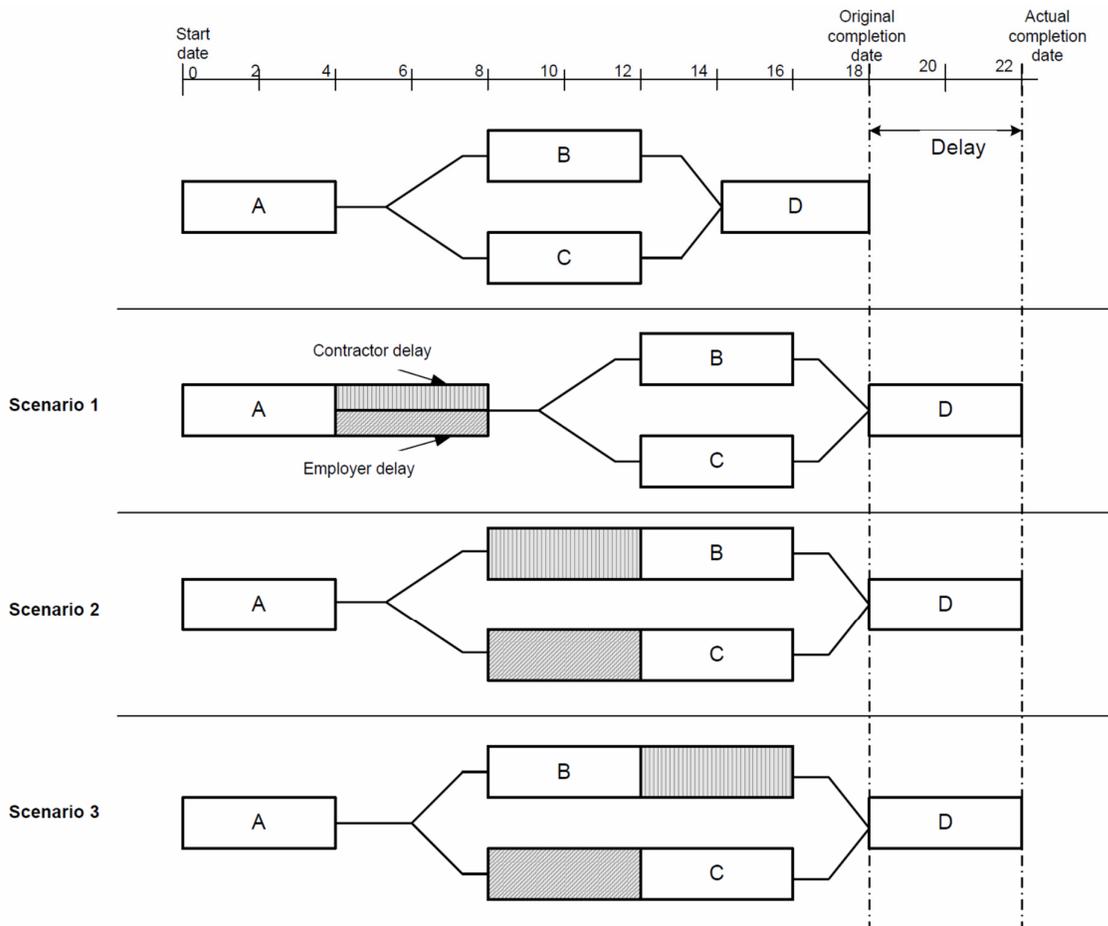
It is also important to distinguish between ‘critical’ and ‘non-critical’ delays. The former are those that cause a delay to project completion date whilst the latter affect progress but not overall completion. For each delay, it is important to validate the true extent of the occurrence (intervening event), this is best done by developing an accurate CPM schedule with its status just before the delay started and then:



Most contracts require that in order for an excusable delay to warrant an EOT, it must affect the completion of the project (i.e. the delay must be critical). This is a relatively simple issue where there is only one delay occurring at a time, it becomes far more complex when there are multiple delays.

The terms *independent delay*, *serial delay* and *concurrent delay* are used to describe delays based on the interrelationship between the delays with respect to their duration and time of occurrence.

- **Independent delays** are delays that occur in isolation or without other consecutive or simultaneous delays.
- **Serial delays** occur sequentially (consecutively) on a particular network path and not overlap each other.
- **Concurrent delays** refer to two or more delays in which either their time of occurrence or their effects overlap (see below).



The resolution of concurrent delays is a contentious legal and technical issue. This is largely due to the fact that resolving them requires consideration of the interaction of a number of different factors including:

- The time of occurrence of the delays,
- The duration of the delays,
- Their critically,



- Argument over a concurrent delay by the contractor being a *delay-pacing strategy* where the contractor optimised its work effort in the knowledge of a pre-existing delay caused by the employer,
- The legal principles of causation and float ownership.

Unfortunately, there is a lack of any uniformly accepted definition among practitioners as to what the term concurrent delay actually means! The general definition of a concurrent delay is the situation in which two or more delays occur at the same time either of which had it occurred alone, would have affected the ultimate completion date of the project but this is far from precise.

The *SCL Protocol*⁵ defines a true concurrent delay as “*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. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion*”. It is extremely rare for delays to start and finish at the same time and most authorities take a pragmatic approach where the requirements for delays to be considered concurrent include balancing a combination of:

- The delays must independently affect a critical path to project completion,
- The delays must occur contemporaneously, although to be considered concurrent, the delays do not need not commence and finish at precisely the same time, merely overlap to a reasonable degree,
- The delays may affect the same activity on the same critical path or may exist in different activities on parallel critical paths.
- There is a *concurrent effect* caused by the occurrence of two or more delay events at different times but where their effects are felt (in whole or in part) at the same time.

The English and Wales High Court in *Thomas Barnes & Sons PLC v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC)*, supports this approach⁶. Unfortunately, internationally there are a number of different approaches that can be used to assess which of the delays takes precedence and the consequential entitlement to an EOT and/or compensation⁷. Different jurisdictions seem to prefer different options⁸ and the legal situation in many jurisdictions continues to evolve.

The AACE® International Recommended Practice No. 29R-03, *Forensic Schedule Analysis* (RP29-03) . Published 25th April 2011, has a very similar definition of concurrency: *Before evaluation of concurrency, there must be:*

- *Two or more delays that are unrelated, independent, and would have delayed the project even if the other delay did not exist;*
- *Two or more delays that are the contractual responsibility of different parties, but one may be a force majeure event.;*
- *The delay must be involuntary; and,*
- *The delayed work must be substantial and not easily curable.*

First cause defines liability

⁵ See **Assessing Delay – the SCL Options:**
https://mosaicprojects.com.au/PDF_Papers/P216_Assessing_Delay_The_SCL_Options.pdf

⁶ See **Concurrent Delays - UK High Court Decision Supports SCL Protocol:**
https://mosaicprojects.com.au/Mag_Articles/AA027_Concurrent_Delays-UK_High_Court.pdf

⁷ For a view of the law in Australia see **Concurrent Delays in Contracts** by Jim Doyle:
https://mosaicprojects.com.au/PDF_Papers/P011_Concurrent_Delays-5.pdf

⁸ A series of papers by Navigant Consulting discuss the different approaches around the world. Download from:
<https://mosaicprojects.com.au/PMKI-ITC-020.php#Concurrent>



This approach argues that liability must rest with the party responsible for the first delay encountered and that subsequent delays occurring during the period of the first delay should not affect liability. This first-in-time principle of resolving causation in concurrent delays seems to operate based on the ‘but for’ test. By this test, a party seeks to lay responsibility for project delay on the other party by arguing that the delay would not have occurred but for the latter’s actions or inactions which occurred first. Although such argument is often made, they have received unsympathetic receptions making this an approach one that no longer has a wide appeal.

Dominant cause approach

This approach argues that the claimant may recover its damages if it can establish that the delay for which the defendant must assume responsibility is the overriding or the ‘dominant’ cause of the loss suffered. 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. The problem with this approach is determining a ‘dominant cause’ where two approximately equal causes exist.

The American approach

The general view in US case law on concurrent delays in which the employer and the contractor are both responsible for delays to project completion, is that neither party will recover financial recompense unless they can segregate delay associated with each competing cause. However, the contractor will be entitled to a non-compensated EOT to remove his liability for damages for delayed completion during the course of the employer caused delay. The concept of pacing-delays becomes important here; if the contractor can demonstrate its delay was to pace the work within an identified time window caused by the employer’s actions, then the effect of the employer’s delay is segregated from the contractor’s and the contractor is entitled to compensation for the delay.

RP29-03 states: *In the absence of any contractual language or other agreements, the conventional rule governing compensability is that the claimant must first account for concurrent delays in quantifying the delay duration to which compensation applies. That is, the contractor is barred from recovering delay damages to the extent that concurrent contractor-caused delays offset owner-caused delays, and the owner is barred from recovery liquidated/stipulated or actual delay damages to the extent that concurrent owner-caused delays offset contractor-caused delays.* And includes the following table:

| Delay Event | Concurrent with | Net Effect |
|---------------------|--|---|
| Owner Delay | Another Owner Delay or Nothing | Compensable to Contractor, Non-Excusable to Owner |
| Owner Delay | Contractor Delay | Excusable but Not Compensable to both Parties |
| Owner Delay | Force Majeure Delay | Excusable but Not Compensable to both Parties |
| Contractor Delay | Another Contractor Delay or Nothing | Non-Excusable to Contractor, Compensable to Owner |
| Contractor Delay | Force Majeure Delay | Excusable but Not Compensable to both Parties |
| Force Majeure Delay | Another Force Majeure Delay or Nothing | Excusable but Not Compensable to Contractor |



The *SLC Protocol* approach

The same general principles are used by the *SLC Protocol*; provided one of the causes of delay in any given concurrency situation affords grounds for extension of time under the contract, then the contractor should be given a time extension notwithstanding any default on its part. The approach supports the prevention principle that states *a person asking another to do something cannot insist upon a condition if it is his own fault that the condition has not been fulfilled*. Therefore, denying the contractor a time extension in such circumstances could make him liable to the payment of damages even though the project would have been delayed anyway due to employer's default. A recent decision arising out of the English and Wales High Court: *Thomas Barnes & Sons PLC v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC)*, offers some clarity in jurisdictions that consider UK precedence⁹.

Commentary

The *SLC Protocol* and the American approach have very strong precedents for resolving the time delay aspect of concurrent delays.

To read more on *Concurrent Delays* see the resources at:
<https://mosaicprojects.com.au/PMKI-ITC-020.php#Concurrent>

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⁹ For a discussion on *Thomas Barnes & Sons PLC v Blackburn with Darwen Borough Council [2022]* see ***Concurrent Delays - UK High Court Decision Supports SCL Protocol***:
https://mosaicprojects.com.au/Mag_Articles/AA027_Concurrent_Delays-UK_High_Court.pdf