CONCURRENT DELAYS

LUIGI DI PAOLA

Studio Legale Bonelli Erede Pappalardo

AND

PAOLO SPANU

Tecnimont SpA

I. INTRODUCTION

During the execution of a construction contract, various events causing the late completion of the works may occur. Such events may fall within the risks and responsibilities that the contract assigns to the contractor, or within the risks and responsibilities that the contract assigns to the employer.

When such events take place at different times, it is possible by means of the ''critical path'' method to assign the respective share of responsibility (as well as the associated additional costs) to the contractor or the employer.

Sometimes, however, the contractor's delays take place (partially or entirely), concurrently with the employer's delays, a situation known as ''concurrent delays''. In such a situation, it may be difficult to assess the degree of responsibility for the delay attributable to the contractor or to the employer.

For example, it often happens, when the works are completed after the contract completion date, that the situation described below takes place:

- the contractor states that it suffered employer's delay (e.g. requests for modifications and additional works) and asks the employer for an extension of the time for completion and for the reimbursement of the additional cost incurred by him as a result of the late completion of the works;
- the employer, whilst admitting that events within his responsibility occurred, states that such events were overshadowed by those within the responsibility of the contractor (e.g. construction mistakes or shortage of manpower). Hence, the employer rejects the contractor's request for an extension of time and additional costs and claims payment of liquidated damages for delay from the subcontractor.

Concurrent delays, therefore, are a controversial issue. All the various authors who have dealt with this subject agree that there is no established approach to the solution. This article outlines the various approaches which may be found under common law and civil law.

II. THE CRITICAL PATH METHOD: CAPABILITIES AND LIMITS

Nowadays, construction contracts (whether standard forms or bespoke), require the impact of delays on the works to be analysed by means of the ''critical path method''. For the purpose of this article it is assumed that the principles of this method are already familiar to the reader.

If the programme of the works has been developed and kept updated with due care, the critical path method will be able (in the majority of cases) to assess objectively how each delaying event contributed to the eventual delay in the completion of the works, and hence to allot the respective share of responsibility to the contractor and to the employer.

In carrying out such an analysis, it must be taken into account that, as a result of the delaying events, the critical path changes. Activities that, in the original programme of the works, did not belong to the critical path can, as a result of the delaying events, become critical path activities. Conversely, activities which belonged to the original critical path may no longer be classified as such.

However, sometimes the critical path method is insufficient to assess the responsibility attributable to each party. For example, consider a situation where the contractor has to carry out excavation works inside a certain area that belongs to the employer. The latter fails to obtain the permits required to start excavation works but the contractor fails to bring the necessary construction equipment to the site.

Both the delaying events stated above (namely, the employer's late obtaining of excavation permits and the contractor's late deployment of the construction equipment) impact on the same activity (the excavation works).

In this case, as the two delaying events impact on the same activity, the critical path method is not able to decide whether the responsibility for the late completion of the works lies with the contractor or the employer. As a result, the critical path method is unable to decide whether the contractor is entitled to an extension of time and to the reimbursement of the additional cost incurred or whether the employer is entitled to claim payment of liquidated damages for delay from the contractor.

To address these kinds of problems, it is necessary first to refer to the contract provisions. Unfortunately, the contract often does not include the relevant provisions; in this case it becomes necessary to refer to the governing law.

The following pages outline the various approaches that have been developed to deal with concurrent delays under common law (Part V) and civil law (Part VI). The rest of this article will refer to the relationship that exists between contractor and employer. However, the same propositions will also apply to the relationship that exists between contractor and subcontractor. It will also be assumed that (1) the contract defines the allocation of risks and responsibilities between the parties exactly, and that (2) the contract requires the delays to be analysed using the critical path method.

III. CLASSIFICATION OF THE DELAYS

Before outlining how to deal with concurrent delays, it is useful to consider several definitions. According to a classification that originates from the US construction industry, the delays may be ''Excusable delays'' or ''Non-excusable delays'':

- *Excusable delays* entitle the contractor to an extension of time. This group includes delays that result from the delaying events that are at the employer's risk and responsibility under the contract.
- *Non-excusable delays* do not entitle the contractor to an extension of time. This includes the delays that result from the delaying events that are at the contractor's risk and responsibility. With respect to these delays the employer is entitled to apply liquidated damages for delay under the contract.

Furthermore, the delays may be ''Compensable delays'' or ''Non-compensable delays'':

- *Compensable delays* entitle the contractor to compensation for the additional costs incurred as a result of the delay. Such additional costs are, for example, management team salaries, construction equipment rent, insurance premiums.
- *Non-compensable delays* do not entitle the contractor to compensation for the additional costs incurred as a result of the delay.

The excusable delays may be compensable or non-compensable, while the non-excusable delays may only be non-compensable.[1]

[1] *Force majeure* events *generally* entitle the contractor to an extension of time (so they are classified as excusable delays) but do not entitle the contractor to compensation for the additional costs incurred (so they are classified as non-compensable delays).

IV. THE CRITERIA SUGGESTED BY THE SOCIETY OF CONSTRUCTION LAW

In October 2002, the Society of Construction Law (England) published the Delay and Disruption Protocol.[2]

The Protocol was developed along the lines of English construction law, however, its recommendations may easily be accepted and implemented under civil law.

The Protocol defines a series of principles and criteria which can be used to establish objectively the ''fair'' extension of time, as well as identifying when and to what extent the contractor is entitled to compensation for the additional costs incurred or, alternatively, when and to what extent the employer is entitled to claim liquidated damages from the contractor for the delay.

As for concurrent delays, the Protocol separates the matter of the extension of time from the matter of compensation for additional costs.

As for the extension of time in relation to concurrent delays, the Protocol states that:

> ''Where Contractor Delay to Completion occurs concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due.''[3]

The Protocol also clarifies that:

> ''Where an Employer Risk Event occurs after the contract completion date, in a situation where failure to complete by the contract completion date has been caused by Contractor Delays, the principle set out in Section 1.4.7 above should apply, except where the Employer Risk Event is a non-compensable Employer Risk Event. In such an event, no EOT (or compensation) should be due.''[4]

Furthermore, the Protocol clarifies that:

> ''Where an EOT is due after the contract completion date, the Employer Risk Event does not exonerate the Contractor for all its delays prior to the Employer Risk Event occurring. The effect of the Employer Risk Event should be assessed as described above and any EOT found due should simply be added to the contract completion date.''[5]

Thus, the effect of an employer risk event reduces but does not nullify the period subject to the application of liquidated damages.

As for the compensation for additional costs incurred, the Protocol states that:

> ''Where an Employer Risk Event and a Contractor Risk Event have concurrent effect, the Contractor may not recover compensation in respect of the Employer Risk Event unless it can separate the loss and/or expense that flows from the Employer Risk Event from that which flows from the Contractor Risk Event.''[6]

[2] The Society of Construction Law, Delay and Disruption Protocol (www.eotprotocol.com).
[3] Delay and Disruption Protocol, para. 1.4.1.
[4] *Ibid.* para. 1.4.8.
[5] *Ibid.* para. 1.4.8.
[6] *Ibid.* para. 1.10.4.

Furthermore, with reference to the contractor's additional costs:

> "If it would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover these additional costs."[7]

It is to be noted that the principles and criteria proposed by the Society of Construction Law are not binding; however, they may be adopted into the contract and thus become binding on the parties.

It is also to be noted that various standard forms (as well as bespoke contracts) adopt approaches which are very different from those mentioned above. For example, several contracts stipulate that if an excusable delay occurs concurrently with a non-excusable delay, then the contractor is not entitled to an extension of time and is liable to pay liquidated damages for the delay.[8]

If, as often happens, the contract does not state how to deal with concurrent delays, it becomes necessary to refer to the governing law. Part V outlines the different approaches that exist under common law, while Part VI describes how the problem is treated under civil law by taking the Italian Civil Code as an example.

V. CONCURRENT DELAYS UNDER COMMON LAW

Consider the following example. The employer hands over the site area to the contractor 10 days later than the site handover date in the contract. Meanwhile, the contractor deploys the required excavation equipment 10 days later than the site handover date in the contract.

At the beginning of the eleventh day, when the employer hands over the site area to the contractor and the contractor deploys the required excavation equipment, the excavation works start. The works are then completed 10 days later than the contract completion date.

Both events impact on the very same construction activity (the excavation works). Each one of them alone is sufficient to cause a 10-day delay in the completion of the works.

So, under these circumstances, is the contractor entitled to a 10-day extension of time? Or, has the contractor's own delay (the late deployment of the excavation equipment) nullified his entitlement to a 10-day extension of time and he is now liable to pay the liquidated damages for delay to the employer under the contract?

Furthermore, where the contractor is entitled to a 10-day extension of time, does this mean that he is also entitled to compensation for the overrun costs incurred?

[7] *Ibid.* para. 1.10.4.

[8] Several authors remark that the court may find that such provision is not enforceable on the grounds that it goes against the principle that the employer cannot benefit from its own default: Keating Chambers' Seminar, *Concurrency in Construction Delays*, Presented by Adrian Williamson QC, 1 September 2005: http://www.keatingchambers.com/pages/seminars.php.

If the contract is in line with the principles and criteria recommended by the Protocol, the contractor will be entitled to a 10-day extension of time (on the grounds that the contractor's delay does not limit his entitlement to the extension of time resulting from the employer's delay) and the employer, consequently, is not entitled to ask the contractor for payment of the liquidated damages for delay.

However, the contractor will not be entitled to any compensation for the overrun costs (on the grounds that the contractor would have incurred such overrun costs in any event as a result of his own delay).

If the contract, as often happens, does not state how to deal with concurrent delays, it becomes necessary to turn to the governing law. Under common law several different approaches exist. *Keating on Building Contracts* outlines the following four approaches:

1. Devlin's approach

"If a breach of contract is one of two causes of a loss, both causes co-operating and both of approximately equal efficacy, the breach is sufficient to carry judgment for the loss."[9] Thus, for example, the employer's late handover of the site area to the contractor would entitle the contractor to an extension of time and compensation for overrun costs incurred.

However, if one considers the obverse problem, one obtains an opposite solution: the contractor's late deployment of excavation equipment would entitle the employer to recover the additional costs incurred through the payment of liquidated damages by the contractor.

This is an obvious contradiction as the two parties cannot both be an outright winner at the same time. This obvious contradiction leads *Keating* to consider this approach as inadequate in solving concurrent delay problems.[10] Under common law there are only a few cases where this approach has been applied and many of them have been overturned at a later date by higher courts.

2. Burden of proof approach

"If part of a damage is shown to be due to a breach of contract by the claimant, the claimant must show how much of the damage is caused otherwise than by his breach of contract, failing which he can recover nominal damages only."[11] Thus, for example, the contractor would be entitled to compensation for the overrun costs incurred if, and only if, he

[9] *Keating on Building Contracts* (London: Sweet & Maxwell, 7th ed., 2001), para. 8.26, p. 246.
[10] *Keating, op.cit.* n. 9, para. 8.29, p. 247.
[11] *Ibid.* para. 8.26, p. 246.

is able to prove that the damages claimed result solely from the employer.

However, if one considers the obverse problem, the employer would be entitled to claim liquidated damages if, and only if, he is able to prove that the delay (and the associated damages) results solely from the contractor. In the example in question (employer's delay in site area handover and contractor's delay in excavation equipment deployment) neither party would be in a position to prove that the delay incurred was caused solely by the counterparty. Thus, one reaches the contradiction that both parties fail at the same time. For this obvious contradiction, as before, *Keating* considers this approach inadequate in solving concurrent delay problems.[12] Under common law there are only a few cases where this approach has been applied and many of then have been overturned at a later date by higher courts.

3. Dominant cause approach

"If there are two causes, one the contractual responsibility of the defendant and the other the contractual responsibility of the claimant, the claimant succeeds if he establishes that the cause for which the defendant is responsible is the effective, dominant cause."[13] This approach is preferred by *Keating*,[14] however, other authors disagree with this viewpoint.[15] In reality, this approach has rarely been applied by common law courts.[16]

4. Tortious solution

The claimant would be entitled to recover damages if he proves that the defendant is responsible for causing or materially contributing to the damage incurred. The compensation would be reduced if the claimant is found to have also contributed to the damage (in Part VI it will be shown that this is the approach which applies under civil law).

It would seem natural to apply this approach (which is also known as "apportionment"[17]) to problems that arise from concurrent delays by apportioning the responsibility of the delay and the relevant consequences

[12] *Ibid.* para. 8.30, p. 247.
[13] *Ibid.* para. 8.26, p. 246.
[14] *Ibid.* para. 8.31, p. 248.
[15] Keith Pickavance, *Delay and Disruption in Construction Contracts*—(London: LLP, 2nd ed., 2000), p. 500.
[16] John Marrin, QC, remarks: "In terms of judicial authority, however, the dominant cause approach has almost entirely escaped attention" (2002) 18 Const LJ at 446.
[17] *Ibid.* at p. 439.

between the contractor and the employer. When it is difficult or impossible to establish the correct share of responsibility it would seem natural to revert to a 50–50 split. On the contrary, however, this approach cannot be applied to construction contracts under common law.[18]

However, it is worth noting that in several common law jurisdictions (e.g. in Canada and New Zealand) the apportionment of responsibilities between the parties in case of concurrent delays may be considered a well-established practice.[19]

Besides the four approaches outlined by *Keating*, two other approaches should be considered:

5. "But for" approach

This approach states that a series of consequences would not have taken place, were it not for certain events within the responsibility of the counterparty.[20] The contractor often uses this reasoning (whether consciously or not) in situations where the employer requires modifications or additional works and the contractor, due to his own fault, completes the agreed modifications or additional works after the agreed date. In such a case, the contractor states that, were it not for the employer's request for modifications or additional works, he would have completed the works on time (this is where the term "but for" originates). Despite this approach often being invoked by contractors, it does not seem to have found any support under common law.

6. Malmaison approach

This approach,[21] which is in line with the principles and criteria stated by the Society of Construction Law Protocol, is named after the case *Henry Boot Construction (UK) Ltd* v. *Malmaison Hotel*. The Technology and Construction Court in London accepted that a delay, or a part of a delay, may be attributed to two or more concurrent causes, and stated that the non-excusable delay does not prejudice the contractor's entitlement to the

[18] *Keating* states " . . . the law does not currently permit apportionment where the defendant is liable only in contract": *op. cit.* n. 9, para. 8.33, p. 249. John Marrin, QC, states: "the courts of common law jurisdictions tend to apply the principle of causation in an 'all or nothing' way. Historically, the courts sought to attribute any one event to a single cause with the result that the plaintiff succeeded completely or not at all. In the absence of statutory authority, the courts historically declined to apportion damages as between two or more competing causes": (2002) 18 Const LJ 439.

[19] (2002) 18 Const LJ 439.

[20] *Ibid.* at 443.

[21] *Ibid.* at 447.

extension of time caused by the excusable delay.[22] Obviously, in a such case, the employer would not be entitled to claim for liquidated damages for delay.

As for compensation for the overrun costs, the contractor would be entitled to recover only those additional costs which he is able to prove originated directly and solely from the excusable delay.

It should be noted that this approach considers the extension of time (which is relevant to contractor's liability for delay) and the entitlement to refund of the overrun additional costs separately. This is generally considered in line with the allocation of risks and responsibilities agreed upon by the parties.

However, this approach cannot be considered an established practice under common law as the case was decided only in 1999.

VI. CONCURRENT DELAYS UNDER CIVIL LAW

This analysis will focus on the indicated principles, using Italian law. Those principles are generally peculiar to every jurisdiction inspired by civil law, by virtue of the common roots they share in Roman law.

As opposed to what happens in common law systems, in civil law regimes the concept of dividing responsibility between the employer and the contractor on the basis of equitable principles is accepted in the following instances:

(1) the completion deadline expires but the work is yet not complete;
(2) the situation is caused by circumstances that can be attributed to both employer and contractor;
(3) neither of the litigants is able to prove accurately how much the counterparty contributed to the work completion delay.

Before the analysis of general principles concerning concurrent delays, within the framework of Italian law certain introductory and systematic statements have to be made. The regulatory scheme of the obligation undertaken by the contractor will thus be set and defined. The hypothesis of joint liability between contractor and employer, will be examined. As

[22] [1999] CILL 1527. *Per* Dyson J: " . . . it is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event. Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour."

described hereafter, this hypothesis carries an obligation undertaken by the contractor.

In drafting a contract agreement, the contractor undertakes the obligation of carrying out the work in conformity with the established conditions, and to ensure that it meets a high standard. This double obligation can be deduced from Articles 1655 and 1662(2) of the Civil Code.

In detail, by means of the before-mentioned Civil Code, and by means of the agreement conditions, the contractor undertakes his obligation to carry out specific work according to the economic terms reached in the agreement and by the deadline.

Where the work is carried out with further costs and/or carried out later than the deadline, the general principle is that the contractor is presumed responsible. The contractor will then be charged with the necessity of bringing evidence of the employer's responsibility, or joint liability.

After these general observations, only then may the contractor carry out the work beyond the deadline and/or with any further costs than those agreed. The contractor would be held responsible for the delay (and would then sustain legal and contractual consequences) and would have to prove the contrary.

There are two main effects of the work completion delay: legal and contractual.

Concerning the first, the primary consequence of the delay within the contractor's responsibility can be inferred from Article 1223 of the Civil Code. By virtue of this Article, the employer has the right to be paid compensation corresponding to the amount of damages caused by the completion delay.

In those cases, when the completion term itself brings in an essential factor, the employer would be allowed to rescind the contract on a non-fulfilment basis.

Concerning contractual effects, as usual procedure, at the very moment of the agreement being drawn up, the litigants fix a penalty clause to be imposed on the contractor for all the contractor's delays which are his fault.

The employer, as corollary to the obligation to carry out the work assumed by the contractor, undertakes the obligation of putting the contractor into the position of being able to carry out the work, of providing everything that depends on the employer and of avoiding every act that may prevent or delay the contractor's activities.[23]

This obligation does not only concern the start of the agreement, but is extended throughout the entire duration of the work.

The employer's obligation can be concretised in the following activities:

[23] This principle finds constant confirmation in the case law. In this respect, see Italian Supreme Court, Sect, 1 June 1994, No 5332.

(1) delivery of drawings and design documents within the employer's competence;
(2) approval of the documents worked out by the contractor;
(3) delivery of those materials and equipment to be provided by the employer;
(4) setting of the work areas;
(5) giving the necessary instruction to the contractor;
(6) test and inspection of the works in compliance with the agreed procedures.

Consequently, the non-fulfilment would have importance, in so far as it prevents the contractor from carrying out the work as per the agreement. The non-fulfilment would have importance, notwithstanding the subsistence of the employer's fault.

As a matter of fact, the employer's missing or delayed performance of his obligations towards the contractor, is not judged by the main doctrine as a necessary premise, so that the consequences of the delay may be charged against the employer.[24]

In light of the above, it is realistic to maintain that the lack of the employer's contribution would only be important if it damages the contractor (i.e. further costs paid by the contractor because of employer delay). Its importance would be independent of the existence or non-existence of fault.

In employer non-fulfilment situations, the contractor would have the right to ask for a postponed deadline or for an extra-payment.[25] Otherwise, the contractor would be able to demand damages as compensation when the fault can be attributed to the employer. The consequence of this would be the possibility of the contractor obtaining compensation for all the actual damages suffered. (The only limit is that they would have to be direct damages.)[26]

A different approach is applied when the delay is caused by joint liability between employer and contractor. On a general basis, when both litigants'

[24] See Barassi, *La teoria generale delle Obbligazioni* (1946), p. 859, and Bellini, "Sull'obbligo del creditore di prestarsi per l'adempimento dell'obbligazione", Riv Dir Civ, 1921, 27.

[25] Postponed time for completion differs from a simple extension of the time for completion. As a matter of fact, if the first mentioned takes place, the contractor has the right to obtain a new and longer period (as seen, when the delay is caused, or also caused by the employer). On the other hand, the extension is simply a mere power of the employer, within the employer's discretion.

[26] See Rubino-Iudica, *Commentario del Codice Civile Scialoja-Branca* (1992), pp. 169–170, and Cianflone, *L'Appalto di Opere Pubbliche* (1999), p. 431, where the author maintains that: "if the Administration is faulty, the Administration hold responsibilities on the consequences related to the longer time of the work." The same principle can be found in the case law. In this respect, see Award of 18 January 1978, No 3, in *Archivio Giuridico Opere Pubbliche*, 1978, III, p. 255, stating that the longer duration of the contract due to the employer's delays gives the contractor the right to be compensated for all further expenses, these expenses being the employer's responsibility and fault. See also Award of 12 July 1989, No 47, *ibid.*, 1990, p. 406.

non-fulfilment caused the delay in the completion of the work, the judge can proceed with a proportional valuation, if the damage quantification cannot be shown (Article 1226 of the Civil Code). This would happen provided that the litigants have fulfilled the burden of proof in relation to the subsistence of the damage.[27]

Concerning these principles, the judge would avoid quantifying the respective delays (and respective consequences) and in general jurisprudence would turn to a comparative and complete evaluation of the litigants' behaviour so as to value its seriousness and importance on the completion of the works.[28]

In detail, once the above-mentioned evaluation has been done, the judge generally proceeds by decreasing the penalty and granting a new deadline, if the delay cannot be completely blamed on the contractor.[29]

In the same way, it is realistic to maintain that, once that the employer's responsibility is defined and valued, and once the seriousness of this responsibility is defined and valued, too, the judge would grant the contractor compensation for the delay costs.

Concerning concurrent delay cases, if the litigants are able to prove the subsistence of the damages, and also to value how counterparty responsibilities affected the damages themselves (resulting in the correct valuation of the damage cost), the judge's task should be much easier.

As a matter of fact, once the solidity and truthfulness of the probationary elements are ascertained, the judge would proceed with the quantification of the damages and their settlement.

In conclusion, Italian law, and generally all civil law jurisdictions, seem fairer and effective in terms of responsibility subdivision in concurrent delay cases and the judge has the possibility of proceeding with proportional valuations. These valuations take into account the litigant's respective responsibilities to avoid a situation that could be in conflict with

[27] See Award of 28 January 1999, No 6, *Arch Giur OO PP*, 2001, p. 2; Award of 19 June 1998, No 60, *ibid.*, 2000, p. 328; Award of 3 April 1997, No 35, *ibid.*, 1999, p. 173; Award of 21 May 1996, No 79, *ibid.*, 1998, p. 79; Award of 20 July 1995, No 113, *ibid.*, 1997, p. 612.

[28] See Italian Supreme Court, 19 September 1975, No 3063, *Mass Foro it.*, p. 736; Italian Supreme Court, 25 May 1973, No 1460, *ibid.*, p. 420. See also Award of 15 April 1996, No 54, *Arch Giur OO PP*, 1998, p. 225; Award of 28 January 1995, No 10, *ibid.*, 1997, p. 10; Award of 7 April 1994, No 55, *ibid.*, 1996, p. 184; Award of 31 January 1994, No 20, *ibid.*, 1996, p. 76.

[29] This principle is legally confirmed by the combined reading of Arts 1218, ''Responsabilità del Debitore'', and 1384, ''Riduzione della Penale'', of the Italian Civil Code. Art 1218 reads as follows: ''the Debtor who will not strictly carry out his service will be obliged to compensate the damages, unless he proves that non-fulfilment or delay were determined by the Debtor's impossibility to carry out the work under circumstances that cannot be attributed to the Debtor itself.'' Art 1384 claims: ''The penalty may be subdivided equally by the Judge, if the main obligation was partially carried out, or if the amount of the penalty is hugely too high, always having consideration for the Creditor's interest.'' See also Arts 1227, ''Concorso del fatto colposo del creditore'', and 2056. ''Valutazione dei danni'', of the Italian Civil Code. A similar principle can be found in Art 29, ''Capitolato Generale del Ministero dei Lavori Pubblici''. In case law, see Italian Supreme Court decision of 24 September 1999, No 10511. See also, Cianflone, *op. cit.* n. 26, pp. 763–765.

common sense, which sometimes happens in the common law (see above) due to the obstruction of using proportional valuations.

Contractors and employers can reasonably maintain that, if the delay is caused by events whose responsibility can be charged on the counterparty, and the litigant suffers damage, they would be in a better position to obtain fair compensation even when it is hard to value the counterparty's responsibility in causing the delay.