SOCIETY OF CONSTRUCTION LAW INDIA

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Delay and Disruption under the Global Frameworks

A Framework for Structured Construction Dispute Resolution in India

Introduction

Construction disputes are, by their very nature, uniquely complex. The execution of a construction project invariably generates an extensive volume of technical documentation, drawings, schedules, method statements, inspection and testing records, correspondence, daily logs, and measurement sheets. Moreover, the dynamic and often unpredictable environment of construction makes diligent record-keeping, periodic updates to work programmes, and continuous assessment of progress and productivity not merely desirable but essential. Nevertheless, when disputes arise, parties frequently struggle to navigate this documentary maze, interpret construction schedules, or correctly assess delay and disruption. What follows is the familiar pattern observed in construction arbitrations: repeated assessments by technical experts, prolonged cross-examinations on complex scheduling methodologies, and extended arbitral hearings, ultimately resulting in costly and time-consuming proceedings.

Importantly, it is only at the dispute stage that the true value of accurate records, contemporaneously updated programmes, and timely delay assessments becomes fully appreciated. Many disputes, or, at the very least, their procedural and evidentiary complexities, could be substantially mitigated through adherence to structured project management and recognized analytical principles.

India's construction sector, which stands as one of the largest and most fast paced globally, paradoxically lacks a uniform and institutionalised approach to delay and disruption analysis. While several jurisdictions (or construction markets) operate on a set system, Indian contracts, whether executed by government entities or private developers, lacks a universally recognised framework for managing, analysing and resolving delay claims.

This is manifested as:

- Adoption of inconsistent delay analysis methodologies adopted
- Tribunal decisions that vary significantly in their treatment of concurrent delay, disruption, and causation
- Inconsistent requirements for contemporaneous documentation and programming
- Considerable variation in the technical sophistication brought to expert evidence on scheduling and delay

Consequentially, the disputes become more protracted, expensive, and unpredictable in their outcomes. Parties cannot reliably anticipate how tribunals will assess delay claims. Expert evidence, though often voluminous, frequently lacks standardization, rendering cross-examination inefficient and tribunals uncertain as to the proper analytical framework.

Government agencies, which are among the largest employers in the Indian Construction arena, often resist delay claims and escalation claims, even where liability is clear, due to the absence of a recognized, neutral framework that might compel acceptance of technical findings. This void stands in sharp contrast to major construction markets globally, where internationally recognized frameworks developed by industry bodies, endorsed by courts and arbitrators and refined through extensive application have substantially improved clarity, consistency, and efficiency in dispute resolution

International Frameworks

Over the past two decades, three principal frameworks have emerged as international benchmarks for managing and analysing delay and disruption in construction. These frameworks are neither uniformly prescriptive nor mutually exclusive, rather, they are complimentary documents that offer structured approaches grounded in good industry practices.

The Society of Construction Law (SCL) Delay and Disruption Protocol (2nd Edition, 2017)

The SCL Protocol, first published in 2002 and substantially revised in 2017, provides practical, contract-oriented guidance for managing delay and disruption claims in construction projects. Comprising of 22 core principles, the Protocol emphasizes proactive measures such as the maintenance of contemporaneous records and the establishment of baseline programmes in order to facilitate accurate post-event assessments. The Protocol is non-binding in nature and expressly disclaims any intention to override contract terms or applicable law. Instead, it functions as a reference standard for industry gold standard, widely cited in international arbitrations conducted under LCIA, ICC, SIAC, and HKIAC rules, as well as in English and Australian, Hong Kong and Norwegian Courts. The Protocol's takes a holistic approach, integrating procedural, contractual, and analytical consideration while maintaining neutrality as to the specific legislative framework governing any dispute.

AACE International Recommended Practices (RP 29R-03)

AACE International, being the professional association for cost engineering and project management, has published complimentary recommended practices pertinent to delay analysis. Its RP 29R-03 (Forensic Schedule Analysis, 2011 revision) provides a granular, methodological guidance for conducting retrospective delay analysis, for potential use in court proceedings.

The RP 29R-03 provides range of FSA methods for measuring delay. Broadly, these methods fall into two categories:

Observational methods, which focus on reviewing what actually happened on the project by comparing the original (as-planned) programme with the updated and as-built schedules, progress reports, and contemporaneous project records

Modelled methods, which use scheduling software to insert or remove delay events from the programme in order to understand their effect on the critical path and ultimately on project completion.

Across these approaches, AACE consistently underscores several principles:

Analysis must be based on reliable and contemporaneous project data.

The cause of delay must be clearly distinguished from the effect on time or productivity.

The methodology should be transparent and repeatable, so that another expert applying the same data and steps can reach the same result

Although these recommended practices do not override contractual provisions or legal rules, they offer tribunals a structured and defensible analytical framework to assess expert evidence and determine which delay analysis is more reliable.

FIDIC Contract Provisions on Delay and Extension of Time

The Fédération Internationale des Ingénieurs-Conseils' (FIDIC's) standard form contracts, particularly the Red Book (1999 and 2017 editions) and the Yellow Book, are widely used in international construction projects, funded by the likes of World Bank and the Asian Development Bank. The FIDIC Red Book is largely a contract template that follows a balanced approach and is designed in such a way that it highlights the specific responsibilities of both the contractors and employers for mitigating of potential disputes that may arise during the project's lifespan.

Sub-Clause 8.5 of the Red Book (2nd Ed) provides a structured mechanism for extension of time (EoT) claims made by the contractors, in instances where they are able to prove that the project has been delayed by reasons that entitles them to an extension. These claims are highly complex and the burden of proof falls on the contractor through use of contemporaneous documentation, its entitlement and associated relief from the employer's claim for liquidated damages. If the contractor fails to prove that an event caused a genuine delay to the progress of work, then, the engineer will not be in a position to grant the said extension. Now, granting an EoT does not automatically lead to an award of costs and/or damages. However, if a contractor is given an EoT, it may seek to recover the time-related costs of remaining on site for an extended period of time, known as prolongation charges, in accordance with the relevant conditions.

Sub-Clause 8.5 states that in case of a concurrent delay, contractor's right to an EoT will be judged according to the Special Provisions (if they exist), or otherwise fairly, considering all circumstances. This prevents either party from unfairly benefiting when responsibility is shared. FIDIC's emphasis on contemporaneous programming, early warning requirements, and transparent claim procedures aligns closely with SCL principles. The key distinction is that FIDIC operates within a contractual architecture (defining rights, notice procedures, and time bars), while the SCL Protocol being a non-contractual framework, operates across contractual boundaries as a flexible reference standard.

Evolution and Global Acceptance of the SCL Protocol

The SCL Protocol was first published in 2002, with a comprehensive revision in 2017 to reflect developments in construction practice, scheduling techniques, and dispute resolution. Over the last two decades, the Protocol has evolved from a consultative document into a significant reference point across multiple jurisdictions.

Its trajectory in England and Wales is indicative of a developing judicial acceptance. Although the courts have always maintained that the Protocol is not a statement of law and should not override express contractual provisions, it is regularly cited by delay experts and in TCC decisions as a reference point for how parties should behave. This judicial engagement includes everything from relying on the Protocol's definitions applicable to critical path analysis, to referencing its guidance concerning concurrent delay, yet courts stand guard against its misapplication of or elevation over agreed contractual mechanisms.

In Australia, the protocol has achieved significant penetration in major infrastructure disputes, where courts have utilised it not only to define technical concepts but to validate the admissibility of specific delay analysis methodologies. The Australian Courts have demonstrated a willingness to treat the Protocol as a litmus test for the reliability of expert evidence. The courts also frequently adopt the Protocol's definitions to clarify technical disputes.

The Protocol is a staple in the arbitrations under the HKIAC, SIAC and ICC Rules, often cited to justify the use of specific retrospective analysis techniques, with the Hong Kong Courts having used the Protocol to assess the legitimacy of delay methodologies used in the assessment while maintaining respect for arbitral tribunal's discretion.

The Supreme Court of Norway engaged with the Protocol's guidance to establish evidentiary thresholds for disruption claims, requiring contractors first to prove loss of productivity attributable to employer responsible conditions, and then to substantiate causality between that disruption and actual financial loss through specific evidence.

Although non-binding, the SCL Protocol has become one of the most widely cited delay analysis frameworks in international arbitration.

Comparative Analysis of SCL Protocol, AACE RP 29R-03, and the FIDIC Contractual Framework

As discussed above, international best practice on the administration and assessment of delay and disruption is shaped in large part by three influential instruments:

SCL Protocol

AACE RP 29R-03

FIDIC Contracts

Although each has a different purpose, SCL and AACE being guidance documents, FIDIC being contractual conditions, they overlap significantly on issues of delay attribution, concurrency, entitlement to EoT, prolongation costs, and disruption.

Methodological Approaches to Delay

SCL Protocol – Principle-Based, Project-Facing Guidance

The SCL Protocol is particularly drafted as a "guidance document" envisioned to assist parties in managing and resolving delay and disruption issues under construction contracts. The document's objective states that it is curated to provide practical, common-sense guidance on issues such as delay analysis, concurrency, disruption, EoT, prolongation costs and record-keeping, while particularly noting that it does not override the contract or governing law.

From a methodological angle, the SCL Protocol identifies six key delay analysis techniques in paras 11.6(a)–(f), including:

- Impacted As-Planned
- Time Impact Analysis
- Time Slice (Windows) Analysis
- As-Planned vs As-Built (including windows variants)
- Retrospective Longest Path Analysis
- Collapsed As-Built

For each, it offers a simple explanation of how the method works and when it may be appropriate, without prescribing any single approach as the best approach. It stresses that the choice of method should be driven by the facts of a particular case, the quality of contemporaneous records, the availability of reliable programmes, and the purpose of the analysis, and that analysis should be logical, transparent, and fair.

Importantly, the Protocol envisages prospective assessment of delay while the project is ongoing (Core Principles 4 and 5). It encourages submission and assessment of EoT claims as close as possible to the occurrence of the delay event, using the current updated programme, rather than leaving all analysis until after completion. This provides the SCL Protocol a strong project-management orientation which is aimed at dispute avoidance and early clarification of entitlements between the parties.

AACE RP 29R-03 – Forensic, Analyst-Facing Guidance

It is a detailed, method-driven document. It is designed to guide forensic analysis, typically after disputes have arisen. While it also recognises the same core methods as the SCL Protocol, As-Planned vs As-Built, Windows / Time-Slice, Impacted As-Planned, Time Impact Analysis, Collapsed As-Built and variants of Retrospective Longest Path, it develops them into a taxonomy of nine Method Implementation Protocols (MIPs), divided broadly into:

Observational methods (static or dynamic comparisons of as-planned, updates and as-built data)

Modelled methods (additive and subtractive techniques that insert or remove delay events in a CPM schedule to test impact on the critical path).

It sets out, for each MIP, the data requirements, procedural steps, checks for validity, and limitations. Therefore, it functions as a technical manual for expert witnesses and analysts, rather than as a project management guide.

FIDIC – Contractual Framework

The FIDIC Books are standard forms of contract that assign risk and define procedural steps for EoT and claims. They do not propose or advocate any particular delay analysis methodology. Instead, they create the contractual environment within which methodologies proposed by SCL or AACE may be applied.

For instance, under the 2017 Red Book, Sub-Clauses 20.1 and 20.2 (Contractor's Claims) require the contractor to:

Give timely notice (typically within 28 days of becoming aware of the event)

Submit a fully detailed claim with supporting particulars within a further period

Demonstrate that a qualifying event has actually delayed completion, thereby justifying EoT

FIDIC, therefore, defines what must be proved and when but leaves how it is proved to different delay and disruption methodologies, where the SCL Protocol and AACE RP 29R-03 can be invoked.

Prospective vs Retrospective Use

An effective way to distinguish the three frameworks is to look at how and when are they intended to apply. The SCL Protocol is drafted with a strong prospective focus: it requires parties to update programmes, identify critical delay early, and assess EoT contemporaneously as the project unfolds. However, it also recognises that retrospective analyses will be needed when disputes arise and provides guidance on delay analysis methods for that purpose.

AACE RP 29R-03 is predominantly retrospective and forensic in nature. It aims to cater to situations where the project is complete (or substantially advanced) and there is a need to reconstruct and allocate delay using available data due to no early determination or acknowledgment by the parties.

FIDIC sits across both with strict notice and claim procedures which are to be invoked contemporaneously, but EoT determinations and claims assessments often involve retrospective delay analysis using SCL/AACE methods applied to updated or as-built programmes.

In practical understanding, one can say that SCL speaks primarily to project administrators, contract managers and tribunals, promoting good behaviour and structured thinking; AACE finds it primary audience in delay experts, providing them with a toolbox to carry out rigorous forensic analysis; and FIDIC provides the contractual framework in which these techniques may be deployed.

Treatment of Concurrent Delay

Concurrent delay is a central point of interaction between the three frameworks.

SCL Protocol

The SCL Protocol provides a carefully articulated taxonomy of concurrency. Para 10.3 defines "true concurrent delay" as the occurrence of two or more delay events at the same time, one an employer risk event and the other a contractor risk event, whose effects on completion are felt at the same time. It accepts that such true concurrency is relatively rare. Para 10.4 contrasts this with a relatively common situation where delay events arise at different times, but their effects overlap which we can call ordinary concurrency.

On remedy, the Protocol expressly adopts the Malmaison approach (drawing from Henry Boot Construction Ltd - UK vs Malmaison Hotel Ltd - Manchester), captured at para 10.12 of the protocol:

Where concurrent delay is established, the contractor should be granted an EoT for the employer delay, and the contractor's own delay should not reduce that EoT.

However, the contractor is only entitled to compensation to the extent that it can establish additional loss attributable to the employer's delay (i.e. separable cost).

This gives the SCL approach a clear, pragmatic rule: "time but not necessarily money" in genuine concurrency.

AACE RP 29R-03

AACE RP 29R-03 discusses concurrency using a more analytical perspective. It distinguishes "literal concurrent delay", where delays occur truly simultaneously, from "functional concurrent delay", where delays arise at different times but coincide within the same analysis period and jointly affect completion.

AACE describes concurrency as "arguably the most contentious technical subject in forensic schedule analysis" and frames it as a question of critical path interaction between multiple causative events.

FIDIC

FIDIC does not provide a technical definition of concurrency nor a prescribed analytical method for determination. However, under the 2017 Red Book, Sub-Clause 8.5 entitles the contractor to EoT for identified employer-risk events which "delay (or will delay) completion".

In practice, Engineers and tribunals operating under FIDIC often adopt an approach broadly aligned with the Malmaison/SCL model:

EoT is granted where employer-risk delay affects the critical path, even if there is concurrent contractor delay

Prolongation costs for the concurrent period are often withheld unless the contract or law clearly provides otherwise.

FIDIC, therefore, sets no rigid concurrency rule but provides the contractual gateway for applying SCL-type concurrency principles and AACE-type forensic analysis to determine EoT and, where appropriate, costs.

Float, Disruption and Documentation

Float

SCL and AACE both treat total float pragmatically. The Protocol recognises that total float neither exclusively belong to the employer nor the contractor, absent express contractual stipulation. In the absence of such contractual stipulation, total float is treated as a common pool of time available for consumption by the party whose activities consume it first. This avoids disputes over "float ownership" unless the contract expressly allocates float.

AACE RP 29R-03 also take a similar position with the performance of forensic analysis. AACE treats float

as part of the network logic rather than something owned by one party. As such, consumption of float is merely a factual constituent of the delay claim narrative.

On the other hand, FIDIC does not expressly allocate float. As a result, in the disputes involving FIDIC contracts, the arbitral tribunals frequently rely on the shared-float concept drawn from SCL and AACE.

Disruption and Productivity Loss

SCL Protocol provides valuable guidance on disruption by devoting specific guidance to loss of productivity and disruption claims. The SCL Protocol recommends the Measured Mile as the preferred method where practicable, while recognising other methods (project-specific studies, project comparison, industry studies).

The Protocol stresses that disruption may arise independent of critical path delay, i.e., a project may complete on time with significantly higher costs due to reduced efficiency in the works.

AACE RP 29R-03, being concentrated on schedule delay, deals only peripherally with productivity loss. As such, it is quite frequent that parties rely on SCL and other disruption literature to structure their factual and expert evidence on disruption and prolongation cost.

On the other hand, FIDIC provides the contractual basis to raise disruption and prolongation claims (e.g. claims for "Cost" and profit where applicable). Apart from providing the contractual basis, FIDIC is generally silent on how such cost or loss is to be assessed or quantified, leaving room for the applicability of SCL prescribed or other methodologies.

Documentation and Evidence

All three frameworks emphasize upon the importance of maintaining contemporaneous records, but SCL makes this a central theme. The SCL Protocol includes detailed guidance, including appendices listing the types of records that should be maintained by the parties (daily site reports, updated programmes, correspondence, notices, test results, hindrance registers, etc.), and repeatedly stress that good records are necessary for a credible delay and disruption analysis.

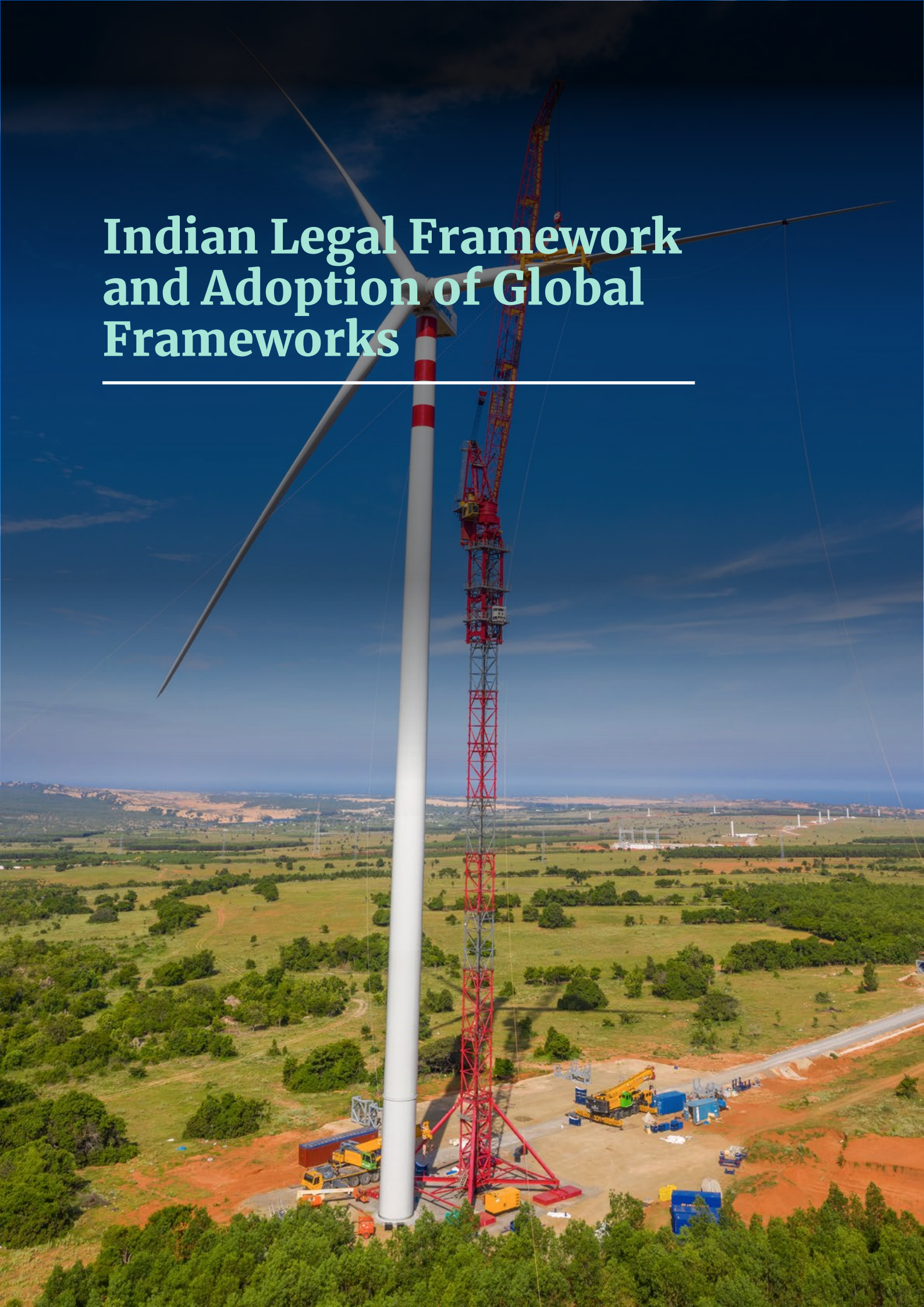
AACE also stresses source-data validation, requiring that analysts test schedule updates for logic errors, check for out of sequence progress, and rely on as-built records before conducting any forensic analysis. FIDIC gives contractual backing to recordkeeping by requiring the contractor to submit records, programmes and particulars with its EoT and cost claims, and by empowering the Engineer to examine and determine claims based on such documentation.

Technology based Evidence in Delay and Disruption Claims

Digital tools such as Primavera P6, Building Information Modelling (BIM), Tilos, Synchro 4D, and drone-based photogrammetry are some of the widely used tools in international arbitrations which contributes to the significantly at the evidence stage of the proceedings for delay and disruption claims.

These technological tools may assist the tribunals in establishing causation and attribution of delays and as well as the quantification of claims by providing objectively set out project records. These tools help in reducing the reliance on witness testimony or modified schedules which are in itself subjective in nature. Interpretation of the data generated from these tools when read with SCL, AACE, and FIDIC principles can significantly enhance the objectivity and robustness in evidence and consistency of delay and disruption assessments across arbitral proceedings.

Indian Legal Framework and Adoption of Global Frameworks



Indian Statutory Alignment with International Principles

Section 73 and 74 of the Indian Contract Act requires causation, substantiated loss, and mitigation. These delay analysis frameworks are in line with the statutory requirements as it substantiate the delays or disruption in a project.

Section 73 imposes affirmative mitigation duty; international frameworks formalise this through reasonable mitigation requirements that do not demand unreasonable steps increasing losses or altering contractual obligations.

Judicial Approach

A review of the Indian precedents on delay and disruption claims reveals that there is no one overarching standard that the tribunals or courts have preferred to apply to analyse delay attribution and determine compensation. The fallout can be explained with an instance: a standard form prescribes a clause that provides that in case of a delay the sole remedy of the contractor is to an extension of time, to the specific exclusion of any claim for compensation. The same clause has found different by Indian Courts – while one line of judgments take a strict interpretation, holding there is a complete bar on the grant of compensation under the contract, another line of judgments has sought to take a liberal approach, working in the test of attributability for the delay, to determine if the contractor can be entitled to compensation.

Yet another interpretation emerged when the Indian Supreme Court took the position that the claim by the contractor would be entertainable in certain situations being: if the employer allowed the extension through a supplemental agreement or clearly allowing the escalation of rates or compensation for delay or if the contractor expressly states that escalation or compensation for delay must be paid, and the employer nonetheless accepts the contractor's performance despite the delay and despite such notice placing the employer on terms. Divergent judicial approach therefore causes lack of clarity both during the execution of the project and at the dispute stage, leading to prolongation and uncertainty.

Therefore, there is a strong case for the adoption of global frameworks in construction disputes.

Possible Contractual Adoption Mechanisms

- **SCL/AACE Integration**: Model clauses can reference to good industry practices in General Conditions (GCC), enabling contractors and employers to specify framework principles. Government contracts (NHAI, CPWD, Metro Rail, PWDs) can embed contemporaneous programming and record-keeping requirements aligned with international standards.

- **FIDIC Framework**: FIDIC provides contractual architecture suitable for Indian conditions with emphasis on timely record keeping, detailed procedure for EOT, substantiation process, etc.

Institutional and Judicial Pathways

Arbitral institutions (MCIA, DIAC, ICA) can come up with model expert guidelines similar to these frameworks and establish panels of qualified delay experts. Courts / Tribunals can use them as persuasive technical standards for adjudication. Training workshops for government engineers, contractors, arbitrators, and counsel can build institutional capacity. Tribunals can mandate parties to identify delay analysis methodologies, justify appropriateness, and submit transparent datasets, improving evidentiary standards.

Conclusion

India's Construction sector requires standardized delay analysis to reduce unpredictability and align the contractual and dispute resolution framework with international standard.

Standardization and uniformity enables consistency across disputes as it reduces tribunal discretion variance, improves credibility, and reduces overall dispute duration and cost. Indian contractors operating internationally face credibility gaps absent standardized frameworks; foreign contractors bring SCL/ AACE-trained experts, creating asymmetric advantage. Standardization levels the field.

Uniformity in Indian construction disputes does not require adopting any single framework wholesale. A workable approach requires integrating three layers. The contractual layer adopts that FIDIC-based procedures of notice requirements, substantiation protocols, and Engineer determination. The technical layer applies SCL and AACE methodologies for delay quantification and cost baseline establishment. The legal layer grounds all analysis in Indian statutory principles: Sections 73 and 74 (substantiated loss), doctrine of prevention (employer-caused delay entitlement), and mitigation duties.

Ultimately, these frameworks are important not only as dispute resolution tools but also as preventive strategic options. Their incorporation into contracts or guidance in the disputes would substantially increase efficiency and predictability in the resolution of construction disputes.

The time is ripe for Indian stakeholders, contracting parties, government agencies, arbitrators, and courts, to embrace these Protocols as guiding principles for structured and technically sound management of delay and disruption in construction projects.

Sources

1. Society of Construction Law, Delay and Disruption Protocol (2nd edn, 2017) [pg 6]. The Protocol explicitly states that it is not a statement of law and does not override contract terms; however, it has achieved international acceptance as a reference standard for good industry practice.
2. The Protocol has been cited with approval in Alstom Ltd v Yokogawa Australia Pty Ltd [2012] SASC 49 (Supreme Court of South Australia), Lucas Earthmovers Pty Ltd v Anglogold Ashanti Australia Ltd [2019] FCA 1049 (Federal Court of Australia), and Leighton Contractors (Asia) Ltd v Stelux Holdings Ltd [2004] HKCFI 804 (High Court of Hong Kong), amongst other numerous international arbitrations.
3. Stewart M, Lindsay M and Bailey A, "FIDIC: Claims for Time under the 1999 / 2017 Red Book" Gowling WLG (May 23, 2024) <https://gowlingwlg.com/en/insights-resources/articles/2024/fidic-claims-for-time>
4. FIDIC Red Book , (2nd Ed., 2017), Sub-Clauses 8.3. The sub-clause requires the Contractor to prepare and regularly update a detailed programme, ensuring contemporaneous records of sequencing and timing. This contractual obligation reflects the SCL Protocol's emphasis on contemporaneous programming but embeds it as a binding duty.
5. FIDIC Red Book , (2nd Ed., 2017), Sub-Clauses 8.4. The sub-clause introduces an advance warning mechanism, obliging the Contractor to notify the Engineer of foreseeable events that may affect safety, time, cost, or quality. This mirrors the SCL principle of proactive risk management but is enforceable under the contract.
6. FIDIC Red Book , (2nd Ed., 2017), Clause 20. Sub-Clause 20.1 sets out general requirements for claims, mandating timely notices and adherence to defined procedures. It establishes transparency and accountability in claims handling. Sub-clause 20.2 governs claims for payment and extensions of time, requiring detailed particulars and contemporaneous records. This provision enforces transparent claim procedures contractually, whereas the SCL Protocol offers non-binding best practice.
7. See Thomas Barnes & Sons PLC v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC).
8. In Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm) [289], [292], Hamblen J (as he then was) rejected a claimant's submission on causation purportedly supported by the Protocol. The Court emphasised that the Protocol "is not intended to be a contractual document" nor does it "purport to take precedence over the express terms of a contract or be a statement of law." The Court found that, absent evidence that the parties contracted with the Protocol in mind, it offered little assistance where the contract provisions required a retrospective analysis of actual delay.
9. In Great Eastern Hotel Company Ltd v John Laing Construction Ltd [2005] EWHC 181 (TCC) [298], the defence relied on the Protocol regarding the calculation of time in instances of concurrent delay. However, the courts have maintained strict boundaries regarding its legal weight.
10. In Alstom Ltd v Yokogawa Australia Pty Ltd (No 7) [2012] SASC 49, the Supreme Court of South Australia justified the use of an "As-planned v As-built" methodology by reference to the Protocol [1321]. Conversely, the Court rejected an opposing expert's methodology specifically because it was not recognised within the engineering profession, citing its absence from the Protocol as a primary reason for that rejection [1282].
11. In Lucas Earthmovers Pty Ltd v Anglogold Ashanti Australia Ltd [2019] FCA 1049, the Federal Court explicitly adopted the Protocol's definition of "critical path" where the parties agreed on the concept but required an authoritative baseline [136]. See also 20 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 1) [2006] VSC 490 [55], where the court found no misconduct is an arbitrator relying on the Protocol's guidelines for retrospective delay analysis.
12. In Leighton Contractors (Asia) Ltd v Stelux Holdings Ltd [2004] HKCFI 804 [24]-[35], the High Court noted that the Protocol explicitly supports the "time slice" (or windows) methodology used by experts on both the sides. However, the Court ultimately determined that an arbitrator's decision to reject the results of that specific analysis did not amount to misconduct, reinforcing the principle that while the Protocol provides valid tools, the tribunal retains the discretion to determine their factual applicability.
13. The case of Oppland Fylkeskommune v HAB Construction AS HR-2019-1225-A concerned a road-building dispute where the parties made extensive reference to the Protocol regarding disruption. The Supreme Court clarified the causality requirement for disruption claims, establishing a two-step test: first, the contractor must prove that the employer-risk event caused a loss of productivity; and second, there must be specific evidence linking that disruption to the actual financial loss suffered.
14. (1999) 70 Con LR 32
15. Indian Contract Act, 1872, ss. 73–74. Section 73 requires damages be "those which naturally arose in the usual course of things" and are "such as were contemplated, or known to be likely to result" from the breach. Section 74 limits compensation to reasonable pre-estimate of probable loss. Both require causation and substantiated loss which are principles which are also found in SCL, AACE, and FIDIC frameworks. Society of Construction Law, Delay and Disruption Protocol (2nd edn, 2017) Core Principles 20–22 (compensation based on actual costs or actual loss).
16. Indian Contract Act, 1872, s. 73. SCL Protocol paras 15.1, 15.5
17. Ramnath International Construction (P) Ltd. v. Union of India, (2007) 2 SCC 453
18. Asian Techs Ltd. v. Union of India, (2009) 10 SCC 354
19. Northern Railway v. Sarvesh Chopra, (2002) 4 SCC 45

About Khaitan & Co

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To know more, visit www.khaitanco.com

Contributors

Sanjeev Kapoor
Senior Partner
Dispute Resolution
sanjeev.kapoor@khaitanco.com

Gaurav Juneja
Partner
Dispute Resolution
gaurav.juneja@khaitanco.com

Abhisaar Bairagi
Partner
Dispute Resolution
abhisaar.bairagi@khaitanco.com

Aayush Jain
Counsel
Dispute Resolution
aayush.jain@khaitanco.com

Milind Sharma
Principal Associate
Dispute Resolution
milind.sharma@khaitanco.com

Swastika Chakravarti
Principal Associate
Dispute Resolution
swastika.chakravarti@khaitanco.com

Suhel Qureshi
Senior Associate
Dispute Resolution
suhel.qureshi@khaitanco.com

Ausaf Ayyub
Associate
Dispute Resolution
ausaf.ayyub@khaitanco.com

Mimansha Durgapal
Associate
Dispute Resolution
mimansha.durgapal@khaitanco.com

About The Society of Construction Law (SCL) – India

Founded in 2016, SCL India was created to educate the stakeholders in the construction industry about construction law and to promote India-wide adherence to international standards and practices. Through its programs, scholarly publications and membership activities, led by many of the top global experts and supported by many of the most actively engaged organizations, corporations, law firms and individual practitioners, SCL India is an important forum on contemporary issues in the field of construction law.

Ratan K. Singh
Senior Advocate and Chairman
The Society of Construction Law India

Akshay Gandotra
Advocate and Jt. Secretary
The Society of Construction Law India