By Nigel Ribbands

The NEC 3 contract has attracted much attention, at least in the construction industry, with its wide spread adoption in prestigious contracts including the London 2012 Olympic Games. It is not without its critics though. Love it or hate it, as Nigel Ribbands explains, it should come with a health warning attached.

The Engineering and Construction Contract 3rd Edition (more commonly known as "NEC 3") was published in June 2005[1]. Since its publication, NEC 3 has attracted much attention as it was put under the spotlight by the Office of Government Commerce recommending its use by public sector construction procurers on grounds it complies with Achieving Excellence in Construction Principles using simple language and modern project management techniques.

Enhanced Profile of NEC 3

NEC 3's profile has been further enhanced by its use on prestigious projects in the UK including the London 2012 Olympic Games, Crossrail and Heathrow, Terminal 5 and wider afield internationally in South Africa, UAE, Hong Kong, New Zealand and Thailand. Love it or hate it, NEC 3 is here to stay. Indeed, only recently the ICE announced its intention not to continue updating its family of contracts but instead to endorse the NEC and its suite of contracts.

Notwithstanding NEC 3's rapid rise to fame, it has not come without criticism. The Compensation Event provisions of the NEC forms have proved problematic. Payment is at the heart of most commercial agreements. NEC 3 is arranged in nine sections. Section six provides for Compensation Events.

Compensation Events

Broadly speaking section six comprises six main clauses, namely, (i) Clause 60 defines compensation events, (ii) Clause 61 deals with notification by either the Project Manager or the Contractor that a compensation event has occurred, (iii) Clause 62 provides for Quotations (iv) Clause 63 sets out the mechanism for assessing compensation events (time and money), (v) Clause 64 deals with assessments made by the Project Manager and (vi) Clause 65 explains how compensation events are to be implemented.

Tucked away in the Compensation Events section of Clause 61.3 are the words *"If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not."*
So
what do these words actually mean?

One leading and well respected commentator has suggested *"... it is clear that the NEC Panel intended the second paragraph of the new clause 61.3 to be a condition precedent[2]".*
A condition precedent is an event which must take place before a party to a contract must perform or do their part[3]. It therefore could be said the parties have voluntarily put into their agreement (upholding the public policy of freedom to contract) the Contractor's right to a change in the Prices, the Completion Date or a Key Date is lost if the Contractor does not notify of a compensation event within eight weeks of becoming aware of the event.

Proper interpretation is needed

So, this boils down to the proper interpretation or construction of Clause 61.3 (i.e. its true meaning and effect in law). Notwithstanding there is also potential for argument over when, as a fact, the Contractor became aware of the event (or ought reasonably to have become aware?) and/or that the Project Manager has an obligation to notify the event to the Contractor but he did not. Both would turn on the particular facts of the case.

Prevention Principle

There is also potential to challenge a time-bar clause on what is known as the “prevention principle”. Generally speaking, the prevention principle is well established at common law and provides that no party can take advantage of the non-fulfillment of a condition of performance which he himself has hindered[4]. Take, for example, the Employer does not allow access to or use of a part of the Site by the later of its access date and the date shown on the Accepted Pro gramme
[5] then if the Contractor has "failed to notify"[6] and the 8 week time-bar clause is effective then the Employer has hindered the Contractor’s progress and benefited from such action. However, remember please, if the Project Manager issues an instruction, for example under Clause 60.1(1) or 60.1(4), changing access to and use of part of the site this would constitute a compensation event and, arguably, satisfy the "unless" provision under Clause 61.3.

The clash between the time-bar clause and the prevention principle has spawned much discussion between lawyers and inevitably has and continues to occupy the courts minds in both the UK and the Commonwealth. Some authorities support the time-bar provision[7] whilst others support the prevention principle[8]. The law on this point in England and Wales is currently unclear.

What is clear is that much time, resource and money may be subsumed by parties to the NEC 3 arguing over the facts and the law associated with the proper interpretation of Clause 61.3 (which of course goes to the very root and heart of the agreement) to ascertain its legal consequences.

You have been warned!

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[1] 3rd Edition re-issued with minor amendments in 2006

[2] The Rise and Rise of Time-Bar Clauses for Contractors' Claims: Issue for Construction Arbitrators by Hamish Lal September 2007

[3] Legal dictionary definition

[4] Roberts v Bury Improvement Commissioners [1868 – 1870]

[5] Clause 60.1 (2)

[6] Pursuent to Clause 61.3

[7] Please see for example the Australian case of Turner Corporation Ltd v Austotel Pty Ltd [1997] and the Scottish case of City Inn Ltd v Shepherd Construction Ltd [2002]

[8] Please see for example the Australian case of Gaymark Investments Pty Ltd v Walter Construction Group Ltd [2000] and the obiter comments (made by the way but nevertheless persuasive) by Jackson LJ in Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007]

Nigel Ribbands is a Chartered Quantity Surveyor, Chartered Arbitrator and Panel Registered

Adjudicator. You can find out more about Nigel at http:// www.ribbands .com