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# NEC: Crystal ball or rear-view mirror?

Assessing time related claims after the event under NEC

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## About me



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- MEng (Hons) Civil and Structural Engineering - UGR
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- MSc (Dist) in Construction Law and Dispute Resolution – Kings College London
- Chartered Civil Engineer del ICE(UK) - CEng MICE
- Fellow Chartered Institute of Arbitrators - FCI Arb
- More than 18 years of experience in managing civil works, infrastructure, building and renewable energy projects in Spain, Peru, Germany, UAE, Thailand and the United Kingdom. Extensive practical experience of main forms of contracts having managed construction projects of a value between £50mill and £3bn.
- Testifying Expert Witness in the field of delay and disruption.
- Regularly appointed as delay expert to produce reports and give testimony before DABs, adjudication (UK), international arbitrations (ICC, ICDR, ICSID, SCC, CAM) and courts of law around the world.
- Lectures, seminars and articles in construction law / technical journals.
- Lexology Consulting Experts 2026 – Delay, Quantum & Technical: Future Leader

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## NEC Approach

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## NEC Approach

### Does NEC contract define a specific time for assessment?



#### NEC4 ECC 2017

Time is assessed by **impacting** the last accepted programme (clause 32) *current* at the time of the CE notification (clause 63.5) and **forecasting the effect** of the change on the remaining works (clause 62.2)

- NEC sets out the point at which the assessment is carried out as the "**dividing date**" that separates the work done (actual) from the work not done (forecast) (NEC4 2017, cl. 63.1) and;
- **There is no "second stage"**, since the ethos is to *resolve claims at the time* by predicting the future effect of an event and **no later review** even if the assessment is proven to be incorrect. (NEC4 2017, cl.66.3).

Isolate the forecast impact on planned Completion due to a  
Compensation Event

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## NEC Approach

### Forecast vs. actual impact



- At first glance, NEC would appear to be watertight to disputes, as it prescribes the parties to act and resolve claims when the issues are fresh as the works progressed.
- The prescriptive nature of NEC would suggest a **prospective approach**, even in a dispute forum after the event.
- In practice, NEC provides the Project Manager with *sufficient time* to make a decision, which often means that the real effect of the delay may be known before implementation. This leads to Parties often assessing Compensation Events **retrospectively** in a dispute forum.

*Can this situation be mitigated through compliance with the contractual provisions? Or are there scenarios which will inevitably lead to disputes?*

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## Potential dispute scenarios

### Contractual vs. factual



#### 1. Time-barred claims:

- a) CE not timely notified within the prescribed period -> contractor may lose its entitlement (clause 61.3);
- b) Contractor may not have been aware of the impact of a CE on the programme at the time i.e. late access date, but programme shifts back at every revision.
- c) The PM should have issued an instruction, but did not, and the Contractor does not notify a CE instead

#### 2. Disagreement over CE validity:

- a) Contractor may notify a CE that the Project Manager does not accept is a CE (clause 60.1);
- b) Later on, a subsequent related CE could be accepted, giving rise to disagreement as to which notification date should be used for the assessment.

#### 3. Conflicting assessments:

- a) The Project Manager may disagree with Contractor's quotation -> power to reject and provide own assessment (clause 64.1-64.4);
- b) If the actual effect becomes apparent before this happens, disagreement could arise as to whether the assessment should be based on a forecast or the actual effect.

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## Approaches after the event

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## Approaches after the event

### Common alternatives



1. A **prospective (contemporaneous)** view, *as prescribed* by the NEC contract, which
  - a) Determines the critical path at the time of the CE notification / PM instruction and;
  - b) Assesses the forecast impact on planned Completion at the time of CE notification / PM instruction.
  
2. A **prospective (retrospective)** view, which:
  - a) Determines the critical path at the time of the CE notification / PM instruction, and;
  - b) Assesses the extent of delay once the actual impact is known and can be measured (in hindsight).
  
3. A **full retrospective** view, which:
  - a) Considers all actual events, and review the position of the works with the benefit of hindsight
  - b) This includes, any potential contractor's inefficiencies incurred after the dividing date, in works potentially unrelated to the CE being assessed.

*Is there a preferred approach? What do the contract provisions state on this issue?*

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## Approaches after the event

### Contractual considerations



**Clause 10.1:** *"the Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract".*

Does this statement provide a strong argument in favour of following the provisions in the contract?

**Clause 66.3:** *"the assessment is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong".* There is no "second stage", since the ethos is to resolve claims at the time by predicting the future effect of an event and **no later review** even if the assessment is proven to be incorrect.

The above does **not** cover scenarios where the actual impact is known and:

- *The quotation was never adequately submitted*
- *CE was never formally implemented.*

How to proceed if the forecast sequence/impact is proven to be incorrect before the CE is implemented?

*Should a retrospective analysis be used as a validation? Is there any other guidance stating what approach should be followed?*

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## Approaches after the event Construction industry guidance



### SCL Delay and Disruption Protocol, 2<sup>nd</sup> edition

*"there is no longer a preferred delay analysis methodology where that analysis is carried out time-distant from the delay event or its effect". (page 3, section K(c).*

That said, it provides *"the relevant conditions of contract"* as the first factor to take into account, when selecting the method of analysis. (section 11.3).

### NEC3 Guidance Notes, version 2005

Purpose of the switch date *"This prevents the practice of a Project Manager making a retrospective and selective choice between a quotation and the final recorded costs of a CE".* There is no "second stage", practice that was never intended.

Pursuant to clause W.2.3(7), the adjudicator is required to perform *"an assessment in the **same way** as a compensation event is assessed"*.

This approach does not, however, appear for a tribunal, stating that *"A party is not limited in tribunal proceedings to the information or evidence put to the adjudicator"* (clause W.2.4(3)).

*Should the tribunal turn a blind eye on matters that is aware have already occurred?*

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## Approaches after the event Construction industry guidance (2)



### Keating on NEC3 (leading textbook)

Factual evidence should be preferred to a speculative approach before the implementation of the CE, as it seems wrong to ignore actual evidence when present, which would be inconsistent with the principles of assessing damages (compensatory principle).

Chapter 7, clause 63, it states that *"the better view is probably that the Project Manager is entitled to decide that a quotation is not correct if later events that have occurred, by the time it considers the quotation, have revealed that the effect of the compensation event was not as quoted."* It adds that *"if the PM makes its own assessment, it **must follow** clause 63.1, although later events can probably be brought into account in making the assessment". (para 7-114).*

It also puts forward the proposition that the NEC, in practice, can allow for a reassessment of a previously notified CE through the application of:

- a) **Clause 61.6** -> PM makes assumptions CE too uncertain to be forecast reasonably and;
- b) **Clause 60.1(17)** -> Correction of assumptions if found to be wrong -> Resets assessment date.

*Do the courts (as indicated in the contract provisions) promote a prospective assessment, even long after the actual impact of the delay is known?*

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## Approaches after the event

### What do the courts say?



In *Great Eastern Hotel Company Ltd v John Laing Construction Ltd & Anor* Wilcox J rejected the use of a purely prospective analysis, since “takes no account of the actual events which occurred on the Project and gives rise to a hypothetical answer”. [2005] EWHC 181 (TCC) at [184]

In *Costain Ltd v Charles Haswell & Partners Ltd*, the judge criticized an assessment made simply by recreating the project using a type of prospective analysis that failed to consider whether a delay had been “mitigated, neutralized or even exacerbated by later events”. [2009] EWHC 3140 (TCC) at [181]

In *Bluewater Energy Services BV v Mercon Steel Structures BV*, Ramsey J rejected the use of a prospective analysis after the event had occurred as a “a theoretical exercise [that] does not consider what actually happened”. [2014] EWHC 2132 (TCC) at [324]

Although the NEC3 regimen is based on a prospective analysis:

- The after-the-event assessment should be based on the best possible information which, in this case, was evidence of “what happened”. *Northern Ireland Housing Executive v Healthy Buildings Ltd* [2017] NIQB 42.
- a previous assessment was not binding and could be opened and reviewed in a litigation context, as “there is nothing in the NEC form that states that an assessment is conclusive as to the rights of the parties”. *Imperial Chemical Industries Ltd (ICI) v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC)

The courts have preferred a **retrospective, fact-based approach** to assessing a **delay impact** after the event.

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## Approaches after the event

### What do the courts say? (2)



The courts have made a **distinction** between the point at which the assessment of the extent of the delay must be carried out, for which a retrospective approach is preferred, and the approach to determine if an event has delayed the completion of the works.

In *Walter Lilly & Company Ltd v Giles Patrick Cyril Mackay*, Akenhead J set forth the position of English law: “to consider what critically

• *Mace Construct Ltd v Baltic Investment Holdings Ltd* [2026] EWHC 976 (TCC)

• Delay actually caused vs. EOT reasonably assessed at the time

**Isolate the “fair and reasonable” impact on planned Completion due to a Compensation Event**

longer. Therefore, it is necessary to have regard to how long individual items actually took to perform and not just have regard to what one party or the other at the time was saying it would take.”

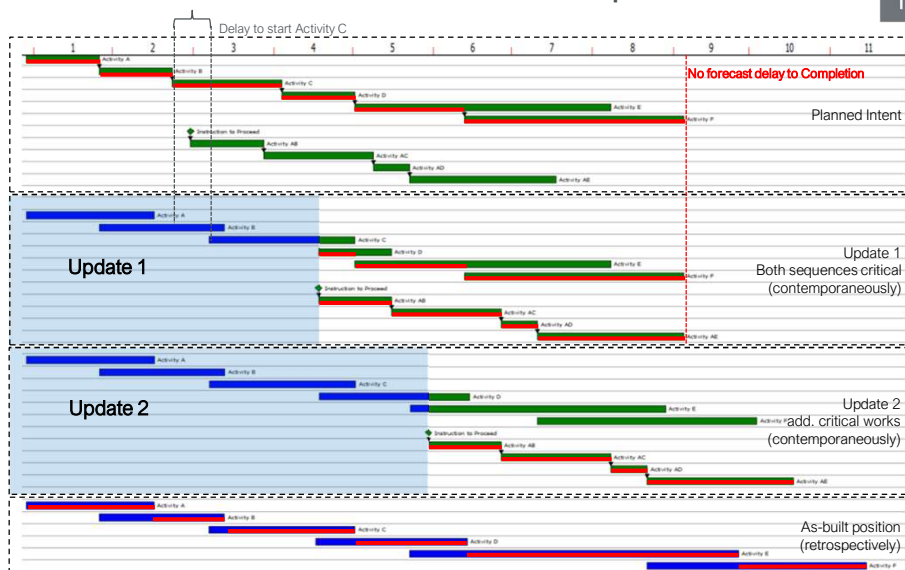
*Walter Lilly v Mackay* 2012 EWHC 1773 (TCC) at [378]

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# Case scenarios

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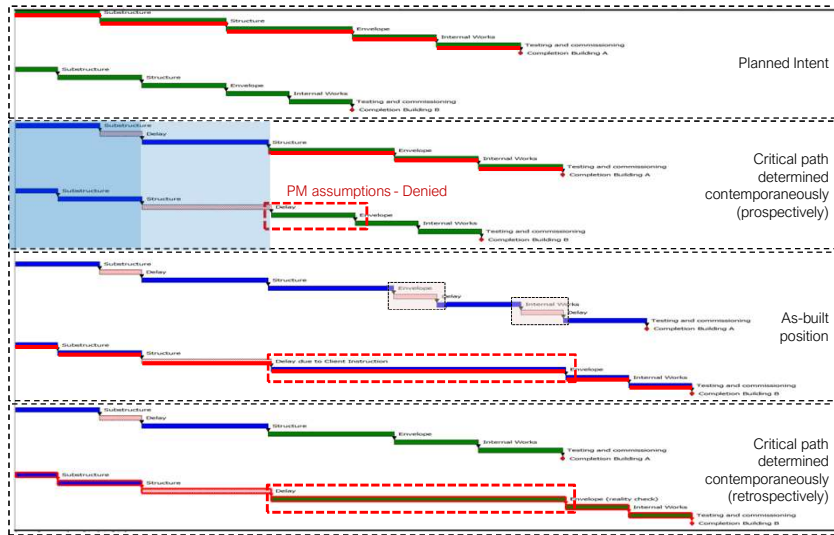
## Case scenarios Scenario 1 – Removal of work from scope



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# Case scenarios

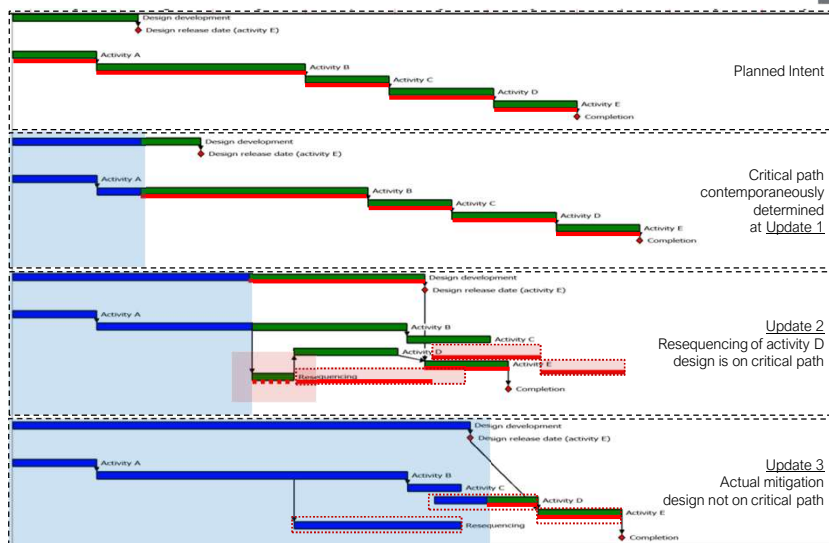
## Scenario 2 – PM assumptions request denied



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# Case scenarios

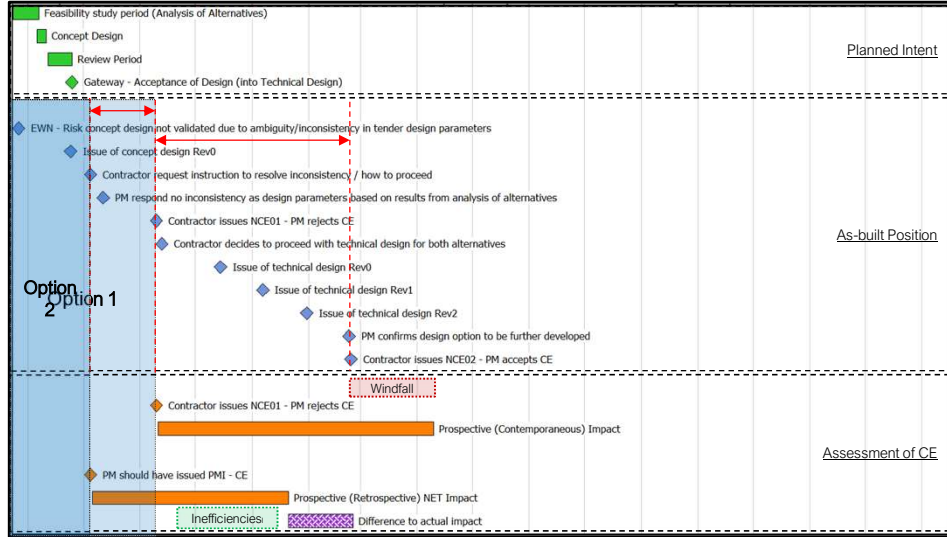
## Scenario 3 – Resequencing and mitigation



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# Case scenarios

## Scenario 4 – Disagreement over CE validity



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# Thank you!

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