

UK construction contracts and contract law round-up

DENTONS

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Welcome to our spring round-up of new and amended standard form construction contracts and contract law issues. If you would like any further information on the topics below, please contact one of the team listed under "Key contacts".

- **Contract law: case reviews**
- **New and updated standard form contracts**
- **Industry consultations**
- **CLLS view on electronic execution of documents**
- **Payment issues: UK construction focus**
- **Procurement: the Outsourcing Playbook**

Contract law: case reviews

Practical completion: construction law's elephant (easier to recognise than describe)

In *Mears Ltd v. Costplan Services (South East) Ltd & Ors* [2019] EWCA Civ 502, the Court of Appeal set out a useful review of the law relating to practical completion.

Prevention principle and expressly agreed terms

In *North Midland Building Ltd v. Cyden Homes Ltd* [2018] EWCA Civ 1744, the Court of Appeal reversed a common law position, confirming that parties may allocate the risk of concurrent delay without contravening the doctrine of prevention.

High Court holds that Brexit does not amount to frustration of a lease

As uncertainty about Brexit continues, the courts are starting to hear claims arising out of Brexit's effect on contracts. In the first such case to be published, the High Court has found that Brexit is not enough to frustrate a lease (*Canary Wharf Limited v. European Medicines Agency* [2019] EWHC 335 (Ch)). You can read our Real Estate colleague's review of that case here: [Brexit not enough to frustrate a lease](#).

New and updated standard form contracts

FIDIC contracts expected in 2019

FIDIC has launched a new **contract users' newsletter** to keep users up to date with the latest FIDIC developments.

The first edition was published in February 2019 and includes news that the following updated/new contracts could be with us during 2019:

- the Suite of Agreements Guide;
- 2017 Red, Yellow and Silver Book Contracts Guide;
- the Short Form of Contract [Green Book];
- the Tunnelling and Underground Work Contract [Emerald Book] and the related Contract Guide;
- the Operate, Design-Build and Operate Contract [Bronze Book];
- the Standard Particular Conditions "Plug-In" for Yellow Book covering Renewable Energy Projects; as well as
- the Conditions of Contract for Underground Works (due 3-9 May 2019), the Conditions of Subcontract for Plant and Design-Build [1999 Yellow Book Subcontract]; Guide for the 2017 Suite of Agreements; and FIDIC 2017 Contracts Guide.

FIDIC is currently conducting a survey into FIDIC contracts and agreements to find out how the contracts are being used internationally. The results will help FIDIC to improve its services. To take the survey, click [here](#).

In a recent [announcement](#), FIDIC confirmed that it has agreed a non-exclusive licence for the use of six FIDIC standard contracts with the international funding organisation the World Bank for the next five years. These contracts, which mainly include the 2017 Second edition FIDIC suite, will be used as part of the standard bidding documents for projects that the World Bank finances. The contracts will be translated into five major languages (Arabic, Chinese, French, Portuguese and Spanish) over the coming months to aid their effective use. FIDIC president Alain Bentéjac hopes that supply chains will be influenced to use FIDIC, which should create more certainty in the planning and delivery of major international and infrastructure projects.

PSC Core Terms published

The Crown Commercial Service (CCS) published the Public Sector Contract (PSC) in May 2018. In March 2018, the CCS updated the PSC's Core Terms, which form part of the framework and call-off contracts. The [Core Terms](#), which must be used on every contract and cannot be changed, are CCS's standard commercial terms governing the supplier's relationship with CCS and every buyer who has a call-off contract.

JCT 2016 edition released "on demand"

The Joint Contracts Tribunal (JCT) has released the following contract families from its 2016 edition through its JCT On Demand digital service: the JCT Standard Building Contract (the Standard Building Contract With Quantities (SBC/Q), the Standard Building Contract Without Quantities (SBC/XQ), and the Standard Building Contract With Approximate Quantities (SBC/AQ)), and the JCT Intermediate Building Contract (the Intermediate Building Contract (IC) and the Intermediate Building Contract with contractor's design (ICD)). (See the JCT press release [here](#).)

NEC4 amendments published

Following feedback on the NEC4 suite of contracts published in June 2017, the NEC has published some minor amendments (the January 2019 amendments) to clarify and enhance the contracts. In its explanatory note, the NEC sets out the following, most significant, amendments as they affect the Engineering and Construction Contract and then states which other contracts they apply to:

- Engineering and Construction Contract (ECC) clause 63.5 – assessment of delay due to a compensation event

(which follows feedback on **Practice Note 1, October 2017**);

- ECC clause 19.2 – termination table;
- ECC options C, D, E and F clause 50.9 – agreement of defined cost;
- ECC options W1 and W2 – senior representatives;
- Professional Services Short Contract (PSSC) – the consultant's contract data – people rates; and
- Supply Contract (SC), Engineering and Construction Subcontract (ECS), Professional Services Subcontract (PSS), Term Service Subcontract (TSS) – project bank account.

Full details of the amendments can be found in the NEC's explanatory note, Summary of the List of Amendments and Detailed List of Amendments **here**.

These amendments follow on from:

- the **NEC's free practice note issued in September 2018**, which explains how the NEC4 suite of contracts can be used to support the use of offsite modular construction; and
- the UK government's issue of a **limited set of standard "boilerplate" clauses for use on public sector NEC contracts**. These clauses are the result of collaboration between the Infrastructure and Projects Authority and the public sector procurement agency Crown Commercial Services.

New funding framework

The Cabinet Office and Crown Commercial Service (CCS) have launched a new funding framework to enable small and large construction firms to bid for work on government projects over the next seven years. The "Construction Works and Associated Services" commercial agreement will help central government and the wider public sector with projects focused on UK construction, refurbishment, repair, demolition or decommissioning of public buildings. The framework scope includes standardised payment terms and other fair payment objectives. (See **press release**.)

New international standards for BIM

In January 2019, the International Organization for Standardization (IOS) published a new set of international standards to enable efficient building information modelling (BIM) for managing information. The ISO confirmed it was issuing the first two parts of **ISO 19650, Organization and digitization of information about buildings and civil engineering works, including building information modelling (BIM) – Information management using building information modelling**, to provide an international framework allowing "the industry to work together [collaboratively] across projects and national borders".

Industry consultations

NIC infrastructure resilience review

The National Infrastructure Commission (NIC) has consulted on the scope of its forthcoming infrastructure resilience review. The consultation, which ended on 1 April 2019, will help the NIC to develop a new framework for studying how to protect UK infrastructure against future change, whether caused by climate change or new digital technologies.

How prepared is the construction industry for offsite?

HM Treasury and the Infrastructure and Projects Authority launched a consultation in November 2018 to review the industry's preparedness to adapt to a new approach to building and, in particular, a move towards offsite construction. The consultation, **Proposal for a New Approach to Building: Call for Evidence**, which ended on 17 February 2019, follows the Chancellor's announcement in his 2017 Budget speech that five central government departments would adopt a presumption in favour of offsite manufacturing where it presents value for money. This has been called a platform approach to design for manufacture and assembly (P-DfMA). The presumption is to allow government departments to "take a consistent approach to construction by using standardised and inter-operable components from a wide base of suppliers across a range of different buildings. This is to drive a new market for manufacturing in construction and thereby take advantage of economies and efficiencies of scale".

CLLS view on electronic execution of documents

Following on from the update in our **Winter 2018 briefing**, the City of London Law Society (CLLS) has published a response to the Law Commission consultation on electronic execution of documents (**available here**). The CLLS largely agreed with the conclusions of the consultation, which was aimed at enabling transactions to go fully digital. Broadly speaking, it agreed "with the Law Commission that an electronic signature can satisfy statutory requirements for a signature and that it is not necessary to enact new law to enable the use of electronic signatures on documents held in electronic form for either business or personal purposes".

The CLLS also commented on some practical issues that could be discouraging the more general take-up of electronic signatures in signing deeds. The CLLS was keen not to be prescriptive on how witnesses complete the attestation. For example, the witnessing and attestation requirement for electronic signatures should not be replaced with a requirement for the use of a particular type of technology. In addition, it envisaged that some flexibility would be allowed on whether a person witnessing a signature would have to be physically present during the signing: a witness could be "present" by watching the signatory sign via video link or other remote technology, provided there was a clear and uninterrupted view of the signatory.

Payment news: UK construction focus

For our latest update on payment issues, click here:

- **Round-up of news on payment policies: UK construction focus**
- **Contract procedure matters: serve those notices to protect your payment position**
- **Grove confirmed as established approach to starting true value adjudications**
- **Project bank accounts: making payment fair**
- **Use of project bank accounts set to rise in the UK**

Procurement

Outsourcing Playbook

The government has published the Outsourcing Playbook to improve government procurement and deliver better public services. The government wants to get more projects right from the start, "to engage with a diverse and healthy marketplace of companies and [be] ready for the rare occasions when things go wrong".

Aimed at those Commercial, Finance and Project Delivery professionals in central government responsible for planning and delivering outsourcing projects, the Playbook changes how government allocates risk between itself and its suppliers, "to ensure contracts are set up for success". New complex contracts will be tested with private sector pilots before a full roll-out and there will be a strong focus on establishing partnerships based on mutual trust and positive outcomes. The new guidelines will help those responsible to avoid the most common errors that occur on outsourcing projects.

The Playbook examines the procurement process from beginning to end, starting with early considerations of the pipeline and market management before guiding users through the approval process, addressing risk allocation, when a make-or-buy decision is needed, pilots, getting ready for and going to market, the selection process, evaluation and making the award, payment issues and implementing the contract.

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