# Standard Forms of Contracts and the intricacies of Force Majeure in Demystifying Unexpected Events in Construction Projects.

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## Abstract

*This study examined the effectiveness of standard forms of contracts in managing the consequences of unexpected events in construction projects from the UK perspective. In this study, unexpected events are restricted to those that affect the whole UK construction industry, such as COVID-19 or the war in Ukraine, which have affected supply chains. No obvious clauses and provisions exist in the standard forms of construction contracts such as JCT and to date, there has been no construction-related decision from the courts. Current contractual provisions were examined to assess if they are straightforward to implement when relief from the impact of unexpected events is required. This investigation concluded that the NEC 4 provisions appear straightforward to implement and likely to apply to various unexpected events. However, the JCT 2016 force majeure provisions have led to widespread confusion. Although the current opinion is that COVID-19 is likely to fall under force majeure due to the widespread impact this event had, for other events such as war in Ukraine or supply chain difficulties, the situation remains unclear.*

## INTRODUCTION

When COVID-19 arrived in the UK in early 2020 and lockdown was announced in March of that same year it is hard to imagine a more extraordinary set of circumstances that would have such an impact on everyday life. Although construction was allowed to continue, some sites closed at least temporarily whilst others operated with reduced productivity resulting in delayed completion dates. Since March 2020, unexpected events other than COVID-19 have impacted the construction industry, causing delays and additional project costs. In February 2022, when war broke out in Ukraine, the availability of certain materials was impacted, and increased energy prices resulted in a knock-on effect on those materials, for example, steel and bricks, that require large amounts of energy in their manufacture. (Duncan, 2022). Although Brexit was not an unexpected event, when the UK left the European Union in January 2020, it was pushed to the back of people's minds as covid began to take centre stage. The full impact was not felt immediately, as many of the restrictions did not come into full effect until a later date. Christou (2021) notes that more than 75,000 non-UK nationals left the construction industry between September 2019 and September 2020. The dry lining sector was particularly affected as many workers were from eastern Europe. This would

further exacerbate the shortage of skilled workers in construction, pushing up wages and delaying projects. Christou (2021) also notes a reduced supply of European materials, particularly structural timber and steel, wire, tiling and roof products. Further costs are being incurred in the form of unexpected customs duties, with additional paperwork at the border, which, combined with a reduced number of lorry drivers, has compounded the difficulties in obtaining materials on time (Morgan-Ford et al., 2021). As soon as lockdown restrictions were lifted, the construction industry was subsequently affected by all these other events, which compounded the effects of the pandemic to create further disruption, delays, materials shortages, and cost increases. The latest crisis is the Houthi attacks on ships coming through the Red Sea, causing many ships to re-route via the Cape of Good Hope, causing considerable delays and increasing shipping costs. Although most construction products used in the UK are manufactured in the UK or Europe, some, including electronics, steel and sanitaryware, are imported from China (Lowe, 2024); therefore, there is potential for supply chain disruption. The question asked in industry publications as COVID-19 began to spread worldwide and its arrival anticipated in the UK was how the delays and additional costs would be treated under the contract and which clauses, if any, allow the contractor to claim additional time and/ or costs. The force majeure clause, included within the JCT suite of contracts, was one of the clauses widely discussed in numerous law and building industry publications. It was acknowledged that force majeure has no meaning under English law and that JCT contracts do not define the events to which it applies. It was anticipated that a court decision would be required before any clarity on the issue could be achieved.

Another difficulty is that assigning which unexpected event is responsible for the delay can be difficult. For instance, Brexit, COVID-19 and the war in Ukraine have all been attributed to causing material shortages. Still, it is unclear how these issues can be identified as the cause in a particular instance (Robinson, 2022). In the absence of being able to obtain relief under the contract, there has been speculation that disputes will escalate, and contractors will face financial hardships with increased levels of insolvency. One survey carried out by Arcadis, the results of which are published in its 2021 Global Construction Disputes Report (Arcadis, 2021), states that 75% of survey respondents had experienced COVID-19-related claims or disputes. During these turbulent times, where each fresh crisis has a compounding effect on supply chains and costs, building contracts must contain clear and explicit provisions that deal with the impact of those events transparently and fairly. Without such provisions, parties are tied up in lengthy discussions, sometimes escalating into full-blown disputes. Laying all the costs associated with unexpected events on to the contractor, with construction projects typically running on tight profit margins anyway, risks putting the contractor under financial strain and increasing the likelihood of disputes and companies becoming insolvent. The construction industry has encountered the highest number of insolvencies over the last three years compared to other industries, with escalating material and labour costs being blamed (Smith, 2024). Fewer numbers of contractors mean a smaller pool of companies to tender for work,

which in turn pushes tender prices up. This is particularly true for specialist contractors where only a small number of contractors may be capable of performing such work.

JCT 2016 and NEC 4 contracts were reviewed because these are the most used standard forms in the UK. Contracts include terms that deal with unexpected events that affect individual projects, such as extreme weather, fires, floods, and strikes. However, the scope of this paper is restricted to unexpected events that affect construction on an industry-wide scale and for which there is no obvious provision in the contract. The aim of this paper is to establish if JCT 2016 and NEC4 contain provisions that deal with unexpected events adequately and transparently. It will examine if the conditions under which the relevant terms are invoked are easily understood by those relying on them. Case law will be reviewed to establish as far as possible, the type of event that English law considers to be force majeure. The findings will then be compared with the articles reviewed to examine if any recent unexpected events are covered by force majeure clauses, or the equivalent NEC4 Compensation Event.

## METHODS

This research combined case law analysis with discussion supported by the literature on force majeure. The literature selected for inclusion in the discussion examined both contemporaneous industry publications and peer-reviewed articles. The former gave an insight into how contractual provisions were perceived and implemented in the context of recent unexpected events, whilst the latter discussed and opined how contract provisions, particularly force majeure, should be implemented following events English law considers amount to force majeure. Google Scholar was used to search for articles which related to force majeure and those selected and referenced within this paper were those that discussed the definition of force majeure in the context of escaping contractual obligations particularly in respect of COVID-19.

The case law discussed concerned force majeure, and it was selected because the judgement provided guidance on what constitutes an event as amounting to force majeure under English law. Combining the findings from the articles reviewed with the case law analysis enabled the author to form a view on the correct application of force majeure. It was then possible to compare this with how contemporaneous industry publications advised on implementing force majeure provisions in standard form building contracts concerning recent unexpected events and to ascertain if this aligned with how the courts implement force majeure.

## STANDARD FORM BUILDING CONTRACTS

### The JCT 2016 Contract

The JCT 2016 suite of contracts deals with the award of time and money separately. Time is awarded when one of the Relevant Events listed in the contract has occurred, one being ‘force majeure’. The Relevant Matters are a list of events which entitle the contractor to loss and expense. Force majeure is not included in the list of Relevant Matters; therefore, there is no

award of costs arising from a force majeure event. The force majeure clause does not elaborate on the type of event that triggers it.

**The NEC4 Contract**

The NEC4 contract deals with the award of time and money together for those events listed under its Compensation Events clause. The sub-section of the Compensation Events Clause that deals with unexpected events is the equivalent of the JCT's force majeure clause and is worded as follows:

***Clause 60.1(19)*** *An event which*

- *stops the Contractor from completing the whole of the works or*
- *stops the Contractor completing the whole of the works by the date for planned completion shown on the Accepted programme*

*and which*

- *neither Party could prevent,*
- *an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it and*
- *is not one of the other compensation events stated in the contract.*

The contractual mechanism under the NEC appears straightforward in that it could apply to a wide range of unexpected events. The only possible questions are the degree to which the event was foreseeable and whether it had only *"a small chance of occurring."* The JCT wording lends itself to discussion and disagreement over what type of events amount to force majeure, given the complete absence of any wording that might have provided clarification.

**The importance of providing for unexpected events in building contracts**

The construction industry is particularly susceptible to numerous risks and uncertainties, and force majeure clauses allocate the risk when a force majeure event occurs, albeit poor drafting of these clauses is common, leading to conflict between the parties (Hansen,2020). Similarly, Thomas (2011) notes that force majeure clauses are a way of providing for events outside the control of the parties and states that construction projects, being of lasting duration, are particularly prone to the repercussions of such events, resulting in the inclusion of such a clause a common occurrence.

**How is force majeure defined under English law?**

Force Majeure is a civil law concept not recognised by English law. Therefore, the contract must contain a force majeure clause, as this cannot be implied into a contract. Ideally, the clause will contain a list of events that trigger its provisions. Hewitson (2020) considers the following to be essential elements of a force majeure claim:

- *"An event which will amount to a force majeure;*
- *A causal link between the force majeure event and non-performance of the contract;*
- *A requirement to mitigate the effect of the force majeure; and*
- *A requirement to notify the other party of the force majeure event."*

It is generally accepted that the event must have been beyond the control of the party who is relying on the force majeure clause, and that party must not have been the cause of that event or contributed to it in any way. Force majeure must be defined in the contract by listing the events that trigger the clause. Without doing so, a clause that merely refers to force majeure without any further definition may be unenforceable (Hewitson 2020). Hansen (2020) provides a 'Force Majeure decision model' to enable parties to a construction contract to ascertain if an event constitutes force majeure. Applying this decision model to a JCT contract would not be helpful as it would guide the user of the model to determine that, as the clause neither defines force majeure nor provides a list of force majeure events, then under common law, the only possible relief available may be the doctrine of frustration. Like Hewitson (2020), this model appears to be saying that if a force majeure clause does not contain a definition or list the type of events which trigger the clause, then that clause is rendered inoperable under common law regimes. Miller (2020) however, opines that it is unlikely that a court would render the JCT clause inoperable due to the undesirable implications this would have for the construction industry.

The difficulty of including such a list is that no list could cover every eventuality (Irvine, 2020). Adding a catch-all wording such as "any other events beyond the control of the parties" is open to interpretation. Suppose none of the events listed is like a pandemic. In that case, it will be harder to prove that an event such as COVID-19 falls within the force majeure provisions, however "*given the once -in-a-generation, multi-jurisdictional, highly disruptive nature of the pandemic, the courts may be sympathetic to as broad an interpretation as possible within the wording of the clause"* (Irvine 2020). Ambrose (2003) also warns of the risk attached to "catch-all" wording at the end of a list of events such as "any other causes beyond the control of the parties" as this may be caught by the ejusdem generis rule whereby the wording is interpreted in the context of the events listed and limited to the same type of event. Neudorf et al. (2014) note the British Court's resistance to applying force majeure other than in "truly exceptional circumstances", such circumstances being extremely rare, plus the requirement to evidence that action was taken to mitigate foreseeable risk. Irvine (2020) opines that when interpreting a force majeure clause, the courts will consider the following:

- The words will be given their "*natural and ordinary meaning*" and interpreted according to the parties' words.
- The meaning of the clause will be interpreted with regard to the whole of the contract.
- Where a force majeure clause includes a list of events to which it applies, all events not specifically listed are excluded.

The courts will also refer to the parties' intention when the contract was made. Under English law, the event need not be unforeseeable, as would be the case under French law (Xu Lindsey, 2020).

**Force Majeure and the JCT Contract**

Ambrose (2003) opines that force majeure is "*a difficult area of law"* and where the clause does not specify the type of event that triggers it, this leads to uncertainty. When an event impacts the party's ability to perform, the JCT states that for force majeure to apply, there must have been a delay to progress, and the Contractor must notify the Employer of the event and its likely effect upon the completion date. In these circumstances, the JCT provides for an extension of time, and in the event of suspension exceeding a certain length of time stated in the contract, either party can terminate the contract. There are no reported cases as to the meaning of Force Majeure under a JCT contract, nor any requirement for performance to be impossible, prevented or hindered, as the force majeure clause is triggered when the progress of the Works is delayed, which in turn, causes a delay to the Completion Date (Miller 2020). Miller stated that "*on balance, it would appear that the current COVID-19 outbreak would give rise to an extension of time under the JCT D&B 2016 and NEC4, but there is still no legally binding authority as to whether this is the position."* Pinsent Masons (2020) states, "*Given the almost unprecedented nature of the COVID-19 outbreak and the actions of governments around the world in response, it is likely that COVID-19 would constitute a force majeure event under many force majeure clauses".* Others have a more cautious approach, as to what the courts may decide. Referring to both NEC4 and JCT provisions, Robinson (2022) opines that neither is a "*neat fit*" and "*under existing contracts, the contractor will need to work hard to demonstrate that its circumstances meet the criteria to afford relief."* It appears that, regarding COVID-19, the consensus is the courts would likely find that this is force majeure. Conversely, no conclusions are reached regarding other recent unexpected events.

**Case Law relating to force majeure.**

To establish what English law considers a force majeure event, it is necessary to examine how the courts have previously treated such events. One of the earliest cases that debated what events force majeure could relate to was that of **Matsoukis v Priestman [1915][1].** This case involved the purchase of a steamship, which was delivered late due to several intervening events, including a coal strike and a breakdown of machinery due to an accident. Mr Justice Bailhache held that the coal strike, whilst not a direct cause of delay, was the cause of the "*general dislocation of the defendant's business and the business of the manufacturers of steel plates, etc*." thus delaying materials that were required, for shipbuilding. The judgement confirmed that force majeure applied in those circumstances because of the coal strike and the accident-causing machinery breakdown. The judgement in the case of **Lebeaupin v**

[1] [1915] 1K.B.681.

**Richard Crispin and Company [1920]**[2] confirmed that "*a man cannot rely on his own act, negligence, or omission, or default, as "force majeure" ".* The case concerned two contracts under which cases of tinned salmon were to be sold however the seller failed to deliver them. It was held that there had been no disrupting event that intervened to cause the non-performance, which in this case was blamed on the canner's error of judgement.

In the case of **Channel Island Ferries v. Sealink UK Limited [1987][3],** Lord Justice Parker laid down the following prerequisites to demonstrate force majeure:

> *"1. That it is for the party relying on a Force Majeure clause to bring himself squarely within that clause;*
>
> *2. that in most cases that can only be done by showing either legal or physical impossibility;*
>
> *3. A party must not only bring himself within the clause but must show that he has taken all reasonable steps to avoid its operation or mitigate its results."*

In this case, Sealink were to provide certain vessels in connection with its merged operations with Channel Island Ferries under the contract as the contract resulted in significant redundancies for Sealink, on learning of the contract the day before it took effect, a strike ensued resulting in the occupation of the named vessels. Sealink eventually agreed with the worker's unions. However, that agreement prevented the performance of its contractual obligations with Channel Island Ferries. Lord Justice Gibson held that Sealink's inability to perform its obligations was not due to circumstances outside its control, and neither did it demonstrate evidence of having taken any mitigating action that might have avoided or mitigated the effects of the strike.

The case of **Brauer & Co (Great Britain) v. James Clark (Brush Materials) Ltd [1952)][4]** addresses the question of whether force majeure applies in instances where the cost of supplying goods had increased. The contract concerned the shipping of goods from Brazil. However, an export licence could only be obtained if the price of those goods was greater than the price stated in the contract. The sellers failed to ship the goods and sought protection under the force majeure clause. It was held that force majeure did not apply in these circumstances as there had been "*no prohibition, no embargo, no physical or legal prevention";* the sellers had merely entered what turned out to be an unprofitable contract.

There was discussion over the degree of price increase, and it was acknowledged that had the price of the goods increased by a hundred times the contract price, the force majeure clause may have protected the sellers as neither party contemplated that price increase. Applying this reasoning to recent unexpected events, even if costs had escalated prohibitively and the courts declared the event to be force majeure, no relief would be provided under the JCT as

[2] [1920] 2K.B. 714
[3] [1987] WL 622867
[4] [1952] 2 All ER 497

there has to have been a delay for the clause to be operative. The only relief provided is an extension of time.

## FINDINGS

A well-drafted contract should be clear and concise and will assist the parties in establishing the rights and obligations of each when an unexpected event occurs. The NEC 4 contract includes within its list of Compensation Events the prevention clause which can be easily understood and invoked to award the contractor time and costs when an unexpected event occurs. The only possible source of disagreement relates to the foreseeability of the event, as the clause is only operable when the unexpected event has only "a small chance of occurring". In the context of COVID-19, this raises the question of at what point the consequences of covid foreseeable. Some think that for any contracts entered after December 2019, the impact of COVID-19 was foreseeable, and therefore, this would render the NEC4 prevention clause inoperable. That said, the NEC4 provisions appear relatively straightforward to understand and implement in response to an unexpected event compared with JCT. The force majeure clause in the JCT suite of contracts has been widely debated since the pandemic's start, with no conclusive opinion reached. The clause does not conform with the requirements of a well-written force majeure clause, which, as discussed above, should contain a list of the events to which it relates, in the absence of which there is a risk it could be void for uncertainty.

Notwithstanding the uncertainty surrounding the JCT clause, the consensus appears that due to the severity of the impact of COVID-19, the courts would probably consider it to amount to force majeure. However, the situation is that the confusion surrounding the wording has taken up significant time debating the issue, evidenced not just by the volume of articles on the topic but doubtless the amount of time taken up discussing the issue by those involved in construction projects that have been affected by unexpected events. The increase in disputes evidences this point. There is also the issue of other recent unexpected events, such as the war in Ukraine and the general difficulties with supply chains, which appear to be the culmination of several unexpected events; the question is, could these events amount to force majeure? Difficulties in proving that the delay was due to one event could leave the contractor with no prospect of escaping its obligations. To date, the courts have not provided guidance as to how recent unexpected events will be dealt with and how force majeure provisions in JCT contracts will be interpreted. Reviewing historical case law that deals with the issue of force majeure does little to shed any light on the situation. For instance, it could be argued that the "general dislocation of business" that resulted in the delay in obtaining materials in **Matsoukis**[5] is similar to that experienced during the pandemic when supply chains were affected. However, both **Channel Island** [6] and **Brauer**[7] prescribe that the

[5] Ibid.
[6] Ibid.
[7] Ibid.

causative event must render the performance of the contract legally and physically impossible. It is hard to justify that this is the case with COVID-19. Still, suppose it could be shown that the inability to obtain a crucial item of equipment or material that could only be obtained from one source was due to one of the recent unexpected events discussed above. In that case, there may be an argument that force majeure applies. **Brauer**[8] addressed the issue of increased costs and confirmed that only a degree of cost increase that is prohibitive and outside the contemplation of the parties could amount to force majeure. It is difficult to see that this would apply because of any recent unexpected events as, although construction projects have likely incurred additional costs, it is unlikely that these are at an amount that would be considered prohibitive. The judgement in **Lebeaupin**[9] noted the increasing use of force majeure in English contracts however dissatisfaction was expressed regarding the absence of a definition or any regard as to how the wording works alongside the remainder of the contract. Over a hundred years later, the same issue continues to cause debate. The case law examined in this paper, whilst providing no definitive answers, tends to indicate that to amount to force majeure, the performance of the contract must be physically or legally impossible, or there must have been a prohibitive increase in costs that was completely outside the contemplation of the parties. The decision in **Matsoukis**[10] does appear to be a more sympathetic interpretation. The JCT suite of contracts includes a force majeure clause within its list of Relevant Events that entitle the contractor to an extension of time. Therefore, the only thing we know about the type of event that the JCT considers to be force majeure is that it must have caused delay. On that basis, the JCT's interpretation of force majeure does not appear to align with how the courts interpret it.

**Table 1: Summary of Findings**

| Standard Forms of Contract | Clauses related to force majeure/ unexpected events |
|---|---|
| NEC 4 | Clearly written, easily understood. |
| | For the clause to be triggered, performance must have been delayed. |
| | Wording is broad so could apply to a range of unexpected events. |
| | Requirement that the event be unforeseeable could potentially lead to conflict. |
| | Fails to include a list of events to which it applies, therefore the events it might apply to have been widely debated. |
| | The event must be unavoidable, uncontrollable and beyond a party's responsibility. |
| | There must be a link between the occurrence of the event and the party's inability to perform (although it does not necessarily have to be the sole cause of non-performance). |

[8] Ibid.
[9] Ibid.
[10] Ibid.

| | |
|---|---|
| **JCT 2016** | Force majeure does not require the event to be unforeseeable. |
| | The JCT contract only requires that for force majeure to be invoked, the contract completion date must have been delayed. It does not state a minimum length of delay and it does not require that performance has become impossible. |
| | Case law regarding force majeure appears contradictory at times but tends to point towards events that are "legally and physically impossible". Using this definition, recent unexpected events may not amount to force majeure. |
| | The inclusion of force majeure in the JCT as a Relevant Event that gives rise to an entitlement to additional time does not appear to align with the court's definition of "legally and physical impossibility". |
| | Although courts usually interpret the clause narrowly, many consider it likely that COVID-19 would be a force majeure event. With regards to other recent unexpected events such as war in Ukraine that have caused supply chain disruption, the likelihood of force majeure applying is unclear. |

## CONCLUSION

Building projects are complex processes involving numerous risks, and there is always the potential for delays and additional costs and the more these escalate, the more likely disputes are to occur. Standard form contracts contain provisions for certain unexpected events, such as extreme weather and any default by the employer. In those cases, the contract contains clauses that deal with those events and state explicitly what the contractor is entitled to recover. Some recent unexpected events have highlighted the lack of clear provisions related to those events not explicitly referred to in the contract, causing confusion, different interpretations of the contract and increasing the potential for disputes. The NEC 4 contract appears to include better provisions for unexpected events than JCT 2016, as the language is easily understood, and the use of undefined terms is avoided. The requirement that the event be unforeseeable could be problematic, however. The Compensation Event mechanism in NEC4 awards time and associated costs, providing complete recompense for the contractor. The JCT 2016 contract, on the other hand, includes wording with no proper definition, which has led to much discussion and disagreement regarding the events it may apply to. Its inclusion in the JCT as a Relevant Event but not a Relevant Matter entitles the contractor to

an award of time only, potentially exposing the contractor to financial hardship or an increasing likelihood of administration.

To address future unknown events, it is recommended that consideration is given to making inclusion in contracts for unexpected events, either by including a list of such events or by including broader wording, such as the NEC. Even if an event is foreseeable, it may not be possible to predict the impact of it and allow sufficient time and costs within the tender. Therefore, it may also be prudent to revise any requirement for the event to be unforeseeable.

It is recommended that knowledge relating to the effectiveness of building contracts in response to unexpected events could be advanced further by carrying out empirical research. This would investigate how unexpected events impact live building projects and how the delays and additional costs that occurred as a result were dealt with contractually. This type of research will reveal how those construction professionals involved with delivering construction projects interpret the relevant contractual clauses, highlighting the drawbacks and difficulties of current contractual wording and providing an indication on how this could be improved.

## CASES


Matsoukis v Priestman [1915] 1K.B.681.

Lebeaupin v Richard Crispin and Company [1920] 2K.B. 714

Channel Island Ferries v. Sealink UK Limited [1987] WL 622867

Brauer & Co (Great Britain) v. James Clark (Brush Materials) Ltd [1952) 2 All ER 497


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