This article is not intended to provide definitive answers to these two issues because until further legal authority is available it is unlikely that such a proposition is even remotely possible. However, it will hopefully stimulate some interesting discussion.

The New Engineering Contract has been around for some time now and is certainly being more widely used. It does somewhat surprise us that it has not enjoyed more excursions to court and this is perhaps explained by the reliance on adjudication (whether statutory or otherwise) as a first line of defence when disputes arise. One of the most intriguing features of NEC was the use of compensation events. In our experience this is an area that causes some difficulties. The purpose of this article is to explore the concept of disruption under the latest edition, NEC3 April 2013 edition. Before looking at the detail it is worth noting that the word disruption is not mentioned in the NEC but the concept of disruption has been around for a very long time. What does it mean? The dictionary definition of disturbance, commotion, interruption, interference or disorder doesn’t really help us very much at all. We might venture in the present context the definition of “disruption is the manifestation of events on the productivity of a project commonly leading to higher costs, than would have been incurred but for the disrupting event.”

If one were to write down the matters that commonly result in disruption we suspect that you would have a list broadly like the list of compensation events contained in NEC clause 60.1. It seems reasonable to conclude therefore, that disruption may arise from a compensation event as envisaged by NEC but the question remains, how should it to be dealt with?

**The differences between NEC 3 and traditional contracts**

The ICE form of contract (of course no longer supported by the Institution of Civil Engineers), the Infrastructure Conditions of Contract that mimic the old ICE contract, the International Federation of Consulting Engineers’ suite of contracts (on the international front) and building contracts such as the Joint Contracts Tribunal, deal with variations to the contract, extensions of time for completion and loss or expense separately. In NEC these are rolled together within section 6, compensation events.

The other major difference is that in terms of both delay and disruption these are usually considered post the event and can be the subject of a review after the works are complete. Conversely, the whole concept of NEC is to provide a forecast in respect of compensation events. Clause 65.2 provides that if “the assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong” it would seem to suggest that the contractor and the employer are stuck with the forecast and the effects of the compensation event. But is that really the case? We would venture to suggest that it was certainly the intention of the contract but has that intention been borne out? The other difference between traditional contracts and NEC is that each event being a compensation event is dealt with apparently in an encapsulated
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form. In the JCT idiom it is comparatively unusual for the delaying and disrupting effects of variations, for example, to be considered when evaluating that variation (schedule 2 quotations excepted). It is common and perfectly permissible methodology when dealing with the effects of multiple events (such as variations and other matters) to deal with them together in terms of a collective disrupting effect. That option is simply not available within the express provisions of NEC3.

Disruption and delay
We think it is important to distinguish between disruption and delay. A project may be very badly disrupted without the completion date being affected. It is possible, albeit unlikely, that delay can be present without disruption becoming a byproduct. Sometimes it is possible to accommodate disruption calculations by considering delays to discrete elements of the work, usually by reference to a programme. For example, if a non-critical activity is delayed and that activity or group of activities requires an expensive bit of equipment, such as a crane to be there, the disruption may simply be the length of time and the extra cost of having the crane on hire.

However, that does not begin to cover the ramifications of disruption. Sometimes disruption may take place and affect a task or a group of tasks, but quite commonly it can affect a broad range of tasks and, indeed, may in fact affect the whole of the works. It is this more insidious effect of disruption resulting in extra costs in parts of the works not immediately connected to the event that causes the difficulty. Normally this creeping form of disruption is considered once its effects are fully known and can be evaluated as a matter of fact as opposed to a matter of projection or estimation. Our experience suggests that establishing and calculating disruption, even post the event, is normally a very difficult affair.

The NEC3 compensation event procedure from a practical standpoint
The procedure broadly breaks into three phases; notification, assessment and agreement or disagreement. Figure 1 is a simplified version of the process through which a compensation event will go during the course of its life. As compensation events are the only way in which the price is changed this becomes the sole vehicle for the carriage of disruption costs and is therefore crucial to this consideration. From this the only inward route for disruption is in the contractor’s quotation and that in turn requires a request from the project manager.

Notification
The notification mechanism has been frequently debated. It is beyond the scope of this article to express a view as to whether lack of a notification is fatal. However, it would be an imprudent contractor who assumed otherwise. Why do we say that? We suggest that although not an NEC based authority, you read the Education 4 Ayrshire v South Ayrshire Council (2009) CSOH 146 case. In this case the lack of a notice expressly required under the contract proved fatal.

It is worth noting, that the notification of a compensation event should either come from the project manager (or the employer1) or from the contractor (or the consultant2) depending on the circumstances. Our experience suggests that difficulties come from an instruction that should in the contractor’s opinion have been notified by the project manager and is not. Now let’s look at an authority (for once one relating to NEC) that gives assistance on this issue.

In Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd (2014) NICA 27 this point arose. This judgment from the Northern Ireland Court of Appeal illustrates an exception to the
rule that notice must be given within a certain time frame in order to claim a change in the prices arising out of a compensation event under the Professional Services Contract. Here, the NI Housing Executive issued an instruction changing the scope of works but did not notify the consultant of a compensation event. No notice was given by the consultant within the eight weeks required by the contract. However, as the NI Housing Executive should have given notice of a compensation event, but failed to do so, the consultant’s claim for a change in the prices was held not to be time barred. It matters not where, as was apparently the case here, the employer is under a mistaken belief that it was not giving an instruction changing the scope — notification of the occurrence of a compensation event still ought to have been given.

When one thinks about it, that has to be correct. The employer had the responsibility to notify and did not do so. The consultant has no ability to change its brief. In the main contract situation the contractor cannot alter the works Information. The notice can only come from the employer in the context of this case or the project manager in the Engineering and Construction Contract (Black Book) context.

Assessment
In the context of disruption, our experience suggests that three fundamental issues make the matter of disruption extremely difficult in assessing compensation events. These are:

1. Can the disruptive effect of multiple compensation events be considered separately to the individual compensation events?
2. Is disruption calculated by forecasting or is it calculated with hindsight?
3. If the disruption is forecast can the actual disruption displace that forecast, even in adjudication after the disruption (or lack of it) has occurred?

Taking these in order, we see no opportunity to consider disruption on a global or semi global basis in the NEC. We are of the view that any disruption must be attached to a single compensation event or spread over several causative events but allocated to each one. It has been suggested that a compensation event for disruption alone could be notified. Although this point has never been tested on any reported basis, the provisions of the final bullet point of clause 61.4 come into play. This provides for the project manager rejecting a notification if an event notified by the contractor “is not one of the compensation events stated in this contract.” Disruption is not a stated compensation event. It also seems to us that there are a number of practical difficulties in that even if the contractor’s notification could be squeezed into one of the stated compensation events, its disruptive effect would still have to be estimated. The start date for that assessment is when notification was given. In other words, a separate notification for disruption would serve no useful purpose and would be as limiting as including the disruption with the event that gave rise to it. That rather begs the question of what happens when several compensation events that are listed collectively have an effect that cannot be separated. Again, based solely on our experience, contractors normally get round this by including the entire disruption of all possible compensation events and wait to see which one is accepted by the project manager. Needless to say, we do not condone that procedure but it may become commercial reality in certain circumstances.

Turning now to the more difficult question, whether or not disruption should be assessed retrospectively or prospectively, we get some assistance from the contract. Clause 63.1 tells us that the evaluation for the changes in price (and that must include disruption) are the actual defined cost for work already done or the forecast to define cost for the work not yet done with the fee being
added to either one of these. Therefore at a simplistic level, if the work has not yet been done it is forecast. If the work has been done it is simply a collection of all of the costs with these costs presumably able to include disruption. However that dividing line between prospective and retrospective assessment is somewhat clouded by the same clause 63.1. In most cases the date that divides these is a notification of the compensation event by the contractor. However, if the compensation event arises because the project manager gave an instruction, issued a certificate, changed an earlier decision or corrected an assumption, then that communication is the dividing point. This can be problematic. What happens if the project manager does not give an instruction or at least does not notify a matter as being an instruction constituting a compensation event? That is a question to which there is no certain answer based on any relevant authority of which we are aware. We have addressed this issue above to some extent.

Accordingly the evaluation of disruption can either be prospective or retrospective or a bit of both depending on the circumstances. Why that is important we will consider below.

Our experience suggests that difficulties come from an instruction that should in the contractor’s opinion have been notified by the project manager and is not.

This is the stage where things can get a bit tricky. An important concept to be reminded of is that once a quotation has been accepted by the project manager (or it has carried out its own assessment), except for the backstop of adjudication and perhaps onwards to the tribunal, the forecast is not revised. Clause 65.2 provides that: “The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong.” Let’s look at this in a bit more detail.

The assessment mechanism is described first of all in clause 63.1. This provides for a two barrelled approach being “the actual defined costs for the work already done” and “the forecast defined costs of work not yet done.” To each one of these is added the fee. There is nothing to stop both these provisions being used in terms of the assessment of a single compensation event where the contractor notifies. In many contexts but particularly in the present context of disruption, the demarcation line beyond the actual defined cost and the forecast defined cost can become important. By way of a reminder later in clause 63.1 we find the following “...the date which divides the work already done and the work not yet done is the date of that communication.” That communication is the giving of a project manager’s instruction or a supervisor’s instruction, the issuing of a certificate changing an earlier decision or the correction of an earlier assumption. If that doesn’t apply, clause 63.1 then goes on to say “in all other cases, the date is the date of the notification of the compensation event.” Let’s look at both of these in a little more detail.

Figure 2a shows the situation which transpires where the project manager gives an instruction or one of the other listed events occurs. For convenience we have referred to this as Case 1. We cannot envisage any situation whereby the contractor would commence work before the instruction has been given but it is conceivable that work could be carried out in relation to the changing of an earlier decision or correcting an assumption. However, it looks as if the more general situation usually prevails and all of the defined costs would be calculated on a forecast basis. Given this situation it seems quite permissible to include disruption, so far as that is possible, within the forecast. Later on we will look at what happens if this forecast is not accepted but for present purposes in Case 1 it is most likely that the forecast defined cost will apply.
Moving now to what we have termed Case 2, where a different situation arises. An event occurs and a contractor then has eight weeks within which to give notice. It is entirely possible that all or some of the work at least has been carried out before the notification has been given. In our experience, contractors are reluctant to give notice if the event appears trivial and the relationship between the project management and the contractor is relatively good that they will wait to see what the effect is going to be before making a notification. Equally it is possible that the work could continue for some significant time after the notification has been given. The dividing point is shown in Figure 2b between the yellow and green bars.

So where does disruption fit into these two potential cases? Where the actual defined costs are used as the basis for the contractor’s quotation, it is going to have to deal with the costs of the activities immediately affected by the event but it will also have to make consideration of the effect of that event on the rest of the project up until the notification. That is substantially going to be a matter of establishing facts.

However, if by the time of notification all the work has not been carried out, the contractor is going to have to invoke the second bullet point of clause 63.1 to carry out a forecast of the defined cost for the work not yet done. That applies even though the disruption to this work may be somewhat remote from the event.

Agreement or not?
This is all well and good where the contractor gives a quotation that is acceptable or revises the quotation until it is acceptable. We now move from the theoretical to the practical. Disruption is by its nature very difficult to assess, even after the event. Attempting to assess disruption predictively is even more difficult. How likely is the project manager to accept a quotation on the basis that significant parts of the remaining work will be disrupted on account of an instruction it has given or an event that has occurred? For most project managers that involves a little too much crystal ball gazing. In the normal course of events on a contract other than NEC3 it is universal practice that disruption is dealt with post the event. In NEC3 it seems there is limited possibility of doing this and would only occur in Case 2 in the matter of actual defined costs prior to the notification being given. Hindsight simply doesn’t enter into the equation nor is the application of hindsight available in the form of a final review.

Although the majority of compensation events are dealt with contemporaneously, some proceed to adjudication. How does the adjudicator deal with disruption, especially when appointed after all work has been carried out? To the best of the authors’ knowledge this difficulty has not yet been addressed in any wholly relevant legal authorities, therefore what follows is somewhat conjectural.

As we see it, there are two possible ways in which an adjudicator looking at disruption post the event can consider matters. The adjudicator now has the advantage over the contractor and the project manager in that they know or at least it can be demonstrated to them what disruption actually took place. Let us put to one side the inherent difficulties of proving disruption and rather concentrate on the fact verses prediction aspect of disruption. Can the adjudicator simply ignore the facts in arriving at their decision? The adjudicator is bound by the provisions of clause 65.2. In other words, the forecast cannot be revised if later recorded information is proved to be wrong. Let us say that the contractor has predicted that a particular group of activities on the project will be subject to 15% disruption and, as it turns out post the event, it cannot prove that any disruption took place. Is it correct for the adjudicator therefore to correct the forecast on the basis of later recorded
information? The alternative is for the adjudicator to put themselves back in the position of the project manager and the contractor when the quotation was given. In summary, were the predictions of disruption reasonable and appropriate under all the circumstances pertaining at the time, regardless of what happened later?

We do not think that it is good enough for the adjudicator to simply conclude that what was estimated and projected at the time was unreasonable simply because it hasn’t manifested itself. The contractor may have worked extremely hard to prevent the disruption taking place in the knowledge that at that stage the project manager was not allowing any financial recompense for that disruption. We have seen an authority cited in support of the adjudicator considering the facts that were only available after the event occurred. The case in question was the Golden Victory House of Lords maritime case (named after the ship which was the subject of the dispute). The usual approach is to determine damages when the breach occurs. In this case the charterer (or hirer of the ship for those unfamiliar with such agreements) breached a seven-year charter agreement three years into the charter. This left the charterer open to damages for four years. However circumstances arose whereby it could have legitimately terminated earlier due to a war clause. As events would have it, the charterer contended successfully that it was only liable for the shorter period of damages due to the outbreak of the second Gulf War in Iraq in 2003. The quoted passage from one of the judges was: “Why with the lights on should you shut your eyes and grope in the dark?” Just bear in mind this charter-party case did not contain NEC3 clause 65.2

Doubtless the pros and cons of the two approaches could be debated long and hard. The authors do not offer a view as to which is preferable where we are mindful of the express provisions of clause 65.2 and the reluctance of the courts to rewrite contracts.

How then to deal with disruption in NEC3?

The project manager and the contractor may have to deal with disruption when either providing a quotation or considering a quotation. It seems to the authors that this can fall into either or both of the first two bullet points of clause 63.1, i.e. the actual defined cost or the forecast defined cost. The circumstances will dictate which of these applies or indeed if both can apply. The mechanics of how the disruption is forecast is beyond the scope of this paper. However some of the classic methods such as retrospectively comparing productivity in a disrupted period against a non-disrupted period are simply not open for consideration unless an adjudicator can carry out some form of retrospective assessment. It is difficult to imagine project managers readily accepting predictive disruption.

We are not for a moment suggesting that parties should automatically adjudicate on matters of disruption but it seems to us that disruption under NEC3 could be a fertile breeding ground for disputes. Until such times as we have some positive authority as to whether or not retrospective assessment of compensation events under NEC3 by adjudicators, taking into account the actual facts, is appropriate, there must remain some conjecture over this. It is therefore difficult to draw any conclusion other than that currently the likely success of disruption claims under NEC3 is not high.

That seems to be the case even where an isolated instruction or event could give rise to disruption. The situation is arguably more complex where several instructions or compensation events generally could give rise to disruption on a collective basis. There simply does not seem to be any room in NEC to promote such claims.
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1 Under the Professional Services Contract
2 Ibid
3 Ian Yule, ‘The benefit of hindsight’, *Building*, 09 03 12
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Figure 1: A simplified version of the process through which a compensation event will go during the course of its life.
1 Under the Professional Services Contract
2 Ibid
3 Ian Yule, ‘The benefit of hindsight’, Building, 09 03 12

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