

InFocus

Issue No. 7 - Spring 2022

Insights into the
construction industry
with **Pyments Periodical**

pyments
"a clear resolution"

CONFLICT
IN UKRAINE –
CONFLICT ON
YOUR PROJECT?

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InFocus

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This 7th Edition of 'InFocus' continues with our team of experts preparing articles which provide their own unique insights into the construction industry. InFocus provides thought-provoking articles which both inform, and encourage best practice, on a wide range of specialist construction issues.

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What a resilient lot we are!

Introduction by Gordon Connell, Managing Director of Pyments

I have to be honest... it's a very nice feeling to be sharing my thoughts with you, for the first time from the MD's chair.

In a world challenged by a pandemic, war in Europe, and a raft of economic and other challenges (which at times appear unrelenting), you would be forgiven for thinking this world of construction that we know and love, may have buckled and floundered a great deal more than it has. What a resilient lot we are!

I have to say though, as a firm, and as a group of professionals passionate about the work we do, the relationships we continue to enjoy with the men and women of our client organisations are among the very finest I've experienced in all my years in construction. Many of the best and longest standing relationships we've formed have stemmed from projects with the type of challenges that, at first, have appeared insurmountable to the teams facing them, but which, through depth of character and, it has to be said, a determined and informed approach, have brought success where none was expected. So, am I surprised by the resilience I've seen in the last two years? Not a bit!



As an industry, we're blessed with some of the best people in the land and it would be wrong of me not to acknowledge, in this first article, the incredible talent Pyments bring to the table in that respect. Equality and diversity have always been at the backbone of who we are as a firm, so it follows that each of our recently appointed Directors (Alan Powell, Jess Whiston and Stuart Neville) have been promoted to these roles on merit; simply put, they're amongst the best in the business, and they in turn are supported by an exceptional and diverse team of multi-discipline professionals, representing the very best of the Pyments brand.

Those of you who know us well enough, will appreciate the appetite we have to succeed, and for our clients to share in and enjoy what is an enviable track record in delivering consistently high levels of success (including in those seemingly insurmountable challenges I mentioned!). You'll also know we bring a 'progressive' approach in how we seek to protect your interests; i.e., whilst achieving a successful outcome on any one project will always be welcome, delivering strategies for success 'business-wide' will always be more attractive.

For a very long time, I've counselled our clients to reach out to us whenever they consider an impartial sounding-board will assist in their contemplation of a particular matter, either project specific or more generally business-wide; that many of our clients have and continue to do so, is an encouragement in itself.

So, am I excited for the future of all things Pyments? You bet! With an exceptional client-base, working with some of the best in our industry, and facing every challenge 'head-on'... what's not to love!

And, dear reader, if I haven't already made the offer to you directly, and if you'd like to know more about Pyments, or how we can support you in a particular matter, then please do give me a call... it doesn't cost either of us anything for a five-minute conversation... but it can and usually does make a difference... and, I'm always flexible on the "five" minute thing!

Gordon Connell

Managing Director

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CONFLICT IN UKRAINE – CONFLICT ON YOUR PROJECT?

By Adrian Purvey, Senior Consultant

The invasion of Ukraine by Russia, or as Mr Putin would have it the 'special military operation', is of course a humanitarian disaster unfolding before our eyes. The pain and suffering being experienced by those caught up in the fighting is immense and heart-wrenching.

Whilst the human anguish being endured, and the physical destruction of buildings and infrastructure caused by the conflict, is of course not being directly experienced by us in this country, the impact of the crisis has the potential to cause difficulties on projects here due to price increases of materials and equipment needed for the works, and possibly supply disruption causing delays to the regular progress of works on site.

The problems potentially arising will exacerbate an already turbulent market with issues caused by Brexit, the Covid-19 pandemic, inflation and

surging energy and fuel costs, to name but a few!

The Construction Leadership Council has recently published its first (in an expected series) guidance note on the approach the CLC considers the industry responses should look like. When the guidance was published (week commencing 28 March 2022), it is fair to say the timescales for, and extent of, disruption associated with the invasion remained effectively unknown, as are the potential for further effects. However the guidance note can be found within the "News" icon at:

www.constructionleadershipcouncil.co.uk

So, if your project is affected by matters directly attributable to the conflict in Ukraine, what is the position, and what can you do to mitigate the impact of those matters?

To use a typical politician's answer, it depends!

The CLC guidance note advocates a collaborative response to the various challenges presented by the conflict, and



this collaboration, the CLC suggests, should extend throughout the supply chain, i.e. not just between Employers and Main Contractors, but as importantly, if not more so, by Main Contractors to their sub-contractors and

“play by the rules and expect others to as well”

suppliers. To quote the guidance “If there ever was a time when a chain needed to be stronger than its weakest link, it is when most of the cost risk is being held by lower tier sub-contractors and suppliers. This time is now”.

Whilst advocating the collaborative approach, the CLC guide also says parties should “play by the rules and expect others to as well”, and in its checklists for various members to the construction process, it consistently refers to assessment of the contractual position.

The possible impact on existing projects will vary and the factual position for any particular project will need to be considered very carefully. Consideration and thorough understanding of the contractual position is therefore essential.

Whilst of course there are a plethora of forms of contract in use for construction projects currently on site or about to go to site, with, no doubt, extensive schedules of amendments to those forms of contract, and that’s not to mention bespoke forms of contract, it is therefore impractical to suggest there is any “one size fits all” position, hence the comment above of careful and thorough consideration of the specific terms governing your project.

However, looking at the standard JCT and NEC forms of contract, it would seem the position in respect of extension of time and cost recovery for a Contractor can be summarised as follows.

With regard to JCT, the grounds for extension of time may rest upon clause 2.26.14 (Force Majeure), and clause 2.26.12 (Change in Law).

Force Majeure is undefined in JCT, which is not particularly helpful, but broadly it could be said it refers to an event which is not reasonably contemplated by the parties when executing the contract, and is reasonably beyond the control of the party seeking to rely upon the provision. It is therefore likely (but not entirely certain) a war scenario can be described as an event of this nature. However, a note of caution must be sounded. Whether the Ukrainian conflict and/or any resulting unavailability of particular goods or materials constitute a Force Majeure event will need careful assessment of the particular



facts in each case. A high level of proof will be required to demonstrate the events are the effective cause of non-performance. Simply because contract performance has become more expensive or onerous, and material procurement become more challenging to source or prices have increased, is unlikely on its own to be sufficient. Mitigation will also be highly relevant in this context, as will the timing of the event and any other contributing delay matters.

A Change in Law in the JCT is *“the exercise after the Base Date by the United Kingdom Government... of any statutory power... which directly affects the execution of the Works”*. This could be cited in relation to sanctions instigated by the UK Government against Russia. Similar to the comments above in respect of Force majeure, the devil will be in the detail specific to the facts at play in each case.

Neither of the above events are Relevant Matters under JCT, and therefore do not entitle

a Contractor to additional loss and expense. However, if the change in law necessitates an amendment to the Employer's Requirements under a design and build form, then clause 5.1 may apply and the amendment being treated as a “Change” would allow cost recovery for the Contractor. Furthermore, pursuant to clause 2.2.1, if the Contractor is not able to procure the materials and goods of the kinds and standards described in the Employer's Requirements, then again this could be grounds for a “Change”.

If clauses 4.2, 4.12 and 4.13 apply, then the JCT Fluctuation Provisions may allow for recovery of price increases, the extent of which is depending upon the form of fluctuation provision applying.

Turning to NEC, additional time and money are assessed together to the extent they are caused by a qualifying “Compensation Event”, the grounds for which include:

- clause 60.1(19) (an event *“neither party could prevent”* and which *“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”*);



“If there ever was a time when a chain needed to be stronger than its weakest link, it is when most of the cost risk is being held by lower tier sub-contractors and suppliers. This time is now”

- Option 2 (Changes in Law);
- clause 60.1(1) (if the Scope requirements are impossible to perform, the PM must give instructions);

As is evident from the above, the path through the implications of the conflict from a causal link and contractual viewpoint is difficult. If you need assistance, give Pyments a call.

Also consideration could be given to the application of clause 10.2 (*obligation to “act in a spirit of mutual trust and co-operation”*), and if applicable Option X1 (Price Adjustment for Inflation).

In extreme circumstances, the above events could even lead to a situation where the obligations of the contract are frustrated and/or cannot be performed at all, and in such extreme situation rights to suspension and/or termination may occur. Again the contractual position will need careful and thorough consideration.



Adrian Purvey
Senior Consultant

Adrian offers a wealth of experience in his role as Senior Consultant within the Pyments team, principally from 30+ years within the Main Contracting arena, where he rose through the ranks from Trainee Quantity Surveyor to Commercial Director of a Tier 1 contractor.

Adrian provides specialist advice across a range of commercial and contractual matters, including in developing strategies for dispute prevention and resolution and in mediation. He is experienced in acting as party advocate in adjudication proceedings.

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“Never Put Off Till Tomorrow What You Can Do Today”

By Chris Kevis, Senior Consultant at Pyments

I've been doing a bit of research. The earliest reference I can find to the above proverb is a letter written by the Late Right Honourable Philip Dormer Stanhope, Earl of Chesterfield, to his son, Philip Stanhope, Esq on 26th December 1749. He wrote:

“Know the true value of time; snatch, seize, and enjoy every moment of it. No idleness, no laziness, no procrastination: never put off till tomorrow what you can do today.”

Wise words indeed. But why do so many contractors fail to take notice of such wisdom? I'm talking of course, about contractors' routine failure to give timely notice. Specifically, failure to give timely notice of Loss and Expense (to use the terminology of the JCT conditions).

I can hear a collective 'yawn' – he's on his soapbox again!

Well yes, I am on my soapbox and I'm going to provide a few words of wisdom of my own.



What goes wrong?

As we all know, construction contracts are bedevilled by delay and disruption. In my experience contractors are reasonably alert to the requirement to give notice of delay to progress. However, the requirement to notify 'Loss and Expense' is often overlooked, or at best, addressed by a short sentence added as an afterthought to the end of a delay notice.

The practical result of this behaviour is that contractors struggle to recover additional costs and losses that have been incurred on a

project even when in principle, there is genuine entitlement for recovery. I will explain.

Contractors routinely tackle the recovery of Loss and Expense in a manner my wife would very eloquently describe as *"a*** backwards"* (apologies to those offended by bad language!). This is where the well-worn phrase *"cause and effect"* (by necessity) becomes *"effect and cause"*.

Consider the following (all too common) scenario;

Towards the tail-end of a project the contractor adds up all his costs and becomes aware of the full extent of the large overspend on a project (the *"effect"*). He then scratches his head at great length in an attempt to figure out exactly what gave rise to the overspend (the *"cause"*).

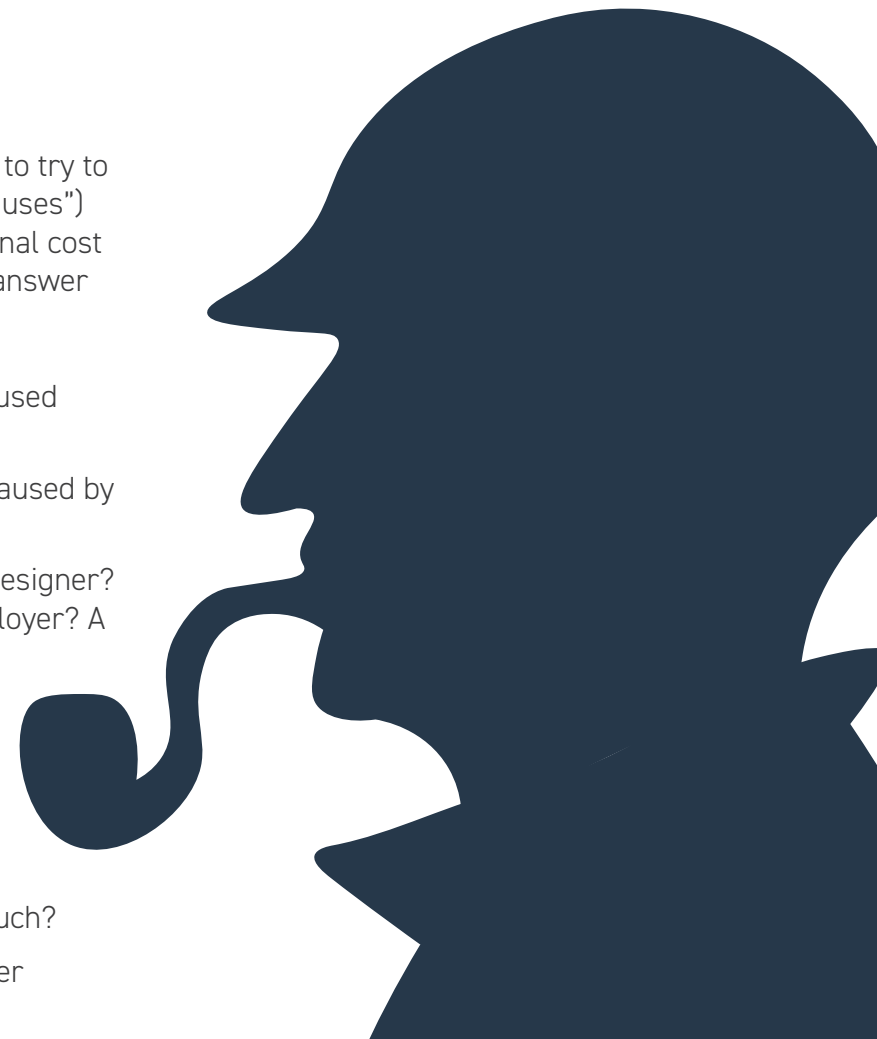
The problem with this approach is that it's an extremely difficult exercise to carry out retrospectively. The contractor is forced to cast

his mind back over the full contract period to try to remember which events happened (the *"causes"*) that might have forced him to incur additional cost (the *"effect"*). He then needs to attempt to answer the following questions:

- Which events of delay or disruption caused additional cost (loss and expense)?
- How much of the additional cost was caused by each individual delay event?
- Who caused each delay event? – The designer? A subcontractor? A supplier? The Employer? A combination of two or more?
- How did each delay event lead to the Contractor suffering loss? – Delay? Disruption? Both?
- Was some of the additional cost caused by events that were nothing to do with the Employer and if so, how much?
- Does evidence exist to support whatever conclusions are reached?

“... the Contractor should do what the contract conditions tell him to do!”

Hopefully you're beginning to see the difficulty. It's a tangled web of intrigue, the disentangling of which would test the powers of Sherlock Holmes.



Undeterred, the contractor will persuade himself, beyond all reasonable doubt, that the Employer is wholly responsible for disrupting the regular progress of the works and causing the contractor to incur the additional costs. He will prepare a claim for loss and expense complete with numerous heads of claim. For instance:

- Subcontractor claims.
- Deployment of additional numbers of staff.
- Deployment of additional non-productive labour.
- Additional and disrupted resources.
- Additional involvement of head office / overhead staff.

Where the Contractor prepares his claim some months or even years after suffering the loss, the task of attributing a specific additional cost (the “effect”) to a specific Employer-culpable disrupting event (the “cause”) is likely to be little more than an educated guess or a random re-allocation of costs.

If the claim can be settled by negotiation between Contractor and Employer, so much the better. However, where the Employer doesn't recognise his culpability, the claim can

quickly escalate into a formal dispute referred to a third party for determination (most commonly by an adjudicator in the first instance). Given the scenario described above, the adjudicator will be faced with deciding whether or not the evidence provided by the Contractor supports the claim being made.

Where the loss and expense claim has been compiled “a*** backwards”, the adjudicator will often decide that many of the heads of claim are not sufficiently supported by the evidence. The reason he will give for reaching this conclusion is entirely predictable and is likely to read along the following lines:

I am not persuaded the evidence adduced for this head of claim demonstrates the loss flowed directly from the Relevant Matter upon which the Contractor relies.

But why do adjudicators so often reach this conclusion? Reading between the lines of many adjudicators' decisions, what they are really saying is:

I would happily have awarded you some money if only you had properly identified, notified and recorded events at the time it happened, and had thereafter kept a record of the costs incurred..... but you did not.





In other words, had the Contractor identified and notified the “*cause*” when it happened and recorded the “*effect*” when it was felt, the adjudicator would have had no problem at all in making an award in the Contractor’s favour.

So, what exactly should the Contractor do?

Put simply; the Contractor should do what the contract conditions tell him to do! Let’s take a look at JCT D&B 2016 (other standard forms of building contract are available).

Clause 4.20.1 of the JCT conditions provides:

“The Contractor shall notify the Employer as soon as the likely effect of a Relevant Matter on regular progress.....becomes (or should have become) reasonably apparent to him.

I need to emphasise the following words.....

“shall”:

This means the Contractor must notify - the Employer needs to know the regular progress of the works has been affected.

“the requirement to notify ‘Loss and Expense’ is often overlooked, or at best, addressed by a short sentence added as an afterthought to the end of a delay notice.”

“as soon as”:

Don’t delay - “*never put off till tomorrow what you can do today*”.

Clause 4.20.2 provides:

“That notification shall be accompanied or, as soon as reasonably practicable, followed by the Contractor’s initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Employer to ascertain the loss and/or expense incurred.



Again, note these words.....

“shall”:

This means the Contractor must do it - the Employer needs to know how much loss and expense has been incurred.

“as soon as”:

Don't delay - *“never put off till tomorrow what you can do today”*.

Do what the conditions of contract tell you to do (and what you agreed to do when you signed the Contract). In short; **“never put off till tomorrow what you can do today.”**

And if you act immediately, there will be very obvious benefits:

- It will be easy to identify the additional resources deployed. You will be able to see them / talk to them / shake hands with them – so will the Employer!
- It will be easy to keep accurate records of who / what / how much.
- An adjudicator (if appointed), will be delighted to be provided with evidence he can rely upon in order to award the Contractor some money.
- It won't be necessary to engage the services of Sherlock Holmes two years after the event (he's not cheap!).



Chris Kevis
Senior Consultant

Chris has extensive commercial and contractual experience having been employed in senior roles, predominantly for main contractors, for more than 30 years. During this period Chris has gained comprehensive practical experience of what he refers to as the 'muck and bullets' issues routinely encountered in the construction and civil engineering industries.

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Questions and answers with Alan Powell

Alan's wide-ranging expertise enables him to provide liability, quantum and delay analysis across a variety of commercial and contractual matters, including acting as principal advocate in adjudication and mediation.



When did you join Pyments?

Way back in October 2008 - before children, an expanding waistline, and most of my grey hair!

What do you do?

It depends who's asking the question! I've taken on the role of a Director since the turn of the year so my role seems to have grown legs in the last few months.

Typically, the day job primarily involved retrospective delay analysis for EoT

submissions however I am RICS qualified as a Quantity Surveyor so do provide

commercial & contractual advice on both live and historic projects, some contentious, some not. I've also co-delivered workshops to Main Contractors nationwide as part of our Training division when a global pandemic doesn't intervene!

What were you doing before Pyments?

I worked for a top 5 national residential developer before I started doing some proper Contracting!



What do you like about Pyments?

Variety. We get involved in some great schemes across most sectors of the industry. We also get instructed by Specialist Sub-Contractors, Main Contractors and Employers so you have to get used to wearing different hats depending which day of the week it is. Not only that, but the specific instructions also differ and with Pyments encouraging employees to have exposure across all sectors of the business it has helped develop me into a well rounded commercial and contractual consultant.

What do you do away from work?

I'm sport obsessed. I'd generally watch anything but have to focus my main energies on football and cricket as otherwise I'd just get nothing done. During my twenties and thirties I'd play football in the Winter and cricket in the Summer; in my forties I now help out with my 10 year old son's teams whenever I can and will still have the occasional game of cricket when the body allows!

Favourite food?

I'm not fussy and would eat most things. I do enjoy a paella and have been known to cook a paella from scratch in my special paella pan!



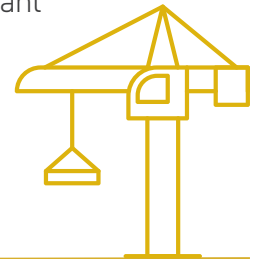
What might someone be surprised to know about you?

I've had windsurfing lessons and walked on glaciers but never surfed or gone skiing!



If you could offer one piece of advice to someone looking at a similar career, what would it be?

Early on in your career get on site as early and as often as possible. A successful construction project is a team effort, working with Pyments I often see operational and commercial teams at loggerheads; it's so important to appreciate each others roles and responsibilities and when individuals don't, the team performance is inevitably impacted.



What trends do you see emerging over the next five years?

The continued development of sustainable building is an obvious one. Emphasis must be placed on the carbon impact of the life cycle of the building with the physical construction just being a part of the consideration. This will lead to increased volumes of modular construction improving efficiency, sustainability and safety.

About Pyments

Pyments is a firm of commercially and contractually minded construction experts offering multi-disciplinary services to an extensive range of clients all across the United Kingdom.

Pyments has celebrated over 30 years within the construction industry and continues to go from strength to strength enjoying continuity of leadership throughout, and benefitting from a long-serving and exceptionally talented and experienced team.

Working with Main Contractors, Sub-Contractors and Employers, the company has acquired extensive knowledge and understanding of how to represent the 'best interests' of its clients. The Pyments team pride themselves on their ability to provide pragmatic contractual advice, which married with their commercial expertise, allows repeat business through successful results.

The company enjoys the trust and longevity of many 'first tier' clients who entrust Pyments to deliver on high value and complex projects and issues. These relationships have developed because of Pyments hard work and dedication to ensure the highest levels of client service and satisfaction to all of its clients and in all of its instructions.

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*This list is not extensive. Please contact us for further information about how we can help you.

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