



13 JULY 2023

Construction & Engineering ALERT

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Termination for convenience: Traversing the termination tightrope in NEC 3 contracts

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Termination for convenience: Traversing the termination tightrope in NEC 3 contracts

Enforcing the contractual right to terminate a construction contract is a serious choice and must always be approached with caution. This is especially so in the case of the widely used suite of NEC 3 construction contracts, where the parties are afforded various possible contractual grounds for termination in the “Reasons for termination” provisions.

These generally include certain common grounds for termination, listed below, in addition to others that may be contractually agreed upon by the parties:

- In the event of either party becoming insolvent.
- In the event of default by the Contractor.
- In the event of default by the Employer.
- Either party may terminate if the parties have been released under the law from further performance of the whole contract.
- The Employer may terminate if an event occurs which stops the Contractor from completing the works or stops the Contractor completing the works by the date shown on the accepted programme and is forecast to delay Completion by 13 weeks, and which neither party could prevent, and an experienced Contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable for them to have allowed for it.

Selecting the appropriate ground for termination requires careful consideration of the facts. In certain instances a party may have more than one termination right available to it. In these circumstances, parties are encouraged to review all the available grounds for termination in order to choose the ground/s most favourable to them when enforcing their contractual right to termination and are cautioned not to adopt rights which may be inconsistent with one another and have contradictory implications.

Should a party elect to terminate a contract on the ground of a breach, it ought to do so within a reasonable period of the default of the defaulting party or the circumstance triggering the termination right, as the effluxion of an unreasonable period of time may be construed as an affirmation of the continued existence of the contract.



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Termination for convenience clauses

In our experience, the inclusion of a clause by agreement and allowing for termination for the employer's convenience, has become more commonplace in construction contracts. In terms of The NEC 3 ECC contract, clause 90.2 allows for the Employer to terminate the Contract for any reason. Generally, the common feature of this clause is the right of a party to terminate without providing a reason.

Counter-balancing of "mutual trust and co-operation" provisions in the contract

The unilateral and one-sided nature of such a clause has been the topic of discussion in several cases, with a particular focus on whether the absolute application and operation of the clause ought to be qualified with, as has been argued,

other clauses in the contract requiring the parties to act reasonably or in good faith. We discuss the English case of *TSG Building Services plc v South Anglia Housing Limited* [2013] EWHC 1151 (TCC), 2013 WL 1904170.

In the case of *TSG*, TSG had contracted to provide a gas servicing and associated works programme to South Anglia. The partnering contract was for a term of four years. Clause 13.3 of the partnering contract gave South Anglia the right to terminate for convenience at any time. After approximately a year, South Anglia sought to terminate the contract on that basis. One of the questions for the court to consider was whether the duty to act in a spirit of mutual trust and co-operation imposed any "constraints, condition or qualification" on the rights of the

parties to terminate for convenience. Pursuant to the interpretation of the clause 13.3, the court held that the scope of the clause requiring the parties to "work together ... in the spirit of trust, fairness and mutual co-operation" did not apply to the expressly agreed upon right of South Anglia to terminate for convenience. The above clause is akin to the clause 10 duty under NEC 3 and 4 contracts, which states:

"The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation."

It is worthwhile mentioning the remarks of the court in the *TSG* matter that had either party applied their mind to the termination for

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convenience clause prior to the contract being signed, it was clear that the unqualified right to terminate was available to be exercised at any time and that where a contract makes such specific provision, care must be taken not to construe a general and potentially open-ended obligation such as an obligation to “co-operate” or “to act in good faith” as covering the same ground as other, more specific, provisions such as those relating to termination.

When exercising the termination right for convenience, a party ought to be guided by the principles applicable to termination generally. These include clearly and unequivocally citing the available termination rights and following the termination procedure stipulated in the contract.

Critically, in circumstances where a party exercises a right to terminate without being entitled to do so or without complying with the contractual procedure, the erroneous attempt to terminate could amount to a repudiation at common law, thereby giving the other party a right to accept such repudiation and bring the contract to an end.

In the context of construction contracts, it is also important to note that any rights of the parties which have already accrued prior to termination remain unless modified. This is of significance when considering the post termination claims of the parties, which are generally governed by the “*payment on termination*” provisions of the NEC 3 contract.

Joe Whittle and Krevania Pillay



Cliffe Dekker Hofmeyr

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