

# "Adverse Weather" Clauses

## An overview of different forms of construction contracts

In light of recent weather conditions we have produced the table below which gives a broad overview of how standard form building contracts deal with "adverse weather" – highlighting some key clauses, together with commentary. While not everything the contracts say can be covered here, we hope this summary is helpful.

Form of Contract	Clause	Wording/Definition	Notice	Comments
JCT (2016)	<p>Yes (Relevant Event)</p> <p>JCT Standard: Clause 2.29.8 or 2.29.9</p> <p>JCT Design &amp; Build (D&amp;B): Clause 2.26.8</p> <p>JCT Intermediate: Clause 2.20.8</p>	<p>"exceptionally adverse weather conditions"</p>	<p>For Standard, D&amp;B and Intermediate:</p> <ol style="list-style-type: none"> <li>The Contractor has to notify the Architect/ Contract Administrator / Employer (depending on the contract) as soon as it realises that completion of the Works is or is likely to be delayed. Notice to include details of the material circumstances</li> </ol> <p>Additionally for Standard and D&amp;B:</p> <ol style="list-style-type: none"> <li>The Contractor has to notify of the expected result of the delay</li> <li>The Contractor to continue to give notices of any change in the estimated delay or other details and supply further requested information</li> </ol> <p>(Clauses 2.27 Standard / 2.24 D&amp;B / 2.19 Intermediate)</p>	<ul style="list-style-type: none"> <li>The term "exceptionally adverse weather conditions" is very broad. Exceptionally adverse conditions are considered to be greater than usual adverse conditions. "Exceptional" means "having much more than average..."<sup>1</sup></li> <li>There is no accepted prescriptive definition for "adverse weather conditions"</li> <li>The JCT also contains a force majeure clause but, given the existence of a clause regarding weather conditions, the force majeure clause is unlikely to apply</li> <li>Whether the weather is sufficiently adverse is (initially at least) for the Contract Administrator or other relevant person under the contract to decide</li> </ul>
NEC4 (2017)	<p>Yes (Compensation Event)</p> <p>NEC4 Engineering and Construction Contract: Clause 60.1 (13)</p>	<p>"A <i>weather measurement</i> is recorded</p> <ul style="list-style-type: none"> <li>within a calendar month</li> <li>before the Completion Date for the whole of the <i>works</i> and</li> <li>at the place stated in the Contract Data</li> </ul> <p>the value of which, by comparison with the <i>weather data</i>, is shown to occur on average less frequently than once in ten years.</p> <p>Only the difference between the <i>weather measurement</i> and the weather which the <i>weather data</i> show to occur on average less frequently than once in ten years is taken into account in assessing a compensation event"</p>	<ol style="list-style-type: none"> <li>The Contractor has to notify the Project Manager of a compensation event "within eight weeks of becoming aware that the event has happened"</li> <li>If notice is not given, the Contractor loses its right to any additional money or time</li> </ol> <p>(Clause 61.3)</p>	<ul style="list-style-type: none"> <li>The Contract Data should include clear and objective measurement details, which are often negotiated between the parties to the contract</li> <li>However it only deals with rain, cold and snow – eg not extreme heat, wind (think of cranes) or worse</li> <li>If the weather in question occurs "less frequently than once in ten years" then it can qualify as a "compensation event"</li> <li>There are four ways to measure weather: <ul style="list-style-type: none"> <li>the cumulative rainfall (mm)</li> <li>the number of days with rainfall more than 5mm</li> <li>the number of days with minimum air temperature less than 0 degrees Celsius</li> <li>the number of days with snow lying at a stated time GMT</li> </ul> </li> <li>The weather measurements' intention is to report the weather over a calendar month – not hourly/daily</li> <li>Weather measurements should be taken on site or as close as possible to it</li> </ul>

<sup>1</sup> Collins English Dictionary, (2014). (12th ed.). London: HarperCollins Publishers

<b>ICC (2011)</b>	Yes (Relevant Event)  ICC Design and Construct Version August 2011: Clause 44(1)(c)	"exceptional adverse weather conditions"	<ol style="list-style-type: none"> <li>1. The Contractor has to notify the Employer's Representative (<b>ER</b>) "within 28 days after the cause of any delay" with detailed particulars</li> <li>2. The ER must make an assessment upon receipt of the particulars of the delay and notify the Contractor</li> <li>3. If the ER finds that the Contractor is entitled to more time, it grants an interim extension of time</li> <li>4. The ER must "no later than 14 days after the due date or extended date for completion of the Works" proactively consider whether an extension of time should be given, whether or not the Contractor has asked for time to be extended</li> <li>5. The ER to make a final decision on the overall extension of time granted under the contract "within 28 days of the issue of the Certificate of Substantial Completion"</li> </ol> (Clauses 44(1) - (5))	<ul style="list-style-type: none"> <li>• As with the JCT, the term "exceptional adverse weather conditions" is very broad. The ER will usually assess whether the weather is sufficiently adverse</li> <li>• Having historical records would be very helpful in determining whether the weather conditions were exceptionally adverse – but it is not clear how far back these records should go (some say 10 years by analogy with the NEC terms, others more)</li> </ul>
<b>FIDIC (2017)</b>	Yes (A "cause")  Yellow Book: Clause 8.5(c)	"exceptionally adverse climatic conditions, which ... shall mean adverse climatic conditions at the Site which are Unforeseeable having regard to climatic data made available by the Employer under Sub-Clause 2.5 ... and/or climatic data published in the Country for the geographical location of the Site"	<ol style="list-style-type: none"> <li>1. The Contractor has to notify the Engineer describing the event giving rise to the cost or delay "as soon as practicable, and no later than 28 days after the [Contractor] became aware or should have become aware" of the event</li> <li>2. If the Engineer considers that the Contractor has failed to give notice of its claim within the 28 day period, it notifies the Contractor within 14 days of receiving the Contractor's claim (giving reasons). If the Engineer does not give such notice, the Contractor's notice of claim is deemed to be a valid notice</li> <li>3. The Contractor keeps such contemporary records as necessary to substantiate its claim</li> <li>4. The Contractor has to provide a "fully detailed Claim" as defined by Sub Clause 20.2.4 within 84 days after it became aware (or should have become aware) of the delay event</li> </ol> (Clause 20.2)	<ul style="list-style-type: none"> <li>• The FIDIC 2017 yellow book provides greater clarity on exceptionally adverse climatic conditions than its 1999 edition</li> <li>• But it also now includes concurrent delay wording at the end of Clause 8.5: "if a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to [an extension] shall be assessed in accordance with the rules and procedures stated in the Special Provisions (if not stated, as appropriate taking due regard of all relevant circumstances)"</li> <li>• So even if there are exceptionally adverse climatic conditions, the Contractor may still not be entitled to an extension, if the resulting delay is concurrent with another Contractor delay</li> <li>• Whether weather is sufficiently adverse is determined by the Engineer</li> </ul>
<b>General Comments – Practical Tips</b>	<ul style="list-style-type: none"> <li>➢ Checking the contract provisions should be a priority – all contracting parties should understand how the weather risks are apportioned before signing it</li> <li>➢ Amendments are often made to the standard forms of contract eg to change which party bears the risk of adverse weather conditions or to clarify what the parties agree "adverse weather conditions" should mean</li> <li>➢ What is considered "adverse weather conditions" may differ depending on the type of project and construction methods used eg a project for the erection of wind turbines may be more vulnerable to high winds and lightning storms so it may be more difficult to demonstrate that the conditions were "exceptional"</li> <li>➢ When making or considering claims for adverse weather, parties should ensure they comply with the terms of the contract - including giving and responding to notices in time and providing all information required</li> <li>➢ Ideally, records of weather changes should be kept and updated regularly to assist with any claims which may need to be made</li> </ul>			

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