

FIDIC, JCT & NEC Contracts provide relief from COVID-19's adverse impact, including a Second Wave, on your UK C&E Projects

1 Introduction

- 1.1 On 11 March 2020, the World Health Organisation's (**WHO**) Director General categorised the new coronavirus (**COVID-19**) as a pandemic.
- 1.2 Consequently, governments around the world, including the government of the United Kingdom (**UK**), implemented different emergency measures restricting social interaction, including imposing travel bans, quarantining citizens, closing schools and minimising attendance at offices to delay and stop COVID-19 (**First Wave**) spreading further.
- 1.3 As the UK lifts its emergency measures, however, and its citizens return to some semblance of pre COVID-19 social interaction, COVID-19 cases are increasing and medical experts have confirmed that the UK is at the start of the so called "second wave" (**Second Wave**) of COVID-19, potentially spreading through the population.
- 1.4 The UK Government, therefore, is in the process of analysing the relevant data and its strategy appears to include the reintroduction of certain emergency measures restricting social interaction. In addition, it may well introduce new emergency measures, formulated throughout the year, to delay and mitigate the adverse impact of the Second Wave.
- 1.5 The Second Wave, however, arrives as many Contractors in the UK C&E Industry are, having protected their rights with the relevant Notices and interim Contractor's Claims, assessing the "time and cost" impact of the First Wave on their C&E Projects.
- 1.6 In this context, therefore, it is essential that Contractors, at all levels, in the UK C&E Industry understand whether their C&E Contracts, executed before or after COVID-19 was foreseeable, provide potential relief from COVID-19's adverse impact.
- 1.7 We discuss the above in detail below and refer to "*Force Majeure*" and "*Change in Law*", two helpful legal principles under the law of England and Wales (**Law**), together with the FIDIC 1999 & 2017, JCT D&B 2016 and NEC/4 standard form contracts (**Contracts**).

2 Force Majeure: FIDIC / JCT / NEC

- 2.1 Under the Law *Force Majeure* is a creature of contract and the Courts define the same. For instance, the Court of Appeal has found that the word "*prevent*" within a *Force Majeure* clause means that the event must render performance "*legally or physically impossible*", not merely "*difficult or unprofitable*"¹, and that the event was only "*beyond [a party's] control*"² if that party had taken all reasonable steps to avoid the event or mitigate its impact.

¹ *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd [1917] AC 495.*

² *Channel Island Ferries Ltd v Sealink UK Ltd [1988] 1 Lloyd's Rep 323.*

COVID-19 and Force Majeure event?

2.2 Generally, in the UK C7E Industry it is accepted that COVID-19 is a *Force Majeure* event. The Contracts either refer to *Force Majeure* or contain clauses which provide relief for unforeseeable and exceptional events, such as COVID-19, as follows:

Table A: Unamended FIDIC / JCT / NEC: Clauses Providing Relief for Force Majeure/Exceptional Events

Contract	Clause	Comment
FIDIC 1999	<p>Clause 19 <i>Force Majeure</i> defined as:</p> <ul style="list-style-type: none"> • exceptional event; • beyond the parties' control; • not attributable to the other party; and • could not reasonably have provided against prior to execution. 	Highly likely that COVID-19 is a <i>Force Majeure</i> event.
FIDIC 2017	Clause 18 refers to Exceptional Events defined as the above.	Highly likely that COVID-19 is an exceptional event.
JCT D&B 2016	Clause 2.26.14 refer to <i>Force Majeure</i> in Relevant Events, however, it does not define the same. Further, it does not refer to the same as a Relevant Matter.	Highly likely that COVID-19 is a <i>Force Majeure</i> event.
NEC/4	<p>Clauses 19 and 60.1(19) refer to Prevention and do not use the term <i>Force Majeure</i>. An event such as COVID-19, however, must meet the Prevention criteria for the Contractor to obtain relief:</p> <ul style="list-style-type: none"> • stops a Contractor from completing the works; • neither party could have prevented the event; • not a different compensation event listed in the contract; and • an experienced Contractor would have assessed the event as highly unlikely to occur and it would be unreasonable to allow for the same. 	Highly likely that COVID-19 meets the Prevention criteria.

2.3 As mentioned, it is highly likely that COVID-19 is a Force Majeure (Exceptional/Prevention), Event under the unamended versions of the Contracts. This logic, however, applies only in circumstances where the Contract was executed prior to COVID-19 becoming a foreseeable risk.

- 2.4 In this context, parties note that on 14 July 2020, the Construction Leadership Council (**CLC**) published its “*Future Proofing Guide for Contracts Launched*” (**FPG**) which provides options to amend the JCT and NEC contracts, following the institutions’ own guidance, to cater for COVID-19’s impact on the delivery of works/services going forward - FIDIC provided guidance in April 2020.
- 2.5 The issue however, regardless of the guidance mentioned above, is at what point in time did COVID-19 become a foreseeable risk? For instance, did COVID-19 become a foreseeable risk on 11 March 2020, when the WHO categorised the virus as a Pandemic, or earlier/later than that date?
- 2.6 Given the above it may well be necessary to obtain expert evidence to determine the date on which COVID-19 became a foreseeable risk to assist Contractors with their claims that COVID-19 fits into their *Force Majeure* provisions and they are entitled to relief.

3 Change in Law: FIDIC / JCT / NEC

- 3.1 As mentioned, the UK Government introduced emergency measures, including new laws, which it may use to delay and stop the spread of COVID-19.
- 3.2 Specifically, on 25 March 2020 the UK Government enacted the Coronavirus Act 2020 (**CA/20**) which provides the Government with broad powers including the ability to create regulations to protect public health (Sch./18) and, if necessary, close the UK’s borders including suspending port operations (Sch./20).
- 3.3 CA/20, therefore, has the potential to have an adverse impact on the UK C&E industry including closing/suspending projects and stopping/delaying imports of construction materials into the UK – approximately £15 billion annually (RIBAJ <https://www.ribaj.com/intelligence>).

Contracts and Change in Law

- 3.4 The Contracts include Change in Law provisions as follows:

Table B: Unamended FIDIC / JCT / NEC: Clauses Referring to Change in Law

Contract	Clause
FIDIC 1999	Clause 13.7 provides the Contractor with a right to an increase in the Contract Price and an EOT (C/8.4) due to a Change in Law in the Country in which the site is located.
FIDIC 2017	Clause 13.6 as above and an EOT under C/20.2.
JCT D&B 2016	Clause 2.26.12 provides a right to an EOT for a Change in Law and Clause 2.15.2.1 provides a right to a Variation if a change in statutory requirements causes a change to the Works.
NEC/4	Clause X2 is an optional clause – if used it provides the right to additional time and costs if there is a Change in Law in the country in which the site is located.

UK Government's response to COVID-19 and Change in Law

- 3.5 The UK Government placed CA/20 on the statute books on 25 March 2020 and it is therefore new legislation – CA/20 was enacted two days after the Government announced the initial lockdown on 23 March 2020.
- 3.6 To date, however, the Government has not invoked CA/20's provisions, which directly impact the C&E Industry and its approach includes “recommendations” and “guidance” to keep projects open and the industry working.
- 3.7 In this context, the Construction Leadership Council (**CLC**) produced its “*Site Operation Procedures*” (**SOP**) to reflect the Government's guidance in relation to social interaction on projects across the UK e.g. social distancing etc. Version 5 of the SOP, the latest, was published on 1 July to reflect the Government's guidance regarding the lifting of Lockdown measures on 4 July 2020. Given the Second Wave the CLC may well publish Version 6 of the SOP in the near future.
- 3.8 In addition, we note that SOP Version 5 refer refers to Health & Safety Executive (**HSE**) being the relevant enforcing authority to control public health risks in the industry e.g. the HSE has a right to visit projects to determine whether the Contractor is complying with the SOP.

4 Conclusion

- 4.1 In conclusion, the Contractor may argue that COVID-19 constitutes a *Force Majeure* event under the Contracts and could formulate an argument, depending on the circumstances, that the Government measures constitute a Change in Law to claim any additional time and costs incurred on its UK projects.
- 4.2 Generally, however, the parties amend the Contracts to clarify/allocate the *Force Majeure* and Change in Law risk. In this context, it is common for the Contracts to include an exhaustive list of *Force Majeure* Events, together with expressly limiting the Contractor's right to recovery e.g. time only, and attempt to allocate the Change in Law risk to the Contractor.
- 4.3 Given the above, each Contract should be construed individually as a whole, at the date of execution, to identify its meaning as a matter of the Law and determine whether COVID-19 fits within its *Force Majeure* provisions and/or whether the UK Government's measures constitute a Change in Law.
- 4.4 Contractors would be wise to instruct and work with an experienced C&E lawyer to identify the position as a matter of Law and its objectives together with formulating a flexible strategy to reach the same.

