

How should the impact of the COVID-19 outbreak be managed on projects under FIDIC and NEC?

31 March 2020

Authors: [Rebecca Shorter](#), [Charles Nairac](#), [Dr. Markus Burianski](#), [Dr. Dimitar Kondev](#), [Yasmine El Achkar](#)

The impact of COVID-19 has already had a profound impact on all business sectors globally, including the construction industry. Projects in many countries have been impacted by the outbreak, including as a result of labour shortages and disruption to supply chains. This note provides guidance to those involved in projects using either the FIDIC or NEC forms of contract on how to manage the impact of COVID-19.

Introduction

This client alert considers some of the provisions of the FIDIC¹ and NEC² forms of contract (the two most commonly used form of construction contracts internationally) that are the most relevant to the current COVID-19 pandemic. It concentrates on the contractual forms and not the impact of governing law on the parties' obligations.³

Force Majeure

Whether the COVID-19 outbreak may be classified as a force majeure event will ultimately depend on the Contract in question and the law governing it. Under FIDIC (1999), Sub-Clause 19.1 defines "*Force Majeure*" as "*an exceptional event or circumstance:*

- (a) which is beyond a Party's control;
- (b) which such Party could not reasonably have provided against before entering into the Contract;
- (c) which, having arisen, such Party could not reasonably have avoided or overcome, and
- (d) which is not substantially attributable to the other Party."

¹ The references in this note to FIDIC are to the 1999 and 2017 editions of the FIDIC Red Book. Wherever words or phrases in this note are capitalized, they have the meaning ascribed to them in the FIDIC Red Book, 1999 ed. or the FIDIC Red Book, 2017 ed.

² The references below are to the standard provisions of the NEC4 edition of the Engineering Construction Contract (ECC). Wherever words or phrases in this note are capitalized, they have the meaning ascribed to them in the NEC4 ECC (June 2017).

³ For this topic, see M. Clarke, Dr. M. Burianski, C. Theissen, Dr. M. Clasmeier, J. Hart, "[Suspending contract performance in response to the coronavirus outbreak](#)", dated 18 February 2020; F.-G. Vaissier, S. Swaminathan, "[Coronavirus: Legal Considerations to a Global Health Emergency – French law focus](#)", dated 11 March 2020.

The definition does not require that the event or circumstance be unforeseeable. Sub-Clause 19.1 also includes the following non-exhaustive list of exceptional events or circumstances, which may constitute a Force Majeure if they meet the four requirements quoted above:

- (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
- (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,
- (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and
- (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

Although pandemics do not feature on the list, the COVID-19 outbreak is comparable to events listed in the non-exhaustive list and could in principle be included, as it would likely meet all the four conditions mentioned above.

In FIDIC (2017), the term "*Force Majeure*" was replaced with "*Exceptional Event*", but the definition and the non-exhaustive list of events or circumstances remained substantially the same.⁴

Although NEC does not contain a provision expressly identified as a force majeure clause, Clause 19.1 (*Prevention*) provides that if an event occurs which stops the Contractor from completing the whole of the works, or delays completion beyond the planned completion date, 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 to have allowed for it*", the Project Manager "*gives an instruction ... stating how the event is to be dealt with*".

The COVID-19 outbreak could in principle meet the requirements of NEC Clause 19.1 since it is difficult to see how it could have been prevented by the Parties and an experienced contractor could not have reasonably foreseen its occurrence and/or adverse impact (assuming the contract was entered into before such time as the widespread impact of the outbreak became known). However, whether Clause 19.1 applies will ultimately depend on whether it stops the Contractor from completing the whole of the works or from completing the works by the contractual completion date. The same language as Clause 19.1 can be found in Clause 60.1(19) of the NEC form with the additional general proviso that the event in question "*is not one of the other compensation events stated in the contract*". Clause 60.1 is the NEC clause that lists the events which are "compensation events" (i.e., events that may result in additional time and cost being allowed to the Contractor).

Notice of and Relief for Force Majeure

In common with most (if not all) forms of construction contract, both FIDIC and NEC require the Contractor to give notice of events affecting the progress or preventing him from completing the works. In the context of the COVID-19 outbreak, the prevention may either be legal (e.g., in the case of governmental restrictions suspending work) and / or physical (e.g., because the Contractor's personnel or suppliers are ill or in quarantine, causing critical delay and inability to meet the program).

Under the FIDIC forms, a Contractor affected by a Force Majeure must give a notice to the Employer if "[it] *is or will be prevented from performing any of its obligations under the Contract by Force Majeure*" within 14 days after that Party became aware (or should have become aware) of the relevant Force Majeure event or circumstance.⁵ Given the wording in Sub-Clause 19.2 (1999) / 18.2 (2017), Contractors are advised to give a Force Majeure notice as soon as they understand that a Force Majeure event will prevent them from performing one or more of their obligations without waiting for the prevention to actually take place. For example, in the case of a governmental restriction suspending work on the site, which would take effect in seven days, it would be prudent for a Contractor to give a Force Majeure notice before the restriction comes into effect.

⁴ Sub-Clause 18.1 of FIDIC Red Book, 2017 edition.

⁵ Sub-Clause 19.2 of FIDIC Red Book, 1999 edition.

FIDIC (2017) adds an additional requirement for the affected Party to give further notices every 28 days after giving the first notice if the Exceptional Event has a continuing effect.⁶ The affected Party must also give a notice once it ceases to be affected by the Exceptional Event.⁷

Sub-Clause 19.4 of FIDIC (1999) / 18.4 (2017) entitles the Contractor to an extension of time and, on some occasions, Cost⁸ “[i]f the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given”. The Contractor’s entitlement to Cost would only be available in case of certain events or circumstances “of the kind” described in the above-quoted items (i) to (iv) of the non-exhaustive list in Sub-Clause 19.1 (1999) (items (a) to (e) of the non-exhaustive list in Sub-Clause 18.1 (2017)). Pandemics are not mentioned in that list and item (v) of the list (item (f) (2017)), which refers to events somewhat comparable to the COVID-19 pandemic, is expressly not referred to as part of the events or circumstance that may justify a claim for Cost. Items (i) to (iv) ((a) to (e) (2017)) include “war, hostilities (whether war be declared or not), invasion, act of foreign enemies”, and other events, such as terrorism, strikes, etc. It is debatable whether the COVID-19 outbreak is somehow comparable to that of a war such that a Contractor may be able to recover additional costs incurred on account of the pandemic. If not, it will be treated as a neutral delaying event, i.e., where the Contractor is granted an extension of time (and protection from Delay Damages) but no additional costs.

Any entitlement of the Contractor under FIDIC is subject to the claims procedure provided for under Clause 20.1 (1999) or Clause 20 (2017) which contains its own notice requirements (separate to those under the Force Majeure clause discussed above), keeping of contemporary records, and submission of a fully detailed claim (or interim claims at monthly intervals, if the claim has a continuing effect).⁹

As noted above, since force majeure events fall within the compensation event regime under NEC, a Contractor who is affected or expects to be affected by a compensation event must give a notice to the Project Manager in accordance with Sub-Clause 61.3 of the NEC4 contract within eight weeks of becoming aware that the event has happened. The assessment of what financial or time-related compensation relief follows is governed by Clauses 61 to 66. Given the uncertainties surrounding the ongoing impact of COVID-19, it should be noted that Sub-Clause 61.6 provides that if the Project Manager decides that the effects of the compensation event are too uncertain to be forecast reasonably, he will state assumptions about the event which the Contractor may base his assessments on. If any of the assumptions are later found to have been wrong, the Project Manager notifies a correction, which constitutes in and by itself a compensation event, entitling the Contractor to a reassessment based on the actual consequences.¹⁰ Alternatively, the Project Manager and the Contractor may agree to an extension of the time for the submission and/or approval of the quotation in accordance with Sub-Clause 62.5.

In all circumstances, Contractors should note that failure to give adequate notice may result in a loss of entitlement to relief.

Duty to Mitigate

Under both FIDIC 1999 and 2017, each Party is at all times obliged to use “all reasonable endeavours to minimise any delay in the performance of the Contract”.¹¹

Although the NEC does not expressly include an obligation to mitigate, it does contain an early warning system. Both the Contractor and the Project Manager have an obligation to give an early warning, pursuant to Sub-Clause 15.1, as soon as either becomes aware of any matter, which could “increase the total of the Prices, delay Completion, delay meeting a Key Date or impair the performance of the works in use”. Following such a warning, the Parties will meet in order to discuss ways to mitigate the effects of the matter.¹² Failure by a Contractor to give an early warning where an experienced Contractor could have done so will be taken into account by the Project Manager in assessing any compensation event arising out of the same event, pursuant

⁶ Sub-Clause 18.3 of FIDIC Red Book, 2017 edition. Sub-Clause 18.2 of the 2017 edition is substantively identical.

⁷ Sub-Clause 19.3 of FIDIC Red Book, 1999 edition, and Sub-Clause 18.3 of FIDIC Red Book, 2017 edition.

⁸ Sub-Clause 1.1.4.3 of the FIDIC Red Book, 1999 edition, defines “Cost” as all expenditure reasonably incurred (or to be incurred) by the Contractor on or off the Site, including overheads and similar charges but excluding profit.

⁹ Sub-Clause 20.1 of FIDIC Red Book, 1999 edition, and Clause 20 of FIDIC Red Book, 2017 edition.

¹⁰ Sub-Clause 60.1(17) of the NEC4 ECC.

¹¹ Sub-Clause 19.3 of FIDIC Red Book, 1999 edition, and Sub-Clause 18.3 of FIDIC Red Book, 2017 edition.

¹² Sub-Clauses 15.2 and 15.3 of the NEC4 ECC.

to Sub-Clause 61.5. Although the early warning system under NEC is predominantly a management tool, given the uncertainties around the ongoing implications of COVID-19 in many jurisdictions, Contractors are advised to give an early warning in order to both manage the situation on the project, and prevent avoidable losses which it may not be possible to recover.

The nature of what mitigation is possible will very much depend on the factual circumstances at hand. Contractors could for example consider alternative suppliers for goods, equipment and materials (where supply chains are disrupted) and adjustments to scheduling and resource management to reduce delays to completion; contractors should also retain evidence of all such efforts, irrespective of their outcome, so as to be able to demonstrate that mitigation efforts were made.

Termination

In the most extreme situations of force majeure or prevention, parties may consider whether the contract should be terminated.

Under FIDIC, either Party may terminate the Contract “[i]f the execution of substantially all the Works in progress is prevented” due to the Force Majeure event for a continuous period of 84 days or for multiple periods that total more than 140 days.¹³ It must be emphasized that termination would only be possible if the prevention affects “substantially all the Works in progress”, and not only part of the Works, if, for example, this occurs due to a shortage of Materials due to the pandemic.

Upon termination, the Contractor will be paid for all work it has done, including Plant, Materials, removing Temporary Works and Contractor’s Equipment, and the cost of repatriation of the Contractor’s staff and labour.¹⁴ The Contractor cannot recover profit on the balance of incomplete work, and the Employer cannot recover the cost of procuring a replacement contractor to undertake the incomplete work.

Under Sub-Clause 91.7 of NEC, the Employer may terminate the Contract where an event of Prevention under Clause 19.1 “is forecast to delay Completion of the whole of the works by more than thirteen weeks.” In such circumstances, if the Contractor wishes to avoid termination by the Employer, it must ensure that completion is not delayed by more than 13 weeks by taking measures to mitigate delay and / or accelerate the outstanding works. Pursuant to Sub-Clause 91.6 of NEC, either Party may terminate the contract if, in the absence of default by the Contractor or the Client, the Project Manager has stopped the works for more than thirteen weeks. In accordance with the Termination table in Sub-Clause 90.2 and Clause 93, payment on termination under either of these scenarios is for the work the Contractor has done, including Plant and Materials, and the cost of removing Equipment from site.¹⁵ Again, no additional sums to the Employer or Contractor are due in relation to the balance of the works.

Finally, if termination is being considered, all parties should consider carefully the impact of the governing law under the contract in addition to the terms of the contract itself. Both the FIDIC and NEC forms expressly refer to the potential reliance of the parties on the governing law to terminate the contract / be released from further performance of the contract.¹⁶

Other relevant provisions

Besides the provisions discussed above, there are other provisions of both FIDIC and NEC which may be relevant to projects impacted by COVID-19.

For example, under FIDIC:

- Sub-Clause 8.4 entitles a Contractor to request an extension of time if completion of the Works is or will be delayed by “Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions”.¹⁷ This covers epidemics (and therefore also pandemics) or governmental

¹³ Sub-Clause 19.6 of FIDIC Red Book, 1999 edition, Sub-Clause 18.5 of FIDIC Red Book, 2017 edition.

¹⁴ Sub-Clause 19.6 of FIDIC Red Book, 1999 edition, and Sub-Clause 18.5 of FIDIC Red Book, 2017 edition.

¹⁵ Sub-Clause 93.1 of the NEC4 ECC and Sub-Clause 93.2 (A2) of the NEC 4 ECC.

¹⁶ Sub-Clause 91.5 of the NEC4 ECC, Sub-Clause 19.7 of FIDIC Red Book, 1999 edition, and Sub-Clause 18.6 of FIDIC Red Book, 2017 edition.

¹⁷ Sub-Clause 8.4 of FIDIC Red Book, 1999 edition. There is a similar provision in the FIDIC Red Book, 2017 edition (see Sub-Clause 8.5), which extends the provision to Unforeseeable shortages of Employer-Supplied materials.

actions wherever they occur in the world. Unlike the Force Majeure provisions discussed above, the Contractor's relief under this provision is dependent on the shortages being "*Unforeseeable*" – i.e., not reasonably foreseeable by an experienced contractor by the date of submission of the tender (FIDIC 1999)¹⁸ or by the Base Date (28 days before the date for submission of the Tender, FIDIC 2017).¹⁹

- Contractors can also request an extension of time under Sub-Clause 8.5 due to critical delays caused by public authorities.²⁰ Again, the delay must be, amongst other requirements, "*Unforeseeable*". This provision may be applied to any type of governmental or other public bodies' decisions or measures taken against the COVID-19 outbreak that delay the Contractor (e.g., suspension of work, ban on gatherings above a certain number of people, mandatory quarantine of certain personnel).
- A Contractor invoking Sub-Clause 8.4 or 8.5 may only claim an extension of time but not Cost. However, under Sub-Clause 13.7,²¹ Contractors may be entitled to claim both an extension of time and Cost if they can identify changes in the laws of the country of the Site that cause them to incur costs and delays.

Under NEC, even if issues relating to COVID-19 do not meet the criteria of Clause 19.1, they may still give rise to other compensation events listed in Sub-Clause 60.1, and on which the Contractor may rely in order to request a change of Prices, the Completion Date, and/or a Key Date. In particular:

- Failure by the Client to provide: access to site; materials, facilities and samples for tests and inspections; and anything else it has agreed to provide, all in accordance with the Accepted Programme;²²
- The Project Manager gives an instruction to change the Scope and / or an instruction to stop or not to start any work or to change a Key Date;²³
- The Client or Others do not work within the times shown on the Accepted Programme.²⁴

In addition, if the Parties have incorporated the secondary Option X2.1, pursuant to which a change in law constitutes a compensation event, the Contractor may also be able rely on this provision to request additional costs and / or time, in the event of any emergency legislation that impacts the project, for example, restricting the movement of goods and / or people.

Conclusion

The COVID-19 pandemic has created an enormous amount of uncertainty in terms of both its practical and legal implications for those involved in construction and engineering projects. Collaboration and good communication will be key to managing the impact and steering projects through this period of uncertainty. To this end, parties should pay careful attention to the notice provisions under their contracts and give appropriate and adequate notice(s) as soon as practicable and within any contractual deadlines. The potential and actual impact of COVID-19 on works in progress should be monitored carefully, mitigation measures taken where possible, and contemporaneous records made of all of the above. Termination is the most serious of the available remedies and advice should be taken on the impact of the governing law of the contract in addition to contractual terms before taking such a step.

¹⁸ Sub-Clause 1.1.6.8 of FIDIC Red Book, 1999 edition.

¹⁹ Sub-Clause 1.1.4 and Sub-Clause 1.1.85 of FIDIC Red Book 2017 edition.

²⁰ Sub-Clause 8.5 of FIDIC Red Book, 1999 edition.

²¹ The FIDIC Red Book, 2017 edition, contains a similar provision (see Sub-Clause 13.6).

²² Sub-Clause 60.1(2); Sub-Clause 60.1(16); Sub-Clause 60.1(3) of the NEC 4 ECC.

²³ Sub-Clause 60.1(1) and Sub-Clause 60.1(4) of the NEC 4 ECC.

²⁴ Sub-Clause 60.1(5) of the NEC 4 ECC.

White & Case LLP
19, Place Vendôme
Paris, France
75001

T +33 1 55 04 15 15

White & Case LLP
5 Old Broad Street
EC2N 1DW
United Kingdom

T +44 20 7532 1000

White & Case LLP
Bockenheimer Landstraße 20
Frankfurt am Main
60323

T +49 69 29994 0

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.