

NEC3 Construction Contract (U.K.) compared with FIDIC Yellow Book

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Les grand modèles de contrat à l'international: FIDIC (Yellow) v. NEC3

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[Part I Jurriaan Kien: Using FIDIC (Yellow Book) and NEC3]

Part II SOME FUNDAMENTAL DIFFERENCES

Introduction

FIDIC 'Rainbow' vs. NEC 'Family of Standard Contracts'

a 'Contract', versus a 'Project Management Procedures Manual'

I Characteristics of NEC3

History of NEC1, NEC2, NEC3 (EEC, Engineering and Construction Contract)

- the 'Philosophy' of NEC (EEC) compared to FIDIC
- NEC Editions 1992-2009; Latham Report 1994: *Constructing the Team*; Egan Report 1998: *Rethinking Construction*.
- Aims and Objectives of NEC: Flexibility, Clarity and simplicity, Stimulus to good management

Structure of NEC3

- Main Options: A – F, Secondary Options X-1/X-20, Dispute Resolution W1/W2, Z Clauses
- Language / Concepts: *e.g.* Contract Data, Project Manager (PM), Works Information, Key Dates, Risk Register, Activity Schedule, Compensation Events
- Subcontract (ECS); Professional Services Contract (PSC); Short Contracts (ECSC, ECSS)

II Some Core NEC3 Clauses

Risk Management Tools

- Risk allocation (in Contract Data I and II), Risk Register, Risk reduction meetings, Early-warning, Etc.
- Problems in practice: additional risks inserted by Employer or Contractor. Pitfalls

Compensation Events, compared to Force Majeure under FIDIC

- NEC3, Clauses 19, 60-65; FIDIC, Clause 19 (*jo.* 17.3); Clauses in EDF Contracts
- Compare on Clause 63.5: Humphrey Lloyd, 2008 *Internat. Constr. Law Review*
- 'force majeure' in common law (U.K.) vs. civil law (France): a term vs. a doctrine; reliance on civil law for a claim, *e.g.* French law (EDF Dunkerque Contract, 2010); Solution in FIDIC Gold Contract: 'Exceptional Events'

- *Force majeure* and *frustration of contract*, a matter of interpretation of contract?
Risk-allocation in stead of ‘foreseeability’ standard.
Compare: Jan van Dunné, *Internat. Constr. Law Review*, 2002

III General Obligations under NEC3

Clause 10.1 and the ‘spirit of mutual trust and cooperation’

The ‘shall’ word, in combination with good faith *à l’anglaise*

The position and obligations of the Project Manager (PM), compared to the Engineer under FIDIC (fairness and reasonableness)

- NEC3, in general; Justice Jackson in: *Costain v. Bechtel*, 2005
- FIDIC, Clause 3.5, ‘fair determination’ ... ‘taking due regard of all circumstances’; Clause 20.4, Engineer acting as DAB, ‘fairly and impartially’, fees paid by Employer
- Compare Humphrey Lloyd, 2008 *Internat. Constr. Law Review*

IV Consequences of applicability of U.K. Law

Interpretation of NEC3 Contracts

- The role of the *NEC Guidance Notes* for interpretation
- Construction of contract (interpretation) under U.K. law, and the use of implied terms; *ICS* case: Lord Hoffmann in *Investor’s Compensation Scheme v. West Bromwich Building Society*, 1998; *Chartbrook v. Persimmon Homes*, 2009
- Comparison with interpretation of contract in civil law and the use of implied terms, e.g. French law: *l’interprétation créatrice du contrat*; Charles Jarrosson, 1987; Clémentine Caumes, diss. Avignon 2010; Aurore Portefaix, Nimes 2007; Fanny Bugnet, Montpellier 2007
- The Entire Agreement clause of NEC3: the irrelevance of pre-contractual dealings
- *Rectification* as additional instrument under U.K. law; *estoppel*, *waiver* and *good faith*
- Recent English case law on interpretation of contract and the (implied) duty of good faith: *Yam Seng v. International Trade Corp*, 2013; *Lloyds TSB*, 2013

V Dispute Resolution under NEC3

Adjudication

Mandatory under NEC3, and under U.K. law in general

Comparison with FIDIC: Clause 20, DAB

VI Conclusions

The future of international Construction Contracts: a combination of FIDIC and NEC?
Or even a fusion?

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